RETHINKING THE GOOD CAUSE EXCEPTION TO NOTICE-AND-COMMENT RULEMAKING IN LIGHT OF INTERIM FINAL RULES

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The Administrative Procedure Act (APA) created notice-and-comment rulemaking as the paradigm for informal rulemaking. Scholars have recognized the benefits of this process for generating rules that reflect more inclusive public preferences and values and that are more carefully drafted to better serve the public interest. But the APA also permits an agency to adopt a rule without notice-and-comment when the agency shows good cause for why those procedures are impractical, unnecessary, or contrary to the public interest. Traditionally, the first and third ground for the good cause exception to notice-and-comment procedures were understood to be narrow, applying only when there is an unforeseen emergency and when advance notice of the rule would undermine the effectiveness of it. But the notice-and-comment rulemaking process has become protracted since the enactment of the APA in 1946, resulting in long lag times between when a rule is proposed and when it is finally adopted. Thus, this process imposes a cost of delay before the benefits of a new or amended rule are realized. This translates into a conundrum for use of the good cause exception because such use can alleviate the costs of delay but at the expense of the likely extent to which the rule serves the public interest.

Recently, agencies have used a mechanism called interim final rulemaking to adopt rules. Under this mechanism, the agency issues an interim final rule (IFR)—a rule that becomes effective before the agency receives public comments on it but on which the agency invites comments after the rule takes effect. The agency essentially commits to considering whether

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to amend the IFR in response to the postpromulgation comments that the IFR generates. Issuance of an IFR can solve the good cause exception conundrum because it both allows the IFR to go into effect quickly but does not preclude ultimately delivering the benefits of notice-and-comment procedures when the agency considers the post-promulgation comments and issues a final final rule. But IFRs can themselves alter the rulemaking process so that the final final rule might not be as good as the rule that would have resulted from prepromulgation notice-and-comment proceedings.

In light of the potential for IFRs to solve the good cause exception conundrum, this Article advocates that agencies more broadly invoke the exception by issuing IFRs, and that courts become more tolerant of that practice. At the same time, the Article reviews how use of IFRs might result in harm to the public interest and suggests some restrictions on the broadened use of IFRs to avoid their use resulting in less benefit to the public interest than would derive from the traditional notice-and-comment rulemaking paradigm.

INTRODUCTION

The paradigmatic procedure for agencies to adopt substantive legislative rules under the Administrative Procedure Act (APA)[1] is notice-and-comment rulemaking.[2] Kenneth Culp Davis, an early and well-noted administrative law guru, went so far as to opine that notice-and-comment rulemaking is "one of the greatest inventions of modern government."[3] Nonetheless, in some circumstances, notice-and-comment procedures are costly and perhaps even interfere with the ability of agencies to regulate to best serve the public interest.[4] Thus, the APA explicitly allows agencies to adopt substantive legislative rules without using notice-and-comment procedures when the agency shows good cause for why notice-and-comment procedures would be "impracticable, unnecessary, or contrary to the public interest."[5]

Traditionally, the good cause exception to notice-and-comment procedures has been construed narrowly.[6] Recently, however, agencies have increasingly invoked the exception so that as of 2012, about 27% of major rules and 27% of nonmajor legislative rules were adopted without using notice-and-comment procedures and cited the exception.[7] This reflects

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1. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 561–570a, 701–706.

2. A substantive rule is one that creates obligations regarding the matter being regulated, as opposed to a rule that specifies agency procedure for taking a specific substantive action, although applying this distinction is harder than it might otherwise appear. *See* Jessica S. Schaffer, Comment, Air Transport Association of America v. Department of Transportation*: Excess Baggage for Rules of Agency Procedure*, 42 CATH. U. L. REV. 313, 321–22 (1993) (describing the various approaches courts have used to distinguish procedural from substantive rules). A legislative rule is one that has independent force of law—that is, one for which a person can be penalized simply for violating the rule, rather than one that merely specifies how the agency contemplates implementing its regulatory authority. *See* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 347 (2011) [hereinafter Seidenfeld, *Review of Guidance Documents*]. The APA also lays out a procedure for "formal rulemaking," which applies whenever a statute requires that the agency rule be supported by the record after opportunity for a hearing. *See* 5 U.S.C. §§ 553(c), 556, 557.

3. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65 (1969).

4. *See infra* notes 94–95 and accompanying text.

5. 5 U.S.C. § 553(b).

6. *See, e.g.*, N.J. Dep't of Env't Prot. v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (citing cases calling for a narrow reading of exceptions to the APA's notice-and-comment requirement).

7. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8, 15 (2012). Between

several developments that led agencies increasingly to rely on informal rulemaking to replace adjudication and formal rulemaking as the primary method of adopting agency policy.[8] In what may have been reactions to increased use of informal rulemaking, Congress, the courts, and even the President have attempted to constrain agencies to ensure that agency rulemaking was careful and deliberative.[9] As a result, the rulemaking process

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2003 and 2010, agencies published about 35% of major rules and about 44% of nonmajor rules without using notice-and-comment procedures. *Id.* at 8. Of these rules published without notice-and-comment procedures, 77% of major rules and 61% of nonmajor rules cited the good cause exception. *Id.* at 15.

8. In the early years following enactment of the APA, agencies primarily used adjudication and formal rulemaking to set agency policy. *See* Cass R. Sunstein, *Arbitrariness Review and Climate Change*, 170 U. PENN. L. REV. 991, 1003–04 (2022) [hereinafter Sunstein, *Arbitrariness Review*] (asserting that most important decisions would be made by adjudication); Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487, 500, 502 (2019) [hereinafter Levin, *Regulatory Accountability Act*] (describing the retreat from formal rulemaking that occurred in the 1970s). Since the Supreme Court held in *United States v. Florida East Coast Railway Co.* that requiring an agency rulemaking be done after a hearing did not trigger the APA's formal rulemaking requirements, even for matters for which formal rulemaking had traditionally been used, formal rulemaking has become relatively rare. 410 U.S. 224, 241 (1973); Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 10 (2017) (noting that "because agencies almost never voluntarily choose formal rulemaking, formal rulemaking has become 'a null set'").

9. The two primary proponents of judicial constraints on agency action were D.C. Circuit Judges Bazelon and Leventhal. Judge Bazelon advocated that "in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a [decisionmaking] process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public." Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, J., concurring). According to Judge Leventhal:

> Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. . . . Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions.

Id. at 68 (Leventhal, J., concurring) (footnote omitted).

With respect to Congress's attempts to constrain agency rulemaking, see Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1314–15 (1972) (noting that in response to concerns of regulated entities that their views were not sufficiently considered by agencies,

has become sometimes too cumbersome and protracted to address problems that, in a world of virtually instantaneous electronic communication, can arise and morph in short periods of time.[10] Thus, the costs of delay that stem from the current practice of notice-and-comment as well as judicial review of agency rules can be great, which has prompted agencies to rely on the good cause exception in a variety of circumstances that do not meet the traditional standard to help speed up the rulemaking process.

Courts consistently have opined that the good cause exception is to be construed narrowly but have been inconsistent in how they review agency invocation of the exception.[11] Commentators have generally advocated for the courts to hold the line on the use of the good cause exception to avoid the exception swallowing the general requirement of notice-and-comment procedures.[12] However, given the slow pace of rulemaking—especially for matters that have a significant economic impact[13]—the good cause exception

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Congress enacted numerous statutes imposing rulemaking procedures that were hybrids between notice-and-comment and formal rulemaking).

10. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992) (describing the ossification of informal rulemaking into an "increasingly rigid and burdensome" process "heavily laden with additional procedures, analytical requirements, and external review mechanisms").

11. *See, e.g.*, United States v. Dean, 604 F.3d 1275, 1278–82 (11th Cir. 2010) (reviewing agency use of the good cause exception under an arbitrary-and-capricious standard); Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014) (reviewing de novo); United States v. Reynolds, 710 F.3d 498, 509 (3d Cir. 2013) (declining to endorse a standard, leaving it as "a question for another day"); *see also* William S. Jordan, *Rulemaking*, *in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE: 2010–2011 95, 102 (2011) ("The courts generally articulate a demanding test under which the exception 'is to be narrowly construed' and will apply 'only when delay would do real harm,' but . . . struggle to determine what actually constitutes good cause." (footnotes omitted)).

12. *See, e.g.*, Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 310–11 (2016) (arguing that courts should adopt a strong but rebuttable presumption "that rules promulgated using postpromulgation notice and comment are invalid" to dissuade agencies from making an end run around the prepromulgation notice-and-comment requirements); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 337 (1989) ("[T]he [good cause] exemption must be used only as a last resort.").

13. For example, Executive Order 12,866, as amended by Executive Order 14,094, requires an agency to prepare a regulatory impact analysis that includes a cost benefit analysis for any "rule that may . . . [h]ave an annual effect on the economy of [$200] million or more or adversely affect in a material way the economy" before publishing the notice of proposed rulemaking (NOPR) or adopting the final rule. Exec. Order No. 12,866 §§ 3(f)(1), 6(a)(3)(b),

can alleviate often long delays in adopting and implementing rules, and thereby provide the benefits of a rule sooner than if the agency follows notice-and-comment procedures. Thus, there is reason for courts to consider liberalizing the use of the good cause exception. At the same time, however, allowing agencies to invoke the good cause exception liberally forfeits the benefits that flow from the notice-and-comment procedures.[14] In an attempt to balance these countervailing considerations, agencies have used a process known as "interim final rulemaking."[15] Under this process, the agency skips notice-and-comment procedures and issues an interim final rule (IFR), which is a legislative rule that usually takes effect immediately.[16] At the same time, the agency invites comments on the IFR and promises to consider such comments to decide whether to maintain the IFR, or instead to issue a different "final final rule" (FFR) if the agency decides that comments warrant such additional action.[17]

The thesis of this Article is that courts should recognize an expanded good cause exception to encourage agencies to issue IFRs except in circumstances where the issuance of an IFR is unlikely to result in a net increase in social welfare. This thesis essentially balances the benefit of an IFR in minimizing regulatory delay against any detrimental effects the IFR might have on the ultimate FFR adopted. The Article goes on to describe the factors that might lead to issuance of an IFR that results in a net loss of welfare and hence, if present, would counsel against use of the good cause exception even if the agency issues an IFR. These factors consider the benefits of the IFR as a substitute for the regulatory status quo ante that would otherwise continue unless and until the agency completed a notice-and-comment rulemaking, as well as the effects the IFR is likely to have on the quality of the ultimate FFR issued by the agency. In short, this Article's bottom line recommends that courts consistently soften the traditional reluctance to allow agencies to use IFRs instead of prepromulgation notice-and-comment rulemaking when the issuance of an IFR and the ultimate FFR is likely to best serve the public interest.

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58 Fed. Reg. 51,735, 51,738, 51,741 (Sept. 30, 1993); Exec. Order No. 14,094 § 1(b), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023). *See generally* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533, 536–37 (2000) (identifying up to 109 steps an agency must complete before issuing a final rule).

14. *See infra* Part I.B.1.

15. ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110, 43,111 (Aug. 18, 1995).

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

17. *Id.*

To clarify precisely what the Article advocates for, it is imperative to note that the interim final rulemaking process is complex because it involves two agency actions: the adoption of an IFR that is meant to be temporary and the finalization of the rule into a permanent FFR.[18] In addition, the IFR plays two different roles in the scheme: first, it is a rule that has the force of law that is meant to remain in effect until the agency finally resolves what is the best permanent rule; second, it substitutes for a notice of proposed rulemaking (NOPR) for the proceeding that results in the issuance of the FFR. This Article analyzes when an IFR should be found to be proper under the good cause exception to notice-and-comment rulemaking, which essentially addresses the procedural validity of the IFR. It also examines how the use of an IFR should affect the standard of review that the courts apply when considering a challenge to the FFR, given the influence the IFR has on the FFR due to the independent force of law an IFR carries unless and until it is replaced with an FFR.[19]

Perhaps it is most clear to state what the Article does not address. First, an IFR might be a legitimate candidate for exercise of the good cause exception and still not be substantively justifiable as the best rule. That is, even if the nature of an IFR makes it appropriate for the agencies to issue it without notice-and-comment, the IFR might still be challenged as substantively invalid, for example, as being beyond the agency's statutory authority[20] or being arbitrary and capricious.[21] That substantive review would be carried out using the usual standards courts apply to such challenges for rules that go through the notice-and-comment process[22] and, hence, are not the focus of this Article. Second, an IFR might be a rule that should be considered procedurally valid under the good cause exception but might not provide adequate notice for the rulemaking that culminates with the FFR. Such challenges to the IFR as a substitute for the more traditional NOPR, for example, might claim that the IFR failed to include information

18. *Id.*

19. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'").

20. *See, e.g.*, Washington v. DeVos, 481 F. Supp. 3d 1184 (W.D. Wash. 2020) (bringing action against the Department of Education alleging the Department's interim final rule (IFR) exceeded its statutory authority).

21. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 41–44 (1983) (laying out standard for evaluating whether any final agency action is arbitrary and capricious).

22. For a description of how agencies might go about applying arbitrary and capricious review of rules for which interested persons had no opportunity to file comments, see Seidenfeld, *Review of Guidance Documents*, *supra* note 2, at 385–94.

that the APA requires be included in a NOPR[23] or that the FFR was not a logical outgrowth of the IFR.[24] Again, the standard for evaluating such challenges is the same for evaluating the adequacy of a NOPR in a traditional notice-and-comment rulemaking proceeding and, hence, is not addressed by this Article.

I. THE GOOD CAUSE EXCEPTION CONUNDRUM

A. Current Bounds of the Good Cause Exception

When the APA was adopted, Congress envisioned that the good cause exception would be narrow.[25] The APA provides that agencies are required to justify invocation of the exception and thus puts the burden of showing good cause on the agency.[26] According to the Attorney General's Manual on the APA, issued in 1947, the three criteria that trigger the exception addressed three different concerns.[27] Notice-and-comment was viewed as impracticable when it would delay a rule that was needed to address an emergency.[28] An emergency had to be grounded in unforeseen circumstances that, if not addressed, would lead to threats to physical health, safety, or national security.[29] Notice-and-comment was considered unnecessary when the rule was uncontroversial so that no person would object to it or so trivial that the cost of entertaining comments would not

23. *See* Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 12 (2022) ("[C]ourts have held that, at the stage when an agency first proposes a rule, it must disclose the technical studies and data on which it proposes to rely." (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–94 (D.C. Cir. 1973))).

24. *See, e.g.*, Ctr. for Sci. in the Pub. Int. v. Perdue, 438 F. Supp. 3d 546, 558–61 (S.D. Md. 2020) (finding final rule published by the U.S. Department of Agriculture eliminating the Final Sodium Target and whole grain requirement for school lunches to be unlawful under the APA as it was not a logical outgrowth of the IFR which spoke only in terms of delaying compliance).

25. *See* TOM C. CLARK, U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947); *see also* Lavilla, *supra* note 12, at 333–35 (discussing the APA's legislative history and Congress's intent for a narrow construction of the good cause exception). Although there are some indications in the legislative history of the APA that Congress may have thought the exception broader than specified in the Attorney General (AG) Report, overall the legislative history is best read to support the Report's narrow reading of the exception. *See id.* at 335.

26. 5 U.S.C. § 553(b)(B) (requiring agency to incorporate "the finding and a brief statement of reasons" for good cause).

27. *See* CLARK, *supra* note 25, at 30–31.

28. *See id.*

29. *See id.*

justify the concomitant expenditure of agency resources.[30] Notice-and-comment was considered contrary to the public interest only if the rulemaking process itself would undermine the efficacy of the rule, such as a rule restricting withdrawal of funds from banks to guard against a bank run during an impending depression.[31] The very notice would immediately prompt the forbidden behavior before the rule could take effect, causing a bank run, which is precisely what the rule was meant to prevent.

Invocation of the good cause exception when notice-and-comment is unnecessary generally is not controversial, and this Article does not address the use of the exception on this basis.[32] In applying the exception based on the first and third criteria in particular cases, courts generally do not consider these criteria separately but rather evaluate overall whether the exigencies counseling for immediate adoption of the rule warrant bypassing the notice-and-comment procedures.[33] This makes sense because the criteria themselves can overlap with respect to any particular rule; in fact, construed literally, the exception for rules for which notice-and-comment would be contrary to the public interest would include those rules for which notice-and-comment would be impracticable. Although courts almost universally state that the exception is to be construed narrowly, judicial review of the application of the exception occurs on a case-by-case basis, and judicial holdings seem to vary with respect to the breadth they afford.[34]

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30. *Id.* at 31.

31. *See id.*

32. Today, agencies often handle rules they believe to be uncontroversial by issuing direct final rules—rules that take effect upon the passage of the time after enactment specified in the APA or in the statute authorizing rulemaking unless a person files a comment. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995). If any person files a comment, the agency withdraws the rule and proceeds to entertain comments before deciding whether to adopt it. *Id.* Courts and scholars generally accept the use of direct final rulemaking. *Id.* at 2.

33. *See* Lavilla, *supra* note 12, at 333; *see also* Alcaraz v. Block, 746 F.2d 593, 611 (9th Cir. 1984) ("Our inquiry . . . proceeds case-by-case, sensitive to the totality of the factors at play."); Mid-Tex Elec. Coop., Inc. v. Fed. Energy Regul. Comm'n, 822 F.2d 1123, 1132 (D.C. Cir. 1987) ("[T]he 'good cause' inquiry is inevitably fact- or context-dependent.").

34. *See* Lavilla, *supra* note 12, at 363 ("Agencies and courts unavoidably engage in a balancing exercise. This exercise must be contextual and relative, as a consequence of upholding the principles of congruence and case-by-case determination."); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 88–89 (2015) (listing twelve factors courts have considered when determining whether an agency validly invoked good case); Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 120 (1984) ("Decisions interpreting the good cause provisions of section 553

One principle on which courts seem to agree, with which I fundamentally disagree, is that mere delay in effectively implementing the agency authorizing statute is usually not sufficient to justify bypassing notice-and-comment procedures.[35] Essentially, courts uphold use of the exception to avoid delay only in those situations where an agency could not comply with its statutory obligations or achieve its regulatory objective at all if it had to go through notice-and-comment rulemaking.[36] For example, courts have held that statutory deadlines for an agency to adopt regulations may justify use of the good cause exception, but only when it would be virtually impossible for the agency to meet the statutory deadline and proceed with notice-and-comment rulemaking,[37] or when it is the clear intent of Congress that notice-and-comment procedures need not be followed.[38]

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necessarily have an ad hoc quality. Since the statutory procedure applies to all federal agencies which issue rules, agencies which face different problems and have widely diverse responsibilities will raise the question in vastly different factual settings. . . . [C]ourts have little choice but to examine each claim in context, weighing all the facts and circumstances to decide whether other legitimate interests outweigh the desirability of providing an opportunity for public participation in rulemaking.").

35. *See* Lavilla, *supra* note 12, at 359 ("[I]f the purpose of dispensing with public procedures is simply the desire to effectuate as soon as possible the policy of a given act, examples of which are found in administrative practice, then a finding of good cause cannot normally be accepted."). Because an emergency is "an unforeseen change in circumstances that necessitates immediate action to remedy harm or avert imminent danger to life, health, or property," the desire to maintain the status quo versus gaining the benefits of a change in policy does not qualify as an emergency. *Emergency*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/emergency (last visited Nov. 11, 2023); *see also* Reed Shaw, *"Good Cause" for a Good Cause: Using an APA Exception to Confront the COVID-19 Crisis*, 21 J.L. IN SOC'Y 116, 131–32 (2021) (noting that courts will find an emergency when delay of adopting a rule threatens serious harm).

36. Lavilla, *supra* note 13, at 374–75.

37. *See, e.g.*, Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992) ("[T]he good cause exception goes only as far as its name implies: It authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission."); W. Oil & Gas v. EPA, 633 F.2d 803, 810–13 (9th Cir. 1980) (rejecting EPA's reliance solely on statutory deadlines to enact clean air standards as good cause to justify dispensing of notice-and-comment procedures). But "agencies cannot 'simply wait until the eve of a . . . deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures.' An agency cannot safely 'dawdle at the outset and then attempt a rush in the final months.'" Lavilla, *supra* note 13, at 374–75 (footnotes omitted).

38. *See, e.g.*, Asiana Airlines v. Fed. Aviation Admin., 134 F.3d 393, 398 (D.C. Cir. 1998) (explaining that a statute that explicitly provided for issuance of an IFR and comments in response to that rule evidenced congressional intent that prepromulgation "notice and

An issue that has split the circuit courts is whether to apply the APA's "de novo" standard or its more deferential "arbitrary and capricious" standard when reviewing whether an agency has justified invoking the good cause exception.[39] As I will describe below, neither of these standards are appropriate for all aspects of such review. Whether a rule warrants adoption prior to the opportunity for the public to comment on it may involve questions about the effects of the rule that depend on evaluations of legislative facts and policy predictions. Courts are ill-suited to make such determinations without guidance from the agency. At the same time, simple deference to agency determinations will allow agencies to abuse the exception and apply it to adopt rules that disserve the public interest. Rather than simply advocate that courts defer or not, this Article lays out some factors that courts should consider when determining whether an agency is justified in invoking the exception.

B. The Good Cause Exception Conundrum

1. The Costs of Invoking the Good Cause Exception

Rules adopted under the good cause exception do not go through the notice-and-comment process and thus forfeit any benefits that accrue from that process. Advocates of notice-and-comment procedures contend that the procedures increase the information available to the agency and facilitate public deliberation about the proposed rulemaking.[40] By increasing the breadth of sources of information available to agencies, both about the technical aspects of the rule and the various stakeholders' preferences regarding it, comments are thought to lead agencies to structure their rules to better serve the public interest.[41]

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comment procedures need not be followed"); Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994) (same).

39. *See* Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 252 (2021) (describing various standards of review circuit courts have used to evaluate agency invocation of the good cause exception).

40. *See* Michael Barsa & David Dana, *Regulating During Emergencies*, 116 NW. U. L. REV. ONLINE 223, 226–29 (2021).

41. *See* Hickman & Thomson, *supra* note 12, at 307–08 ("[R]equiring an agency to consider a broad range of viewpoints before adopting a rule makes it more likely the agency will come up with the 'best' possible rule."); *cf.* Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, L. & POL. ECON. PROJECT (July 31, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment ("[N]otice-and-comment is . . . an opportunity for marginalized people—people whose voices are often diluted or excluded in the realm of formal electoral politics—to call out the power dynamics they see operating in the world and to name the casualties.").

It is unclear, however, how much comments influence final rules that agencies ultimately adopt.[42] Agencies frequently seem to have their minds set on the substantive fundamentals of rules by the time they specify a proposed rule in a NOPR.[43] The lack of effect of comments seem to reflect two phenomena.

First, few members of the general public comment effectively on proposed rules, even if those rules will significantly affect them.[44] To comment effectively, one must be aware that a rule has been proposed, have the incentive to comment, and have relevant information about how the rule will operate that goes beyond whether one simply prefers the proposed rule or not.[45] Individuals affected by a rule rarely satisfy any of these three

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42. *See* William F. West, *Formal Procedures, Informal Procedures, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 73–74 (2004) ("[R]ulemaking procedures set the agenda for the . . . accommodation of interests through politics" but changes in proposed rules "seldom address the fundamental nature of the policy."); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 259 (1998) ("[I]n the majority of cases the agency made some of the changes that were requested by commenters, but it rarely altered the heart of the proposal."). Some scholars suggest that comments could have a greater influence on the quality of rulemaking if agencies and courts did not discount "outsider" comments that reflect "situated knowledge"—"highly contextualized, experiential information, often communicated in the form of personal stories"—that "supplement[s] the expertise of rulemaking insider" by providing "relevant knowledge about facts, causes, interrelationships, and likely consequences." Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1187–88, 1217 (2012).

43. *See* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 597 (2002) ("The timing of rulemaking encourages agency lock-in by concentrating the bulk of decisionmaking in the pre-notice period. Notice occurs after the agency has completed substantial amounts of development, analysis, and review.").

44. "[I]ndividuals and small entities do not participate [in notice-and-comment rulemaking] because they (1) are unaware of rulemakings that would affect them; (2) are unfamiliar with how to participate effectively in the process; and (3) would be overwhelmed by the volume and complexity of rulemaking materials." Farina, Epstein, Heidt & Newhart, *supra* note 42, at 1197. With the advent of e-rulemaking, in well-publicized controversial rulemakings, sometimes hundreds of thousands of individuals comment, but these comments are often submitted by merely having the commenter click on a link provided in an email to send the agency identical comments written by the interest group. *See* Cynthia R. Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T & ADMIN. L. 123, 127–28 (2012).

45. Tino Cuéllar's study of three regulations promulgated by three different agencies

prerequisites for filing comments likely to affect the ultimate rule the agency adopts. Thus, most comments are filed by interest groups that represent a significant class of stakeholders,[46] often a class that has a focused interest on the outcome of the rulemaking or are repeat players that represent interests that are generally affected by the rulemaking agency's policies.[47] Second, by the time a rule is proposed, which is before any comments are officially received, the rulemaking agency staff often has discussed the proposal with significant interest groups representing various stakeholders and already knows most of the information that the comments subsequently provide.[48]

Nonetheless, because of the "threat" of judicial review, comments play an important role by encouraging agencies to vet proposed rules with interest groups who would be affected by the rule, especially those groups that

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concluded that sophistication of the comments rather than the identity of the commenter predicted agency adoption of suggestions in the comments. *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 430 (2005).

46. *See* Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 110 n.12 (2006) (finding that 85% of comments in the sample included in her study were from "companies, business and trade associations, unions, other levels of government, and the so-called public interest groups"); CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 178 (3d ed. 2003). Even interest groups that represent the diffuse interests of the public may have trouble justifying the time and expense of submitting meaningful comments. *See* Neil Komesar & Wendy Wagner, *The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 940 (2017).

47. Groups with a focused interest have a smaller number of members each of which have a substantial stake in the outcome of the rulemaking. Focused interests have an advantage over groups with members who have a diffuse interest in organizing to participate in notice-and-comment rulemaking. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). Often, business groups have the most focused interest. Hence, not surprisingly, studies show that industry groups or other business interests file most comments. *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131 (2006) (examining the influence of comments on forty rulemakings across four federal agencies); *see also* Keith Naughton, Celeste Schmid, Susan Webb Yackee & Xueyong Zhan, *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258, 260 (2009) ("[T]he majority of studies find[] that business interests are the main participants in the notice and comment period of rulemaking.").

48. *See* Richard J. Pierce, Jr., *The Administrative Conference and Empirical Research*, 83 GEO. WASH. L. REV. 1564, 1567–68 (2015) ("[T]he most important part of the rulemaking process occurs before the agency issues the [NOPR]."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1775 (1975) ("Indeed, the content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence.").

regularly participate in agency regulatory matters.[49]

> [H]ard-look review has deeply influenced the organizational structure of contemporary administrative agencies. Agencies hire experts to study and corroborate their policy decisions, staff to review and respond to comments, economists to evaluate the costs and benefits of different policies, and lawyers to draft preambles explaining the reasons for policy decisions and to defend agency actions.[50]

The psychological literature on accountability suggests that review of the agency's reasoning by a reviewer whose views are not known to the agency is ideal for encouraging agency deliberation to ensure it adopts the best rule.[51] Under the reasoned decisionmaking requirement that courts have imposed when engaging in arbitrary and capricious review, judges review the agency's reasons for choosing or omitting the data it addresses, the alternatives it considers, and the arguments it provides for its ultimate rulemaking choice to the extent that the reviewing judges consider these matters relevant to the agency decision.[52] Data, including suggested alternatives or arguments in the

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49. *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 510 (1997) ("Hard look review encourages agencies to obtain and coordinate input from various professional perspectives.").

50. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1862 (2012); *see also* Mark Seidenfeld, *The Long Shadow of Judicial Review*, 32 J. LAND USE & ENV'T L. 579, 596–98 (2016) ("[D]emands . . . imposed by hard look review provided incentives for agencies to create staff offices with experts in various disciplines different from those that populated the agency program offices, and that responded to different constituencies than agency program offices . . . ."); Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1711–12 (1993) (noting how the National Environmental Policy Act's requirement that agencies identify and consider environmental impacts forced agencies to include environmental experts in their decisionmaking process).

51. *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 516–18 (2002) [hereinafter Seidenfeld, *Cognitive Loafing*].

52. Under the reasoned decisionmaking standard of review, courts must ensure that agencies "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" not rely "on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem" and not reach a decision that "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); *see also, e.g.*, Chamber of Com. v. SEC, 412 F.3d 133, 144–45 (D.C. Cir. 2005) (holding that rule requiring some mutual funds to have an independent board chairman was arbitrary and capricious because the agency failed to consider the alternative of requiring disclosure of a chair's conflicts of interest); Am. Tunaboat

comments, are fair game for a court to find relevant.[53] Thus, the prospect of judicial review leads agencies often to inform themselves on matters that are likely to be raised by comments even before they issue a NOPR.[54] In fact, a recent study of rulemaking by three very different agencies demonstrated that comments are more likely directly to prompt changes from the agency's proposed rule when the agency process does not include pre-NOPR discussion with significant stakeholders.[55] Essentially, even if comments themselves do not induce the agency to alter the final rule, notice-and-comment procedures reinforce the incentive judicial review provides to an agency to consider data, alternatives, and arguments that it might otherwise ignore.[56]

This becomes especially important when an agency faces political pressure to reach a preordained outcome, such as might occur when the White House has announced a preferred outcome early in the rulemaking process.[57]

Ass'n v. Baldrige, 738 F.2d 1013, 1016 (9th Cir. 1984) (holding that the agency was arbitrary and capricious because it "ignore[d] a comprehensive data base that [was] the product of many years' effort by trained research personnel"); United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977) (reversing agency failure to respond adequately to an argument made during the notice-and-comment process).

53. *See, e.g.*, Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000) (determining that EPA statement accompanying a rule was arbitrary and capricious because the agency failed to respond to comments on an issue on which it had solicited comments). Ultimately, it is up to the reviewing court to decide whether a factor is relevant enough or data significant enough to warrant the agency addressing it. *See* Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1131–32 (2021) (noting the debate about whether hard look review under the arbitrary and capricious standard gives too much discretion to judges to thwart agency policy).

54. Agencies have developed a wide range of techniques "for promoting discussion and a rich, productive consideration of options prior to developing a record for judicial review through notice-and-comment rulemaking procedure." E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992).

55. *See* Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609, 671 (2021) (studying rulemaking at EPA, Occupational Safety and Health Administration (OSHA) and the Federal Communications Commission (FCC), and reporting that the extent to which an agency changed its rules in response to comments varies depending on the extent to which the agency relied on pre-NOPR interactions to ascertain the views of various stakeholders, and which stakeholders filed the comments).

56. *See* Elliot, *supra* note 54, at 1492 (noting that the role of notice-and-comment proceedings is to create a record for judicial review rather than for securing public input into agency action).

57. *See* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 497 (2019) ("[W]hen an agency is acting pursuant to a presidential directive, its decisions require more, not less, scrutiny."); Cass R. Sunstein,

Facing such pressure, an agency has great incentive to find data that supports the preordained outcome and to interpret the data it has as supporting that outcome.[58] It might even go so far as to shortcut rational deliberation to reach the desired outcome.[59] Notice-and-comment thus helps prevent the agency from engaging solely in self-confirming searches and interpretations of evidence and presenting questionable justifications for the rule it ultimately adopts. In short, the opportunity to comment is a crucial part of the process

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Deregulation and the Hard-Look Doctrine, 1983 SUP. CT. REV. 177, 211 ("The technocratic rationality required by State Farm and similar decisions should be understood as a device, admittedly highly imperfect, for reducing the risk that agency decisions will result from 'political' considerations that are sometimes illegitimate and that at any rate ought not to be concealed."). Some scholars contend that public support for a particular rulemaking outcome by executive officials or Congress adds political legitimacy to the rulemaking process, and therefore warrants greater judicial deference to the ultimate agency decision. *See, e.g.*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) ("[W]hat count as 'valid' reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress . . . ."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2380–83 (2001) (noting that courts should "relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question"). But such "super-deference" provides the agency an opportunity to spin the likely effects of the rule and thereby subvert political accountability of administrative policy. *See* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 171 (2012) [hereinafter Seidenfeld, *Irrelevance of Politics*] (noting judicial consideration of political support for an agency action "would allow agencies to substitute the invocation of political preferences for at least some development of facts and reasoning about impacts of agency regulations").

58. "[P]olitical pressure on agency analysts, whether from appointees, the Office of the President, or [Office of Information and Regulatory Affairs] staff," creates "a significant risk of biasing [agency] research." Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2047 (2015); *see also* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 191–92 (1998) (explaining that confirmation "bias is especially prevalent in situations that are inherently complex and ambiguous, which many political situations are"); *cf.* City & County of San Francisco v. U.S. Citizenship & Immigr. Servs., 408 F. Supp. 3d 1057, 1106 (N.D. Cal. 2019) (reversing a Department of Homeland Security rule interpreting whether an immigrant is a "public charge" and thereby excluded from entry into the United States, stating: "At minimum, the APA requires more than reading public comments and responding with a general statement that, however correct the comments may be, the agency declines to consider the issues . . . identified because doing so would contravene the government's favored policy").

59. *See* Mark Seidenfeld, *Foreword to the Annual Review of Administrative Law: The Role of Politics in the Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1453–54 (2013) [hereinafter Seidenfeld, *Role of Politics*].

of creating a record for judicial review of an agency rule that forces agencies to engage in deliberative rulemaking.

Some scholars also claim that notice-and-comment procedures add democratic legitimacy to agencies' action, which are headed by unelected officials and are only weakly accountable to Congress.[60] At the simplest level, viewing the administrative process from a Pluralist perspective,[61] one can argue that the notice-and-comment process provides information about the expected value of an agency rule in terms of the value the polity puts on it. Commenting requires that an individual learn of the rulemaking and inform themselves about any potential final rule at least sufficiently for the commenter to conclude whether they support the rule rather than some alternative. It also requires that the individual write and file the comment with the agency. Thus, the willingness to invest enough to overcome these costs and express an opinion on the rulemaking outcome can be seen as an indication of the value to commenters of their preferred rule. Taking this value into account and multiplying it by the number of commenters supporting a particular outcome provides agencies with a signal of the overall value of a particular rule to the entire polity. With the advent of electronic rulemaking,[62] the costs of filing comments have decreased, which has vastly increased the number of individuals who participate in some rulemakings, and hence might be seen to render rulemaking potentially more democratic.[63]

It is difficult, however, to maintain that notice-and-comment procedures

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60. *See* Barsa & Dana, *supra* note 40, at 229 ("[N]otice-and-comment rulemaking allows for a degree of public inclusion and debate and, hence, democratic legitimacy that otherwise would be lacking in the administrative process.").

61. "Pluralists see within the administrative state a means of registering the preferences of the various interest groups with a stake in a rulemaking. . . . The intensity of an interest group's participation in the administrative process signals the value of the benefit to its members, measuring the sum of the strength of the interest to each of its members." Seidenfeld, *Role of Politics*, *supra* note 59, at 1407.

62. *See* Steven J. Balla, Reeve Bull, Bridget C.E. Dooling, Emily Hammond, Michael Herz, Michael Livermore, et al., *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 100–05 (2022) (describing the development of the electronic rulemaking process).

63. *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 444 (2004) (noting the potential for "e-rulemaking . . . not simply [to] increase participation per se . . . but [to allow] regulators and citizens alike to manage participation that yields desired outcomes and cultivates communities of regulatory practice"); Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1380 (2011) (contending that agencies should take account of identical comments submitted by a large number of individuals because they are likely to reflect the value judgements of the public about an agency rule).

render agency action meaningfully democratic in nature. As this Article already noted, participation in the process is biased in favor of those with focused interests.[64] Second, even those who do participate as individuals in a rulemaking generally do not understand the technical issues and the ramifications of the various plausible alternative rules to ensure that their expressed rulemaking preferences accurately reflect their underlying values.[65] Sometimes a NOPR does generate an overwhelming filing of comments by the public, but the ability of modern technology to facilitate the generation and filing of such comments renders such comments unreliable as an indication of the public's preferences.[66] Thus, notice-and-comment procedures are best understood not to ensure agency fidelity to the preferences or values of the general polity but rather to create a record that makes credible the threat of judicial reversal if an agency fails to deliberate adequately when promulgating a rule—that is, if the agency fails to identify likely effects of plausible final rules and consider the impact of those effects on all stakeholders.[67]

Comments also can act as a "fire alarm" to warn members of Congress of the concerns of interest groups about a rule that might affect their chances of

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64. *See supra* note 46 and accompanying text.

65. Farina et al., *supra* note 42, at 1186. ("Given the barriers to effective citizen engagement in the process—lack of understanding of the nature and importance of rulemaking, lack of awareness when rulemakings of interest are occurring, and lack of motivation or capacity to penetrate the linguistically and technically complex mass of agency documents—it is surprising that individuals, small businesses, nongovernmental organizations, and state, local, and tribal government entities file comments at all. That some of these . . . not only participate, but participate effectively, is little short of astounding."). Of course, as this quote makes clear, despite the fact that public participation in rulemaking cannot render the process democratic, there is potentially great value in allowing such comments.

66. Mass malattributed, and computer-generated comments pose difficult challenges for an agency trying to extract information about public preferences from them.

> Preference information . . . would only be relevant inasmuch as it relates to the views of a genuine person, making it necessary to separate bot and malattributed comments from those that are genuinely submitted by a person. Further, for rules that result in a mass comment response, agencies face a range of difficult questions . . . concerning the representativeness of the pool of commenters and the role of intermediary groups that conduct mass comment campaigns.

Balla et al., *supra* note 62, at 112.

67. *See* Seidenfeld, *Irrelevance of Politics*, *supra* note 57, at 172. There is a debate about whether notice-and-comment procedures render rulemaking more democratic than it otherwise would be in terms of better apprising the agency of public preferences on the specific issue the rule addresses.

losing their seats,[68] either because the rule adversely affects their constituents or, more often, because it adversely affects a group that can organize politically to oppose the members' reelection.[69] To politicians, comments signal stakeholders' reactions (even if not well-informed reactions) to an agency-proposed rule. Hence, although the number of comments would not be relevant to justify a rule under the arbitrary and capricious standard of review, an agency would be well-advised to pay attention to a proposed rule that generates a groundswell of comments with strongly worded opposition if it wants to avoid congressional pressure to change the rule[70] or even outright congressional reversal of the rule.[71]

In sum, notice-and-comment procedures are best viewed not as providing information directly to persuade an agency whether a particular final rule is best but rather as part of a mechanism to improve agency accountability by forcing them to accurately reveal the effects of any final rule they adopt and thereby make transparent value judgments inherent in the rule.[72] Hence, it

68. *See* West, *supra* note 42, at 73; *see also* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1785–86 (2013) (noting that the exemption of guidance documents from notice-and-comment proceedings reduces "opportunities for fire-alarm oversight by outside monitoring groups regarding each document's significance"); *cf.* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) (noting that granting an outside group access to all the information available to the agency allows that group to monitor agency action and alert Congress when such action might warrant its intervention).

69. West, *supra* note 42, at 73 (explaining that rulemaking procedures "provide a cue for [political] mobilization"); *cf. id.* at 71 (finding that the "vast majority of [rulemaking] comments come from or are orchestrated by organized groups").

70. *See* Christopher J. Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs And Vaccines*, 109 CALIF. L. REV. 493, 507 (2021) (describing how revelation of data available to the agency induced the Food and Drug Administration to change its Risk Evaluation and Mitigation Strategy program used to evaluate the risk of addiction and overdoes from prescription drugs).

71. Such reversals are rare, especially because a President will almost never sign legislation that reverses a rule coming from their administration, but it does occur. Two well-known examples of Congress reversing contentious and somewhat unpopular rules occurred when Congress overruled the National Highway Traffic Safety Administration (NHTSA) rule requiring that cars be equipped with a seatbelt interlock that prevented a driver from starting the car unless they had buckled their seatbelt, and use of the Congressional Review Act to reverse OSHA's costly ergonomics rule when George W. Bush became president. *See* Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1, 62 (2020); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1075 (1999).

72. *See* Seidenfeld, *Irrelevance of Politics*, *supra* note 57, at 172.

is important that agencies know that ultimately they will have to allow notice-and-comment and convince a reviewing court that the rule adopted after such procedures satisfies the judicial standards for arbitrary and capricious review.[73]

2. The Benefits of Invoking the Good Cause Exception[74]

The most significant asset of the good cause exception is that it allows an agency to adopt and put into effect rules more quickly than if the agency must go through the notice-and-comment process.[75] This is a benefit to the extent that the rule adopted is better than the status quo ante. The greater the impact of the rule, the greater the benefit of reducing delay.

When Congress enacted the APA, notice-and-comment rulemaking and judicial review of rules adopted using this procedure were envisioned as efficient and flexible.[76] The point of allowing comments was to allow those affected by the rule to inform the agency of the rule's impact on them. The

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73. *Id.* at 171–72.

74. In this subpart of the Article, I do not consider the avoidance of the direct costs of the public having to prepare and file comments, and the agency having to read and consider those comments. Usually, these costs pale in comparison of the regulatory costs and public benefits of the rule. *See, e.g.*, Richard M. Lipton, Daniel A. Rosen & Robert S. Walton, Liberty Global *and the Importance of the Administrative Procedure Act*, J. TAX'N, Oct. 2022, at 32, 35 (criticizing the IRS for invoking the good cause exception to avoid imposing direct costs on taxpayers when such costs "are insignificant in comparison to the tens or hundreds of millions of dollars in tax savings potentially achievable due to what might be viewed as a temporary 'loophole' in the law"). For rules for which the public costs and benefits truly are so insignificant such that direct costs of the rulemaking process are on par or greater than the potential benefits of the rule, the agency would be best proceeding by direct final rulemaking. *See supra* note 32 (describing direct final rulemaking).

75. Generally, avoiding delay in adopting and implementing a rule was not sufficient to justify use of the good cause exemption unless that delay would cause "health hazards or imminent harm to persons or property." Asimow, *supra* note 16, at 752. Despite not being considered sufficient to overcome potential problems from use of the good cause exception, if a rule is better than the regulatory status quo, then necessarily there will be a benefit to implementing the rule as soon as possible.

76. The Senate Committee Report on the Bill that became the Administrative Procedure Act explained:

> Section 4 (b) [5 U.S.C § 553(c)], in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based but is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.

S. REP. NO. 79-752, at 225 (1945).

agency was not required to justify its decision in light of the record of all the information before the agency, including the filed comments.[77] Rather, comments were meant to provide the agency with information that it could consider before using its expert judgment to decide what rule best served the goals of the statute.[78] Courts were to review rules under a highly deferential arbitrary and capricious standard of review.[79]

The speed and efficiency of notice-and-comment rulemaking, however, were never realized. Before Congress enacted the APA, agencies established most policies via adjudication, which required formal trial-type procedures and review of findings of fact under the substantial evidence standard applied to the record as a whole, which is less deferential than arbitrary and capricious review.[80] Following the APA's enactment, agencies did not immediately change to using rulemaking to make policy: agencies continued to rely primarily on adjudication to do so.[81] Those agencies that did use rulemaking often followed the formal rulemaking requirements of the APA when their authorizing statute called for rules to be adopted after a hearing.[82]

Agencies' undue aversion to the use of informal rulemaking prompted the Supreme Court to send a clear message to agencies and lower courts that when a statute calls for rulemaking after a hearing, only informal notice-and-comment procedures are required.[83] By the time the Supreme Court

77. *See id.*

78. *See id.*

79. *See* Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 200 (1996) (explaining that the "arbitrary and capricious test that existed when Congress enacted the APA in 1946" was "highly deferential" (citing Pac. States Box & Basket Co. v. White, 296 U.S. 176 (1935))).

80. *See* Sunstein, *Arbitrariness Review*, *supra* note 8, at 1003–04 (2022) (asserting that "most important agency decisions would be made through adjudication").

81. *See* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 346–47.

82. *See* Levin, *Regulatory Accountability Act*, *supra* note 8, at 502 (describing the retreat from formal rulemaking that occurred in the 1970s). Although it is not entirely clear why agencies did not immediately avail themselves of the ease and flexibility of informal rulemaking, it might have reflected a fear of reversal under § 559 of the APA, which states that the APA does "not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559.

83. The case in which the Court most emphatically made that point was *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973). The Interstate Commerce Commission had interpreted its statute to require formal rulemaking to set rates governing use of boxcars by railroads to require formal hearings but attempted to streamline the proceeding by allowing all testimony to submitted in writing and limiting cross examination of those providing

clarified that informal rulemaking was generally all that was required, however, many scholars had become concerned about agency abuses of discretion and biases against the public interest in the regulatory process.[84] "Sometime in the middle of last century, 'capture theory' became the dominant paradigm of bureaucratic behavior."[85] Public choice theorists explained how the rulemaking process favored those with focused interests over those with diffuse interests.[86] This scholarly unease in turn led to judicial expressions of concern by judges[87] and Congress.[88]

This concern prompted courts to impose requirements that burdened the informal rulemaking process. In response to the increased use of notice-and-comment rulemaking, initially, courts reserved the authority to order agencies to add procedures in addition to those required by their authorizing

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testimony. *See id.* at 231–34. The Supreme Court, on its own initiative, asked the parties to address whether the statute required use of formal rulemaking proceedings. *Id.* at 226–27, 238. After briefing on this issue, the Court decided it did not. *Id.* at 226–28.

84. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1285 (2006) ("No longer seen as politically neutral dispensers of public goods, regulatory agencies were increasingly eyed with distrust as politically unaccountable incubators of narrow interest-group politicking.").

85. *Id.* at 1285; *see also* B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 18–19 (1994) (documenting the development of capture theory); Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 49, 49–56 (Daniel Carpenter & David A. Moss eds., 2013) (discussing the history of political capture theory for federal agencies); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089, 1089–90 (1991) (explaining that the regulatory experience of the 1970s led the academic profession to expand the view of capture beyond the work of Olson and Stiglitz).

86. Mancur Olson laid out the economics of how groups whose members had significant and focused interests had organizational advantages over groups whose members had diffuse interests. *See generally* OLSON, *supra* note 47. And public choice theorists applied Olson's work to explain perceived biases in agency regulation. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

87. *See, e.g.*, Moss v. Civ. Aeronautics Bd., 430 F.2d 891, 893 (D.C. Cir. 1970) (stating that "[t]his appeal presents the recurring question which has plagued regulation of industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect").

88. *See, e.g.*, S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) (Report of James Landis, who had been one of the architects of President Franklin D. Roosevelt's New Deal). In 1978, Congress enacted the Ethics in Government Act, which limited post-employment contacts between former high-level officials and their former agencies in an attempt to discourage capture. Ethics in Government Act of 1978, Pub. L. 95-521, tit. 5, § 207, 92 Stat. 1824, 1864–67 (1979).

statutes and the APA to create a sufficient record for public and judicial scrutiny.[89] Courts also viewed notice-and-comment procedures as creating a rulemaking record on which the agency had to justify its decision.[90] In addition, they read the APA requirement that agencies include a statement of the basis and purpose for a rule when adopting it along with the APA's authorization of judicial review to ensure that an agency rule is not "arbitrary, capricious, [or] an abuse of discretion" as justifying rigorous judicial inquiry into the agency's factfinding, predictions, and reasoning when adopting a rule.[91] Although the Supreme Court ultimately held that courts have no authority to order an agency to add procedures not required by the APA or other statutes,[92] the Court affirmed that judges are to review rules to ensure that the agency adequately considered all relevant facts and arguments and provided a meaningful opportunity for interested persons to comment on the proposed rule.[93]

These additional requirements for adopting a rule by notice-and-comment procedures greatly contributed to bogging down the process of informal rulemaking.[94] Today, it is not unusual for an agency to take several years to develop a proposed rule and several more after the issuance of the

89. *See* Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1812–13 (1978) [hereinafter Stewart, Vermont Yankee] (describing how courts developed hybrid rulemaking procedures to ensure an adequate basis for effective review).

90. *See* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 408–09, 419 (1971); Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (per curiam); *see also* Stewart, Vermont Yankee, *supra* note 89, at 1816 (contending that *Vermont Yankee* is "self-contradictory . . . [because it] recognizes that courts should review notice and comment rulemaking on the basis of an evidentiary 'record,'" which goes beyond what the APA requires); James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 259–60 (1979) (characterizing the courts as having "transformed informal rulemaking into a new kind of on-the-record proceeding").

91. *See* DeLong, *supra* note 90, at 263–66 (reporting that appellate courts had imposed obligations in addition to simple notice-and-comment on agency rulemaking, including that "the agency must establish a proper 'framework for principled decision-making,' 'take a hard look' at the issues before it and ensure that interested parties have 'genuine opportunities to participate in a meaningful way'" (footnotes omitted)).

92. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 541–48 (1978).

93. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43–44 (1983).

94. *See* McGarity, *supra* note 10, at 1385–86; *see also* Richard J. Pierce Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012) [hereinafter Pierce, *Rulemaking Ossification*].

NOPR for the agency to adopt the rule.[95] Given the length of time it takes an agency to adopt a rule, the benefit of adopting a rule more quickly by dispensing with notice-and-comment is significant.

Congress's dysfunction is another reason that the good cause exception is more attractive today than it was when the APA was enacted. Even when faced with situations that both parties agree would benefit from a regulatory response, Congress usually cannot reach agreement on what that response should be. Neither party is willing to support legislation proposed by the other party because that would allow the proposing party to take credit for solving the problem.[96] Even when one party controls both the Capitol and White House, the filibuster, more often than not, prevents Congress from using traditional legislative processes to enact statutes that provide needed reforms.[97] That puts pressure on the administrative state to regulate to

95. *See, e.g.*, Jonathan H. Adler, *The Legal and Administrative Risks of Climate Regulation*, 51 ENV'T L. REP. 10485, 10490 (2021) (stating the average time for EPA to take a rule from NOPR to final rule is over 600 days); Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENV'T L. 767, 770 (2008) (finding that, between 2001 and 2005, EPA took an average of between a year and a half and two years to finalize a rule after publishing it); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RSCH. & THEORY 113, 134 (1992) (finding that EPA took an average time of 1,108 days, including time to generate a NOPR, to promulgate a rule). The increase in the time it takes for a rule subject to notice-and-comment to go from NOPR to final rule is somewhat debated. On the low end, a comprehensive study of Department of Interior rules showed that from 1950 to 1975, 80% of rules were promulgated within 200 days of publication of the NOPR and 90% within one year of the NOPR. Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1456 (2012). From 1976 to 1990, only 40% of rules were promulgated within 200 days and 65% were promulgated within a year of publication of the NOPR. *Id.* On average, from 1950 to 1975, rules took fewer than 200 days, whereas from 1975 to 1990, that length of time increased to just under a year, which is not a particularly great increase in delay. *Id.* at 1456–57, app. at 1487 fig.9. But that study focused on all rulemaking, so the data from the earlier period included rules promulgated by formal rulemaking, which take inordinately longer than notice-and-comment procedures. It also did not limit its focus to economically significant rules, for which delay is both most likely and also most costly. *See* Pierce, *Rulemaking Ossification*, *supra* note 94, at 1498.

96. *See generally* THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012).

97. The filibuster traditionally was rarely used, but by 1970 its use became common, and

prevent significant, sometimes catastrophic, outcomes. Given the current political realities of congressional inability to act, the potential benefit of quick regulatory fixes is substantial.

C. The Good Cause Exception Conundrum

The discussion above indicates that use of the good cause exception to adopt an ultimate final rule can deliver substantial benefits but also might generate substantial regulatory costs. Use of the good cause exception would serve the public interest for adopting any rule when the cost of delaying a rule outweighs the cost of adopting a rule inferior to one that would be adopted if notice-and-comment procedures are used. It is difficult for courts to evaluate the likelihood that skipping notice-and-comment procedures will lead to adoption of an inferior rule or how greatly inferior such a rule would be without a full rulemaking record and a justification for the rule in light of filed comments. But, if the courts require comments and a full agency justification, then they have essentially required notice-and-comment proceedings and forfeited the potential benefits from use of the exception. Hence, courts might seem to be in a catch-22 in that they can only decide whether the agency was justified in skipping notice-and-comment procedures by requiring notice-and-comment.

II. INTERIM FINAL RULEMAKING AS THE SOLUTION TO THE GOOD CAUSE EXCEPTION CONUNDRUM

A. The Promise of Interim Final Rulemaking

Luckily, there is an alternative to both allowing the agency to use the exception to generate the ultimate final rule and forbidding the agency from doing so. An agency can issue an IFR which allows the agency quickly to implement a rule that is superior to the regulatory status quo ante, thereby reducing the cost of regulatory delay while allowing notice-and-comment procedures to commence immediately upon adoption, ultimately promising that the agency can choose a better rule if the comments cause the agency to

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threats of filibuster even more common. *See* BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE 94–95 (1989). Today, it is the rare bill reported out by the majority party that does not face a filibuster, *see* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 213 (1997) ("[F]ilibustering has in effect created a supermajority requirement for the enactment of most legislation"), leaving the majority to have to resort to unorthodox methods of passing legislation that are not subject to a filibuster. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 137–69 (5th ed. 2017).

believe that there is one superior to the IFR. Thus, the use of an IFR seems like the perfect solution to the good cause exception conundrum.

One might object that expanding the good cause exception is contrary to the APA, which sets out preadoption notice-and-comment as the general means for agencies to enact rules.[98] However, the APA text states that the section on rulemaking does not apply when the agency can show good cause that notice-and-comment would "be contrary to the public interest."[99] Thus, the text of APA is entirely consistent with my thesis that the agency should invoke good cause and use interim final rulemaking whenever that best serves the public interest.

Nonetheless, some object to the expansion of the good cause exception because they claim it is contrary to the intent of Congress. For example, Professor Kristin Hickman and Mark Thomson have advocated for a strong presumption against use of IFRs, which the agency would have the burden of rebutting because liberal use of IFRs would undermine the intent of Congress when it enacted the APA that all but those rules falling within narrow exceptions were to adopted using pre-enactment notice-and-comment proceedings.[100] Reliance on legislative intent divorced from statutory text, however, is a precarious position to defend. Textualists disavow that legislative intent even exists,[101] let alone that it can be determined reliably enough to give meaning to otherwise ambiguous statutory text.[102] But even if one views

98. 5 U.S.C. § 553(b)–(c).

99. *Id.* § 553(b)(B).

100. *See* Hickman and Thomson, *supra* note 12, at 311. Hickman and Thomson reason that without the presumption against use of the good cause exception, an agency would see no downside to use of IFRs and hence would use them for virtually all rulemaking. Later in this Article I propose that agencies that issue an IFR commit to finalizing the rule, forcing them to consider comments and explain their choice of a final final rule (FFR) in the future. *See infra* notes 146–148 and accompanying text. If courts accepted this proposal, agencies would no longer see the advantage of avoiding having to devote resources to digesting and responding to comments. In fact, an agency would have to expend more resources by using an IFR because in addition to defending its FFR, it may have to address challenges to the IFR itself. Thus, contrary to Hickman and Thomson's conclusion, an agency would see the potential penalty of having to use resources that it could otherwise use for other matters if it issues an IFR.

101. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2405–06 (2017) ("Since Congress is a 'they,' not an 'it,' there is no natural or neutral way to aggregate legislative intent . . . ." (footnote omitted)).

102. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005)

legislative history as a valid source of legislative meaning, defining such intent as some subjective desire of the legislature is not a defensible understanding of legislative intent. To have any claim to legitimacy as a tool of statutory interpretation, legislative intent must mean the legislature's understanding of the meaning of the text they enacted into law.[103] So understood, Congress's intent regarding the breadth of the good cause exception is far from clear.

Admittedly, when the APA was adopted in 1946, the good cause provision was seen as a narrow exception to the notice-and-comment requirement.[104] But the expectation that the exception would have limited breadth developed against a backdrop understanding that notice-and-comment procedures would render rulemaking quick and flexible. That understanding was never realized.[105] Thus, the delays that notice-and-comment procedures create for rulemaking increase the cost they impose. Whether members of the Congress that enacted the APA would have believed that those costs were so great that following those procedures would be contrary to the public interest is anyone's guess. In essence, what has changed since 1946 is not the meaning of the APA but the understanding that informal rulemaking would demand significant time and agency resources.

One might also object that Congress may have required notice-and-comment procedures for reasons other than to specify the functional mechanism for adopting the best rules. As then-Professor Scalia pointed out in his article on *Vermont Yankee Nuclear Power Corp. v. National Resource Defense Council, Inc.*,[106] Congress might require greater or lesser procedural burdens on agency rulemaking to respectively discourage or encourage the amount of rulemaking.[107] This view depends on the seemingly unlikely conclusion that the Congress that enacted the APA predicted that the notice-and-comment process would develop into the cumbersome process it is today.

("[T]extualists . . . think it impossible to tell how the body as a whole actually intended . . . to resolve a policy question not clearly or satisfactorily settled by the text.").

103. *See* Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1823–24 (2020) ("[L]egislative intent must refer to the understanding of the meaning of the enacted text that the legislators had rather than a purely subjective inquiry into what legislators desired.").

104. *See* James Yates, *"Good Cause" Is Cause for Concern*, 86 GEO. WASH. L. REV. 1438, 1442–43 (2018) (reviewing the legislative history of the good cause exception); *supra* note 25 and accompanying text.

105. *See supra* notes 93–104 and accompanying text; *infra* note 107 and accompanying text.

106. 435 U.S. 519 (1978).

107. Scalia, *supra* note 81, at 404–05 ("[O]ne of the functions of procedure is to limit power—not just the power to be unfair, but the power to act in a political mode, or the power to act at all.").

But even if Congress in 1946 foresaw the development of today's protracted notice-and-comment process, issuance of an IFR would not undermine any intent that notice-and-comment procedures discourage rulemaking in general because such issuance does not exempt an agency from the burden of notice-and-comment rulemaking. It merely delays that burden so long as the agency commits itself to allow and consider comments on the IFR and ultimately to adopt an FFR.[108] Moreover, the issuance of an IFR does not alter the nature of judicial review of the FFR. In other words, use of the IFR process commits the agency to the devote the same level of agency resources to consider comments and justify its decision in light of them as would notice-and-comment rulemaking that began with a prepromulgation NOPR.

Nonetheless, despite the rosy picture this Article paints about the use of IFRs, unfortunately, their use does open up the possibility of agency abuses and other undesirable effects. Hence, while IFRs are promising for solving the good cause conundrum, agencies' use of IFRs should be restricted to avoid these effects.

B. Limits on the Use of Interim Final Rulemaking

At first blush, the IFR seems perfectly suited to resolving the conundrum of the good cause exception and generally should be considered procedurally proper when issued without prior notice-and-comment. Issuance of an IFR, however, still allows an agency leeway to abuse the good cause exception and may also cause the agency to adopt something other than the ideal FFR. Thus, there will be factors that courts should evaluate to determine when these potential problems with a particular IFR should preclude an agency issuing it under the good cause exception.

At the outset, the use of interim final rulemaking raises questions about how to structure judicial review to ensure that an agency has an incentive to adopt an IFR only when doing so would serve the public interest. The problem arises because IFRs may only be in effect for a relatively short time, but their issuance can cause harm that extends beyond the time they are in effect and, in fact, might be permanent. In the most problematic scenario, an agency may issue an IFR that is challenged in court, but the agency then issues an FFR before the court has time to fully review the challenge to the IFR. Certainly, a regulated entity that has been fined or otherwise adversely affected because it violated the IFR would still be able to claim the invalidity

108. *See infra* notes 146–159 and accompanying text (discussing how requiring an agency to commit to a sunset provision in an IFR will ensure that the agency must defend the ultimate rule that it adopts).

of the IFR as a defense to the order penalizing it.[109] But, there is a question whether an entity could argue for reversal of the FFR on grounds that the IFR was improperly issued.[110] And even if the impropriety of an IFR provided procedural grounds for reversing a resulting FFR, it is unlikely that any deleterious effect the IFR had on the FFR would be remedied by reversing the FFR on such grounds.[111] It is thus crucial that allowing the use of IFRs when they likely serve the public interest requires some means by which courts can quickly review them to ensure that, given their impacts, including their effects on any subsequent FFR, IFRs do not cause more harm than good.

One way for courts to assure timely review of the propriety of using the interim final rulemaking process would be for them to expedite consideration of a petition to stay an IFR solely on grounds that the IFR is not justified under the good cause standards as set out in the remainder of this Article. While this might seem to be asking a lot of the courts, the issues raised by a petition for such a stay would be limited to whether the IFR is justified as good cause for pre-notice-and-comment promulgation of the rule and not any issues that address the legal authority of the agency to adopt the rule or whether the rule passes judicial standards of arbitrary and capricious review.

The potential pathologies of an IFR include the following: that the IFR itself is not better than the regulatory status quo ante; that the agency might abuse the IFR to adopt a rule that is preferred by the current administration but that judicial or congressional review would prevent an agency from adopting if it had to use notice-and-comment procedures; and that the IFR will bias the subsequent consideration of comments so that the FFR serves the public interest less well than would a rule that the agency would ultimately have adopted had it not issued the IFR. Although all of these represent potential problems with agency issuance of an IFR, regardless of the nature of the problem, the ultimate question is whether the benefit of an IFR in terms of decrease in regulatory delay exceeds the costs of the agency adopting a less-than-ideal FFR. The remainder of this part of the Article addresses each pathology and explains how it should limit judicial approval of IFRs under the good cause exception to notice-and-comment rulemaking.

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109. Hickman & Thomson, *supra* note 12, at 266 ("If an agency promulgates a rule claiming an exception from § 553's prepromulgation notice and comment requirements and a court subsequently holds that the claimed exception does not apply, then the rule is simply invalid.").

110. Circuit courts are split on the validity of an FFR that follows a procedurally flawed IFR. *See* Hickman & Thomson, *supra* note 12, at 286–305 (discussing the various approaches); *see also* Lavilla, *supra* note 12, at 412–13 (discussing the effects of an IFR's lack of good cause on a FFR); Asimow, *supra* note 16, at 725–27.

111. *See infra* notes 214–216 and accompanying text.

1. The Potential for an IFR To Be Worse Than the Regulatory Status Quo Ante

The possibility that the lack of notice-and-comment might allow the agency to adopt a rule that is inferior to the status quo ante counsels that courts should restrict the bounds of IFRs to rules with objectively recognized benefits. To justify invoking the good cause exception, an agency should present credible evidence that the rule will better serve the statutory scheme that the agency is authorized to regulate, as well as the public interest.[112] It may be that under a full hard look review opponents to the rule could demonstrate that the agency failed to consider whether there are rules that would better serve the public interest.[113] But, on the limited question of whether to stay the rule because it was issued prior to the opportunity for comment, the need for a quick judicial decision warrants judges addressing simply whether the rule is likely better than the regulatory status quo ante. Even with respect to that question, the nature of an IFR as an invocation of the good cause standard warrants some deviation from the potentially demanding standard that courts would apply under arbitrary and capricious review.[114]

a. Evidence of Objective Superiority of the IFR.

In reviewing an IFR, the agency should still have the burden of convincing the court that the IFR likely will be objectively better than the regulatory status quo. Admittedly, there may be considerable judicial leeway in determining whether the agency has identified what all would agree are net benefits over the regulatory status quo. However, consistent with the usual standards of reasoned decisionmaking,[115] this will require the agency to

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112. *See, e.g.*, Asimow, *supra* note 16, at 710 (noting that agencies may issue an IFR because of "a sincere and understandable desire to achieve regulatory objectives as quickly as possible").

113. Under the hard look test, a court will set aside agency action as arbitrary and capricious if the agency failed to consider a reasonable alternative to the rule it ultimately adopts. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (reversing the NHTSA's repeal of its passive restraint rule on grounds that people might disable automatic seatbelts because the agency failed to consider an airbags-only alternative).

114. Of particular note, arbitrary and capricious review of an agency rule requires the agency to explain its decision in light of a record created by notice-and-comment proceedings. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973) ("In applying [the arbitrary and capricious] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *see also* 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ."). There will be no such record for an IFR.

115. *See State Farm*, 463 U.S. at 42–43 (describing the reasoned decisionmaking standard

explain how the IFR will affect those intended to be protected by the agency's regulatory program. Often, this will involve matters on which the agency has expertise. But experts should be able to explain why their choice of issuing an IFR is most likely to lead to objectively better outcomes.[116] An agency should identify evidence from which it concludes that the IFR is likely better than the regulatory status quo. Clearly, given the fact the IFR is a temporary gap filler, the agency need not conduct new studies to justify its adoption of an IFR. By the same token, it should not ignore publicly available information that undermines its evaluation of the superiority of the IFR. And if the evidence does not resolve that question with certainty, the agency should explain why it believes that it is more likely than not that the IFR will provide objective benefits vis-à-vis the status quo. The court should not defer to the agency due to mere uncertainty,[117] but if the agency can explain why the rule is likely to lead to objectively superior outcomes, the court should not reject the IFR simply because it is uncertain that the agency's findings and predictions are correct.[118] In that limited sense, the

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of review); *see also* Seidenfeld, *Irrelevance of Politics*, *supra* note 57, at 148–70 (discussing the underpinnings of reasoned decisionmaking).

116. While courts defer to agencies on matters relating to their technical expertise, they "do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment. In order to survive judicial review in a case arising under § 7006(2)(A) [sic], an agency action must be supported by 'reasoned decisionmaking.'" Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 437 F.3d 75, 77 (D.C. Cir. 2006) (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998)).

117. Courts tend to give extreme deference to agency action in the face of uncertainty regarding technical facts. *See* Chamber of Com. v. SEC, 412 F.3d 133, 143 (D.C. Cir. 2005) ("[A] court owes an 'extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.'" (quoting Hüls Am. Inc. v. Browner, 83 F.3d 445, 452 (D.C. Cir.1996))). But even when predicting uncertain future events, an agency must not only acknowledge factual uncertainties, it must also "identify the considerations it found persuasive." Rural Cellular Ass'n v. FCC, 588 F.3d 1095, 1105 (D.C. Cir. 2009); *see also State Farm*, 463 U.S. at 52 ("Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions. . . . [T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))).

118. The "likely superior" standard is similar in nature to the standard a court applies in deciding whether to issue a preliminary injunction, for which it must decide whether the party seeking the injunction has demonstrated a "likelihood of success on the merits" of their claim. *See* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987). But my standard for

court should defer to the agency's expertise.

Although my liberalization of the good cause exception would generally expand the potential for its use when an agency adopts an IFR, there are cases in which courts have upheld agency invocation of the exception but that, under my approach, would have been stayed on grounds that the agency failed to show that the IFR likely would be objectively better than the regulatory status quo. One such matter involved whether the Attorney General appropriately invoked the good cause exception when he issued an IFR making the Sex Offender Registration and Notification Act's (SORNA's) registration requirement applicable to sex offenders who committed their offenses prior to SORNA's effective date.[119] The Circuits split on that question, largely because they disagreed whether the rule addressed an emergency given that Congress had given the Attorney General three years to decide the question, and the Attorney General had taken more than seven months to issue the IFR.[120] From my point of view, the fact that the issue may not have been an emergency is not particularly troubling because if the rule provided a clear benefit, then there was value in adopting the rule sooner rather than later. What does trouble me about the use of interim final rulemaking for this matter is the Attorney General's justification that the IFR would provide a benefit. The Attorney General did not rely on any evidence that making SORNA's notice requirement retroactive would have any effect on sexual offenses; he instead relied on the mere *possibility* that retroactivity would reduce such crimes.[121]

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a stay would go to the question of whether the IFR is substantively justified as part of the inquiry of whether to enjoin the IFR as procedurally invalid. The similarity, however, is not a coincidence, because both in evaluating whether to stay an IFR, and in evaluating whether to issue a preliminary injunction, a court is making a preliminary ruling prior to the development of a full record, that will be replaced with a more definitive decision after the record is fully developed.

119. *See* United States v. Dean, 604 F.3d 1275, 1277 (11th Cir. 2010).

120. *Compare* United States v. Ross, 848 F.3d 1129, 1132 (D.C. Cir. 2017) (holding that the AG was not justified in asserting the good cause exception), United States v. Cain, 583 F.3d 408, 419–20 (6th Cir. 2009) (same), United States v. Brewer 766 F.3d 884, 889–90 (8th Cir. 2014) (same), United States v. Reynolds, 710 F.3d 498, 510 (3rd Cir. 2013) (same), United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011) (same), *and* United States v. Valverde, 628 F.3d 1159, 1168 (9th Cir. 2010) (same), *with Dean*, 604 F.3d at 1281 (holding AG justified use of good cause exception), *and* United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009) (same).

121. *See Cain*, 583 F.3d at 422. Studies have concluded that there is little evidence that community sex offender registration and notification laws have been effective in reducing either incidents of first-time sex offenders or the rate of sex crime recidivism since they were

b. The Insufficiency of Value Judgments to Justify an IFR.

A special case in which an agency essentially fails to claim objective superiority of the IFR is when the agency chooses the rule based on a subjective value judgment.[122] In such a case, courts should stay an IFR and await the agency adoption of the FFR before deciding on whether the rule is justified. This is one way that my proposed standard for review of IFRs differs from traditional arbitrary and capricious review.

Courts generally have held that, in applying arbitrary and capricious review to agency rules, courts are not to second guess evaluations of such judgments an agency makes.[123] Thus, rules which the agency determines are better than alternatives because of such value judgments may satisfy hard look review. [124] The problem with the agency relying on value judgments to justify adopting an IFR is that such judgments are inherently political in

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first implemented in the 1990s. *See* Kristen M. Zgoba, Wesley G. Jennings & Laura M. Salerno, *Megan's Law 20 Years Later: An Empirical Analysis and Policy Review*, 45 CRIM. JUST. & BEHAV. 1028, 1030–31 (2018). Thus, the data seemed to support that increasing the applicability of Sex Offender Registration and Notification Act to past offenders has no effect on public safety, contrary to the supposition of the AG. This seems to be an example where the political optics of being hard on sex offenders drove the rule rather than any indication that the rule was in fact beneficial.

122. A student note reached a somewhat similar conclusion that "[c]onstitutional and moral harms are invalid reasons for invoking the . . . good cause exemption . . . ." Miriam R. Stiefel, Comment, *Invalid Harms: Improper Use of the Administrative Procedure Act's Good Cause Exemption*, 94 WASH. L. REV. 927, 964 (2019). Her rationale for her conclusion gave a plethora of reasons why an agency should not be allowed to issue an IFR to remedy constitutional or moral harms, including that: such harms are better implemented by courts via litigation challenging pre-existing rules because such an avenue of challenge means that the IFR is not issued in response to an emergency and appropriately leaves constitutional questions to the courts or Congress; if agencies do issue rules to remedy alleged constitutional harms, those rules have broad impacts of great importance to the public, and therefore should be adopted using notice-and-comment procedures; the APA did not envision using the good cause exception to remedy moral harms; moral goals of an IFR may conflict with the goals of the statute being implemented. *Id.* at 955–62. She does not argue as I do, however, that remedying such harms fails to reflect a consensus that the IFR is better than the regulatory status quo.

123. *See, e.g.*, San Luis Obispo Mothers for Peace v. U.S. Nuclear Regul. Comm'n, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (stating that judicial examinations of agency evaluations would be an "extraordinary intrusion into the realm of the agency" that would disrespect the integrity of the administrative process).

124. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (stating that an agency need not demonstrate that a rule is objectively better than the rule it replaces, so long as it is better in the eyes of the agency).

nature.[125] Rules that are justified only by an agency's value judgments essentially would likely not have been adopted by an agency within an administration that holds different subjective values about the outcomes to which the rule leads. Accepting such subjective justifications for IFRs would thus allow agencies to undo rules adopted by prior administrations without delay, leading to potential regulatory instability and uncertainty. It would also undermine the use of notice-and-comment to allow for public input into what is essentially a political matter.[126] In contrast, if an agency adopts a rule because it learns of dangers inherent in the regulatory status quo that all agree are truly dangers to be avoided, then the efficacy of the rule depends on the accuracy of the agency predictions of the factual outcomes that flow from the rule, rather than simply to a different subjective evaluation of those outcomes. One might contest the accuracy of the agency predictions of outcomes from the rule, but if those predictions are supportable, there would be consensus that the rule likely would be superior to the status quo ante and would be a proper candidate to be issued as an IFR.

In addition, rules that are justified by appeal to subjective preferences often address issues meant to please the White House or perhaps to energize the base of the administration's party.[127] As such, frequently, they are adopted because of political pressure on the agency.[128] While such pressure is not illegitimate per se, it often will short-circuit the agency's deliberative process, which can lead the agency essentially to fail to reveal honestly the objective trade-offs of adopting the rule.[129] Thus, it is precisely for such rules that notice-and-comment plays an important role in ensuring transparency and fair-minded deliberation in the agency rulemaking process.[130] Hence, an agency should not be able to invoke the good cause exception for such rules.

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125. *See* Seidenfeld, *Irrelevance of Politics*, *supra* note 57, at 159; Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281 (1986) (noting that technical information "will rarely be conclusive, however, and its usefulness will often depend upon value judgments, which must be made in accordance with the governing statute").

126. *See* Asimow, *supra* note 16, at 708 (discussing how notice-and-comment is a surrogate for the political process).

127. *See* Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 276 (2019).

128. *See id.* at 276–78 (noting that since the Clinton administration, presidential influence on regulatory policy has often even sidestepped the need for legislative authorization); Kagan, *supra* note 57, at 2290–99 (describing how President Clinton was the first President to use directives to agencies to adopt policies he wanted).

129. *See* Seidenfeld, *Role of Politics*, *supra* note 59, at 1453–54 (describing how presidential influence can interfere with deliberative agency processes for rulemaking).

130. *See* Seidenfeld, *Irrelevance of Politics*, *supra* note 57, at 155–56 (discussing the agency's burden of explanation in the rulemaking record).

A quintessential example of an IFR that was predicated on the different value judgment of an administration from that of the prior administration was the Department of Health and Human Services' rule allowing employers and insurance companies an exception for religious reasons even from the need simply to inform the agency that they objected to the Affordable Care Act requirement that they provide coverage for contraception.[131] The comparative benefits of this rule versus the regulatory status quo depended on the weight one puts on one's religious conviction that reducing the incidents of sex that does not lead to pregnancy and the value individuals put on not feeling compelled to facilitate in any manner a program that they feel compromises their religious values compared to the value one places on a person's interest in choosing to have sex without the risk of pregnancy.[132] The values the American public places on these alternatives vary greatly.[133] Hence, there would not be objective consensus about whether a rule serves the public interest even if we knew with certainty the extent to which the rule contributes to sex engaged in for reasons other than procreation. Because there was no objective indication of the superiority of the IFR over the regulatory status quo, courts should have prohibited the agency from using the interim final rulemaking process to issue this rule.

2. The Problem of Permanent IFRs

Even if an IFR likely better serves the public interest than the regulatory status quo ante, it may not be the best rule the agency could adopt. The public interest would best be served by replacing an IFR if agency analysis of comments indicates that there is a superior FFR. This suggests that an agency should act to finalize an FFR as soon as practicable. In his comprehensive study of IFRs for the Administrative Conference of the United States (ACUS), Professor Michael Asimow analyzed the outcome of IFRs and found that

131. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (codified at 45 C.F.R. § 147.133).

132. *See* Stiefel, *supra* note 122, at 961 (arguing that the Department of Health and Human Services' use of moral objections as justification for the good cause exception was subjective in nature and therefore arguably not real and demonstrable harm); *cf.* Seidenfeld, *Role of Politics*, *supra* note 59, at 1441 (contending that the balancing of policy that depends on value judgments cannot be resolved on a purely reasoned basis).

133. *See Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RSCH. CTR. (Sept. 28, 2016), https://www.pewresearch.org/religion/2016/09/28/1-most-say-birth-control-should-be-covered-by-employers-regardless-of-religious-objections/.

agencies did not finalize between 42% and 53% of them.[134] Professor Asimow noted that many of these IFRs were airworthiness directives issued by the Federal Aviation Administration (FAA), which generally do not draw any comments and which the FAA does not finalize.[135] But even excluding these directives, based on the data reported by Professor Asimow, agencies failed to finalize about 27% of the IFRs within three years after they were issued.[136] This indicates that many IFRs are left in place far longer than is warranted and, in many cases, indefinitely. Addressing this problem requires an evaluation of why agencies fail to finalize many IFRs and whether that sometimes is justifiable.

Agencies might have reasons to want the IFR to remain in place, even though comments might reveal that there is a better rule that the agency could adopt. An agency might have adopted an IFR in the first place to avoid notice-and-comment procedures because the agency is under political pressure to adopt a rule that might not survive judicial scrutiny if the agency had to defend it in light of comments generated by the notice-and-comment process.[137] If this were the case, the agency would be using the IFR to adopt what is essentially a permanent rule that it might not be able to adopt using notice-and-comment procedures. Similarly, an agency might reason that having to justify the rule in light of comments might provide an alarm that the agency is regulating in a manner with which those in Congress or the public disagree.[138] Allowing an IFR to remain in effect without considering the comments filed in response to it could thwart potential legislative

134. Asimow's report found: 42 of the 92 IFRs (46%) issued in the first quarter of 1989 remained in place three years later; 38 of 90 IFRs (42%) issued in the third quarter of 1991 remained in place three years later; 73 of 139 IFRs (53%) issued in the second quarter of 1994 remained in place three years later. Asimow, *supra* note 16, at 714–15.

135. *Id.* at 714 n.45.

136. I calculated this percentage by excluding the airworthiness directives from the data reported by Asimow. Thus, for example, for IFRs issued in the third quarter of 1991, 18 were airworthiness directives. Asimow, *supra* note 16, at 715 n.46. That left 20 of the 72 non-airworthiness directive IFRs (27%) that remained in place three years after they were issued.

137. *See* Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 559, 565 (1997) ("Active judicial review of the agency decisionmaking process can give staff an incentive (and perhaps power) to resist political pressure from agency higher-ups to reach preordained results.").

138. *Cf.* Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 771 (2014) ("[W]here an agency fails in its . . . tasks of record building or reason giving, the overwhelming lack of publicly available information renders the entire policymaking process far less transparent or accessible, such that outside observers are left with little or no basis on which to judge the quality of the agency's decision making.").

oversight.[139] Clearly, either of these rationales malevolently thwarts the structures intended to hold agencies accountable and, thus, does not provide a legitimate basis for invoking the good cause exception.

Alternatively, an agency might reason that the IFR, once issued, is good enough. In other words, an agency might reason that its best use of its resources would be to allow the IFR to remain in place rather than devoting staff time and labor to consider amending it and ultimately defending whatever FFR was adopted.[140] While this rationale seems more innocent than agency intent to thwart oversight, it is contrary to the structure of the APA, which envisions that the agency must be willing to devote the resources to analyzing any permanent rule that it adopts. As noted above, statutes may require administrative procedures not only as instruments to improve the quality of agency decisionmaking but also as burdens on agency resources by which Congress can manipulate agency incentives to regulate.[141] Thus, avoiding notice-and-comment procedures altogether may simply make it too easy for an agency to adopt rules, resulting in more rules promulgated than Congress envisioned.

Moreover, even if an agency skips notice-and-comment procedures to minimize the resources it has to expend to deliberate about and defend a rule—rather than malevolently to minimize judicial or legislative oversight—taking the good cause shortcut in adopting a permanent regulation is likely to lead to less deliberative rulemaking. According to the psychology of accountability, hard look review after notice-and-comment rulemaking improves agency rulemaking not so much because courts will find and correct agency errors but rather because such review is structured to encourage the agency carefully to deliberate and to ameliorate potential

139. Notice-and-comment may play a role in signaling concern to members of Congress. Such concern can result in an agency deciding against promulgating a rule that it and the current administration would prefer because of fear that the agency would pay too high a cost in terms of lost congressional support or even a reduction in agency funding. *See* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 198–99 (1999) (explaining that rulemaking procedures provide a mechanism for Congress to monitor agency action and exercise oversight in the event the agency acts in a way that displeases Congress members' constituents, thereby encouraging agencies to serve these constituents).

140. *See* Asimow, *supra* note 16, at 736 ("Busy members of the agency staff feel no pressure to deal with the comments received (if any) or to figure out how to modify the rule in light of the comments or administrative experience.").

141. *See supra* note 107 and accompanying text (citing then-Professor Scalia for pointing out this fact).

decisionmaking biases.[142] Thus, whether malevolent or not, allowing an agency to adopt an IFR and then avoid consideration of comments and comprehensive justification for the rule generally will result in the promulgation of suboptimal rules.

Currently, once an IFR is in place, an agency generally is not obligated to reconsider the interim rule in light of the comments it receives.[143] And there are reasons why agencies often do not seriously reconsider IFRs. If an IFR reflected a reaction to political pressure,[144] the agency, by issuing the IFR, often has already triggered the political response by the administration's party's base or the significant campaign contributor who it was meant to benefit. And to the extent that the IFR addresses some underlying problem that the public felt needed to be addressed, the fact that it ameliorated the problem to some extent likely would relieve some of the public pressure on the agency to further address that problem. Thus, not infrequently, an agency will simply let an IFR remain in force without seriously considering the comments the IFR generated.[145] In essence, agencies often have an incentive to abuse the use of IFRs to adopt a rule that they desire, but that may not best serve the public interest.

To assure that IFRs are subject to notice-and-comment procedures within some reasonable time after they are adopted and that the rule is justified in light of those comments, courts should require that an IFR sunset at a certain time after the IFR is issued.[146] If courts are to require every IFR to be subject to a sunset provision, however, that requirement needs to be implemented in a manner that both allows the agency sufficient opportunity to finalize the IFR in a manner that best serves the public interest, while also constraining

142. *See* Seidenfeld, *Cognitive Loafing*, *supra* note 51, at 522 ("Judicial review is likely to attenuate biases in decisionmaking when the bias results from shortcuts in the processing of information or an unwillingness to engage in self-critical thinking . . . .").

143. *See* Asimow, *supra* note 16, at 736–37.

144. For example, the "[Obama] EPA moved forward [by proposing climate change regulations, in part] . . . because of a variety of outside pressures, including interest group lobbying, . . . various legislative proposals and numerous committee hearings on Capitol Hill, and ultimately a major climate initiative announced by President Obama." Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 93 (2016) (footnotes omitted).

145. *See* Asimow, *supra* note 16, at 736–37.

146. *See* Yoon-Ho Alex Lee, *Beyond APA Section 553: Hayek's Two Problems and Rulemaking Innovations*, 91 GEO. WASH. L. REV. (forthcoming 2023) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4324145 (advocating for use of sunset provisions for rules to ensure that agencies seriously consider whether the rule should remain in force after "the agency will have the benefit of hindsight based on the industry's compliance experience").

agencies' abilities to abuse the use of IFRs and thereby forfeit the benefits described above.

First, there should not be a standard sunset period that applies universally to IFRs.[147] Each rule involves issues that relate in unique ways to the information to which an agency is privy, either by its own investigation or from the comments it receives. Also, different rules raise issues of different levels of technicality and complexity that will require different investments of agency time and resources to analyze carefully. Hence, the period during which an IFR remains in effect should consider the nature of the regulatory issue and the burden that collection and analysis of relevant information will impose on the agency.

To minimize the cost of having a less-than-optimal rule in place while the IFR is operational, an agency should maintain an IFR only for the minimal time necessary for the agency to digest comments likely to be filed and consider and react to the concerns they might raise regarding the interim rule. The agency itself, which has the best knowledge of how much time would be reasonable for thorough consideration of the FFR, should be responsible for proposing the time at which the IFR sunsets. As part of the agency's justification for invoking the good cause exception that the APA requires, the IFR should explain why it would be unreasonable for the agency to have to finalize the IFR prior to the sunset date.[148] In this manner, the IFR can maximize the benefit of a rule that immediately takes effect without compromising the potential for greater benefits when the rule is reconsidered in light of comments.

In his ACUS report on IFRs, Professor Michael Asimow decided against suggesting that all IFRs contain a sunset provision "because it would be likely to cause serious practical problems."[149] But, I believe that Professor Asimow gave insufficient weight to the APA's understanding that permanent rules are to be subject to notice-and-comment and failed to consider how courts might treat whatever action the agency takes when the rule is finalized. Professor Asimow's objections[150] can be lumped into two basic categories: concern

147. Some statutes require that IFRs or their equivalent be finalized within a statutorily specified period. *See* Asimow, *supra* note 16, at 737–38 n.131 (noting that temporary tax regulations expire if not finalized within three years, and emergency listings of endangered species must be finalized within 240 days).

148. For example, an agency might rely on the time it has taken the agency historically to adopt similar rules after the agency has published a NOPR for those rules to justify its proposed sunset period.

149. Asimow, *supra* note 16, at 738.

150. Asimow lists seven objections to mandating that every IFR contain a sunset provision. *Id.* at 739–40.

regarding the allocation of agency resources and the potential for undue influence of the IFR on agencies' ultimate rulemaking decisions.

The first expresses concern that a sunset provision might obligate an agency to commit resources to analyzing comments and amending an IFR when agency resources can be better employed on other regulatory matters.[151] The APA, however, clearly envisions that an agency will invest such resources when it commits to creating a final legislative rule. As noted earlier, the burden imposed by the rulemaking requirements may reflect legislative intent to prevent an agency from engaging in regulation of marginal import.[152] Once the agency decides to consider issuing a regulation, it is committing to invest such resources as are required by the notice-and-comment process, subsequent potential judicial review, and political oversight. Use of IFRs should be about the timing of when such consideration occurs, not whether it must occur at all.[153]

Perhaps Professor Asimow was envisioning an agency faced with a dire emergency that found it had to choose between abandoning regulating the matter addressed by an IFR with a looming sunset deadline and a matter that demanded immediate attention by a large part of its rulemaking staff. For example, Congress might have enacted a new statute that demanded a large initial investment of agency resources in initial implementing regulations. Or, perhaps, some catastrophic event might have occurred, such as the COVID-19 pandemic, whose importance dwarfed that of other agency regulatory obligations at agencies like the Centers for Disease Control and Prevention.[154] In such instances, the agency could then amend the IFR by extending the sunset deadline. Such action would be an amendment of an existing rule and hence would be final agency action that could be

151. This would cover the first four of Asimow's objections. *See id.*

152. *See* Scalia, *supra* note 81, at 404–05.

153. ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110, 43,110–13 (Aug. 18, 1995). ACUS's recommendation, based on Asimow's Report, that anytime an agency invokes the good cause exception on grounds that notice-and-comment is impracticable or contrary to the public interest, it should proceed by issuing an IFR, Asimow, *supra* note 16, at 733–34, implicitly reflects the understanding that good cause should not excuse an agency from devoting resources to notice-and-comment procedures. Given this understanding, it seems a bit anomalous for Asimow to let the agency off the hook after issuing the IFR by not requiring that it finalize the rule.

154. The effect of the COVID-19 pandemic on the Centers for Disease Control and Prevention's (CDC's) agenda has been profound. "On January 21, 2020 CDC launched its agency wide response to the COVID-19 pandemic. It has been the largest response of the CDC to any disease outbreak in CDCs history." *About CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/about/index.html (last visited Nov. 11, 2023).

challenged in court.[155] The only issue would be whether the alleged emergency truly required delaying finalizing the IFR. Such instances would be extremely rare, and I envision that courts would reverse any extension of an IFR sunset deadline unless the emergency the agency claimed it had to address first was something the agency was unaware of when it issued the IFR and that all would agree was of sufficient import to take precedence over the agency's preexisting regulatory commitments.

The second category of problems created by requiring IFRs to contain sunset provisions is that the provisions will bias the ultimate agency decision adopting an FFR.[156] On the one hand, at the end of the sunset period, the agency might rush its evaluation of the comments and adopt a non-optimal FFR. However, adopting the FFR would be an amendment of the IFR and hence would again be final agency action subject to judicial challenge.[157] And the FFR will have to address comments filed in response to the IFR. If the agency cannot justify its adoption of the rule rather than a superior alternative, the FFR will be reversed as arbitrary and capricious. In fact, just knowing that the FFR will be subject to judicial review will encourage the agency to carefully deliberate even in the face of the sunset deadline.[158]

On the other hand, at the end of the sunset period, the agency might decide that it no longer wishes to devote the resources needed to determine and justify the best FFR, in which case it might simply allow the IFR to lapse. The sunset provision then essentially changes the default outcome if the rulemaking lapses from the IFR to the regulatory status quo that preceded the IFR. This would seem to be an undesirable outcome given that, to have constituted a justifiable invocation of the good cause exception, the agency must have demonstrated that it was likely objectively superior to the status quo ante. The problem is that without the sunset provision, an agency might issue an IFR that it never intends to finalize as a means of undermining judicial review and legislative oversight.[159] A court would have no reliable means to ensure that the use of IFR was not malevolent, which would

155. *See* 5 U.S.C. §§ 551(5), 551(13), 704 (including amendment of rule as rulemaking, and therefore the resulting rule as agency action, and providing for review of final agency action.).

156. This would cover the last three of Asimow's objections. *See* Asimow, *supra* note 16, at 739–40.

157. *See* 5 U.S.C. §§ 551(5), 551(13), 704 (including amendment of rule as rulemaking, and therefore the resulting rule as agency action, and providing for review of final agency action).

158. *See* Seidenfeld, *Cognitive Loafing*, *supra* note 51, at 547 ("[A]rbitrary and capricious review provides incentives for agency staff to take appropriate care and to avoid many systemic biases when formulating rules . . . .").

159. *See supra* note 145 and accompanying text.

encourage agencies to use interim final rulemaking for all the wrong reasons.

One way to reduce an agency's incentive to change its ultimate decision due to the burden of having to defend that decision when finalizing a rule would be to consider whatever action or non-action the agency takes regarding finalizing the rule to be final agency action subject to judicial review. Obviously, were the agency to amend the IFR, that would essentially change the existing rule. Similarly, were the agency to adopt the IFR as the FFR instead of letting it sunset, that too would constitute action that changes the rule from what it otherwise would be if the agency simply did not act. Thus, both of these courses of action would almost certainly be final agency action subject to judicial review. This Article proposes, in addition, that even if the agency fails to do anything and lets the IFR sunset, that inaction should be considered reviewable agency action.[160] Essentially, when finalizing an IFR the agency has three choices: adopt an amendment to the IFR as an FFR, adopt the IFR as the FFR, or allow the rule to revert back to the regulation in place before the IFR was adopted. By considering allowing an IFR to sunset, the agency would have to defend its ultimate decision regardless of which of these three outcomes it chooses. This would avoid the agency factoring in the costs of defense of its action regardless of the agency's choice.

One might object that having courts require that an IFR contain a sunset provision would violate the edict in *Vermont Yankee* that courts may not add procedures to those required by the agency authorizing statute and the APA.[161] Courts, however, have not read *Vermont Yankee* to preclude them from adding procedures that render those required by the APA meaningful.[162] The suggestion that an IFR must include a sunset provision is necessary to ensure that an agency will not abuse the good cause exception to escape entirely the APA requirement of notice-and-comment when such procedures serve the public interest. Hence, requiring a sunset provision is consistent with *Vermont Yankee* to the extent a court finds it necessary to ensure that the agency invocation of the exception meets the criteria set out in the APA.

3. An IFR as an Imperfect Substitute for a NOPR

Because an IFR may be an imperfect substitute for a NOPR, it may be appropriate for a court to limit interim final rulemaking to those situations

160. The APA explicitly specifies that agency action may include an agency failure to act. *See* 5 U.S.C. § 551(13) (defining agency action).

161. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 541–48 (1978).

162. *See, e.g.*, Am. Radio Relay League v. FCC, 524 F.3d 227, 239 (D.C. Cir. 2008) (holding that the judicially created mandate that agencies reveal studies on which it relied to justify its rule is consistent with *Vermont Yankee*).

where it is a good substitute, as well as to reverse an agency FFR that bears the vestiges of the use of the imperfect IFR. Some courts have rejected any FFR that results from an IFR that the court finds procedurally invalid.[163] Others have categorically affirmed the use of the IFR to start the FFR rulemaking.[164] Still, others have focused on the likelihood that the use of the IFR to commence the FFR rulemaking altered the FFR from the rule that the agency would have adopted had it issued a NOPR rather than issuing an IFR.[165] Below, I assess each of these general approaches for reviewing not only the IFR itself but also the FFR that results from the use of interim final rulemaking.

a. Categorical (In)validity of an IFR to Commence the FFR Rulemaking

Courts that categorically reject any FFR that results from an IFR that the court has determined is an invalid exercise of the good cause exception often suggest that the use of the IFR to commence the rulemaking may affect the final FFR,[166] but they do not rely on the likelihood of such an effect to justify such rejection. Instead, these courts seem to be concerned that use of interim final rulemaking will encourage agencies to substitute such rulemaking for almost all rules, thereby allowing the good cause exception to swallow the

163. *See, e.g.*, U.S. Steel Corp. v. EPA, 595 F.2d 207, 214–15 (5th Cir. 1979) (stating that postpromulgation comment cannot substitute for prior notice-and-comment required by the APA); Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982) (invalidating an FFR identical to the IFR that lacked good cause); Sharon Steel Corp. v. EPA, 507 F.2d 377, 381 (3d Cir. 1979) (holding that "the period for comments after promulgation cannot substitute for the prior notice and comment required by the APA").

164. *See, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 n.14 (2020) ("Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs."); Grapevine Imps., Ltd. v. United States, 636 F.3d 1368, 1380 (Fed. Cir. 2011) ("Now that the regulations have issued in final form, these arguments [of procedural shortcomings in their issuance] are moot.").

165. Advocs. for Highway & Auto Safety v. Fed. Highway Admin., 28 F.3d 1288 (D.C. Cir. 1994); Levesque v. Block, 723 F.2d 175, 188 (1st Cir. 1983) ("[A]t times an agency may be able to present evidence of a level of public participation and a degree of agency receptivity that demonstrate that a real 'public reconsideration of the issued rule' has taken place.").

166. *See U.S. Steel Corp.*, 595 F.2d at 214–15 ("Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way . . . We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *fait accompli*." (quoting City of New York v. Diamond, 379 F. Supp. 503, 517 (S.D.N.Y. 1974) (internal quotations omitted))).

preadoption notice-and-comment rulemaking requirement in the APA.[167]

The thesis of this Article should make it clear that potential replacement of the notice-and-comment paradigm for rulemaking does not bother me. If the use of the IFR for this purpose results in a rule that serves the public interest as well or better than a rule that would result from a separate issuance of a NOPR, I contend that courts should accept the move away from prepromulgation notice-and-comment as a good development. Even from a formalistic perspective that seeks to remain true to the notice-and-comment paradigm, however, such categorical reversal of FFRs fails to consider that the IFR plays two separate roles: first, as a rule that carries independent force of law,[168] albeit for a temporary period; second, as providing the notice of the agency intention to commence notice-and-comment rulemaking.[169] The fact that an IFR is invalid as a legislative rule under the good cause exception has no bearing on whether it meets the criteria for a valid NOPR under the APA. And if it does, unless the use of the IFR instead of a NOPR changes the ultimate FFR, there is no formal or practical reason to reject the ultimate FFR.[170]

By the same token, courts that categorically accept FFRs as procedurally legitimate also are problematic. These courts rely on the APA provision allowing them to take into account the rule of prejudicial error.[171] For example, in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[172] Justice Thomas, writing for the Court, upheld the FFR because—even if technically the APA requires a NOPR rather than an IFR to trigger submission of comments—the use of the IFR was harmless error.[173] To be harmless, however, an error must have "no bearing on the procedure used

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167. *Id.* at 215 ("Were we to allow the EPA to prevail . . . we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.").

168. *See* Asimow, *supra* note 16, at 704 ("Interim-final rules have the same legal effect and are judicially reviewed in the same manner as any other final rules.").

169. *See id.* ("[T]he [interim final] rule is effective immediately but it also serves as a notice of proposed rulemaking for the final rule that will supplant it."); Lavilla, *supra* note 12, at 413 (arguing for courts to treat "the request for *post hoc* comments on the first rule as a notice of proposed rulemaking and [that] the content of the first rule should be considered as the proposed rule.").

170. "[I]t is . . . reasonable to believe that, in at least some instances, postpromulgation notice and comment will function at least as well as prepromulgation notice and comment, and in those cases a blanket rule precluding judicial consideration of postpromulgation notice and comment procedures will be detrimental." Hickman & Thomson, *supra* note 12, at 289.

171. 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error.").

172. 140 S. Ct. 2367 (2020).

173. *See id.* at 2385.

or substance of the [ultimate] decision reached."[174] Use of an IFR, however, might alter the extent and nature of the comments submitted or bias the agency toward maintaining the IFR when it issues the FFR. But Justice Thomas never considered whether the use of the IFR detrimentally affected the process by which the agency ending up adopting an FFR that was identical to the IFR that commenced the comment process.[175]

Having rejected categorical rejection or acceptance of a permanent rule that comes about by interim final rulemaking, I turn to the task of identifying and analyzing how the informal rulemaking process might alter the FFR from the rule that would result had the agency issued a NOPR instead. IFRs can influence the FFR detrimentally because their issuance might generate a different set of comments than would be filed if the agency followed notice-and-comment procedures before issuing any rule with legal force. IFRs might also affect an FFR by creating path dependencies as well as causing an agency to succumb to the well-demonstrated cognitive phenomenon of confirmation bias.

b. Altering the Comments Filed in the FFR Rulemaking

Some courts and commentators have argued that issuance of an IFR will change the likelihood and perhaps the quality of comments that the agency received compared to those it would receive had it proceeded by using notice-and-comment procedures—that is, issuing a NOPR instead of an IFR.[176] They reason that psychologically a stakeholder that has problems

174. Braniff Airways, Inc. v. Civ. Aeronautics Bd., 379 F.2d 453, 466 (D.C. Cir. 1967).

175. *Little Sisters of the Poor*, 140 S. Ct. at 2385. Nonetheless, it is not clear whether reversing the FFR in *Little Sisters of the Poor* would have provided the appropriate remedy for any influence the IFR had on the ultimate FFR adopted. *See infra* text accompanying notes 214–216 (noting that reversal of the FFR most likely will either result in the agency readopting the same FFR or simply letting the matter lapse, reinstating a potentially inferior regulatory status quo ante, and therefore demanding that courts take an especially nondeferential approach to arbitrary and capricious review of the FFR).

176. *See, e.g.*, Maryland v. EPA, 530 F.2d 215, 222 (4th Cir. 1975) ("The reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision-making process."); U.S. Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979) ("Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas."); Hickman & Thomson, *supra* note 12, at 296–97 (discussing how even if an agency keeps an open mind toward postpromulgation comments, the public may not actually believe that is so); Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 335 (2009) ("Public participation experts—

with an IFR would be less likely to believe that the agency will pay attention to their comments once it has already decided to issue the IFR, which has independent force of law.[177] That is, by making the rule effective pre-comment, stakeholders are likely to find that the rule is already cemented in place and, hence, would not bother to comment.[178] But these judges and commentators fail to recognize that the agency has already committed to a basic rule when it issues a NOPR,[179] and that comments influence the agency mostly by threatening potential judicial reversal when courts apply hard look arbitrary and capricious review to the adopted rule.[180] If influencing judicial review is the primary motivation for comments, it would seem that an entity that finds an IFR problematic is just as likely to file comments expressing its opposition as it is to file a such comment in response to a NOPR.

Contrary to the assumptions of these judges and commentators, one might even surmise that issuing an IFR instead of a NOPR is more likely to generate comments, as well as to improve the quality of those comments. Faced with a NOPR, those affected by the proposed regulation might discount the likelihood that the agency will adopt the proposed rule or at least believe that the rule might be altered in a way they find more acceptable. They might, therefore, think it advantageous to free ride on the expectation that others will comment.[181] Issuance of an IFR might signal

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practitioners and scholars—have repeatedly warned against conducting 'fake' participation, since such participation harms legitimacy, making it more difficult to achieve real participation in the future.").

177. *See* Levesque v. Block, 723 F.2d 175, 187–88 (1st Cir. 1983) ("[C]itizens will recognize that the agency is less likely to pay attention to their views after a rule is in place, and therefore the public is less likely to participate vigorously in comment."); Hickman & Thomson, *supra* note 12, at 296–97 ("[I]f the public does not believe the agency will seriously consider postpromulgation comments, would-be commenters will be dissuaded from submitting comments, thereby defeating the crowdsourcing function of the notice and comment requirements.").

178. Sharon Steel Corp. v. EPA, 507 F.2d 377, 381 (3d Cir. 1979) (asserting that if postpromulgation comments are accepted, "the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change").

179. 5 U.S.C. § 553(b)(3) (requiring a NOPR to include "either the terms or substance of the proposed rule").

180. *See* Elliott, *supra* note 54, at 1492–93 (asserting that the primary purpose for notice-and-comment procedures is to create a record for judicial review); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 67 (1995) (suggesting that agencies make decisions without considering comments, and then spend vast resources coming up with reasons to justify those decisions in light of the comments).

181. *See* Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision*

that the agency is more serious about changing the regulatory status quo ante, and that filing comments is more imperative. Perhaps more significantly, the experience of stakeholders under the IFR might focus them on concrete ways that the rule affects them that they might have failed to perceive or think serious until the rule goes into effect.[182] In essence, having an IFR in effect might educate stakeholders about the rule, which could lead to more specific and higher quality comments than they might file in response to a NOPR.[183] As a bottom line, there are no data or convincing arguments that indicate that IFRs discourage comments or that they affect the care taken by commenters and, hence, the quality of the comments filed.

In short, it seems unlikely that the failure of the agency to seek comments before adopting a NOPR will deleteriously affect filing of comments. Given the lack of any reliable basis for thinking that use of interim final rulemaking will result in fewer or less helpful comments, I would suggest that this concern not disqualify either an IFR or the FFR that ultimately comes out of the process generated by that IFR.

c. Avoiding Significant Path Dependence.

Path dependence, in its most general sense, refers to the concept that a past choice can constrain future choices.[184] "Inefficient path dependence"

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for Broader, More Informed, and More Transparent Rulemaking, 65 ADMIN. L. REV. 77, 85 (2013) (noting the potential for those potentially interested in commenting on a proposed rule to free ride on the comments of others).

182. Essentially, if the agency reconsiders the IFR after it has been in effect for a while, the IFR is like an experimental regulation. Having had to comply with such a regulation may allow stakeholders to see what works and what does not. *See* Lee, *supra* note 146 (manuscript at 19–21) ("The main idea [behind experimental regulation] is for a rulemaking agency to adopt a rule on a smaller scale or on a temporary basis as a pilot program, at the conclusion of which the agency can gather and analyze data that would be relevant for its decision to proceed with a more permanent version of the rule.").

183. The fact that "the accumulation of experience in individual cases is a necessary prelude to any effort to elaborate statutory standards in a manner that deals realistically with actual problems rather than with hypothetical cases that may never arise," suggests that experience attempting to comply with an IFR and living with the consequences of such compliance might render post IFR comments more informed than those issued in response to a NOPR. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 927–28 (1965) (reviewing reasons why policymaking by adjudication may be appropriate).

184. For an overview of path dependence theory and the law, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001) ("In broad terms, 'path dependence' means that an outcome or

occurs when a past choice influences the cost-benefit calculus of a future choice so that the best choice is not the one that would have been best if the initial choice had not been made.[185] Choice of railway track gauges is a classic example of inefficient path dependence.[186] More than half of the world's railroad gauges are 1,435 millimeters,[187] even though there are significant net benefits that would have accrued had this gauge not been chosen for the first railroads in England in the 1820s.[188] But once chosen, the need to interconnect railroads and perhaps to make construction of engines and cars universal provided incentives for subsequent railroads to use 1,435 gauge tracks, and in fact, going forward, it was probably efficient to do so.[189]

Essentially, inefficient path-dependent regulation will occur when an initial regulation requires or stimulates investment particular to that regulation.[190] Once that investment is made, the benefits of future investment may be less than if the initial regulation had not been promulgated. This often occurs because the initial regulation addresses a regulatory problem in part but does not cure the problem entirely.[191] Thus, the benefit of further regulation is decreased.[192] If the investment stimulated by the initial regulation would be lost by amending the regulation to solve the regulatory problem more fully, then investment in an amended

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decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage. At the most basic level, therefore, path dependence implies that 'what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.'"); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643–62 (1996).

185. *See* S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 207 (1995); Hathaway, *supra* note 184, at 631 ("Lock-in or inflexibility can, in turn, lead to inefficiency. Early decisions may lead to formation of a legal rule that becomes increasingly inefficient over time.").

186. Douglas J. Puffert, *The Standardization of Track Gauge on North American Railways, 1830–1890*, 60 J. ECON. HIST. 933, 957 (2000).

187. *Id.* at 933–34.

188. *Id.* at 940–41, 955–56.

189. *Id.*

190. Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 139–40 ("A second source of path dependency stems from the settled expectations of parties who rely on the law and make investments based on the law.").

191. Liebowitz & Margolis, *supra* note 185, at 211 ("When information is imperfect, it is inevitable that some durable commitments are shown to be inferior as information is revealed with the passage of time.").

192. *Id.* (discussing second degree path dependence as occurring when an action is taken that is later revealed to be inferior to some alternative).

regulation might cost more than the resulting benefit from that regulation.[193]

To make this more concrete, consider the following example. Suppose a rule would reduce the cost of a particular air pollutant. At the time when the agency first addresses this problem, the agency is aware of a technology that will reduce this cost by $3 billion per year and will require an investment of $2 billion per year. The agency, finding that implementation of this technology provides a significant net benefit of $1 billion per year, promulgates a regulation requiring those who emit the air pollutant to install the technology and entities subject to the rule to comply with it. Suppose that subsequently, after the first technology is installed, the agency learns of a different technology that would have reduced the cost of the particular air pollutant by $5 billion per year and investment in the new technology would have cost $3 billion per year. The second technology is entirely different from the one required by the initial regulation so that all investment in the initially required technology does not reduce the cost of implementing the new one, but the benefits of the second technology do not increase due to the implementation of the original one. That is, the total benefit remains at a reduction of $5 billion from the status quo that existed before the first regulation was adopted. Had the agency known of the second technology when it first addressed the problem, the best regulation would have mandated the second technology, providing a net benefit of $2 billion a year. But, once the initial regulation is implemented, the additional benefit of installing the second technology is only $2 billion per year, which does not justify the additional cost of $3 billion per year to implement that technology. This analysis suggests that, in general, it would be unwarranted for an agency to adopt an IFR that would impose significant investment costs that likely would be wasted if the FFR differs from the IFR.

Path dependence does not mean that the good cause exception should never be used when the rule the agency would promulgate would require significant upfront investment. The loss of benefits from adopting the non-ideal rule must be balanced against the delay in implementing the ideal rule. Recall that the major benefit from an agency imposing an IFR is the avoidance of delay in getting the rule in place.[194] Suppose that notice-and-comment procedures would allow the agency to learn of the ideal rule but that using those procedures would delay the effective date of the rule by one

193. Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341, 351–52 (2009) ("As these investments—of time, money, skills, and expectations—add up, the relative cost of exploring alternatives steadily rises.").

194. *See supra* note 75 (explaining the benefit of avoiding delay by invoking the good cause exception).

year. In the numerical example above, the extra benefit of the ideal rule is $1 billion per year over that of the initial rule. The one-year acceleration in getting a rule in place, however, provides a one-time net benefit of $1 billion. Hence, it would take only a year before the later-adopted ideal rule would increase total net benefits over those provided by the earlier-adopted non-ideal rule. It seems reasonable to assume that the ideal rule would remain effective for more than one year and, hence, that use of an IFR would be unwarranted.

Suppose instead, however, that the initial rule would provide a benefit in pollution reduction of $50 billion per year, and the ideal rule would provide a benefit of $52 billion per year. Assume that the investments for each technology remain $2 billion a year for the non-ideal technology and $3 billion for the ideal technology. Now a one-year delay in implementing the ideal rule will forfeit $48 billion. It would take forty-eight years for the benefits of the ideal rule to compensate for the costs of delay. It is probably unreasonable to assume that the nature of pollution reduction technology will not change such that a better technology than that which is currently ideal would provide even significantly more benefits. Hence, in this latter numerical example, it would pay to skip the preadoption notice-and-comment procedures and adopt the non-ideal IFR quickly.

The bottom line is that courts should hesitate to allow agencies to issue an IFR if the interim rule requires substantial investment by those subject to it unless the agency can show that the interim rule also promises much greater benefits than the cost of the investments it requires. Thus, when a potential IFR promises overwhelming benefits over the status quo ante, an agency would be justified in promulgating the IFR even if it obligated regulated entities to make significant investments that would not be recouped if a better rule is later enacted.[195]

To sum up my analysis of use of IFRs in light of path dependence, an agency should generally be free to adopt an IFR under a relaxed good cause exception standard if doing so provides significant regulatory benefits over the regulatory status quo ante, and the IFR would not require significant investments that might be lost if the agency later determines that another rule is better. But even if a rule that promises substantial benefits would require regulated entities to make such significant investments, the courts should evaluate agency use of an IFR under the traditional strict standard that

195. Note, however, that if use of the IFR promises to provide overwhelming benefits over the regulatory status quo by reducing the impact of an emergency, then an agency probably could justify invoking the good cause standard even under the traditional narrow view of the exception. *See* CLARK, *supra* note 25 at 30–31; Shaw, *supra* note 35, at 132 (stating that "agencies can successfully defend 'good cause' invocations in cases of threats to human life, wildlife, and fiscal resources").

would meet the traditional narrow good cause exception standard for an emergency.

If the agency issues an IFR that causes inefficient path dependence, which for that reason would be improper under my approach to the good cause exception and subsequently adopts the best FFR going forward, what should a court do in response to a challenge to that FFR? The court will then face the question of how to review the FFR which resulted from an invalid IFR. The answer is quite clear, even if surprising. Once the agency adopts and the industry implements the IFR, the path dependence has occurred. At that point, the most efficient rule going forward is not the one that an omniscient agency would have found most efficient prior to the IFR being adopted. Thus, if the agency simply focuses on developing the best rule after the IFR has been issued and implemented, then the court should ignore the invalidity of the IFR and review the FFR as if it had resulted from the agency using traditional prepromulgation notice-and-comment.

d. Ameliorating Bias.

The very act of adopting an IFR could bias the agency consideration of what constitutes the best FFR toward the IFR. Psychologists have found that decisionmakers have a propensity to reaffirm a tentative initial preference or a choice they previously made—a phenomenon they label as confirmation bias.[196] This bias can exist even at the subconscious level—that is, when decisionmakers do not intend to give and even are unaware that they are giving favored treatment to their initial choice.[197] Confirmation bias is ubiquitous; cognitive and social psychologists have demonstrated that it occurs in political, economic, scientific, and even judicial decisionmaking.[198] Confirmation bias manifests itself in two ways: decisionmakers tend to search for evidence confirming their prior choice more than disconfirming evidence;[199] decisionmakers also tend to discount the value of disconfirming evidence compared to that of confirming evidence.[200]

196. *See* Nickerson, *supra* note 58, at 175 ("[Confirmation bias] refers usually to unwitting selectivity in the acquisition and use of evidence."); *id.* at 211 ("Our natural tendency seems to be to look for evidence that is directly supportive of hypotheses we favor and even, in some instances, of those we are entertaining but about which are indifferent."); *see also* Seidenfeld, *Cognitive Loafing*, *supra* note 51, at 504.

197. *See* Nickerson, *supra* note 58, at 177.

198. *Id.* at 189–97.

199. *See id.* at 177–78; Seidenfeld, *Cognitive Loafing*, *supra* note 51, at 504.

200. *See* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY &

Confirmation bias can be triggered even by forming an initial hypothesis.[201] Thus, when an agency simply proposes a rule, the rulemaking staff charged with collecting data to evaluate the costs and benefits of the rule are potentially subject to confirmation bias. It is not clear whether agency bias will increase if the agency takes additional action committing it to the rule, such as adopting it as an IFR. Confirmation bias might reflect cognitive dissonance between having generated the rule and then considering arguments that it is not valid,[202] in which case it is unlikely to be increased merely by adopting the rule instead of just proposing it. But confirmation bias may also reflect a disfavor for having to spend additional time and attention doing an analysis in addition to the one that the staff completed with respect to the initial proposed rule or IFR.[203] If this explains the bias, then whether the agency will be more biased depends on whether staff had to invest more time and resources in issuing an IFR than a NOPR.

In addition to confirmation bias, the fact that an agency issued an IFR might indicate that the agency has a conscious preference for that rule over alternatives before the agency considers comments. Some courts have addressed this concern by presuming that issuance of an IFR indicates that the agency had made up its mind about the ultimate FFR it would adopt, putting the burden of rebutting this presumption on the agency.[204] In

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SOC. PSYCH. 2098, 2099 (1979); Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. ONLINE 236, 263 (2018) (discussing "confirmation bias" which is "the human tendency to overemphasize information that supports an initial hypothesis and discount or ignore countervailing evidence").

201. *See* Nickerson, *supra* note 58, at 177.

202. *See* Jennifer T. Perillo, Anthony D. Perillo, Nikoleta M. Despodova & Margaret Bull Kovera, *Testing the Waters: An Investigation of the Impact of Hot Tubbing on Experts from Referral Through Testimony*, 45 LAW & HUM. BEHAV. 229, 231 (2021) (noting that confirmation bias is a means of reducing cognitive dissonance); *cf.* David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 425–26 (2013) (noting in the context of taking contract precautions, that searching for disconfirming evidence of a belief creates tensions due to cognitive dissonance).

203. *Cf.* Seidenfeld, *Cognitive Loafing*, *supra* note 51, at 505 ("[C]onfirmation bias also helps reduce cognitive effort and provide closure regarding . . . organizing schemas.").

204. *See* Advocs. for Highway & Auto Safety v. Fed. Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994) (putting the burden on the agency to make a compelling showing that it retained an open mind because an agency is unlikely to be receptive to changes once it issues an IFR); Air Transp. Ass'n v. Dep't of Transp., 900 F.2d 369, 379–80 (D.C. Cir. 1990) (requiring a "compelling showing 'that the agency's mind remain[ed] open'" to overcome the presumption that the agency had made up its mind (quoting McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988))).

applying the open mind standard, the D.C. Circuit has looked at two factors as indicative that the agency had an open mind:[205] whether the agency actually incorporates changes that reflect the comments into the FFR,[206] and whether the agency explicitly engages in careful and searching consideration of comments, especially by discussing them in the preamble to the FFR.[207]

Probing the mind of the regulator, however, is a difficult task that necessarily entails uncertainty. That task is made more difficult by the courts specifying the criteria they will use in determining whether the agency had an open mind, because the specification allows the agency to manipulate the criteria to suggest that it had an open mind when it didn't. For example, an agency can make sure that the FFR includes some changes to the details of the IFR that might make little difference in the fundamental way the rule operates, about which the agency might have had a securely closed mind. And an agency might include in the rule's preamble a discussion of each comment opposed to the IFR, even though it might have intended from the outset not to change the rule in light of those suggestions and arguments.

Finding both the categorical approach to validity of an FFR as well as the open mind test problematic, Professor Kristin Hickman and Mark Thomson suggested a "better middle ground" to resolve whether courts should reverse an FFR due to the potential for agency bias.[208] Their approach, however, is also grounded in ensuring that the agency has an open mind about the ultimate FFR.[209] They approve of the D.C. Circuit's consideration of whether the FFR differs from the IFR and whether the agency explicitly addressed comments in opposition to the IFR when it adopted the FFR.[210] They add that courts should explicitly look for an agency motive other than a belief that the agency used the IFR strategically to simply avoid the "hassle" of notice-and-comment or to "expedite the agency's policy preferences," and they argue that such considerations make it less likely that the agency would take "postpromulgation public input seriously."[211]

The problem with both the D.C. Circuit's open mind inquiry as well as the Hickman and Thomson variation on it is that it focuses on agency state

205. "While other courts have considered an agency's open-mindedness in evaluating the effect of postpromulgation comments, the D.C. Circuit is clearly the open mind standard's leading exponent." Hickman & Thomson, *supra* note 12, at 294 (footnote omitted).

206. *See, e.g.*, *Advocs. for Highway & Auto Safety*, 28 F.3d at 1292. The D.C. Circuit treats changes from the IFR to the FFR as an indication of agency open-mindedness, but adopting an FFR that is the same as an IFR as not dispositive of an agency's closed mind. *Id.*

207. *See, e.g.*, *id.* at 1293; *Air Transp. Ass'n*, 900 F.2d at 380.

208. Hickman & Thomson, *supra* note 12, at 305–06.

209. *See id.* at 315–18.

210. *Id.* 315–16.

211. *Id.* at 317.

of mind and motivation for invoking the good cause exception. The best argument for this inquiry is that it will deter agencies from abusing the IFR process to push through rules that they otherwise could not justify.[212] The problem is, however, that having an open mind or being motivated to adopt the IFR as the ultimate rule does not closely correlate with whether the FFR is, in fact, the best rule. In other words, the open mind and Hickman and Thomson standards will deter agencies from using the IFR process in many cases when issuing an IFR will best serve the public interest.[213]

Perhaps more significantly, even if an agency adopts an FFR with a less than open mind—either consciously or subconsciously—than it would have if the rule that has gone through preadoption notice-and-comment, it is unclear that reversing the FFR is an appropriate or effective remedy. Although in a technical sense, such bias would not be harmless error because it is possible that issuance of the IFR detrimentally affected the FFR,[214] nonetheless, were a court to rule that the issuance of an IFR was a procedural error that invalidated an FFR that otherwise is justifiable (i.e., would withstand arbitrary and capricious review), the remedy would require the court to remand the matter to the agency. The agency would then be free to readopt the rule using prepromulgation notice-and-comment procedures.

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212. *Id.* at 311 ("[I]f agencies see no disadvantage to relying on postpromulgation notice and comment, they will more frequently . . . rely on § 706's harmless error doctrine to sustain rules against procedural objections.").

213. This point is, in part, the basis of the presumption of regularity, *see* Seidenfeld, *Irrelevance of Politics*, *supra* note 57, at 150 n.36 (arguing that agencies can be motivated by political concerns in adopting a rule but that such motivation should be irrelevant to judicial review because it says nothing about whether the rule best serves the statutory or public interest). That presumption, in the context of arbitrary and capricious review, "shield[s] agencies from discovery about their motives when an agency has offered a contemporaneous explanation [for its action]." Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2434 (2018); *see also, e.g.*, San Luis Obispo Mothers for Peace v. U.S. Nuclear Regul. Comm'n, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (denying request for entering transcripts of a meeting of the Nuclear Regulatory Commission at which emergency evacuation plans were approved because petitioners had not presented any independent evidence of agency wrongdoing that would justify probing its decisionmaking process). Recently, for the first time, the Supreme Court found the presumption was overcome when it was shown that the Secretary of Commerce decision to include a citizenship question in the census was motivated by different reasons than those proffered to justify that decision. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019). The Court did not explain what made the pretextual nature of the Secretary's decision more objectionable in this case than in prior cases in which courts refused to consider pretext as a basis for reversing agency action. *See id.* at 2576 (Thomas, J., dissenting).

214. *See supra* notes 174–175 and accompanying text.

But, given that it had initially adopted an IFR, whatever extra confirmation bias use of the IFR would generate would still affect the rulemaking process.[215] And there is no reason to think that the agency would somehow abandon any conscious bias it had just because it restarted the rulemaking by issuing a NOPR. The result would be unnecessary delay and added administrative expense to adopt a rule subject to the same bias as the FFR. Alternatively, after remand, the agency could decide to abandon the rulemaking, returning regulation to the status quo ante before the IFR was issued, despite having justifiably concluded that the FFR was better than that status quo. Either choice is worse than the court affirming the FFR.[216]

The determination that an agency's motivation for its action differed from its reasons justifying the action might indicate an increased probability that the agency's justification for the decision is inadequate. But the key to minimizing the risk of bias is recognition that courts can ameliorate it by ensuring use of appropriate procedures and judicial review of agency action. Notice-and-comment procedures, even when such procedures occur after the IFR has taken effect, coupled with the hard look standard of judicial review, provide a powerful constraint against biased agency decisionmaking. Commenters who disfavor the agency's preferred rule can file comments that include disconfirming data and analyses, which ameliorates the problem of a biased agency exposing itself only to information and analyses that support its action. And hard look judicial review demands that the agency justify its action in light of relevant information and analyses included in the comments.[217] Explicitly demanding a decisionmaker to consider disconfirming evidence that is provided in comments provides a strong palliative against biased agency

215. *See supra* notes 201–203 and accompanying text (noting that confirmation bias will occur once the agency proposed a rule or committed to an IFR).

216. Thus, although the use of an IFR in *Little Sisters of the Poor* was technically not harmless error, the Court may have acted justifiably in declining to reverse the resulting FFR even though the IFR might have changed the ultimate rule adopted. The question of whether *Little Sisters of the Poor* was properly decided comes down to whether one thinks the Court gave a sufficiently hard look to the agency justification for the rule in light of the history of how the agency adopted it.

217. Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519, 541 (2022) (explaining that notice-and-comment "proceedings involve so-called 'paper hearings' with demands to explicitly consider and respond to public comments"); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V?: A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 903, 907 (2007) ("If the agency issues a 'concise general statement,' it likely will be reversed because it did not adequately consider [*inter alia*] . . . critiques contained in comments").

action.[218] Therefore, the structure of such review, which essentially asks the agency to analyze the disconfirming evidence in the comments, encourages an agency carefully and honestly to evaluate the true bearing disconfirming evidence has on the question of whether a proposed rule is best.

If the opportunity to file comments and judicial review are to counteract confirmation bias effectively, as part of such review courts must guard against an agency failing to justify the FFR in the face of disconfirming comments. Unfortunately, courts sometimes apply more deferential standards when evaluating whether an agency action is arbitrary and capricious. In the context of review of rules that reflect technical or scientific inquiries, courts generally apply what some have labeled "super deference."[219] Even in review of non-technical rules that are adopted using orthodox notice-and-comment procedures, courts often apply what others have called "thin rationality review."[220] In particular, in cases where an agency choice reflects uncertainty, courts have sometimes simply deferred to the agency choice without considering whether the agency resolution of the uncertainty is the most likely one.[221] It is especially important, however, in light of the potential

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218. "The confirmation bias . . . is alleviated if an individual is explicitly instructed to consider alternative hypotheses to the one she has initially formed. This . . . is precisely what courts ask of agencies under hard-look arbitrary and capricious review." Seidenfeld, *Cognitive Loafing*, *supra* note 51, at 524 (footnote omitted).

219. *See, e.g.*, Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (stating that courts ought to be at their "most deferential" when reviewing an agency's scientific determinations); Hüls Am. Inc. v. Browner, 83 F.3d 445, 452 (D.C. Cir. 1996) (explaining that review of agency choices under the arbitrary and capricious test is highly deferential and that the court further owes an "extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise'" (quoting Int'l Fabricare Inst. v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992) (per curiam))). Scholars who have noted judicial extension of such "extraordinary deference" have criticized these decisions because super deference "stands in tension with the expectation that courts must reinforce administrative-law values like participation, transparency, and deliberation." Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 735 (2011); *see also, e.g.*, Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1629 (1995) (noting that agencies often fail to reveal policy decisions that fill gaps in uncertain scientific inquiry).

220. *See generally* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (providing evidence that courts often engage in "thin rationality" rather than hard look review and arguing in favor of this more relaxed standard).

221. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2571 (2019) (holding that the Secretary of Commerce was justified in including citizenship question in short census form because it was his job "to make policy choices within the range of reasonable options . . . [and to make] value-laden decision[s involving] . . . weighing of incommensurables under

increased risk of bias from use of the interim rulemaking process, that a court not simply defer to an agency's resolution of uncertainty, even for technical choices.[222] Thus, when an agency issues an IFR to initiate the rulemaking that results in adopting its ultimate final rule, courts should demand that an agency justify why it believes that its factual determinations and predictions are the most likely resolution of uncertainty if judicial review is to provide incentives against bias.

III. AN EXAMPLE OF AN APPROPRIATE IFR UNDER MY RELAXED STANDARD OF GOOD CAUSE

One might question whether the relaxed standard for invoking the good cause exception if an agency issues an IFR that meets my criteria would actually prompt agencies to issue IFRs in order to gain the advantage of an objectively good rule taking effect immediately. The standard I propose seems to leave discretion to the courts to decide whether a rule is objectively better than the status quo, which might prompt agencies, fearing judicial reversal, to refrain from attempting to use the expanded scope of the good cause exception that I propose. Also, it may be difficult to identify any rule that does not involve some reliance by those subject to it, raising the question of whether any IFR would meet my criteria that would not be justified under the current strict standard for invoking the good cause exception. Therefore, I think it is helpful for me to identify a potential candidate for use of my standard.

Recently, the Federal Trade Commission (FTC) proposed a rule to prohibit employers from entering into, or attempting to enter into, a non-compete clause with a worker.[223] The proposed rule broadly prohibits any person who "hires or contracts with a person to do work for them" from

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conditions of uncertainty"). *But cf. id.* at 2584 (Breyer, J., concurring in part and dissenting in part) ("[T]he Secretary's decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal.").

222. The need for more careful scrutiny of an FFR reflects the same concern—that agencies will not fairly evaluate relevant information—that has prompted some scholars to suggest the need for a countervailing "anchor against the influence of raw politics." *See* Peter L. Strauss, *Overseer, or 'The Decider'? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 756 (2007) (noting that the professional civil service serves as "an anchor against the influence of raw politics"); *see also*, Stephen M. Johnson, *Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals*, 60 CATH. U. L. REV. 1000, 1023 (2011) (noting that "supporters of the expertise model of administrative agencies are quick to point out that agencies['] . . . decisions are . . . less defensible, when they are guided by presidential direction and control instead of expertise").

223. Federal Trade Commission Proposed Non-Compete Clause Rule, 88 Fed. Reg. 3,482, 3,482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

entering into a contract "that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."[224] Although this proposed rule has been criticized by some as overly broad, such agreements may legitimately allow an employer to prevent the disclosure of valuable proprietary information[225] or allow competitors to gain an advantage by poaching employees after they obtain industry specific skills that require significant investment by the employer in on the job training. Imagine, however, that the FTC had instead adopted as an IFR a prospective ban on non-compete agreements applied only to employees whose work does not give them access to an employer's trade secrets and for whom the employer does not invest significantly in developing industry specific skills that could be captured by a competitor were the employee to change jobs. Non-compete agreements in these situations serve no function other than to restrict competition in the labor market.[226] As such, an IFR restricting employee non-compete agreements for such employees would seem to provide an immediate objective benefit and would not involve any significant investment by employers in complying with the rule. [227]

Such an IFR would allow the FTC to work out the details of determining which jobs are covered. Line operators in a manufacturing plant, and servers and cooks in the fast food industry would seem easily to be covered by the rule. For other workers, the FTC might use indicia such as whether an employee works at will and an employee's wage as proxies for any employer claim of significant investment in teaching the employee skills that would be

224. Federal Trade Commission Proposed Non-Compete Clause Rule, 88 Fed. Reg. at 3,482–83.

225. Trade secrets law and nondisclosure agreements may provide inadequate protection because it is hard to detect misappropriation of such secrets. *See* Jenna M. Andrews, *An Inside Job: The Intersection of Federal Computer Law and Trade Secret Law in Cases of Insider Misappropriation*, 18 J. HIGH TECH. L. 161, 176–77 (2017) ("A diminished sense of loyalty to employers [by employees who leave their jobs], coupled with numerous tools that simplify the transfer of data, have increased the risk that employees pose to their company's information assets."); Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEX. L. REV. 1803, 1808–09 (2014).

226. *See* Herbert Hovenkamp, *Noncompete Agreements and Antitrust's Rule of Reason*, THE REGUL. REV. (Jan. 16, 2023), https://www.theregreview.org/2023/01/16/hovenkamp-noncompetes-and-rule-of-reason/.

227. The FTC NOPR noted that workers in a sandwich shop chain, in a nationwide payday loan lender, and in an online retailer warehouse had in some instances been subject to non-compete agreements. Federal Trade Commission Proposed Non-Compete Clause Rule, 88 Fed. Reg. at 3,483. All of these would seem to fit within my proposed IFR regarding non-compete agreements.

valued by a competitor in the industry. Ideally, the FTC might provide for the rule to take effect within sixty days of issuance, and for the comment period on the IFR to extend for one year from the time the IFR takes effect. The preamble to the rule should indicate that when issuing the IFR, the FTC will consider criteria that would allow it to apply to employee non-compete agreements more broadly than the criteria that limits the IFR. By doing so, the agency would gain a year's experience with this limited rule that would help it craft an FFR that would be better grounded in predictions of the benefits and costs of a rule prohibiting employee non-compete agreements in contexts where such benefits and costs are less clear.

The problem of employee non-compete agreements is clearly not an emergency that would allow the FTC to issue an IFR addressing the problem under current standards for invoking the good cause exception. The depression of the wages that might result from such agreements does not threaten an individual's life or health, nor does the allowance of such agreements threaten severe disruption of the national economy. But it would serve the public interest to make an initial limited ban on employee non-compete agreements where such agreements can serve no legitimate effective as soon as possible.

CONCLUSION

Since Congress enacted the APA in 1946, courts have consistently repeated the rhetoric that the good cause exception to notice-and-comment rulemaking applied in very limited circumstances. Recently, agencies have invoked the exception more broadly, and courts have not consistently applied it narrowly. Nonetheless, the universally acknowledged understanding of the exception is that it should not apply generally, lest it undermine notice-and-comment procedures as the paradigm for agencies to make rules.

This Article challenges the rhetoric that the exception should apply narrowly. It does so by arguing that an agency often can best serve statutory goals and the public interest by invoking the exception and issuing an IFR. It notes that an IFR allows an agency rule to go into effect without the long delay often required to complete notice-and-comment rulemaking. As long as the rule is better than the regulatory status quo, it is better for it to become effective sooner rather than later. It also rebuts arguments that issuing an IFR likely will result in a less desirable FFR because it will alter the extent and nature of comments filed or because it will lock the agency into a rule that has not reflected the deliberation associated with rules that are adopted using notice-and-comment.

The Article does concede that there are limitations on when agency issuance of an IFR is likely to better serve the public interest than rulemaking adopted via a NOPR and prepromulgation comments. It proceeds to

identify those situations and counsel against use of an IFR when they exist, as well as highlighting certain ways that courts can ensure that the use of IFRs do serve the public interest. But it demonstrates that such situations are not so prevalent that they justify the restrictions on invocation of the good cause exception that traditional understanding of the breadth of the exception would demand.