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## The Procedure Fetish

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# THE PROCEDURE FETISH

Nicholas Bagley\*

*The strict procedural rules that characterize modern administrative law are said to be necessary to sustain the fragile legitimacy of a powerful and constitutionally suspect administrative state. We are likewise told that they are essential to public accountability because they prevent factional interests from capturing agencies. Yet the legitimacy-and-accountability narrative at the heart of administrative law is both overdrawn and harmful. Procedural rules have a role to play in preserving legitimacy and discouraging capture, but they advance those goals more obliquely than is commonly assumed and may exacerbate the very problems they aim to fix. This Article aims to draw into question the administrative lawyer's instinctive faith in procedure, to reorient discussion to the trade-offs at the heart of any system designed to structure government action, and to soften resistance to a reform agenda that would undo counterproductive procedural rules. Administrative law could achieve more by doing less.*

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#### INTRODUCTION

Administrative law comprises a set of procedural rules that affect the pace and composition of government action. That same government action—whether it involves dispensing public benefits or regulating private conduct—allocates resources, risk, and power within the United States. The manner in which administrative law operates will thus favor some interests over others. That’s not an indictment: any set of rules has the same character. Increasing the stringency of judicial review for new agency regulations, for example, will tend to aid those who have the most to lose from government action. By the same token, curbing judicial review will help those who stand to gain. There is no neutral, value-free way to calibrate the stringency of judicial review, and the point holds for administrative procedure more generally. The distribution of resources, risk, and power in the United States is partly a function of an administrative law that is supposed to be agnostic as to that distribution.

With increasing urgency over the past two decades, congressional Republicans have advanced proposals to discipline a regulatory state that, in their view, does too much and with too little care. These proposals travel under an array of names and acronyms, but they embrace a common tactic: they pile procedure on procedure in an effort to create a thicket so dense that agencies will either struggle to act or give up before they start.<sup>1</sup> The Regulatory Accountability Act (RAA), for example, would subject high-impact rules to an oral hearing, complete with cross-examination and a formal record; ban agencies from engaging in public outreach to advocate for their rules; stitch centralized executive oversight and rigorous cost-benefit analysis into law; impose onerous new rules on the issuance of guidance documents; and make adherence to all of these procedures subject to judicial review.<sup>2</sup> By tilting the scales against agency action, Republicans hope to end “job-killing regulations” and invigorate the free market. Not coincidentally, that means favoring industry over environmentalists, banks over consumer advocates, and management over labor.

The point is not that these are bad priorities. The point is that they are *political* priorities. Democrats understand as much. “By hamstringing the dedicated public servants charged with ensuring everything from safe infant

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1. See, e.g., Regulations Endanger Democracy (RED Tape) Act of 2017, S. 56, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R. 26, 115th Cong. (2017); Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong. (2017).

2. Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); see also Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 656–69 (2017).

formula to clean drinking water to a fair day's pay for a fair day's work," writes Sam Berger, a former official in the Obama White House, "this bill would put corporate profits before people's lives and livelihoods."<sup>3</sup> William Funk notes that the RAA will "slow down, if not make impossible, the development of regulations that have major effects on the economy. It does not matter how many lives the regulation might save."<sup>4</sup> But the opposition from the left presents a puzzle. If adding new administrative procedures will so obviously advance conservative priorities, might not relaxing existing administrative constraints advance liberal ones? What if dedicated public servants are already hamstrung? What if it already does not matter how many lives a regulation might save?

Yet there is no Democratic version of the RAA, and little organized energy behind the idea that relaxing administrative procedures will be good for the environment, consumers, and workers. The game is strictly defensive: to protect administrative law, not to transform and rethink it. Actually, matters are worse than that. Some liberals are so enchanted with administrative procedures that they are calling for more. Democrats Heidi Heitkamp and Joe Manchin were Senate cosponsors of the RAA, arguing that it would make regulations "smarter."<sup>5</sup> Cass Sunstein also supports the bill, though not without reservation, and in so doing has thrown his support behind the imposition of the same procedures that Republicans hope will frustrate agency action.<sup>6</sup> Even those who are especially sensitive to the deficiencies of modern administrative law—Jon Michaels comes to mind—endorse court-centered proceduralism as part of their cure.<sup>7</sup>

3. Sam Berger, *Trump's Regulatory Accountability Act Is a License to Kill*, CTR. FOR AM. PROGRESS (May 9, 2017, 9:00 AM), <https://www.americanprogress.org/issues/democracy/news/2017/05/09/432129/trumps-regulatory-accountability-act-license-kill/> [https://perma.cc/T4TK-U9GP].

4. William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017), <https://www.thereview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/> [https://perma.cc/R9YS-5D6A].

5. Press Release, U.S. Senator Rob Portman, Portman, Heitkamp Introduce the Bipartisan Senate Regulatory Accountability Act (Apr. 26, 2017), <https://www.portman.senate.gov/public/index.cfm/2017/4/portman-heitkamp-introduce-the-bipartisan-senate-regulatory-accountability-act> [https://perma.cc/34JM-6QVX]; Press Release, U.S. Senator Joe Manchin, Manchin Joins Bipartisan Effort to Reduce Red Tape for Job Creators (May 24, 2013), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-joins-bipartisan-effort-to-reduce-red-tape-for-job-creators> [https://perma.cc/BEJ7-VGYM].

6. See Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 40 (2017); Cass R. Sunstein, *A Regulatory Reform Bill that Everyone Should Like*, BLOOMBERG OPINION (June 22, 2017, 8:30 AM), <https://www.bloomberg.com/view/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like> (on file with the *Michigan Law Review*). Richard Pierce is also sympathetic to the RAA, with the exception of the provisions requiring formal rulemaking. See Richard J. Pierce, Jr., *A Good Effort, with One Glaring Flaw*, REG. REV. (May 8, 2017), <https://www.thereview.org/2017/05/08/pierce-good-effort-glaring-flaw/> [https://perma.cc/6LYP-3JVA].

7. See JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017).

Why aren't progressives clamoring to loosen administrative law's constraints? It's not for want of targets. Administrative law is shot through with arguably counterproductive procedural rules. In past work, for example, I have argued that the Office of Information and Regulatory Affairs imposes a drag on regulation without adequate justification;<sup>8</sup> that the presumption in favor of judicial review of agency action, and particularly the presumption in favor of preenforcement review, should be reevaluated;<sup>9</sup> and that the reflexive invalidation of defective agency action is wasteful and unnecessary.<sup>10</sup> But the list goes on. The judicially imposed rigors of notice-and-comment rule-making, the practice of invalidating guidance documents that are "really" legislative rules, the Information Quality Act, the logical outgrowth doctrine, nationwide injunctions against invalid rules—all could and perhaps should be reconsidered.

In today's political landscape, however, "regulatory reform" is strictly the province of Republican policymakers, so much so that the anodyne phrase has acquired an antiregulatory connotation. Republicans have a reform agenda. Democrats don't.<sup>11</sup> What's more, the left's hesitation is not a response to Republican control of the federal government. When Democrats held both Congress and the White House in 2009 and 2010, they didn't press to streamline or rethink administrative law.

Liberal quiescence can be traced, instead, to two stories about the administrative state that have become deeply embedded in our legal culture. Fidelity to procedures, one story runs, is essential to sustain the fragile legitimacy of a powerful and constitutionally suspect administrative state.<sup>12</sup> On the other story, procedures assure public accountability by shaping the decisions of an executive branch that might otherwise be beholden to factional

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8. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1329 (2006).

9. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1336, 1339 (2014).

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

11. That may slowly be starting to change. In October 2018, three prominent administrative law scholars released an issue brief under the auspices of the American Constitution Society with reform proposals to "make regulation more evidence-based, more transparent, more inclusive, more accountable, and more efficient." DANIEL A. FARBER, LISA HEINZERLING & PETER M. SHANE, REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST 1 (2018), <https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf> [<https://perma.cc/78GX-G5RT>]. Some of the brief's proposals—including streamlining notice and comment and curbing OIRA review—respond directly to the concerns addressed in this article. Others—like requiring agencies to disclose all ex parte rulemaking contacts and "categorically" treating interpretive rules as judicially reviewable—would, in my view, needlessly frustrate agency action. But it's a start.

12. See *infra* Section II.A.1.

interests.<sup>13</sup> Taken together, these stories suggest we should be thankful for the procedures we have and nervous about their elimination.

But this legitimacy-and-capture narrative is overdrawn—indeed, it is largely a myth. Proceduralism has a role to play in preserving legitimacy and discouraging capture, but it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address. In building this argument, I hope to call into question the administrative lawyer’s instinctive faith in procedure, to reorient discussion to the trade-offs at the heart of any system designed to structure government action, and to soften resistance to the relaxation of unduly burdensome procedural rules. Notwithstanding academic claims that the Administrative Procedure Act (APA) has attained a kind of quasi-constitutional status,<sup>14</sup> administrative law remains very much an object of political contestation. Any convention that Congress can’t tinker with the APA is quickly eroding, if indeed any such convention ever existed. We should acknowledge that fact even if we lament its loss.

In this, I hope to bring the practice of administrative law into conversation with a line of revisionist academic work that questions the left’s embrace of court-centric legalism. That work, among other things, recovers how Progressive and New Deal state-builders embraced a results-oriented, nonlegalistic approach to administrative power. They understood—more clearly than we do now—that strict procedural rules and vigorous judicial oversight could be mobilized to frustrate their efforts to curb market exploitation, protect workers, and press for a fairer distribution of resources.<sup>15</sup> “Substantial justice,” declared President Franklin Roosevelt in vetoing a predecessor bill to the APA, “remains a higher aim for our civilization than technical legalism.”<sup>16</sup>

The left’s antiproceduralist orientation shifted in the wake of *Brown v. Board of Education*, when the fight for civil rights moved into a legalistic register—a shift that, in the revisionist telling, both narrowed the scope of the civil rights movement’s ambitions and hampered its efforts to address yawning racial inequalities.<sup>17</sup> Progressive reformers in the 1960s and the 1970s

13. See *infra* Section II.B.1.

14. See Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

15. See, e.g., KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 733 (2016) (reviewing DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014)).

16. Harold B. Hinton, *House Sustains President’s Veto of Agencies Bill*, N.Y. TIMES, Dec. 19, 1940, at 1.

17. See, e.g., RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1439 (2005).

drew inspiration from the civil rights example, and adopted the tools of adversarial legalism (to use Robert Kagan's phrase)<sup>18</sup> in an effort to spur the vigorous enforcement of new environmental and consumer protection laws.<sup>19</sup> That legalism, which opponents of state action avidly supported,<sup>20</sup> is our inheritance from that era.<sup>21</sup>

Along the way, a positive vision of the administrative state—one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it advances our collective goals—has been shoved to the side.<sup>22</sup> I recognize that now may not be the most auspicious time to press the point, when liberals have seized on administrative law as a means to resist the Trump Administration. But President Trump is temporary; administrative law is not. And an administrative law oriented around fears of a pathological presidency may itself be pathological—a cure worse than the disease. A decade after a financial crisis roiled the financial markets, in a century when climate change threatens environmental catastrophe, and in an era of growing income and wealth inequality, the wisdom of allowing procedural rules to hobble federal agencies is very much open to question. Administrative law may be about good governance, but it is also about power: the power to maintain the existing state of affairs, and the power to change it. It's well past time for more skepticism about procedure.

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18. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001).

19. See, e.g., Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 L. & HIST. REV. 965, 973 (2015); see also Reuel Schiller, *Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market* (2017), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2494&context=faculty\\_scholarship](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2494&context=faculty_scholarship) [<https://perma.cc/AB4Y-T9D5>].

20. See KAGAN, *supra* note 18, at 50.

21. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1243–44 (2017) (“The reigning model for administrative law doctrine continues to be external constraints on agencies imposed by Congress and the courts.”). Recent scholarship, building on foundations laid by Jerry Mashaw, has drawn attention to “internal administrative law,” which is to say the rules and procedures that govern agency staff and that structure interactions within the executive branch. See generally *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* (Nicholas R. Parrillo ed., 2017). But this line of scholarship generally asks administrative lawyers to broaden their field of vision, not to rethink the existing contours of administrative law.

22. See Kessler, *supra* note 15, at 733 (recalling the views of progressive reformers who “believed that an autonomous administrative state was necessary to achieve a more just distribution of the nation’s resources, and that the achievement of this political economic goal, along with democratic support and expert guidance, were the sufficient conditions of the state’s legitimacy”).

I. DEFENSIVE CROUCH ADMINISTRATIVE LAW<sup>23</sup>A. *Distrust*

By proceduralism, I mean the full panoply of formal legal obstacles that an agency must negotiate in order to complete a particular action. At one extreme, the absence of proceduralism would imply that an agency could structure its decisionmaking without regard to any particular rules and could act without shouldering any kind of justificatory burden. At the other, an excess of proceduralism would require the agency to conduct every conceivable study, ventilate every available option, engage every identifiable stakeholder, and weather the most stringent judicial review before any of its actions, however trivial, could take effect.

What I'm calling proceduralism is sometimes called "legalism," partly because the relevant procedures are imposed by law and partly because lawyers tend to assume that procedures advance rule-of-law values.<sup>24</sup> But I want to resist the "legalism" label. The word smuggles into the discussion an implicit judgment that the absence of a given procedure renders an agency action less legally sound than it might have otherwise been. To make the point concrete: if notice and comment reflects a commitment to legalism, then using a guidance document to avoid notice and comment looks like a rejection of, and perhaps a disdain for, legalism. And so the label subtly suggests that those who wish for fewer procedures must also not care that much about law. Proceduralism (which may be good or bad, depending) is the more apt term.

Crucially, a lack of proceduralism—of legally mandated procedures—does not imply an absence of external checks on agency conduct. Congress and the president both remain on the scene, fully capable of reforming or restraining agencies.<sup>25</sup> And the bureaucracy "is itself a medium for registering the diverse wills that make up the people's will and for transmuting them into responsible proposals for public policy."<sup>26</sup>

An absence of proceduralism likewise does not imply anything about the internal procedures that agencies voluntarily adopt to structure their conduct. Any large organization will employ procedures, both explicit and implicit, to allocate responsibilities, coordinate behavior, and assure accountability. Indeed, agencies often adhere voluntarily to procedural rules

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23. Cf. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/P5NE-DKPZ>].

24. See generally KAGAN, *supra* note 18.

25. See JOSH CHAFETZ, *CONGRESS'S CONSTITUTION* (2017); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

26. Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 810 (1952).



that are much more onerous than those imposed by law.<sup>27</sup> As Gillian Metzger and Kevin Stack have recently reminded us, these voluntary rules are the primary constituents of “internal administrative law,” and they can at times frustrate action in much the same way as externally imposed rules.<sup>28</sup> But agency-adopted procedures are matters of discretion: they can be reconsidered, adjusted, overhauled, or scrapped if they impede agency action without adequate justification. Not so with traditional strictures of administrative law, which apply whether the agency believes they serve a useful purpose or not.

Equally crucially, nothing in my argument implies that legally mandated procedures do not yield benefits. They do. But they can also seriously impair the vigor with which an agency pursues its assigned mission. Selecting the type and quantity of procedures to impose on agencies is an optimization problem: Which set of procedures will best balance the competing goals of efficiency, the protection of legal rights, and public accountability? It’s easier to state that problem than to solve it. For one thing, we don’t all agree on what the right balance should be. For another, we lack good evidence about how most administrative procedures affect that balance. Without either agreement or evidence, administrative law has been shaped by a crude and contested assessment of the costs and benefits of vigorous governmental action.

What informs that assessment? The stories we tell ourselves about the state. That’s why it matters so much that administrative law has been built on a bedrock of distrust. When it was adopted in 1946, the APA aimed to soothe the jangled nerves of legal and business communities alarmed by the New Deal and the muscular wartime exercise of state power.<sup>29</sup> Discipline would come through the imposition of procedures to channel, improve, and restrain agency action. Agencies that engaged in formal adjudication would have to adhere to trial-type procedures.<sup>30</sup> Agencies that adopted rules would have to offer notice and an opportunity to comment.<sup>31</sup> Congress also left undisturbed the Supreme Court’s decision in *SEC v. Chenery*, which required agencies to offer reasons for acting from the time of decision, not those devised at some later date.<sup>32</sup> To assure fidelity to these procedural rules and

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27. Elizabeth Magill, Foreword, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009) (describing how agencies “voluntarily constrain their discretion” and “limit their procedural freedom by committing to afford additional procedures, such as hearings, notices, and appeals, that are not required by any source of authority”).

28. Metzger & Stack, *supra* note 21, at 1248.

29. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–61 (1996).

30. See 5 U.S.C. §§ 554, 556–557 (2012).

31. 5 U.S.C. § 553 (2012).

32. 318 U.S. 80, 87 (1943).

protect against irrational action, all final agency action was, by default, subjected to judicial review.<sup>33</sup>

On the page, the APA's procedural strictures were spare. They were not to remain so. Liberal lawyers in the 1960s and 1970s, many of them products of the Vietnam era, grew increasingly disenchanted with the idea that agencies could act as disinterested experts.<sup>34</sup> They likewise grew attuned to the risk of agency capture,<sup>35</sup> and came to believe that judicial participation in the agency process was necessary both to further congressional intent<sup>36</sup> and to protect individual rights.<sup>37</sup> At the vanguard were newly formed public interest groups staffed by idealistic young lawyers who had been inspired by the courtroom successes of the civil rights movement.<sup>38</sup> Their heroes were not the New Dealers who labored in agency trenches, but crusaders like Ralph Nader and Rachel Carson who held the government to account.<sup>39</sup>

By the 1970s, Congress had adopted a rash of new laws to regulate automobiles, air and water quality, workplace safety, and more.<sup>40</sup> Naturally, "political conservatives feared that the bureaucrats might be too zealous, hostile to business and economic growth," so they made common cause with political liberals, fighting with them "for legislative provisions that restricted administrative discretion and subjected it to legal challenge."<sup>41</sup> As the courts began to read novel obligations into the spare language of the APA, the procedural net was drawn tighter still. No longer could agencies offer bare notice of the "subjects and issues" involved in a rulemaking.<sup>42</sup> They were expected to be granular about what they meant to do and to disclose all the evidence that they meant to draw on.<sup>43</sup> No longer could agencies privately mull the comments they received or finalize a rule with a "concise general statement of [its] basis and purpose."<sup>44</sup> They were instead to respond publicly to all vital comments—or, rather, to all comments that a reviewing court

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33. 5 U.S.C. § 704 (2012).

34. See Sabin, *supra* note 19, at 979 (quoting Judge Friendly as saying in 1962 that agencies "did not combine the celerity of Mercury, the wisdom of Minerva, and purity of Diana to quite the extent we had been taught to expect"); Schiller, *supra* note 19, at 18–19 ("In a political culture that increasingly emphasized the value of participatory democracy and individual liberty, the administrative state was viewed with suspicion.").

35. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

36. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (stating that "the court and agency are in a kind of partnership relationship for the purpose of effectuating the legislative mandate").

37. See *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597–98 (D.C. Cir. 1971).

38. See Sabin, *supra* note 19, at 991–92.

39. See *id.* at 983, 991–92.

40. KAGAN, *supra* note 18, at 47.

41. *Id.* at 50.

42. 5 U.S.C. § 553(b)(3) (2012).

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

44. 5 U.S.C. § 553(c) (2012).

might later deem vital.<sup>45</sup> And if an agency's final rule departed too far from the proposal, it would have to start all over again to avoid the rule's invalidation on "logical outgrowth" grounds.<sup>46</sup>

By 1971, Judge Bazelon could herald "a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts," one in which courts would "insist on strict judicial scrutiny of administrative action."<sup>47</sup> (The equation of "strict judicial scrutiny" with "fruitful collaboration" was emblematic of the times.) Rules about standing were relaxed.<sup>48</sup> Statutes precluding judicial review were read into oblivion.<sup>49</sup> Guidance documents were scrutinized to see if they had binding effect and, if so, were invalidated for failing to pass through notice and comment.<sup>50</sup> In *Abbott Laboratories v. Gardner*, the Supreme Court brushed aside finality and ripeness concerns to endorse preenforcement review of agency rules.<sup>51</sup> The courts subjected compliance with the National Environmental Protection Act (NEPA) to judicial review, "ma[king] adversarial legalism a recurrent feature of governmental efforts to build highways and license power plants, implement forestry plans, dredge harbors, construct waste disposal facilities, and issue offshore oil exploration leases."<sup>52</sup> By the time the Supreme Court recognized in *Vermont Yankee* that proceduralism had run amok in the lower courts,<sup>53</sup> all of these changes and more were firmly embedded in administrative law.

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45. See, e.g., *Nat'l Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar*, 491 F.2d 31, 40 (D.C. Cir. 1974).

46. See *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("[A]n agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1992))).

47. *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971); see also *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

48. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686–87 (1973); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 38 n.172 (2011).

49. See, e.g., *Traynor v. Turnage*, 485 U.S. 535 (1988); *Johnson v. Robison*, 415 U.S. 361 (1974).

50. See *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974).

51. 387 U.S. 136, 148–49 (1967).

52. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 32 n.100 (1994). After NEPA's enactment in 1969, the federal courts initially divided over whether courts could review the substance of an agency's environmental impact statement. Project, *Federal Administrative Law Developments—1972, 1973* DUKE L.J. 157, 301–10. The courts eventually resolved that split by opting for hard-look review. See SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* (1984).

53. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543–45 (1978).

Strict judicial oversight of agencies was accompanied by a surge of congressional interest in transparency tools. First adopted in 1966<sup>54</sup> and substantially amended in 1974,<sup>55</sup> the Freedom of Information Act (FOIA) requires agencies to disclose their records upon request and subjects any refusal to do so to judicial review. The Federal Advisory Committee Act (FACA), adopted in 1972, imposes strict transparency rules on advisory committees,<sup>56</sup> and the Government in the Sunshine Act (GITSA), adopted in 1974, opens every meeting of more than two members of regulatory commissions to public observation.<sup>57</sup>

With support from Congress, the executive branch then stepped into the game. In 1980, the Paperwork Reduction Act required agencies to justify any effort to collect information from the public and established the Office of Information and Regulatory Affairs (OIRA) to assure compliance.<sup>58</sup> Shortly after taking office, President Reagan tapped OIRA with responsibility for restraining agencies that were heedless of the costs they were imposing on American industry. By executive order, no major agency rule could take effect without OIRA's sign-off, which would be forthcoming only after a thorough-going review of costs and benefits.<sup>59</sup> (Independent agencies were exempted.<sup>60</sup>) Because OIRA's gatekeeping role stymied agency decisionmaking—indeed, that was the point—many observers expected President Clinton to rescind the order upon taking office.<sup>61</sup> But an institutional device to promote consistency with White House priorities was too tempting to abandon. President Clinton made OIRA review his own, and OIRA review—gatekeeper function and all—has become an entrenched feature of the regulatory state.<sup>62</sup>

When Republicans swept Congress in 1994, they quickly adopted, with President Clinton's support, a number of new procedural rules to constrain agencies. The Congressional Review Act imposes a sixty-day waiting period on the effective date of any major rule, requires agencies to submit a raft of information to Congress about new rules, and adopts fast-track procedures

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54. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2012 & Supp. 2018)).

55. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

56. Pub. L. No. 92-463, § 10, 86 Stat. 770, 774-75 (1972).

57. Pub. L. No. 94-409, § 3, 90 Stat. 1241, 1241-46 (1976) (codified as amended at 5 U.S.C. § 552b (2012)).

58. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 2, 94 Stat. 2812, 2819-21 (1980) (codified as amended at 44 U.S.C. § 3507 (2012)).

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

60. *See id.* § 1(d).

61. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6 (1995) (describing Clinton's continuation of OIRA's oversight as "in many ways quite surprising" in light of the criticism Reagan's program had received).

62. *See* Bagley & Revesz, *supra* note 8, at 1262.

to afford Congress a chance to halt new rules.<sup>63</sup> The Unfunded Mandates Reform Act requires agencies to engage in intergovernmental consultation before adopting any rule that might impose financial burdens on state, local, and tribal governments, and to publish the results of that consultation.<sup>64</sup> The Regulatory Flexibility Act compels agencies to specifically account for the burdens that their rules may place on small businesses, exposing that analysis to judicial review.<sup>65</sup> And the Information Quality Act, designed to address the ostensible scourge of “bad science,” requires agencies to create a formal mechanism for responding to petitions (usually from industry) asking for the correction of information that doesn’t adhere to OIRA guidelines on data quality.<sup>66</sup>

The consistent pattern is that procedure after procedure is adopted to soothe an ever-present (indeed, ever-increasing) anxiety about the state. The sediment deposited by this accretion of procedures can channel agency action into unproductive courses or even dam it altogether.<sup>67</sup> There’s an analogy here to complaints about how government rules stifle industry. No regulation, taken alone, is especially objectionable, but the sum total frustrates action.

The difference between agency-eneebing proceduralism and job-killing regulations, however, is that only the latter is a matter of urgent public and bipartisan concern. When President Trump issued an executive order in the first month of his presidency requiring every agency to withdraw two old rules before adopting any new one,<sup>68</sup> it wasn’t surprising to see him employ familiar conservative rhetoric: “This executive order is one of many ways we’re going to get real results when it comes to removing job-killing regulations . . . .”<sup>69</sup> But the Obama Administration sang much the same tune: one of its signature regulatory initiatives was a retrospective review to identify rules “that may be outmoded, ineffective, insufficient, or excessively burden-

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63. Pub. L. 104-121, §§ 251–53, 110 Stat. 847, 868–74 (1996) (codified at 5 U.S.C. §§ 801–808 (2012)).

64. Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

65. Pub. L. No. 104-121, §§ 241–45, 110 Stat. 847, 864–68 (1996) (codified as amended at 5 U.S.C. §§ 601–612 (2012)).

66. Pub. L. No. 106-554, app. C, § 515, 114 Stat. 2763, 2763A-153 to -154 (2000) (codified at 44 U.S.C. § 3516 note (2012)).

67. See Kagan, *supra* note 52, at 5 (“[C]ompared to European democracies, regulatory decision making in the United States entails many more legal formalities—public notice and comment, open hearings, restrictions on *ex parte* and other informal contacts, high evidentiary and scientific standards, mandatory official ‘findings’ and responses to interest group arguments—most of which are designed to enhance interest group participation and review by courts.”).

68. Exec. Order No. 13,771, 3 C.F.R. 284 (2018), *reprinted in* 5 U.S.C. § 601 app. at 249 (Supp. 2018).

69. Donald J. Trump, U.S. President, Remarks by President Trump at Signing of Executive Order on Regulatory Reform (Feb. 24, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-order-regulatory-reform> [<https://perma.cc/Y8MR-SVVE>].

some, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”<sup>70</sup> Complaints about overzealous regulation are taken seriously in the political culture. Fears that procedural rules may hamper agency action are not.<sup>71</sup>

They’re not nonexistent, of course. Jerry Mashaw, for example, has written plaintively that the “use of law to defeat law-making may ultimately undermine administrative law itself,” and that “legal technicality will eventually come to be seen as the enemy of effective governance.”<sup>72</sup> Tom McGarity has been beating the drum for decades about agency ossification.<sup>73</sup> Peter Strauss worries that administrative law has not developed “means of encouraging attention and responsibility without imposing debilitating costs.”<sup>74</sup> Shep Melnick has done yeoman’s work exploding various platitudes about judicial review.<sup>75</sup> Alan Morrison, Lisa Heinzerling, and Rena Steinzor have all raised alarms about OIRA.<sup>76</sup> And so on.

But voices decrying the costs of administrative law’s proceduralism are marginal, absent entirely from the political conversation and relegated to the sidelines of the academic debate.<sup>77</sup> There is zero public pressure to eliminate preenforcement review, to curtail hard-look review, to repeal the regulatory reform bills of the 1990s, to rethink the rigor of notice-and-comment rule-making, or anything of the sort. The field of modernizing administrative law has been ceded to those—on both the left and the right—who distrust the state.<sup>78</sup>

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70. Exec. Order No. 13,563, § 6(a), 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 817 (2012); Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Executive Departments and Agencies (June 14, 2011), <https://www.foreffectivegov.org/sites/default/files/regs/oira14june.pdf> [<https://perma.cc/NM7V-Y26C>].

71. See KAGAN, *supra* note 18, at 220 (“[T]he same politicians who are disturbed when their programs are bogged down by litigation rarely take a public stand against legal rights to challenge national bureaucracies in court.”).

72. Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 420 (1996).

73. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

74. Peter L. Strauss, Speech, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 775 (1996).

75. See R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983).

76. See Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062–63 (1986); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012).

77. See *infra* text accompanying notes 90–96, 180–183.

78. See Kagan, *supra* note 52, at 26–27.

B. *The Neutrality Myth*

Why have progressives abandoned the field? One answer—a deficient one, in my view—is that there is no problem to solve. Administrative law’s procedural rules are formally neutral: they constrain, yes, but they constrain alike agencies that wish to do conservative things and those that wish to do liberal things. The key text here is *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, where the Supreme Court rejected the argument that the APA exposes deregulatory measures to less scrutiny than agency actions imposing affirmative obligations.<sup>79</sup> *State Farm*’s evenhandedness—its insistence that “the forces of change do not always or necessarily point in the direction of deregulation”<sup>80</sup>—gives the impression that administrative law’s procedural burdens may, on net, have no partisan valence at all. The canonical cases taught in every administrative law course reinforce that view. Some cases skew conservative: think of *FDA v. Brown & Williamson*, which rejected FDA’s attempt to regulate cigarette marketing,<sup>81</sup> or *FCC v. Fox Television Stations*, which upheld penalties imposed on broadcasters for airing “fleeting expletives.”<sup>82</sup> But others skew liberal. The lesson of *Overton Park* is that administrative law preserves public parks;<sup>83</sup> *State Farm*, that administrative law improves auto safety;<sup>84</sup> and *Massachusetts v. EPA*, that administrative law protects the environment.<sup>85</sup> Win some, lose some.

Far from accepting agency inaction as some natural baseline, the APA even defines “agency action” to include a “failure to act.”<sup>86</sup> And, in *Massachusetts v. EPA*, the Supreme Court held that an agency’s refusal to adopt a rule is “susceptible to judicial review” and sternly rebuked EPA for its refusal even to say whether greenhouse gases contributed to climate change.<sup>87</sup> Agencies that decline to act for partisan reasons, or those that are simply sunk in torpor, have as much to fear from the courts as those agencies that regulate with abandon—so the story goes.

The same for OIRA. When originally established under President Reagan, OIRA advanced the deregulatory agenda of its political masters. But President Clinton’s embrace of centralized oversight suggested that a de-

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79. 463 U.S. 29, 42 (1983); see also Merrick Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 543 (1985).

80. *State Farm*, 463 U.S. at 42.

81. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

82. 556 U.S. 502 (2009).

83. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 406 (1971).

84. See *State Farm*, 463 U.S. at 34.

85. See 549 U.S. 497 (2007).

86. 5 U.S.C. § 551(13) (2012); see also Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62 (2008) (“[T]here is no fundamental difference between judicial review of agency inaction or action under the APA.”).

87. See *Massachusetts*, 549 U.S. at 527–28, 533–35.

regulatory bent is a contingent feature of the institution, one that waxes and wanes with the sitting administration's political priorities. Where President Reagan wanted to minimize costs, President Clinton wanted to maximize benefits net of costs.<sup>88</sup> His revised executive order also addressed the Reagan-era problem of interminable delay by imposing a ninety-day limit on review.<sup>89</sup> And so OIRA, once an implacable foe of regulation, was domesticated. Still operating a quarter-century later under the Clinton executive order, OIRA has become a seemingly permanent and largely uncontroversial fixture of the administrative state.

Similar stories about administrative law's evenhandedness can be (and have been) told about other aspects of proceduralism.<sup>90</sup> And so the political neutrality of administrative law has hardened into something of an article of faith.<sup>91</sup> Cass Sunstein and Adrian Vermeule, two of the deans of the field, can thus write that "administrative law lacks any kind of ideological valence" and "is organized not by any kind of politicized master principle but by commitments to fidelity to governing statutes, procedural regularity, and nonarbitrary decisionmaking."<sup>92</sup> They concede that "there is a sense in which administrative law does have libertarian features, certainly insofar as it enables regulated entities to challenge the legality of agency action."<sup>93</sup> But they

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88. Exec. Order No. 12,866, § 1(a), 3 C.F.R. 638–39 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802 (2012).

89. *Id.* § 6(b)(2)(B).

90. See William H. Rodgers, Jr., *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 706 (1979) ("The hard look doctrine plays no favorites; it is advanced as enthusiastically by industry as it is by environmentalists. Its acceptance is deep." (footnote omitted)).

91. Recent empirical work suggesting that ossification isn't so bad reinforces that view. Jason Webb Yackee and Susan Webb Yackee counted the number of regulations that federal agencies have issued over several decades. Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2009); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012). Because the number of regulations is large and the pace of their issuance relatively brisk, they say that their findings "disconfirm" the ossification hypothesis. Yackee & Yackee, *Administrative Procedures and Bureaucratic Performance*, *supra* at 262. But that's not right. As Richard Pierce has argued, concerns about ossification typically center on economically significant rulemaking, not the everyday rules that are the focus of the Yackees' study. Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1497–98 (2012). In addition, the number of regulations issued is a poor proxy for their strength. To cope with procedural obstacles and litigation threats, agencies may adopt many weak regulations instead of a few stiffer ones. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1396–99 (2010). In any event, changing technology and the world's increasing complexity both suggest that the number of regulations ought to increase over time. Ossification may thus have reduced the number of regulations relative to a nonossified baseline, even if the overall number remained stable over the four-decade period of the study.

92. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401–02 (2015).

93. *Id.* at 464.



deny that the APA and the doctrinal apparatus that comes along with it can be counted as libertarian “in any general or systematic way,” invoking, among other things, the principle from *State Farm* that deregulatory actions are subject to judicial review.<sup>94</sup> They argue that administrative law instead reflects a compromise:

The political, social, and economic forces that swirl around the administrative state—not only the APA but also the legalism of the organized bar, the technocratic and economic approaches to regulatory policymaking, and the demands for democratic oversight by elected officials and for democratic participation by affected groups and citizens—have produced a set of rules that in effect reconcile and calibrate these crosscutting considerations. It is inconsistent with that basic settlement to select one of the APA’s multiple commitments and elevate it as the master principle that should animate administrative law.<sup>95</sup>

Sunstein and Vermeule’s argument works at the level of justification. Administrative law is indeed defended with reference to broadly shared commitments, not to contested ideological visions. But their argument breaks down at the level of substance. Even compromises justified in neutral terms can have controversial political consequences. Such is the case with administrative law, which has an identifiably libertarian, anti-statist tilt. That shouldn’t come as a surprise. A body of law founded on distrust of the state naturally serves to restrain the state—an arrangement that, on net, is more congenial to a libertarian agenda than a progressive one.<sup>96</sup> The surprise, if there is one, is that progressives don’t seem to mind that the deck is stacked against them.

### C. *Administrative Law’s Status Quo Bias*

As a general matter, any legally mandated procedure raises the costs of agency action. Instead of devoting their limited resources to those tasks that they believe will best advance their legislatively assigned mission, agencies must attend to procedural obligations that they might otherwise have dispensed with. The costs associated with any given procedure may be small,

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94. *Id.* at 465.

95. *Id.* at 466–67.

96. A word about terminology. Classical libertarianism doesn’t reflexively reject the need for government. It expects, for example, that the state will enforce rules of property, contract, and tort in order to facilitate a market economy and demarcate a zone of freedom for individual choice. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974). For the same reasons, classical libertarians could conceivably support state action to forestall harms arising from externalities, at least where private bargaining is infeasible: no one should be at liberty to infringe on the property rights of another. In administrative law, however, modern American libertarianism has taken on a more specific connotation, one resting on the view that “political distortions yield policies that depart unjustifiably, and harmfully, from the baselines set by market ordering. These policies violate liberty, properly understood, and also threaten to reduce social welfare.” Sunstein & Vermeule, *supra* note 92, at 398. It is that reflexively anti-statist version of “libertarianism” that I mean to employ.

even trivial; the requirement to publish rules in the Federal Register, for example, is not onerous.<sup>97</sup> But most procedural obligations are not so easily satisfied. They require substantial attention from agency staff, which means the diversion of attention from other priorities. And procedures are cumulative. Those that appear reasonable in isolation can, when piled together, take a serious toll on agency efficiency.<sup>98</sup>

Apart from increasing costs, adhering to procedures also delays agency action. That's obviously true in a narrow sense: every task takes time. But the problem runs deeper, as Herbert Simon's work on organizational decisionmaking suggests. Any agency must juggle a host of competing priorities, which means employees and political appointees with managerial responsibilities tend to oversee multiple projects. But complying with legally mandated procedures requires the time and attention of those harried federal managers, creating organizational bottlenecks.<sup>99</sup> The problem is exacerbated because government agencies tend to have too few staff to carry out their many responsibilities. And so even a minor procedural hurdle can become a source of delay, and multiple procedural rules can introduce multiple bottlenecks.

Delay then affords groups opposed to agency action more time to mobilize against it. They can lobby Congress, the White House, and the agency itself, whether by mustering coalitions to support their cause, channeling financial contributions to key political officials, or threatening to withhold support for future initiatives.<sup>100</sup> As delays mount, changes in the political weather—the replacement of key political appointees, a midterm election that changes the odds of congressional oversight, the election of a new president—give those groups yet another opportunity to thwart agency action. In agencies as in legislatures, limited bandwidth and the need to sustain political capital means that, for any reasonably complex action, the window of opportunity will open only briefly. Delay allows that window to be shut before the agency can act.

Procedural rules can also empower gatekeepers to stop agency action dead in its tracks. Courts are the most obvious example. For salient actions with sizable economic consequences, judicial review has become, in effect, the final step in the agency process. And the risk of losing in court is real: empirical research indicates that about one in three challenges to agency ac-

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97. See 5 U.S.C. § 553(b) (2012).

98. See McGarity, *supra* note 73. For a vivid visual illustration of the point, consider the almost comical complexity of the “Reg Map” of informal rulemaking, which was developed under the auspices of the General Services Administration. ICF CONSULTING, THE REG MAP: INFORMAL RULEMAKING (2003), <https://www.reginfo.gov/public/reginfo/Regmap/regmap.pdf> [<https://perma.cc/H4GJ-UWSE>].

99. See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS 241 (4th ed. 1997).

100. See BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 4–5 (1978).

tion succeeds on some ground or another.<sup>101</sup> In all of those cases, the agency must either respond to the court's concerns, with the attendant resource diversion that entails, or abandon the action altogether. Either way, judicial review systematically depletes agency resources and frustrates agency action.<sup>102</sup>

The uncertainty of judicial review also works against agencies that seek to make the most sensible use of their resources. On the margin, rational agencies will shy away from actions that are likely to provoke litigation<sup>103</sup> (or, alternatively, soften those actions to mitigate litigation risk<sup>104</sup>), meaning that they will squander some of the best opportunities to achieve collective goals. And when they do act, they will invest in fortifying their action from potential judicial challenge, whether or not that's an especially good use of their time.<sup>105</sup> Courts thus distort agency judgment even when they don't review a thing.

And courts are not the only gatekeepers. OIRA is another. No significant proposed rule, final rule, or guidance document can issue from an agency unless and until OIRA approves it.<sup>106</sup> Depending on the year, that means that about four dozen employees<sup>107</sup> working within the Executive Office of the President are responsible for reviewing anywhere between 415 and 831 significant agency actions.<sup>108</sup> The risk of bottlenecks is acute; indeed, OIRA is notorious for sitting on rules. Lisa Heinzerling reports that “[m]any, many rules linger at OIRA long past the 90- or 120-day deadline” by which it is supposed to complete its review.<sup>109</sup> “Some rules have been at OIRA for years.”<sup>110</sup> Even when OIRA adheres to its deadlines, it tacks on many months to the effective date of agency action. Sunstein, in a meditation on his time as OIRA administrator under President Obama, argues that what looks like unwarranted delay from the outside usually reflects, from the inside, “a

101. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 173 (2010).

102. For a discussion of the costs of remand, see Bagley, *supra* note 10, at 263–65.

103. See JAMES Q. WILSON, BUREAUCRACY 290 (1989).

104. See Wagner, *supra* note 91, at 1396–99.

105. See R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992) (arguing that agencies “react[] defensively” to judicial review).

106. Exec. Order No. 12,866, § 8, 3 C.F.R. 648–49 (1994), *reprinted as amended in 5 U.S.C. § 601 app. at 806* (2012); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-13.pdf> [<https://perma.cc/GTK8-4RPA>] (clarifying that “significant policy and guidance documents . . . remain subject to OIRA’s review under Executive Order 12866”).

107. See Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845 (2013).

108. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 10 tbl.3 (2016).

109. Heinzerling, *supra* note 76, at 358.

110. *Id.* (emphasis omitted).

judgment that important aspects require continuing substantive discussion.”<sup>111</sup> Whatever the value of that substantive discussion, however, it still amounts to delay. Even more significantly, OIRA is almost exclusively a *re-active* institution, one with the power to reject agency action but little capacity to spur it.<sup>112</sup> Agencies that wish to do something important have reason to fear OIRA. Agencies that sit on their hands do not.

In short, proceduralism drains agency resources, introduces delay, and thwarts agency action.<sup>113</sup> To that extent, it puts a thumb on the scale in favor of the status quo;<sup>114</sup> by itself, that’s enough to give administrative law a libertarian, anti-statist cast. Nonetheless, the ideological valence of administrative law remains at least arguably ambiguous. Proceduralism might impede a progressive agenda that depends on active government, but what if it equally thwarts a libertarian agenda to pare back the existing state?<sup>115</sup> If that were the case, administrative law’s apparent asymmetry would be an artifact of whichever baseline (more government, less government) you happened to prefer. Which is to say, it wouldn’t be an asymmetry at all.

Without question, administrative law can entrench Democratic achievements.<sup>116</sup> In the early years of the Trump Administration, for example, the courts have repeatedly rebuked federal agencies for suspending

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111. Sunstein, *supra* note 107, at 1842.

112. See Bagley & Revesz, *supra* note 8, at 1274, 1277. OIRA could potentially be reshaped to advance a more proactive agenda. Mike Livermore and Ricky Revesz, for example, have offered a sustained argument for a review mechanism that exploits “information generated by private actors to identify areas where action is needed but where agencies have failed to move forward.” Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1383 (2013).

113. See Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 803 (2006).

114. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 181 (1999).

115. In a related vein, Aaron Nielson has argued that the agency procedures that produce ossification may, under some conditions, empower agencies to achieve long-term goals. Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018). But those conditions are strict. They arise only when (1) an agency offers regulated parties alternative ways to comply with a given rule; (2) one of those alternatives requires substantial up-front investment and the other doesn’t; and (3) the agency prefers the investment-heavy approach to the alternative. See *id.* at 120–23. In those cases, a “sticky regulation”—one that’s hard to withdraw—may serve as a commitment device that encourages regulated parties to make the agency-preferred investments. *Id.* at 123–24. Such cases, however, are likely the exception, not the rule. And it’s odd to claim that procedures empower agencies to achieve the things they really care about, but only when they don’t care enough about those things to adopt a binding rule demanding them.

116. Indeed, McNollgast have argued that the APA sailed through Congress precisely because, “by 1946, the New Dealers in Congress had an interest in consolidating their policy gains against the possible antipathy of a Republican presidency, and they could finally count on the courts to favor New Deal programs in adjudicating procedural provisions.” McNollgast, *supra* note 114, at 183.

Obama-era rules without observing procedural niceties.<sup>117</sup> For any number of reasons, however, administrative proceduralism makes it easier to tear down the administrative state than to build it up. On net and over time, proceduralism favors a libertarian agenda over a progressive one.

#### D. *Administrative Law's Ideological Asymmetry*

Because the world is changing at a breakneck clip, a bias toward inaction means that the state will respond too slowly as new risks present themselves and existing risks come into focus. Internet commerce, drones, social media, cellular phones, algorithmic trading, driverless cars, and artificial intelligence barely existed two decades ago; today, they are part (or are becoming part) of the fabric of our lives. We only dimly understand how to cope with the attendant risks to health, welfare, and privacy associated with these technological changes. At the same time, older risks have become more prominent, whether because of evolving scientific understanding (climate change, the waning efficacy of antibiotics), shifting patterns of industrial organization (the rise of monopoly power across multiple industries), or crises that exposed fragility in complex systems (the financial crisis, Hurricane Maria). An administrative apparatus that cannot adapt to a changing world threatens to become a relic of a bygone era. It also becomes easier to dismantle. Regulations adopted in a very different environment will come to look ill fitting and unresponsive to modern problems. Justifying their abandonment or relaxation is straightforward: the world really has changed.<sup>118</sup> Adopting a new rule and defending it against concerted attack, however, remains enormously difficult.

More prosaically, the outsize participation of industry groups in notice and comment means that agencies will have a wealth of information at their disposal about the costs of agency rules and why, given certain facts about the industry, they won't accomplish very much. As Tom McGarity and Ruth Ruttenberg have shown, "industry cost estimates have usually been high, sometimes by orders of magnitude, when compared to actual costs incurred."<sup>119</sup> In contrast, regulatory beneficiaries often lack the resources, the technical know-how, and the industry-specific knowledge to contradict those estimates, leaving agencies to do the best they can with the information they have.<sup>120</sup> An agency that lowballs cost estimates or is too bullish about a rule's benefits will face the ire of industry, which will (with some reason) ar-

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117. See, e.g., *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).

118. Wendy Wagner and her coauthors have recently documented that agencies frequently amend their rules, typically at the behest of regulated parties and "with the diffuse public potentially on the losing end of the stick." Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 241 (2017).

119. Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 1998 (2002).

120. See *id.*

gue in court that the agency has downplayed their concerns without adequate justification. In contrast, an agency that wishes to kill a rule or justify its refusal to move forward can cherry-pick from the data submitted by industry, all with little to fear from courts that are reluctant to second-guess agencies on technical matters.

Standing doctrine exacerbates the imbalance. In contrast to regulated entities, which will face a concrete injury in fact arising from compliance costs, a regulatory beneficiary's interest in a given rule may be too diffuse and insubstantial to count.<sup>121</sup> In *Public Citizen v. NHTSA*, for one example among many, a public interest group representing drivers challenged a NHTSA standard on the ground that it was insufficiently stringent.<sup>122</sup> The D.C. Circuit dismissed the case: in the court's view, the statistical increase in risk associated with the rule's alleged weakness was too speculative and insubstantial to amount to an injury in fact.<sup>123</sup> Indeed, the Article III difficulties for regulatory beneficiaries may increase in coming years: The author of *Public Citizen*, then-Judge Kavanaugh, indicated his discomfort with "probabilistic injury."<sup>124</sup> With his elevation, a Supreme Court that is already hawkish on beneficiary standing may become more hawkish still.

The progressive promise of *State Farm* is stillborn for yet another reason. If they are to be followed, rules must sometimes be enforced—which means agencies must be prepared to convince not only an administrative law judge but also the courts that the action is reasonable and legal. In contrast, under *Heckler v. Chaney*, an agency has no justificatory burden when it declines to enforce a statute.<sup>125</sup> Agencies can thus gut existing rules by enforcing them less vigorously—without observing any procedural niceties at all.<sup>126</sup>

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121. See Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 393–94 (2009).

122. *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 513 F.3d 234, 238–41 (D.C. Cir. 2008); *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1293, 1298 (D.C. Cir. 2007) (raising doubts about standing based on increased statistical risk and asking for more evidence of petitioner's standing); see also *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (noting that "this Court has limited its jurisdiction over cases alleging the possibility of increased-risk-of-harm to those where the plaintiff can show 'both (i) a substantially increased risk of harm and (ii) a substantial probability of harm with that increase taken into account'" (quoting *Public Citizen*, 489 F.3d at 1295)).

123. *Public Citizen*, 513 F.3d at 235–37. A group representing regulatory beneficiaries can't overcome the standing hurdle by arguing that it's likely that one of its members will suffer an injury: "At the very least," the D.C. Circuit has held, "the identity of the party suffering an injury in fact must be firmly established." *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006).

124. *Public Citizen*, 489 F.3d at 1295.

125. 470 U.S. 821 (1985); see also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 683 (1985) ("Whatever the defects of judicial review, they do not justify a one-way ratchet against regulation . . .").

126. Cf. *Nat'l Ass'n of Home Builders v. Salazar*, 827 F. Supp. 2d 1, 7 (D.D.C. 2011) ("Ample precedent demonstrates that a lawsuit seeking declaratory and injunctive relief is moot when the challenged [guidance document] is withdrawn.").

On occasion, the courts will rebuke agencies for adopting categorical nonenforcement policies,<sup>127</sup> but agencies face virtually no litigation risk if they don't publicly codify those policies (and little risk even if they do).<sup>128</sup> Less obviously but no less importantly, *Lincoln v. Vigil* precludes review of agency decisions to allocate agency resources away from enforcement.<sup>129</sup> During the Trump Administration, for example, EPA enforcement actions against polluters dropped precipitously<sup>130</sup> and, prior to Administrator Scott Pruitt's resignation, special agents charged with investigating environmental crimes were reassigned to his security detail.<sup>131</sup> There's nothing the courts can do about any of that.

Nor does *Massachusetts v. EPA* redeem *Heckler* of its deregulatory bias.<sup>132</sup> Even as it held that the courts can review an agency's decision to decline to adopt a rule, the Supreme Court intimated that an agency should be able to justify a refusal to regulate by invoking resource constraints or timing concerns.<sup>133</sup> Because such constraints and concerns are ubiquitous in the administrative state, agencies have at hand a ready-made justification for turning away virtually any rulemaking petition. The same cannot be said for agency decisions to adopt a rule in the first instance.

Consider too the weakness of the Supreme Court's remedy in *Massachusetts*. Notwithstanding its stirring language, the opinion's only immediate legal effect was to vacate EPA's denial of Massachusetts's rulemaking petition. The Court didn't order EPA to grant the petition; indeed, it couldn't have done so. As the Supreme Court confirmed in *Norton v. Southern Utah Wilderness Alliance*, courts can force agencies to act "only where a plaintiff

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127. See *Texas v. United States*, 809 F.3d 134, 166 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam); *Cook v. FDA*, 733 F.3d 1, 12 (D.C. Cir. 2013) (finding an FDA nonenforcement policy to be inconsistent with statute); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (distinguishing between a "single-shot non-enforcement decision" and a "general enforcement policy" for purposes of judicial review (emphasis omitted)).

128. See Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1573 (2016) ("[I]nstitutional limitations on courts—limitations with a broader resonance in constitutional and administrative law doctrines—provide a cogent descriptive and normative justification for judicial deference to executive nonenforcement.").

129. 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion.").

130. See Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html> [https://perma.cc/U4YS-FAKD].

131. See Juliet Eilperin & Brady Dennis, *At EPA, Guarding the Chief Pulls Agents from Pursuing Environmental Crimes*, WASH. POST (Sept. 20, 2017), [https://www.washingtonpost.com/national/health-science/at-epa-guarding-the-chief-pulls-agents-from-pursuing-environmental-crimes/2017/09/19/7b78b6c-9ce0-11e7-8ea1-ed975285475e\\_story.html](https://www.washingtonpost.com/national/health-science/at-epa-guarding-the-chief-pulls-agents-from-pursuing-environmental-crimes/2017/09/19/7b78b6c-9ce0-11e7-8ea1-ed975285475e_story.html) [https://perma.cc/TQV7-VEL2].

132. See *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007).

133. See *id.* at 527, 533 (suggesting that EPA could avoid taking action "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion").

asserts that an agency failed to take a *discrete* agency action that it is *required to take*.<sup>134</sup> While EPA was obliged to respond in writing to Massachusetts's petition, it had no deadline for doing so.<sup>135</sup> Unsurprisingly, the Bush-era EPA ran out the clock, without objection from the courts.<sup>136</sup> What was true for EPA is true for agencies in general. If they do not wish to do something, the courts cannot and generally will not order them to do it (absent a concrete statutory deadline). Failing to act thus presents minimal legal risk, where acting exposes the agency to legal challenge—even after *Massachusetts*.<sup>137</sup>

The problem is not limited to judicial review. Although OIRA is nominally evenhanded—it reviews any “significant regulatory action,” which is defined to be any action with an effect of \$100 million or more on the economy<sup>138</sup>—Ricky Revesz and I have argued that its reactivity, its abiding concern with regulatory burdens, and its lack of attention to agency inaction mean that the institution is biased toward deregulation.<sup>139</sup> What's more, OIRA review casts a disquietingly long shadow: risk-averse agencies “will be sorely tempted to craft regulations that may not maximize net benefits but will nevertheless avoid unwelcome attention from OIRA.”<sup>140</sup>

Compounding the problem, OIRA and the courts both police the adoption of guidance documents, but not their withdrawal. Because guidance documents elaborate on agency rules and policies, they tend to restrict the freedom that entities have in complying with those rules and policies. (Guidance can also have the opposite effect: it can clarify that regulated entities enjoy discretion that they were uncertain they had. The overall tendency, however, is toward specification and control.<sup>141</sup>) Early in the Obama Administration, OIRA clarified that “significant policy and guidance documents . . .

134. 542 U.S. 55, 64 (2004).

135. 5 U.S.C. § 555(e) (2012).

136. See Darren Samuelsohn & Robin Bravender, *EPA Releases Bush-Era Endangerment Document*, N.Y. TIMES (Oct. 13, 2009), <https://archive.nytimes.com/www.nytimes.com/gwire/2009/10/13/13greenwire-epa-releases-bush-era-endangerment-document-47439.html> [<https://perma.cc/DRA4-FDVX>] (recounting how political officials within the Bush Administration squelched an EPA proposal to act in response to the decision).

137. Cass Sunstein and Adrian Vermeule discern in the case law three constraints on agency discretion to decline to act. First, agencies can't miss hard deadlines; second, they can't ignore congressional instructions to act; and third, they can't use delay to abdicate their statutory responsibilities. See Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 176–88 (2014). What's notable is how weak these constraints are. Most agency action is not subject to statutory deadlines or even a formal congressional mandate. And, “[b]ecause of the difficulties in administering the [anti-abdication] principle, it will usually amount to a judicially underenforced constraint . . .” *Id.* at 162.

138. Exec. Order No. 12,866, § 8, 3 C.F.R. 648–49 (1994), *reprinted in* 5 U.S.C. § 601 app. at 806 (2012).

139. Bagley & Revesz, *supra* note 8, at 1270.

140. *Id.*

141. See generally NICHOLAS R. PARRILLO, *FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE* (2017).



remain subject to OIRA's review."<sup>142</sup> But oversight of guidance is "more limited and unsystematic" than oversight of rules,<sup>143</sup> and an agency's elimination of a guidance document is subject to no review *at all*. Similarly, the courts will invalidate policy statements for failing to pass through notice and comment when they impose a "binding norm" from which the agency is not free to depart,<sup>144</sup> and courts will likewise invalidate interpretive rules when they deviate too far from the statute or regulation that they're interpreting.<sup>145</sup> Only under rare circumstances, however, will the withdrawal of a guidance document yield litigation.<sup>146</sup> Again, the asymmetry is plain.

Finally, and perhaps of greatest moment, administrative law is fond of imposing judicially enforceable procedural rules on agencies to facilitate the ability of outside groups to influence agency decisionmaking, to monitor agency activities, and to check agency overreach. Some examples include notice-and-comment rulemaking, FOIA requests, and hard-look review, though there are many others. But taking advantage of these participatory opportunities is costly: it demands time, resources, and expertise. The implication is that facially neutral procedural rules can give well-organized, well-financed groups—in particular, those that represent business interests—a distinct participatory advantage.<sup>147</sup> Under some conditions, that participatory advantage can magnify industry's ability to influence outcomes on the administrative state. And, as a general matter, industry's goal when it comes to administrative action is not subtle—it wants less of it.<sup>148</sup> I'll return to the point later in arguing that procedures that are sold as defenses to agency capture often end up making it worse. For now, the crucial point is that administrative law's formal neutrality may afford groups with an antiregulatory agenda disproportionate influence over agency decisionmaking.

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In short, proceduralism does not just favor the status quo, though it does that. It also systematically favors inaction over action, deregulation over reg-

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142. Memorandum from Peter R. Orszag, *supra* note 106.

143. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1785 (2013).

144. *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529–30 (D.C. Cir. 1980).

145. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997).

146. *Cf. Nat'l Ass'n of Home Builders v. Salazar*, 827 F. Supp. 2d 1, 7 (D.D.C. 2011) (describing that declaratory relief is only granted when "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (quoting *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985))).

147. *See* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

148. *See generally* Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135 (2006).

ulation, and nonenforcement over enforcement. The end result is a distinctively libertarian slant to administrative law.

## II. PROCEDURALISM'S ALLURE

If that's right, liberals' reluctance to rethink administrative law's embrace of proceduralism is difficult to understand. Part of the explanation, I think, is that the legal community has internalized two stories about the administrative state that make it difficult to contradict the assertion that a given procedure is essential. The first story is about legitimacy: robust procedures, we are told, are needed to legitimize an administrative state that rests on a precarious constitutional foundation and that the public views with suspicion. The second is about accountability: that proceduralism, by stitching the public into agency decisionmaking, can guard against the risk that influential minorities will wield undue influence over agency action.

In my view, these two stories are corrosive to sensible discussion of the trade-offs that administrative law inevitably entails. When concrete arguments in favor of or against a given procedure have run their course, gauzy claims about legitimacy and accountability serve as ready-made arguments in its defense. Our small-c conservative legal culture takes those claims very seriously, especially when it comes to existing procedures. No one can *prove* that relaxing procedural constraints won't damage the legitimacy of the administrative state. No one can *prove* that agency capture won't come roaring back. Why roll the dice?

We should stop being so afraid. The legitimacy-and-accountability claims that have proliferated in the literature are, with rare exceptions, too abstract and analytically muddled to be useful. Yes, some procedures may conduce to legitimacy; others may prevent capture or foster accountability. But procedures can also undermine legitimacy and frustrate accountability. Instead of assuming that a given procedure serves the public-regarding goals that it's said to serve, administrative lawyers should start from a position of skepticism.

The point may seem banal. It is not. The rhetoric of legitimacy is itself constitutive of the legitimacy crisis that procedures are supposed to address. By the same token, the reflexive assertion that agencies have an accountability deficit reinforces the view that agencies are corrupt incubators of private influence. By embracing these stories, progressives play into the hands of those who would prefer to strangle the state. The administrative state is *not* illegitimate; it is *not* the handmaiden of private interests. We should stop suggesting otherwise.

### A. *Legitimacy*

#### 1. The Rhetoric of Legitimacy

Anxiety about agency legitimacy is reflexively invoked to defend administrative law's proceduralism. Richard Stewart, for one example among hun-

dreds, notes that “[t]he traditional conception of administrative law . . . bespeak[s] a common social value in legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable.”<sup>149</sup> Bruce Ackerman, for another, insists that, “[w]hatever the weaknesses of the [APA] . . . the statute recognizes that regulatory decisionmaking needs special forms of legitimation that enhance popular participation, provide ongoing tests for bureaucratic claims of knowledge, and encourage serious normative reflection upon the policy choices inevitably concealed in abstract statutory guidelines.”<sup>150</sup> Gillian Metzger speaks of the way that the APA’s procedural constraints are “credited with broadly legitimizing administrative governance.”<sup>151</sup> And on and on.<sup>152</sup>

Legitimacy claims are especially prominent in the literature about notice and comment.<sup>153</sup> “An agency’s public proposal of a rule and acceptance of public comment prior to issuing the final rule,” writes Nina Mendelson, “can help us view the agency decision as democratic and thus essentially self-legitimizing.”<sup>154</sup> That’s why Lisa Schultz Bressman has called for a presumption in favor of rulemaking: “[A]llowing agencies to use interpretive rules and guidance documents . . . while improving efficiency in particular instances, comes at too high a price overall. It jeopardizes administrative legitimacy. If we are to succeed in legitimizing the administrative state, we cannot prioritize efficiency above all else.”<sup>155</sup> Note her assumption that we have not yet succeeded, and may never succeed, in legitimizing the administrative state. In a similar vein, consider Jody Freeman, who argues that agency use of guidance documents “threaten[s] to further undermine the legitimacy of the rules produced by removing even the pretense of public access and participation.”<sup>156</sup> Not just undermine—“*further* undermine.” Presumptively illegitimate to begin with, agency policymaking must be cleansed

149. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670–71 (1975).

150. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 697 (2000).

151. Metzger, *supra* note 14, at 62.

152. See, e.g., Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1302 (2016) (noting that “courts and commentators celebrate participation as a crucial way to help legitimate the administrative state and improve agency decisions”); Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 935 (2016) (arguing that each of administrative law’s procedural rules “plays a dual role: it *constrains* administrative action in various ways and, as a result, it *legitimizes* that action”).

153. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 904 (2004) (calling the claim that notice and comment legitimates agency action “familiar”).

154. Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011).

155. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 546 (2003).

156. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 10 (1997).

through obeisance to legally mandated procedures. The fact that agencies often seek extensive input on guidance documents is irrelevant. We have lapsed; we must atone.

I'm picking on prominent people in the field, none of whom are political conservatives and many of whom have worked for Democratic administrations. But the claim is ubiquitous, and other procedures are defended in the same register.<sup>157</sup> Take judicial review. Louis Jaffe famously argued that “[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”<sup>158</sup> Ronald Levin says that, “[b]y helping maintain public confidence that government officials remain subject to the rule of law, judicial review also bolsters the legitimacy of agency action.”<sup>159</sup> That claim is repeated ad nauseam by courts<sup>160</sup> and commentators.<sup>161</sup>

Legitimacy has become an all-purpose justification to defend all manner of proceduralism. But what does it even mean? Too often, legitimacy is little more than shorthand for the judgment that it's always best to be procedurally scrupulous. That's less an argument than a signal of discomfort with the disorderliness of policymaking in an administrative state that is more complex, improvisational, and downright strange than we sometimes like to acknowledge.<sup>162</sup> But we can do better, even if most commentators do not. In general, invocations of agency legitimacy sound in one of two different registers: legal or sociological.<sup>163</sup>

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157. See, e.g., Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 STAN. L. REV. ONLINE 9, 13 (2013) (“Cost-benefit analysis helps alleviate . . . concerns [about legitimacy and democratic accountability] by making agency decisionmaking more transparent to the public and to elected officials who can exercise control over the agencies.”); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 242 (2014) (formal rulemaking can improve “the quality and perceived legitimacy” of some agency rules).

158. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320, 372 (1965) (“The Administrative Procedure Act has . . . the merit of codifying the presumption of reviewability.”).

159. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 742 (1990).

160. See, e.g., *Saylor v. U.S. Dep’t of Agric.*, 723 F.2d 581, 582 (7th Cir. 1983) (“The legitimacy of an adjudication by an administrative agency depends to a great extent on the availability of effective judicial review.”).

161. See, e.g., Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 811; Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997).

162. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

163. Cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1842 (2005) (distinguishing between legal, sociological, and moral legitimacy).

## 2. Legal Legitimacy

Here's the standard story: Agencies house executive, legislative, and judicial functions under one roof, in apparent contravention of the lawmaking process described in the Constitution. They thus evade the checks and balances that are supposed to channel federal power. Agencies are also said to labor under an acute democratic deficit: they lack the populist pedigree of either the legislature or the president, yet they wield immense government power. Against this backdrop, proceduralism serves as a rough substitute for the deliberation and accountability that attend conventional lawmaking. Although procedural fastidiousness won't allay the concerns of those who are already convinced that the administrative state is unconstitutional,<sup>164</sup> it may mitigate the concerns of the rest of us who recognize that the administrative state is here to stay.

It's almost impossible to overstate how entrenched this perspective has become. To judge from the casebooks, students are barely introduced to the administrative state before they are told of its enduring "tension" with the constitutional separation of powers.<sup>165</sup> Endless law review pages have been devoted to defending the view that separation-of-powers principles inspire or even compel various aspects of administrative law.<sup>166</sup> The warnings in the case law are dark: Chief Justice Roberts, in deploring the rise of federal agencies, is apt to quote James Madison for the view that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>167</sup> The lesson is clear: the

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164. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless . . . revolution." (footnote omitted)).

165. LISA SCHULTZ BRESSMAN ET AL., *THE REGULATORY STATE* 4-8 (2d ed. 2013) (suggesting the tenuous constitutional status of agencies in a constitutional system that "rest[s] on a fundamental mistrust of consolidated power"); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 46 (8th ed. 2017) ("The question addressed in this chapter is how the combination of functions characteristic of modern administrative agencies can be reconciled with the structural principles embodied in the Constitution."); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 334-51 (2d ed. 2013) (opening their discussion of federal agencies by noting how "[t]his confluence of rulemaking, enforcement, and adjudication under the roof of a given agency would appear problematic under a strict view of the separation of powers"); PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 217, 777-86 (12th ed. 2018) ("These combinations of functions and broad delegations . . . create enduring tensions between the constitutional framework and modern administrative government.").

166. See, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958 (2007); Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 53 (1984).

167. *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (quoting *THE FEDERALIST* NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life,

modern administrative state is a regrettable symptom of constitutional decay.

It's no wonder that this dim view of agencies finds ready acceptance among modern conservatives, with their commitment to a limited federal government and their suspicion of state power. But the separation-of-powers anxiety is nearly as prevalent among progressives who share neither that commitment nor that suspicion.<sup>168</sup> Jon Michaels has in recent years offered the most fulsome exploration of the separation-of-powers anxiety and its connection to administrative law. For Michaels, the genius of the separation of powers is how it “gives voice and venue to any number of important but conflicting values and provides procedures and pathways for those values to collectively inform American public law and governance.”<sup>169</sup> Agencies threaten to upset that scheme, which means that, while “most of us have made our peace” with agencies, “it remains an uneasy, awkward peace, particularly for those troubled by the fact that the separation of powers . . . seemingly fell by the wayside.”<sup>170</sup> Michaels's recent book is a plangent exploration of how the administrative state can be redeemed of its original sin. Among his proposals? An insistence that agencies adhere to strict procedural rules and that courts assiduously enforce compliance with them—what he calls “judicial custodianship.”<sup>171</sup>

The religious language—Michaels speaks of “redeeming” agencies, of the “virtuous” division of powers within an agency, of the “restoration” of the administrative state, of the “sacred” obligations of those vested with state power<sup>172</sup>—is reminiscent of rhetoric on the right that laments the rise of the administrative state and calls for a “restoration, a second coming of the Constitution of liberty.”<sup>173</sup> This is the separation-of-powers liturgy. It resonates in a legal culture in thrall to originalism,<sup>174</sup> and it both constitutes and reinforces what has now hardened into a core precept of administrative law: that the modern state is a fall from grace.

It is long past time to retire this line of reasoning. James Freedman noted almost a half century ago that anxiety about the “the place and function of the administrative process in American government” has been with us from

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heightens the concern that it may slip from the Executive's control, and thus from that of the people.”).

168. See MICHAELS, *supra* note 7, at 8 (“Contemporary scholars, even those . . . generally friendly to progressive government regulation, continue to underscore how much ‘we have struggled to describe our regulatory government as the legitimate child of constitutional democracy.’” (quoting Bressman, *supra* note 155, at 462)).

169. *Id.* at 6.

170. *Id.* at 8.

171. *Id.* at 179–201.

172. *Id.* at 16, 20, 40, 58.

173. Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, no. 1, 1995, at 83, 84 (book review).

174. See William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2373 (2015).

the outset, yielding an “enduring sense of crisis historically associated with the administrative agencies.”<sup>175</sup> But a crisis that endures is not a crisis; it is the steady state. Agencies have wielded legislative, executive, and judicial powers from the beginning of the Republic.<sup>176</sup> Their proliferation was essential to the prosecution of two world wars,<sup>177</sup> to the rise of the post–New Deal welfare state,<sup>178</sup> and to the regulation of novel risks ranging from automobile safety to industrial pollution.<sup>179</sup> Measured against any theory of constitutional interpretation to which liberals claim fealty—whether that’s common law constitutionalism,<sup>180</sup> settlement through historical practice,<sup>181</sup> or the liquidation of constitutional principles<sup>182</sup>—the administrative state’s undiminished persistence stands as a convincing refutation of the view that it’s somehow constitutionally suspect. There must be an expiration date for worrying about the fundamental consistency of the administrative state with our constitutional structure. Surely that date has passed.

Even the originalist case for the unconstitutionality of the modern administrative state is forced.<sup>183</sup> Early Americans may not have anticipated a federal government like the one we have, but it doesn’t follow that the Constitution prohibits Congress from creating one. Not only is that difficult to square with Founding-era practice—again, agencies have been with us from the First Congress—but it runs counter to the original public meaning of a text that broadly empowers Congress to adopt “all Laws which shall be necessary and proper for carrying into Execution” its assigned powers.<sup>184</sup> Nothing in the Constitution purports to limit Congress’s authority to delegate to agencies, unconvincing efforts to read such a limit into Article I’s vesting

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175. James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1043 (1975).

176. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* (2012); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE* (1996).

177. See Mariano-Florentino Cuéllar, *Foreword, Administrative War*, 82 GEO. WASH. L. REV. 1343, 1390 (2014).

178. See TANI, *supra* note 15, at 90.

179. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 125 (1981); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 172 (1990).

180. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

181. See *NLRB v. Canning*, 573 U.S. 513, 525 (2014) (“[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 421 (2012).

182. See generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (describing and “rediscover[ing] the concept of constitutional liquidation”).

183. See Metzger, *supra* note 14, at 42–46 (so arguing).

184. U.S. CONST. art. I, § 8.

clause notwithstanding.<sup>185</sup> Nor do such delegations contravene the Constitution's scheme for dividing power among the branches.<sup>186</sup> Those delegations are in fact enacted *pursuant* to that scheme when they pass through both houses of Congress and are signed by the president.<sup>187</sup> Under black-letter law, they present no separation-of-powers concerns whatsoever. As Justice Scalia explained for the Supreme Court in *City of Arlington v. FCC*:

Agencies make rules (“Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions”) and conduct adjudications (“This rancher’s grazing permit is revoked for violation of the conditions”) and have done so since the beginning of the Republic. These activities take “legislative” and “judicial” forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the “executive Power.”<sup>188</sup>

To read into the spare text of the Constitution some kind of distaste for federal agencies—because they wield “too much” power, because they blend functions, or because they’re too insulated from the public will—is the sort of constitutional adventurism that principled originalists are supposed to eschew.<sup>189</sup>

185. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729 (2002) (“[T]he Article I Vesting Clause . . . simply does not speak to the point at issue.”).

186. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (“[T]he Constitution adopts no freestanding principle of separation of powers.” (emphasis omitted)).

187. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596 (1984) (“[A]s a textual and interpretational matter, the separation-of-powers model need and probably should be taken no further than its use for understanding the interrelationships of the three named actors (Congress, President, Court) at the very pinnacle of government.”).

188. 569 U.S. 290, 304 n.4 (2013).

189. Indeed, there’s a better originalist case for the unconstitutionality of arbitrariness review than there is for the unconstitutionality of federal agencies. Until the late nineteenth century, appellate-style judicial review of executive branch decisions was commonly thought to be unconstitutional. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 20 (2018) (“[T]he Supreme Court’s position was that an appeal to the judiciary from an administrative determination would be unconstitutional.”); Bagley, *supra* note 9, at 1295 (“The federal courts were troubled at the prospect of the judicial revision of discretionary decisions of the executive branch, much as the Supreme Court in *Hayburn’s Case* worried about the constitutionality of executive branch review of final judicial determinations.” (footnotes omitted)). Rooted in the separation of powers, the notion was that each branch of government must have final say over questions within its domain. Consider *Marbury v. Madison*, where Chief Justice Marshall wrote that it was “scarcely necessary for the court to disclaim all pretensions” to “enquir[ing] how the executive, or executive officers, perform duties in which they have a discretion.” 5 U.S. (1 Cranch) 137, 170 (1803). The appellate model of judicial review of agency action was stitched into administrative law only in the early years of the twentieth century. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942 (2011). But no one’s clamoring to dismantle hard-look review on originalist grounds.



It's true, of course, that some of the same functional considerations that animate the separation of powers also animate some pockets of administrative law. Judicial review of the legality of agency action, for example, allows courts to check agencies that exceed boundaries demarked by Congress.<sup>190</sup> Rules requiring agencies to separate adjudicatory functions from prosecutorial and investigative functions mimic the separation of powers among the branches.<sup>191</sup> Civil service protections constrain the president's ability to bend agencies to his will, which may prevent Congress's voice from getting lost in agency hallways.<sup>192</sup> And appropriations law requires the executive branch to annually solicit Congress for funding, which helps to protect its lawmaking functions.<sup>193</sup>

All of this echoes the separation of powers. But none of it is constitutionally compelled. Depending on the felt needs of the time, Congress can and does adjust the division of powers across the branches and within agencies. For example, the legislature routinely prohibits judicial review of politically sensitive or highly technical agency actions.<sup>194</sup> The APA violates a strict separation of functions by assigning to the head of an agency both prosecutorial and adjudicatory powers.<sup>195</sup> The number of political appointees relative to civil servants has swelled over the past five decades, increasing the functional authority of the president to control the bureaucracy and augmenting the Senate's role in confirmations.<sup>196</sup> And not every agency needs an annual appropriation: some are empowered to fund their activities out of exactions imposed on regulated firms, limiting their year-to-year reliance on Congress (and the White House, which makes budget requests).<sup>197</sup>

The point is not to defend any particular deviation from administrative law orthodoxy. The point, instead, is that the Constitution's separation of powers has no legal bearing on the separation of agency functions. As a mat-

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190. 5 U.S.C. §§ 701, 704 (2012) (creating a default rule subjecting final agency action to judicial review).

191. See 5 U.S.C. § 554(d) (2012); see also Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1655–56 (2016) (detailing other aspects of the independence of administrative law judges).

192. 5 U.S.C. § 2102 (2012) (defining the “competitive service”); 5 U.S.C. § 2302 (2012) (detailing “[p]rohibited personnel practices”).

193. 31 U.S.C. § 1341(a)(1)(A) (2012) (making it a crime to spend money in excess of “an amount available in an appropriation”).

194. See Bagley, *supra* note 9, at 1325–27 (discussing Congress's practice of attending to the availability of judicial review).

195. See S. DOC. NO. 77-8, at 57 (1941) (“[Agency heads] have at least residual powers to control, supervise, and direct all the activities of the agency, including the various preliminary and deciding phases of the process of disposing of particular cases.”).

196. See PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 7 (1995) (documenting a 430% increase in the number of political appointees and senior executives between 1960 and 1992).

197. See generally Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555 (2017) (cataloging atypical financing schemes for federal agencies).

ter of institutional design, the risks of amalgamated powers sometimes counsel in favor of their separation.<sup>198</sup> But sometimes the costs of separation outweigh the benefits, and where that's the case, blending powers within an agency offends nothing in the separation of powers.<sup>199</sup>

Legitimacy arguments that turn on agencies' perceived democratic deficits are similarly misplaced. Agencies are themselves the products of a democratic process, one in which Congress and the president have jointly resolved that delegating to an agency is the best way to serve the public interest. Even if the goal is partly to insulate agency decisions from the vicissitudes of plebiscitary politics, that's a democratic choice—and in many cases, a perfectly reasonable one. Public accountability does not mean that agencies must respond like tuning forks to every change in public attitudes, nor does it mean that they must adopt every policy that an unreflective public might endorse. It just means that agencies must be the product of our collective will and subject to our collective control. And they are: what Congress can make, Congress can unmake.

Nor is it even obvious that agencies are less democratic than Congress. Agencies can of course exploit slack in their relationships with their political overseers to pursue their own ends. But so too can the national legislature. Congress's pathologies—chief among them its sensitivity to factional interests and its embrace of destructive tit-for-tat partisan politics, but the list goes on—mean that legislators routinely ignore or minimize the interests of the broad American public.<sup>200</sup> Agency bureaucrats, in contrast, are subject to supervision by a president accountable to a national constituency;<sup>201</sup> have a professional orientation that attunes them to the public interest;<sup>202</sup> and are selected from a more broadly representative pool than politicians.<sup>203</sup> “If one rejects the view that election is the sine qua non of representation,” political scientist Norton Long argued in 1952, “the bureaucracy now has a very real claim to be considered much more representative of the American people in its composition than . . . Congress.”<sup>204</sup> Jerry Mashaw makes much the same

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198. Cf. Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 389 (2012) (arguing that the principle that no one should be a judge in his own case “amounts to little more than a banal counsel that impartiality is sometimes an important value in institutional design”).

199. An independent adjudicator may be necessary to satisfy due process concerns, but that's a different matter. See Strauss, *supra* note 187, at 596–97 (separating “individuals' needs for protection from political intervention in particular cases” from “any general theory about place in government; the former can be provided without necessary regard for the latter”).

200. Cf. Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015).

201. See generally KAGAN, *supra* note 18.

202. See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

203. See Sahil Chinoy & Jessica Ma, Opinion, *How Every Member Got to Congress*, N.Y. TIMES (Jan. 26, 2019), <https://www.nytimes.com/interactive/2019/01/26/opinion/sunday/paths-to-congress.html> (on file with the *Michigan Law Review*).

204. Long, *supra* note 26, at 814.

point: agencies' obligations to explain and defend their decisions with reference to goals that command broad public assent may give them a democratic edge over an often-dysfunctional Congress.<sup>205</sup> One need not crown a victor in some contest of democratic fidelity to appreciate that agencies may not labor under much of a democratic deficit, much less a deficit that calls into doubt their constitutional or legal legitimacy.

Which is why nothing is gained—and much is lost—by defending proceduralism in a constitutional register. It's alluring to believe that scrupulous adherence to procedure can somehow cure the administrative state's purported constitutional sins. But it can't. Constitutional law is generally hostile to second-best solutions.<sup>206</sup> If the administrative state really is constitutionally defective, the only way to restore the balance—to bring the prodigal Constitution home—is to undo the whole damn thing.<sup>207</sup> Because that's unthinkable, the legal legitimacy of the administrative state can never—will never—be secure. In the meantime, any procedure that slows, checks, and constrains agencies will be constitutionally virtuous precisely *because* it hobbles them. And no matter how many more procedures you add, they will never, ever be enough. It's a sucker's game, and we should stop playing it.

### 3. Sociological Legitimacy

Apart from legal legitimacy, commentators are fond of invoking concerns with *sociological* legitimacy. The worry here isn't that federal agencies are legally questionable, but that their authority may be so compromised and tenuous that they are unworthy of public respect. A dearth of sociological legitimacy might manifest as a lack of voluntary compliance with an agency's commands;<sup>208</sup> as a poor reputation, perhaps associated with the belief that the agency is corrupt, venal, or incompetent;<sup>209</sup> or as a loss of faith in collec-

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205. See MASHAW, *supra* note 189, at 177; see also Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655 (2018) (“[F]ar from being shadowy or elitist, the American bureaucracy is very much a demotic institution, demographically diverse, highly accountable, and lacking financial incentives or caste proclivities to subvert popular will . . .”).

206. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (“[T]he ‘fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,’ for ‘[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.’” (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986))).

207. See Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 966 (2018) (“Rhetorically, [originalist] arguments have contributed to a narrative of constitutional corruption that authorizes, and maybe even requires, bold moves to recover a prelapsarian past.”).

208. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4 (2006) (“[N]ormative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior.”).

209. See DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* 46 (2010) (“Whatever the aim of the organization, its *performative reputation* expresses its audiences’ varying judgments of the quality of the

tive action, up to and including the view that the agency lacks the moral authority to command.<sup>210</sup> In contrast to legal legitimacy, which is almost exclusively the domain of lawyers, sociological legitimacy's audience is much broader. It includes those subject to the agency's commands, those whose interests the agency protects, and the public at large.

An agency's legal and sociological legitimacy (or lack thereof) can reinforce one another. Sociological legitimacy turns in part on whether lawyers avow that it is legally legitimate, at least to the extent that the broader public cares what lawyers think. That's one reason that the rhetoric of the constitutional fall from grace matters: as Gillian Metzger has argued, "[e]ven kept to a vocal minority . . . constitutional attacks can have an outsized effect by sowing doubts about administrative legitimacy and thereby limiting the progressive potential of—and public support for—administrative government in the future."<sup>211</sup> Similarly, an agency's widespread public acceptance tends to deflate objections to an agency's legal legitimacy.

A lack of specification about the sort of legitimacy we're talking about—legal or sociological—means that claims about legitimacy tend to slide from one register to the other, lending legitimacy arguments a certain slipperiness. Once the argument is pinned down, however, it's apparent that there's no necessary connection between an agency's sociological legitimacy and its adherence to legally mandated procedures. Legitimacy is not solely—not even primarily—a product of proceduralism. Legitimacy arises more generally from the perception that an agency is capable, informed, prompt, responsive, and fair. (Abbe Gluck, Anne Joseph O'Connell, and Rosa Po have called attention to "the legitimacy of *government getting its work done*."<sup>212</sup>) Mandatory procedures may sometimes advance those values. They can focus agencies on priorities they may have ignored,<sup>213</sup> orient agencies to broader public goals,<sup>214</sup> and improve the quality of agency deliberations.<sup>215</sup> But proceduralism can also channel agency resources into senseless paperwork,<sup>216</sup> empower

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entity's decision making and its capacity for effectively achieving its ends and announced objectives.").

210. See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2463 (2017) (referring to "sociological and public legitimacy" as "the ambient sense in the polity that, whatever grievous errors or injustices the administrative state may inflict in particular instances, its basic existence is acceptable, and the errors and injustices are jurisdictionally valid").

211. Metzger, *supra* note 14, at 5.

212. See Gluck et al., *supra* note 162, at 1842.

213. See TAYLOR, *supra* note 52 (documenting how the National Environmental Policy Act of 1969 spurred agencies to take environmental concerns seriously).

214. See Cass R. Sunstein, *Democratizing Regulation, Digitally*, DEMOCRACY (Fall 2014), <http://democracyjournal.org/magazine/34/democratizing-regulation-digitally/> [<https://perma.cc/HL2G-6PWJ>] (analogizing the information acquired through notice-and-comment rulemaking to the information acquired from the Hayekian price signal).

215. See MASHAW, *supra* note 189, at 196–97.

216. See Bagley, *supra* note 9, at 1288.

lawyers at the expense of substantive experts,<sup>217</sup> and frustrate agencies' ability to achieve their goals.<sup>218</sup> When proceduralism impairs an agency's ability to do its job, the overall effect on agency legitimacy is ambiguous.<sup>219</sup>

What's more, if an agency consistently makes bad decisions, the lawyer's assumption that more procedures will force it to make good ones is quite dubious. Bad decisions may sometimes arise because the agency didn't follow the proper procedures, but they're more often the product of resource constraints, poor leadership, substantive legal rules, organizational dysfunction, ill-trained employees, political infighting, and the like. In general, the best way to build an agency's legitimacy will be to address those concerns, either by turning to Congress for resources and reform, or by enlisting someone who knows something about management. Yet lawyers, not managers, have assumed primary responsibility for shaping administrative law in the United States.<sup>220</sup> And if all you've got is a lawyer, everything looks like a procedural problem.

The point is worth dwelling on. By international standards, lawyers occupy an unusually central role in the United States. That's been true from the beginning: "It is at the bar or the bench that the American aristocracy is found," Alexis de Tocqueville wrote in the 1830s.<sup>221</sup> Nearly two centuries on, lawyers still stand athwart the American state. They make up less than 1% of the population, but more than one-third of the membership of the 116th House of Representatives.<sup>222</sup> Four out of the last ten presidents were lawyers (President Johnson briefly attended law school but did not graduate).<sup>223</sup> And every federal judge is, naturally, a lawyer. As Dan Ernst has recently documented, the lawyers who attended at the birth of the modern administrative state insisted on an intensely legalistic approach to policing the exercise of federal administrative power.<sup>224</sup> Today's lawyers insist on much the same.<sup>225</sup>

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217. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1079 (2011).

218. See MELNICK, *supra* note 75.

219. Cf. Gluck et al., *supra* note 162, at 1839–43 (considering whether unorthodox policymaking in the administrative state enhances or detracts from agency legitimacy).

220. See generally DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014) (documenting the central role that lawyers played in crafting administrative law).

221. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (J.P. Mayer ed., George Lawrence trans., Harper Perennial Modern Classics 2006).

222. Chinoy & Ma, *supra* note 203.

223. See Norman Gross, *Presidential Bar Leaders: Fascinating Facts About America's Lawyer-Presidents*, ABA (June 15, 2017), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2009\\_10/january\\_february/presidential/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2009_10/january_february/presidential/) [perma.cc/9EV2-6R84]; JOHNSON, Lyndon Baines, (1908–1973), BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=j000160> [https://perma.cc/UN6N-UJWA].

224. ERNST, *supra* note 220, at 6–7.

225. See Kagan, *supra* note 52, at 7 (“[I]f lawyers make the laws, promulgate the regulations, and decide the court cases, one would expect them to perpetuate legal forms and values—including ready access to courts, due process norms, strong rights to legal representation,

But is this “rule of lawyers” a healthy approach to governance?<sup>226</sup> By measuring the legitimacy of state power against an antiquated, unrealistic, and court-centric template, lawyers both create and stoke the legitimacy crisis.<sup>227</sup> Indeed, Jeremy Kessler worries that this “lawyerly hegemony” reflects “the capture of the administrative state by lawyers themselves.”<sup>228</sup>

In any event, claims about legitimacy tacitly ascribe the lawyerly anxiety about procedural irregularity to the broader public—a public that, as it happens, is mercifully unaware of picayune debates over administrative procedure.<sup>229</sup> But leveraging the public’s (imaginary) anxieties further insulates a given procedure from challenge. For even if all the lawyers agree that a given procedure is useless, wasteful, and capricious, who’s to say that the public sees matters the same way? If the public is anxious, the performance of adhering to procedural rules may *itself* signal the agency’s conscientiousness and thus conduce to its legitimacy. Framed that way, the claim about legitimacy is unfalsifiable: a procedure is either worthy of adherence for its own sake or worthy of adherence because of what it signals to the public. Indeed, the more burdensome the procedural rule, the more convincing the performance of adhering to that rule will be—and the greater the legitimacy payoff. The rhetoric of legitimacy thus transforms a procedure’s costs into a benefit, supplying a ready defense for even the most taxing procedural rule.

Often, too, administrative law deals with the rights and obligations of corporations, for which the very concept of sociological legitimacy is an awkward fit. In general, these artificial entities will have a relatively instrumental attitude toward agency action, and their compliance with the law is less likely to turn on some ambient sense of legal, ethical, or moral obligation. For them, a cold-blooded weighing of the material risks of noncompliance (agency enforcement, shareholder lawsuits, reputational damage, etc.) will matter more. The claim that proceduralism supports the sociological legitimacy of agencies thus depends on the specification of the relevant audience. When the audience is an individual whose personal rights are at issue, the very act of attending to formal procedures may enhance an agency’s sociological legitimacy.<sup>230</sup> When the audience is corporate America, however, it pays to be skeptical.

More generally, the legitimacy rhetoric tends to assume that agencies are so heedless of their legitimacy that they routinely avoid procedures that

and a significant policymaking and oversight role for the judiciary—that preserve lawyers’ influence on legal reform and implementation.”).

226. See ERNST, *supra* note 220, at 143.

227. Kessler, *supra* note 15, at 726, 762–72.

228. *Id.* at 725, 761.

229. See Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/print-issue/2054> [<https://perma.cc/4L6Q-9EAB>] (arguing that the rhetoric of a “legitimacy crisis” is not “evidence-based” and that “the broad mass of citizenry seems quite pleased . . . to live in an administrative state”).

230. See TYLER, *supra* note 208, at 4 (considering the role that procedural regularity plays in people’s perception of the legitimacy of government action).

might have enhanced it. That assumption is unwarranted. In fact, agencies carefully cultivate their reputations—with the regulated community, the public, Congress, and other audiences—so they can better achieve their goals.<sup>231</sup> Reputation is not quite the same thing as sociological legitimacy, but the two concepts are related: an agency with a poor reputation is more likely to be thought illegitimate. Because procedural regularity can foster a reputation for evenhandedness and care, agencies can and often do go above and beyond the procedural rules that administrative law imposes on them.<sup>232</sup> To be sure, agencies committed to their own mission may be less attentive to public values or private fairness than we might collectively wish. And an agency's concerns with preserving its reputation can be pathological—if they yield a cover-up, for example.<sup>233</sup> But it is wrong to think that agencies will attend to their sociological legitimacy only if they are legally compelled to do so.

It's telling that many of the institutions in our society that enjoy the greatest legitimacy are those least subject to proceduralism. The decisions of the Federal Reserve, for example, matter enormously for lives and livelihoods across the country. Yet those decisions are not subject to the traditional constraints of administrative law. The Fed does not use notice-and-comment rulemaking to set the federal funds rate;<sup>234</sup> as an independent agency, it is exempt from centralized review;<sup>235</sup> and its oversight functions are shielded from judicial superintendence.<sup>236</sup> Peter Conti-Brown's recent book on the Fed's "remarkable metamorphosis" over the twentieth century into a powerful and independent central bank barely mentions administrative procedures or the courts, and for good reason: they're not a big part of the story.<sup>237</sup> Yet the Fed faces no crisis of legitimacy. To the contrary, 63% of Americans hold positive views of the Fed, and just 19% view it unfavora-

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231. CARPENTER, *supra* note 209; Kristina Daugirdas, *Reputation as a Disciplinarian of International Organizations*, 113 AM. J. INT'L L. 221 (2019).

232. See Elizabeth Magill, *supra* note 27, at 860.

233. Daugirdas, *supra* note 231, at 237–40.

234. See, e.g., Regulation D: Reserve Requirements of Depository Institutions, 83 Fed. Reg. 13,104, 13,105 (Mar. 27, 2018) (to be codified at 12 C.F.R. pt. 201) (finding "good cause" because "[n]otice and public comment would prevent the Board's action from being effective as promptly as necessary in the public interest, and would not otherwise serve any useful purpose"); Regulation D: Reserve Requirements of Depository Institutions, 82 Fed. Reg. 7636, 7637 (Jan. 23, 2017) (to be codified at 12 C.F.R. pt. 204) (using precisely the same boilerplate).

235. 12 U.S.C. § 250 (2012).

236. See *Cont'l Bank & Tr. Co. v. Martin*, 303 F.2d 214, 218 (D.C. Cir. 1962) (holding that a Federal Reserve Board order requiring a bank to sell shares to raise capital was unreviewable, taking into account "the important public responsibilities of the Board").

237. PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 6 (2016) ("[T]he law has generally played a limited role in central banking operations." (quoting ROSA M LASTRA, *INTERNATIONAL FINANCIAL AND MONETARY LAW* § 2.01 (2d ed. 2015))); see also Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 LAW & CONTEMP. PROBS., no. 3, 2015, at 65, 66 ("Using traditional mechanisms to make the Fed more politically accountable could substantially impede the Fed's capacity to achieve the aims assigned to it.").

bly.<sup>238</sup> Popularity isn't the same as legitimacy, but, as with reputation, the two are related. And a 63% popularity rating would be the envy of most institutions in the United States today.

Or take the Defense Department, another agency that wields immense power over both lives and resources. The APA exempts anything pertaining to a military function from the procedural obligations that normally attend rulemaking or adjudication;<sup>239</sup> it defines "agency" to exclude courts martial, military commissions, and "military authority exercised in the field in time of war or in occupied territory";<sup>240</sup> and it makes unreviewable questions "committed to agency discretion by law,"<sup>241</sup> which includes sensitive choices about allocating troops or equipment.<sup>242</sup> What is more, as Jonathan Masur has argued, "[c]ourts have diverged drastically from the principles outlined in . . . administrative law jurisprudence when confronted with cases they understand as involving military or wartime matters."<sup>243</sup> Whether defensible on the merits or not, the special treatment afforded to the military has not drained it of legitimacy. To the contrary, as Gallup has reported, "[w]hile Americans' faith in many U.S. institutions has fallen from the levels of previous decades, the public's confidence in the military has remained consistently high."<sup>244</sup>

Until recently, the Internal Revenue Service (IRS) routinely ignored many of the procedural rules that govern other agencies—so much so that "tax exceptionalism" has become a refrain in administrative law.<sup>245</sup> Opponents of tax exceptionalism worry that it saps the IRS of its legitimacy. Kristin Hickman, for example, says that the IRS's "growing reputation for noncompliance with APA requirements" will likely yield "decreased respect for the legitimacy of the tax system and, in turn, a decline in voluntary com-

238. *Majorities Express Favorable Opinions of Several Federal Agencies, Including the FBI*, PEW RES. CTR. (Feb. 14, 2018), <https://www.people-press.org/2018/02/14/majorities-express-favorable-opinions-of-several-federal-agencies-including-the-fbi/> [https://perma.cc/4A5P-CP9D].

239. 5 U.S.C. §§ 553(a)(1), 554(a)(4) (2012).

240. 5 U.S.C. § 551(1)(F), (G) (2012).

241. 5 U.S.C. § 701(a)(2) (2012).

242. *Curran v. Laird*, 420 F.2d 122, 130–33 (D.C. Cir. 1969) (materiel); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 n.2 (2d Cir. 1968) (reserve troops).

243. Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 443 (2005).

244. See Frank Newport, *Americans Continue to Express Highest Confidence in Military*, GALLUP (June 17, 2016), [http://news.gallup.com/poll/192917/americans-continue-express-highest-confidence-military.aspx?g\\_source=military&g\\_medium=search&g\\_campaign=tiles](http://news.gallup.com/poll/192917/americans-continue-express-highest-confidence-military.aspx?g_source=military&g_medium=search&g_campaign=tiles) [https://perma.cc/W6QG-TZVT].

245. See, e.g., Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006). For a recent set of papers on tax exceptionalism, see Amandeep S. Grewal, Foreword, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014).



pliance with the tax laws.”<sup>246</sup> Really? Although the IRS has never been popular—no taxman is—study after study shows that individuals in the United States still pay their taxes, even when the threat of enforcement is low and when paying, in a narrow economic sense, is irrational.<sup>247</sup> To the extent that an agency’s legitimacy sustains a normative commitment to adhering to the law, the IRS would seem to be legitimate, tax exceptionalism notwithstanding. Nor is it plausible to think that taxpayers would more readily pay their taxes if the IRS adhered to the full panoply of procedures applicable to other agencies. The fact of the matter is that the public neither knows nor cares if the IRS cuts the APA’s procedural corners.<sup>248</sup> There may be good arguments in favor of undoing tax exceptionalism. Enhancing the IRS’s legitimacy isn’t one of them.

Finally, consider the thousands of police agencies—federal, state, and local—scattered throughout the country. As Barry Friedman and Maria Ponomarenko remind us, “[o]f all the agencies of executive government, those that ‘police’—*i.e.* that engage in surveillance and employ force—are the most threatening to the liberties of the American people.”<sup>249</sup> Police departments do face challenges to their legitimacy, particularly in minority communities. Nonetheless, they are held in high esteem across most of the public, with 57% of Americans reporting “‘a great deal’ or ‘quite a lot’ of confidence in” the police.<sup>250</sup> Is that because police adhere to rigorous administrative procedures? Not at all. “[F]rom the standpoint of democratic governance, they are the least regulated,” especially when “[c]ompared to the sprawling administrative codes that detail every aspect of agency practice.”<sup>251</sup>

246. Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Petitioners at 5, Fla. Bankers Ass’n v. U.S. Dep’t of the Treasury, 136 S. Ct. 2429 (2016) (No. 15-969); see also Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493, 496 (2016) (arguing that treating the IRS as “an agency like any other” will avoid the threat to its legitimacy). OIRA recently signed a memorandum of understanding with the Treasury Department (which houses the IRS) that would, for the first time, subject “[t]ax regulatory actions” to review—and hired Hickman to help put that commitment into operation. See Memorandum of Agreement, Dep’t of the Treasury & Office of Mgmt. & Budget, Review of Tax Regulations Under Executive Order 12866 (Apr. 11, 2018), [https://cdn.govexec.com/media/gbc/docs/pdfs\\_edit/0412818cc1.pdf](https://cdn.govexec.com/media/gbc/docs/pdfs_edit/0412818cc1.pdf) [<https://perma.cc/6DC6-Y635>]; Prof. Hickman Named Special Adviser to OIRA, U. MINN. L. SCH. (Apr. 18, 2018), <https://www.law.umn.edu/news/2018-04-18-prof-hickman-named-special-adviser-oira> [<https://perma.cc/G7KZ-55X5>].

247. See TYLER, *supra* note 208, at 45–47.

248. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (2013).

249. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1830–31 (2015).

250. Jim Norman, *Confidence in Police Back at Historical Average*, GALLUP (July 10, 2017), <https://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx> [<https://perma.cc/MKS7-P94M>].

251. Friedman & Ponomarenko, *supra* note 249, at 1831.

In truth, administrative law matters much less to an agency's legitimacy than lawyers like to think.<sup>252</sup> And even in those cases when legitimacy claims have some force, an invocation of legitimacy is usually too general and vague to aid in specifying the content of a procedural rule.<sup>253</sup> It's reasonable to think, for example, that the sociological legitimacy of an agency's action turns in part on whether the agency has explained why it did what it did.<sup>254</sup> But how should administrative law cash out that duty to explain? Must the agency offer an explanation at the time it issues its decision?<sup>255</sup> How specific does that explanation have to be?<sup>256</sup> Should courts review the substance of the explanation, and, if so, how vigorously?<sup>257</sup> What should the penalty be for failing to explain adequately?<sup>258</sup> Agencies may have a duty to explain themselves, but it doesn't follow that *Chenery I* was rightly decided or that hard-look review is indispensable.

Similarly, it might be that a rule's sociological legitimacy partly turns on whether the public has been afforded a chance to be heard prior to its adoption. But agencies can (and do) discharge their duty to listen in all sorts of ways: through stakeholder meetings, the designation of public representatives, structured briefing of competing views, advertising campaigns to solicit input, negotiated rulemaking, and more. An agency's legitimacy does not depend on adhering to the finicky particularities of notice and comment. An invocation of legitimacy thus contributes nothing to a defense of those particularities.

Administrative lawyers also tend to overlook the ways that proceduralism can erode legitimacy. One example: In a perceptive report on agency guidance, Nicholas Parrillo has documented the wide range of different approaches—ranging from formal notice and comment to off-the-record phone calls—that agencies use to solicit feedback on guidance documents. He concludes that more procedural formality may sometimes yield greater legitimacy, but not always. At times, the costs of notice and comment can be

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252. Cf. Mashaw, *supra* note 72, at 421 (“Administrative law has always seemed to walk a fine line between impertinence and irrelevance.”).

253. Cf. Metzger, *supra* note 14, at 44 (“The problem for anti-administrativists . . . is that background separation of powers concerns can be addressed in a variety of ways, including approaches that embrace the administrative state rather than cabin it.”).

254. See generally MASHAW, *supra* note 189 (building an extended argument to that effect).

255. Cf. Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 666 (1997) (arguing that “courts might avoid many remands by showing more leniency in allowing counsel on appeal to fill interstitial gaps in overly terse agency rationales”).

256. Cf. *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (cautioning “against an overly literal reading of the statutory terms ‘concise’ and ‘general’”).

257. Cf. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (holding that “the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard”).

258. Cf. Bagley, *supra* note 10, at 302–07 (explaining that “lower courts have exercised more remedial flexibility than *Chenery* appears to display”).

so acute that various stakeholders lose faith in the agency's ability to address their concerns. Notice and comment thus becomes "a factor that kills legitimacy, at least for part of the community."<sup>259</sup>

By the same token, judicial review is supposed to enhance sociological legitimacy because it encourages agencies to mind their p's and q's. Yet it also advertises to the world, sometimes in mocking tones, the deficiencies of agency action.<sup>260</sup> Indeed, agencies don't relish losing in court precisely *because* it damages their reputations, which can have a direct, negative effect on their legitimacy.<sup>261</sup> The effect is also asymmetric: it's news when an agency loses in court, but rarely when it wins. Even more insidiously, high-handed judicial review can suggest that judges are committed to political neutrality and reasoned decisionmaking, while agencies are reckless, sloppy, and partisan.<sup>262</sup> That attitude breeds suspicion not only of agencies but also of the entire project of democratic governance. And while the risk of bad publicity may sometimes spur an agency to improve its performance, it may also lead to fatalism within the agency's ranks.

To cope with the encrustation of procedural constraints, resource-strapped agencies may sometimes take to ignoring or sidestepping them.<sup>263</sup> In so doing, they display a disregard for law that can itself undermine their legitimacy. FOIA, for example, imposes obligations on agencies that they cannot possibly meet, leading to widespread disenchantment with those very agencies. The result, as David Pozen argues, is that "[t]he FOIA process *performs* the very sort of government dysfunction that the Act is then enlisted to expose."<sup>264</sup> The point generalizes. The claim that an agency has avoided procedural rules becomes a focal point for attack, whether or not the rules do more harm than good. Agencies are then bashed in court and in the press for their purported negligence or carelessness. Sometimes the bashing is warranted; often it is not. Either way, it's hard to see how publicly shaming federal agencies for failing to do what they were never equipped to do conduces to their legitimacy. It instead reinforces the perception that government is incompetent.

In any event—and this is the really crucial point—we've now run a half-century experiment into whether stringent procedural rules will yield an

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259. PARRILLO, *supra* note 141, at 165.

260. See, e.g., *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (necding EPA for arguing that "daily" could be read to mean "seasonal" or "annual").

261. See, e.g., CHARLES R. EPP, *MAKING RIGHTS REAL* (2009) (documenting how the "engine of pressure" to reform police departments, government human relations departments, and play equipment was not the financial penalties associated with tort suits but the bad publicity associated with lawsuits and the concomitant threat to professional legitimacy).

262. Cf. Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 75 (documenting the rhetorical strategies that the Supreme Court uses to suggest that it is "somehow removed from the arena of partisan politics").

263. See Mashaw, *supra* note 72, at 420–21 (highlighting this risk).

264. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1135 (2017).

administrative state that its opponents view as fundamentally legitimate. That experiment has failed. The root of antipathy to federal agencies is not that they act without procedural safeguards. It is distrust of state power, full stop. Liberals were wrong to ever think that embracing legally mandated procedures would yield some kind of bipartisan détente that empowered agencies to get on with their work. They are wrong today to indulge the same tired belief.

My claim is not that proceduralism and sociological legitimacy have nothing to do with one another. My claim is that it's a mistake to assume, without knowing more about the effects of particular procedures at particular agencies, that the relationship is a positive one. One example to drive the point home. After the Supreme Court twice rebuked EPA and the Army Corps of Engineers for reading the Clean Water Act too expansively,<sup>265</sup> the agencies launched a rulemaking to narrow their definition of a key statutory term, "waters of the United States." The new rule aimed to give property owners clarity about which waters on their property fell within the agencies' jurisdiction. Knowing that any rule they selected would be controversial, and recognizing the need for input and technical assistance, the agencies launched a vigorous outreach campaign, enlisted the aid of an independent scientific advisory board, reviewed hundreds of thousands of their past jurisdictional determinations, received and responded to more than a million comments, and compiled a scientific report canvassing 1,200 peer-reviewed studies.<sup>266</sup>

Over the course of the protracted rulemaking, the agencies returned again and again to a key question: Which wetlands are closely enough related to navigable waters that they should count as "waters of the United States"? For decades, the agencies had used a loose standard to judge whether a wetland was an "adjacent water" that fell within their jurisdiction.<sup>267</sup> Many property owners and states wanted the agencies to adopt a crisp rule, one based on the distance of the wetland from so-called "jurisdictional waters." The debate—rule or standard?—was a central theme of the rulemaking. Initially, EPA and the Army Corps proposed defining adjacent waters through a "reasonable proximity" standard.<sup>268</sup> But because "this may result in some uncertainty," they also invited comments on "other reasonable options," including bright-line distance limitations.<sup>269</sup> All told, the agencies received hundreds of comments about the definition of adjacent waters, the majority

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265. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

266. Clean Water Rule, 80 Fed. Reg. 37,054, 37,057, 37,065 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

267. See, e.g., *Permits for Activities in Navigable Waters or Ocean Waters*, 40 Fed. Reg. 31,320 (proposed May 6, 1975).

268. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,208 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328).

269. *Id.*

of which concluded that the proposed definition of “adjacent” was “too vague” and “too expansive.”<sup>270</sup> The “dominant request” was to adopt a rule.<sup>271</sup>

So the agencies did.<sup>272</sup> A number of states promptly sued, arguing, among other things, that the final rule was not a logical outgrowth of the proposed rule—even though many of those states had themselves specifically asked the agencies to adopt bright-line distance limitations.<sup>273</sup> The Sixth Circuit agreed with the plaintiffs—it called the rulemaking process “facially suspect”—and entered a nationwide injunction.<sup>274</sup> Shortly after, President Trump took office. On his instructions,<sup>275</sup> EPA and the Army Corps suspended the Obama-era rule to make way for its rescission.<sup>276</sup>

One year after Trump’s inauguration, the Supreme Court overturned the Sixth Circuit injunction on jurisdictional grounds.<sup>277</sup> Yet that ruling left intact the agencies’ suspension of the Obama-era rule—until August 2018, when a South Carolina district court held that the suspension was itself unlawful because it didn’t go through notice and comment.<sup>278</sup> The court entered a nationwide injunction against the Trump Administration’s effort to suspend the Obama-era rule, which thus sprang back into force. So too, however, did two district court injunctions that had previously been entered against the Obama-era rule, one out of North Dakota covering thirteen states<sup>279</sup> and the other out of Georgia covering another eleven.<sup>280</sup> As a result of the competing injunctions, roughly half the states are subject to the Obama-era rule and the other half to older rules of dubious legality. The precise figure is in flux—appeals are pending, as are other lawsuits elsewhere against the Obama-era rule.<sup>281</sup> The Trump Administration, in the meantime,

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270. U.S. ENVTL. PROT. AGENCY, CLEAN WATER RULE RESPONSE TO COMMENTS – TOPIC 3: ADJACENT WATERS 18, [https://www.epa.gov/sites/production/files/2015-06/documents/cwr\\_response\\_to\\_comments\\_3\\_adjacent\\_waters.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_3_adjacent_waters.pdf) [<https://perma.cc/7YCE-W8QE>].

271. *Id.*

272. Clean Water Rule, 80 Fed. Reg. 37,054 (July 13, 2015) (to be codified at 33 C.F.R. pt. 328).

273. *In re* EPA, 803 F.3d 804, 807 (6th Cir. 2015).

274. *Id.* at 807, 809.

275. Exec. Order No. 13,778, 3 C.F.R. 298 (2018).

276. Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328).

277. Nat’l Ass’n of Mfrs. v. Dep’t of Def., 138 S. Ct. 617 (2018).

278. S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018) (entering nationwide injunction of the rule’s suspension).

279. North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015).

280. Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018).

281. See, e.g., Ohio v. EPA, No. 2:15-CV-2467, 2019 WL 1368850, at \*2 (S.D. Ohio Mar. 26, 2019) (“The Government has appealed the South Carolina District Court’s Order that enjoined the Suspension Rule. The Government also moved the District Court to stay the injunction pending appeal. The District Court has denied that motion. As such, the Clean Water Rule is currently in effect in the Plaintiff States [Ohio and Tennessee].” (citations omitted)).

is proceeding with a rulemaking to rescind the Obama-era rule and to adopt a third set of rules,<sup>282</sup> which will themselves be embroiled in litigation for years.

As a result, seventeen years after the Supreme Court first held that EPA's and the Army Corps' regulations were legally defective,<sup>283</sup> no replacement is in place. Many more years will pass before one is. Several different features of proceduralism are at work here: the ready availability of preenforcement review, the excessiveness of notice-and-comment rulemaking, and the zealous application of the logical outgrowth standard. In combination, they have made it next to impossible for the agencies to offer any certainty about the scope of the Clean Water Act. There's nothing ennobling about that. It doesn't conduce to EPA's or the Army Corps' legitimacy to watch them get tripped up on technicalities in politically charged lawsuits brought by those with substantive objections to their interpretation of the Clean Water Act. Quite the opposite.

## B. *Public Accountability*

### 1. The Rhetoric of Capture

When legitimacy runs out as a justification for proceduralism, claims about the threat to public accountability from "agency capture" come to the fore. The meaning of capture has shifted over the decades,<sup>284</sup> and the term is sometimes used loosely to refer to the exercise of any undesirable influence over an agency. When used more precisely, however, capture is understood to arise when relatively small groups deploy their superior organizational abilities to distort agency decisions at the expense of the diffuse public.<sup>285</sup> So understood, capture is a regulatory manifestation of public choice theory.<sup>286</sup>

"Agency capture" is in many respects an unfortunate term. As a metaphor, it suggests an all-or-nothing state of affairs—that an agency is either free from undue influence or wholly controlled by it. In truth, capture is a matter of degree. Few agencies are so imprudent as to ignore groups with an

282. See Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

283. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

284. Early conceptions of capture saw agencies as the clients of the industries they regulated, concerned not with the public interest but with protecting incumbent industries from competitive pressures. See Bagley & Revesz, *supra* note 8, at 1284–85. For two influential accounts, see MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955), and Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467, 498 (1952). Over time, "more subtle explanations of industry orientation" have come to the fore. Stewart, *supra* note 149, at 1685.

285. See Nicholas Bagley, *Response, Agency Hygiene*, 89 *TEX. L. REV.* SEE ALSO 1, 2 (2010); see also Merrill, *supra* note 35, at 1053.

286. See OLSON, *supra* note 147; George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

intense interest in their work; by the same token, few agencies are strictly under their thumbs.<sup>287</sup> Generalized invocations of capture also gloss over the causal mechanism through which capture is supposed to occur. It's simply assumed, usually without evidence or explanation, that powerful groups will find ways to twist regulatory outputs to their ends. That dark, conspiratorial view implies that agencies have neither the internal resources nor the inclination to resist capture. Corruption is just the nature of the beast.<sup>288</sup>

Even setting capture's rhetorical baggage aside, nailing down the scope and extent of capture presents a difficult and probably insoluble problem.<sup>289</sup> How do you know when private interests have improperly pulled the levers of power to their advantage? In a democracy, it is not intrinsically problematic for a committed minority to prevail over a large, somewhat apathetic majority. To the contrary, depending on the relative intensity of views in play, any plausible conception of deliberative democracy suggests that the minority should sometimes prevail. Agency capture thus does not arise merely because the agency attends to narrow interests. Capture requires something more—namely, a judgment that the pressure brought was undue in some sense.<sup>290</sup> But what counts as undue? “[B]y itself,” as Einer Elhauge has argued, interest group theory “cannot generate any normative conclusion about whether the group’s influence was disproportionate to the influence it should have had.”<sup>291</sup> A belief that capture exists must thus rest on an “implicit normative baseline[.]”<sup>292</sup> Maybe the agency has not maximized net benefits, maybe its action has unacceptable distributional consequences, or maybe the agency has squandered property held in the public trust. Whatever the baseline, any assessment of capture will turn on a judgment of whether the agency has inappropriately privileged a well-knit group’s views over the public’s.

So when we fight about capture, we’re really fighting over whose views ought to matter. Naturally, we don’t agree about that, which is why there’s no consensus over the extent to which agency capture has taken hold at a particular agency or across the administrative state. At the same time, even if capture is hard to nail down in a satisfactory way, we all recognize that small, well-heeled groups do punch above their weight when it comes to getting what they want from government. Capture thus manages the trick of being both elusive and ubiquitous: an ever-present fear about the administrative

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287. See WILSON, *supra* note 103, at 75–76.

288. Cf. William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE 25 (Daniel Carpenter & David A. Moss eds., 2014).

289. See Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE, *supra* note 288, at 1.

290. See Bagley, *supra* note 285, at 4.

291. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 51 (1991).

292. *Id.* at 34.

state, but a fear that can't be measured and can never be entirely eradicated.<sup>293</sup>

If agencies are at perpetual risk of succumbing to capture, it's natural to cast about for solutions. For administrative law, those solutions come in the form of procedures.<sup>294</sup> And so every administrative procedure under the sun has been defended on the ground that it combats capture. Notice-and-comment rulemaking, for example, "makes it much more difficult for there to be agency capture."<sup>295</sup> Cost-benefit analysis "furthers the important good governance aim of avoiding agency capture by regulated parties."<sup>296</sup> OIRA guards against the risk that regulation will "favor narrow, well-organized groups at the expense of the general public."<sup>297</sup> Even formal rulemaking might help "where regulatory capture is likely."<sup>298</sup>

Broadly speaking, administrative lawyers tend to assume that any agency procedure that demands more deliberation, more transparency, and more rationality will mitigate the risk of agency capture. The assumption is in some respects reasonable. A more deliberative action will incorporate input from a wide array of actors, including the diffuse public, and possibly reconcile their competing priorities. A more transparent decision will allow courts and voters to hold agencies accountable when they cater to private interests at the expense of the public. And a more rational decision will reject partisan influence and special pleading, adhering instead to neutral principles rooted in the common good.

## 2. Capture Deflated

It is nonetheless wrong to assume that an agency procedure will discourage capture simply because it aims to foster deliberation, transparency, and rationality. The reverse will often be true.<sup>299</sup> The reason is simple. To

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293. See Stewart, *supra* note 149, at 1684–85 (noting the "dogmatic tone that reflects settled opinion" surrounding "the thesis of persistent bias in agency policies").

294. Though not always. Rachel Barkow, for one example, has argued that agencies can and should be designed at the outset to resist capture. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010). Her focus on ex ante institutional design, rather than ex post procedural control, is unusual in the literature.

295. David Fontana, Essay, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 91 (2005); see also Seifter, *supra* note 152, at 1330 (noting the common view that "[a]ctive participation from diverse entities can lessen the risk that factional interests dominate, or even capture, agency decisions" (footnote omitted)).

296. Rose & Walker, *supra* note 157, at 14.

297. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080 (1986).

298. Kent Barnett, *Looking More Closely at the Platypus of Formal Rulemaking*, REG. REV. (May 11, 2017), <https://www.theregreview.org/2017/05/11/barnett-platypus-formal-rulemaking/> [<https://perma.cc/E7S7-L2EL>].

299. Cf. Gluck et al., *supra* note 162, at 1842–43 ("The obvious challenge for any normative evaluation of accountability is that deliberation and public input are one type of measure,



avoid getting drawn into contentious debates over political power, administrative law has a penchant for formal procedural equality: everyone is afforded an equal *opportunity* to advance the values of deliberation, transparency, and rationality. So industry associations participate on the same footing in the administrative process as environmental groups, and every poverty-stricken member of the public has the same right to have her voice heard as the wealthiest banker. If procedural equality does not do enough to mitigate capture, administrative law scholars are prone to call for still more procedures that afford still more opportunities to participate, monitor, and push back. Maybe then the public's voice will finally cut through the interest-group din.

All of this recalls Anatole France's quip: "In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread." Administrative law takes public choice theory seriously when it diagnoses capture as a central pathology of the administrative state. In offering a cure, however, it overlooks what the theory implies about administrative law's formally neutral brand of proceduralism. Exploiting a procedural opportunity takes time, attention, and resources. The same interest groups that are the villains of the capture narrative can deploy their relative organizational advantages to pull procedural levers with more frequency and greater expertise than groups representing the public interest. Under some conditions, the proliferation of procedural opportunities will magnify the ability of well-organized groups to influence agency decisions, not the reverse. Proceduralism can thus exacerbate the very capture dynamic that it's meant to remedy.

As with legitimacy, there is no necessary or straightforward connection between procedural rules and the mitigation of capture. Some administrative procedures may sometimes make agencies more attentive to the public interest. Others, however, will afford the powerful with yet more chances to bend agencies to their will. It all depends on how the procedure plays out on the ground. In pressing the point, I mean to remain agnostic about whether facially neutral procedural rules, over time and on balance, will systematically and inevitably privilege the voices of the haves over the have-nots.<sup>300</sup> If that were the case, the solution might be for administrative law to embrace a more overtly political (and controversial) agenda—one that amplified workers' voices, for example, even as it muffled industry's.<sup>301</sup> I'm sympathetic to that argument, but it is not mine here. I mean, instead, to argue that administrative law's reflexive proceduralism fares poorly even when measured

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but direct legislative accountability is another, and the ability of government to respond and act is yet another. These values are often in tension . . .").

300. Cf. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

301. See K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315 (2018) (arguing for such an approach).

against what I take to be the uncontroversial goal of avoiding interest-group capture. There's vast room for improvement.

In what follows, I'll consider three domains in which the anti-capture story is especially prominent: notice-and-comment rulemaking, FOIA, and judicial review. In all three cases, administrative law's taste for creating formally neutral procedural opportunities has given small, well-organized groups—in particular, industry—immense leverage over federal agencies. If the glib anti-capture narrative cannot justify even these procedural rules, it's unlikely to have much persuasive force in any context.

*Notice-and-comment rulemaking.* Consistent with the predictions of Mancur Olson's work on group mobilization,<sup>302</sup> business organizations dominate the rulemaking process.<sup>303</sup> Jason Webb Yackee and Susan Webb Yackee, for example, examined forty rules across four agencies and found that business interests submitted nine times as many comments as did public interest groups.<sup>304</sup> Those comments were also of higher quality and appeared more likely to provoke changes. "The implication of our empirical results is relatively clear: agencies appear to alter final rules to suit the expressed desires of business commenters, but do not appear to alter rules to match the expressed preferences of other kinds of interests."<sup>305</sup> The Yackees' findings accord with a study by Wendy Wagner, Katherine Barnes, and Lisa Peters, who examined ninety EPA rules governing the release of air toxins. Industry submitted 81% of all the comments, with public interest groups submitting just 4%.<sup>306</sup> They found that an agency's rule was more apt to be weakened as the number of comments increased.<sup>307</sup> Earlier work from Cary Coglianese, who examined the development of hazardous waste rules at EPA over a three-year period, similarly concludes that industry groups submitted more than thirty times more comments than public interest groups.<sup>308</sup> Other studies reinforce these findings.<sup>309</sup>

302. See OLSON, *supra* note 147.

303. See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 132 (2008) (reviewing studies and concluding that "business or industry interests participate in agency decisionmaking processes significantly more than other, broad-based types of interests, especially as measured by the frequency and volume of their participation").

304. Yackee & Yackee, *supra* note 148, at 133.

305. *Id.* at 135.

306. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128–29 (2011).

307. *Id.* at 131.

308. Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 743 (1996) (finding that industry submitted 67% of all comments, where 2% came from environmental groups).

309. See Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. POL. 1191, 1199–1205 (2001) (examining similar parties of lobbying activity); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 126–42 (1998) (reviewing studies); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998) (finding that business

Why do more comments appear to buy more influence? The empirical picture is puzzling because, as Steve Croley has argued, the informational value of comments has very little to do with their volume. In theory, a single comment from a public-interest group should be at least as persuasive as a deluge of duplicative comments from industry.<sup>310</sup> But the actual practice of notice and comment complicates that pat story.<sup>311</sup> Although agencies in principle need only to respond to “vital” comments,<sup>312</sup> they cannot reliably anticipate which comments a reviewing court might someday find vital. Risk-averse agencies therefore have little choice but to respond, often in punitive length and detail, to all the substantive comments they receive. At the same time, administrative law places no filter on the information that commentators can submit to agencies. Recognizing as much, industry swamps agencies with hundreds of comments containing thousands of pages of unstructured, highly technical information, typically pertaining to regulatory costs.<sup>313</sup> Responding to those comments not only drains agency resources, but it also raises the costs of participation for everyone else. Groups that lack the resources to participate on the same footing as industry—which is to say, groups representing a diffuse public interest—find themselves at a disadvantage in debating industry’s technical arguments. Facing a stark participation imbalance, a rational agency will attend to the interests of those who credibly threaten legal action.<sup>314</sup> To quell the threat of litigation, the agency may cave on key industry demands: better a weak rule than no rule at all.<sup>315</sup> As Wagner puts it, “[e]ven if the consequences are unintended, the parties with the resources to feed the information monster will benefit, to the detriment of actors with fewer resources and the administrative system as a whole.”<sup>316</sup>

For a time, the rise of the internet was thought to have the potential to reshape these persistent participatory imbalances. Surely the public would more regularly voice its concerns, the thinking ran, if submitting a comment

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participates disproportionately in notice-and-comment rulemaking); STAFF OF S. COMM. ON GOV'T AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION, VOL. III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS 12 (Comm. Print 1977) (same).

310. See CROLEY, *supra* note 303, at 136.

311. Wagner, *supra* note 91.

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

313. Wagner, *supra* note 91, at 1325; see also Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 152 (2012) (“In practice, agencies are often swamped by comments and pay serious attention to only some of them. They attend to those comments filed by repeat players with instrumental power and may send the rest off to outside contractors to be ignored.”).

314. See Wagner, *supra* note 91, at 1333–34 (“Even when agency staff can withstand the technical minutia coming at them at high speed and under tight time constraints, they face an administrative record that is badly lopsided, and threats of lawsuits against the substance of their regulation that come predominantly from only one sector (industry).”).

315. See *id.* at 1351.

316. *Id.* at 1326.

were as easy as sending an email. Yet “e-rulemaking” hasn’t lived up the hype, notwithstanding assiduous efforts to cultivate public participation.<sup>317</sup> It takes resources, time, and expertise to monitor an agency’s rulemaking docket, read voluminous Federal Register notices, cut through the technical jargon, and formulate a genuinely useful comment. It’s rational for an individual not to make that sort of investment given how little she stands to gain from the slight possibility of changing an agency’s mind. It’s true that, in rare cases, the internet has facilitated the submission of huge numbers of comments from individuals, but to what end? A torrent of general comments of support or opposition may offer some rough sense of public sentiment, but they offer little in the way of argument or data and are unlikely to shape the agency’s thinking.<sup>318</sup>

Indeed, lopsided participation during notice and comment may understate the imbalance. Judicial enforcement of the logical outgrowth standard has shifted much of the debate over agency rules to the pre-notice stage, where industry has an even more sizeable advantage.<sup>319</sup> In a recent study on the Volcker Rule, adopted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Kimberly Krawiec finds that 93% of all contacts with federal agencies prior to the rule’s issuance came from financial institutions and their representatives.<sup>320</sup> Similarly, in reviewing pre-notice contacts at EPA, Wagner, Barnes, and Peters report that industry groups had *170 times* the number of meetings, letters, and phone calls with the agency than public interest groups.<sup>321</sup>

The modern notice-and-comment process is thus poorly designed to mitigate capture. For many rulemakings, perhaps most, it may make the problem worse. That’s not to deny that notice and comment sometimes gives groups representing the diffuse public interest a voice they would have otherwise lacked. But a notice-and-comment process designed to combat capture would look very different than the one we have. Wagner, for example, offers several reform proposals, including the subsidization of groups oriented to the public interest<sup>322</sup> and strict limits on the volume of information introduced into the notice-and-comment process.<sup>323</sup> It is a failure of legal imagination to assume that fostering public participation demands a set of

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317. See Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking* (2009), 62 ADMIN. L. REV. 279 (2010).

318. Mendelson, *supra* note 154.

319. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992).

320. Kimberly D. Krawiec, *Don’t “Screw Joe the Plummer”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 59 (2013).

321. Wagner et al., *supra* note 306, at 125. Industry similarly dominates the OIRA review process, albeit to a less significant degree. Steve Croley examined OIRA’s meeting logs over an eight-year period and found that “narrow interests” (including industry) participated at twice the rate of “broad interests” (including public-interest groups). Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 858 (2003).

322. Wagner, *supra* note 91, at 1416.

323. *Id.* at 1419.

procedural rules that give a decisive advantage to groups that do not represent the public interest.

*Transparency Laws.* A similar dynamic plagues FOIA, the primary transparency law governing federal agencies. As Margaret Kwoka has meticulously documented, FOIA is used most intensively by “private entities that seek information as part of their profit-making enterprise.”<sup>324</sup> It’s not even close. News outlets submit a paltry number of FOIA requests relative to corporate interests, which use FOIA to unearth information about competitors, to compile and resell government data at a profit, and to advise investors on an agency’s regulatory strategy.<sup>325</sup> None of this advances the public interest; to the contrary, as Kwoka argues, FOIA often seems to function as little more than an implicit corporate subsidy.<sup>326</sup> Worse, “[t]he sheer volume of commercial requests likely contributes to the delay and inattention often experienced by constituencies at the heart of FOIA’s intended use: the press and watchdog groups whose mission is to enhance external oversight of governmental activity and promote democratic governance.”<sup>327</sup> FOIA thus allows private interests to clog the information channels, compromising its efforts to foster transparency to the public.

Quite apart from the direct compliance costs, the costs to agencies of responding to the flood of FOIA requests—and those costs are enormous<sup>328</sup>—divert agency resources and personnel away from the agency’s mission and into information management. FOIA thus imposes what David Pozen calls a tax on bureaucratic capacity, raising the costs of agency action in a manner that (not coincidentally) aligns with the business community’s preference for a weakened administrative state.<sup>329</sup> And for what? Evidence that FOIA systematically promotes good governance is elusive, even as the Act discourages frank internal deliberation, undermines agencies’ ability to cooperate with private actors, and embarrasses agencies that lack the capacity to expedi-

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324. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1365 (2016); see also David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 156–57 (2018) (“Populist in principle, this refusal to ration the transparency entitlement—coupled in the case of FOIA with a requester-driven, litigation-intensive procedure—has led in practice to a user base heavily skewed toward business enterprises. Many firms have a strong, steady motivation to learn what their regulators and competitors are up to, or to resell taxpayer-subsidized information to third parties. As a class, they are also far more likely than citizen-investigators or resource-strapped nonprofits to have the time, money, and expertise to navigate the FOIA bureaucracy, monitor congressional hearings, or parse high-value datasets—and then to exploit the information they acquire for private gain.” (footnote omitted)).

325. See Kwoka, *supra* note 324, at 1365.

326. See *id.* at 1415.

327. *Id.*

328. See Pozen, *supra* note 264, at 1135.

329. See *id.* at 1113, 1123.

tiously process FOIA requests.<sup>330</sup> Far from mitigating capture, “FOIA’s request-driven structure . . . invites a kind of corporate capture.”<sup>331</sup>

That’s not an indictment of all transparency laws. It’s just an indictment of FOIA. Pozen suggests, for example, shifting toward a regime in which agencies would be required to disclose information without waiting for a request from a private actor.<sup>332</sup> FOIA itself, however, is inattentive to the way that corporate requesters can exploit its operational machinery for their private ends.<sup>333</sup>

*Hard-look review.* The widespread claim that hard-look review of agency action will discourage agency capture is equally misplaced.<sup>334</sup> It rests on the assumption that “by changing the procedural rules that govern agency decisionmaking and by engaging in more aggressive review of agency decisions [the courts] could force agencies to open their doors—and their minds—to formerly unrepresented points of view, with the result that capture would be eliminated or at least reduced.”<sup>335</sup> The story is appealing, and it resonates in a legal culture that venerates the righteous judge who stands above political

330. See *id.* at 1125–28.

331. *Id.* at 1117. FACA and GITSA have also been criticized on similar grounds. *Id.* at 1128. Because of the harsh glare of publicity, agencies have curtailed their use of advisory committees, and commissioners of multimember agencies rarely meet to discuss policy. See Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 953 (2009) (“The requirements FACA imposes on agencies . . . have significantly curtailed or even inhibited agencies’ use of advisory committees.”); Randolph May, Recent Development, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 416 (1997) (noting the “fairly widespread consensus” that “the Act’s ‘open meeting’ requirement curtails meaningful collective deliberation and substantive exchange of ideas among agency members”).

332. See Pozen, *supra* note 264, at 1148–55.

333. In general, “[p]rogressive-minded reformers of the 1960s and 1970s . . . focused too much on the power of their transparency tools and not enough on the power structures that would condition their use.” Pozen, *supra* note 324, at 157. Much the same could be said about the procedural constraints that the same set of reformers stitched into administrative law. See Merrill, *supra* note 35, at 1040 (“[W]ithout denying that a desire to promote progressive causes may have influenced some of these decisions, the reforms were in fact poorly designed to achieve such a targeted result.”).

334. For a sustained argument that concerns with agency capture drove the adoption of hard-look review, see Merrill, *supra* note 35. For additional support, see Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 880 (2007) (“Since the late 1960s, courts concerned about industry capture of administrative agencies have used [Section 706(2)(A) of the APA] to apply tough substantive standards to agency decision making.”), and Catherine M. Sharkey, State Farm “*With Teeth*”: *Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1650 (2014) (“Judicial review might mitigate the risk of capture of agencies by the parties they regulate.”).

335. Merrill, *supra* note 35, at 1043; see also Kagan, *supra* note 52, at 35 (“Public interest lawyers . . . wanted to expand governmental regulatory power, but they also were profoundly mistrustful of politicians and administrators, whom they viewed as inherently unresponsive or as corruptible by regulated businesses. The reformers’ solution was to create an administrative process that would mimic the adversarial, formal, participatory procedures of courts—the one governmental institution they felt they could either trust or influence.”).

horse-trading and seedy backroom deals. Yet the story holds true only if at least five assumptions about agency incentives, interest-group dynamics, and judicial capacity are also true. Each of these assumptions is either demonstrably false or likely to be so. Their fragility knocks the legs out from under the claim that hard-look review will reliably mitigate capture.

First, judicial review will induce an agency to avoid capture only as to those decisions that, in the agency's view, are likely to be challenged in court. When industry dominates the interest-group environment, however, capture will often manifest as agency *inaction*, which is almost never subject to meaningful judicial review. (Capture may also manifest in the form of safe harbors from enforcement—but standing doctrine and finality rules will likely preclude review of any guidance that extends such safe harbors.<sup>336</sup>) If judicial review will never come to pass, it affords an agency no reason to resist capture.

Second, agencies must believe that resisting capture will improve the likelihood that their decisions (at least those that can be challenged) will be upheld in court. The opposite is probably closer to the truth. Mounting a lawsuit is not cheap, and those same well-organized groups that drive a capture dynamic will have superior means to protect their interests in court.<sup>337</sup> Groups representing the public interest will sue less frequently and, because they play a less prominent role in shaping the administrative record, may be less successful in the suits they bring. To test the point, I collected all the reported cases from the D.C. Circuit and the D.C. District Court involving challenges to agency rulemaking in 2015 and 2016. Of the 106 cases in the sample, sixty-six—or about 62%—were brought by regulated entities or their trade associations. Public interest groups participated in only half as many cases (thirty).<sup>338</sup> That's a less stark imbalance than we see in notice and comment, but courts are certainly not doing much to correct power imbalances. As a result, and contrary to the neat anti-capture story, the risk of judicial review may tempt agencies to be especially solicitous to the very groups that are responsible for capture.

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336. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 420–21 (2007) (“[W]hen an agency enunciates its approach to enforcing regulatory standards in a guidance rather than a rule, it will likely deny a regulatory beneficiary the opportunity for judicial review that is eventually afforded to a regulated entity.”).

337. See Frank B. Cross, Essay, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 355 (1999) (arguing that “the judicial process is more susceptible to manipulation by narrow interests than are the more democratic branches of government and that expanding judicial review of those branches would increase rather than decrease the influence of narrow special interests on public policy”).

338. These figures should be taken as rough estimates for a number of reasons: (1) reported opinions will correlate only loosely with the number of lawsuits; (2) multiple cases may be consolidated; and (3) multiple rules can be challenged in any given case. Data supporting the estimate are available upon request. Cases that appeared in both the district court and the court of appeals in the two-year span were only counted once, as were cases that resulted in multiple opinions.

Third, hard-look review will discourage capture only if the actions that courts invalidate as arbitrary are more likely to be the products of capture than those they sustain. That's also a dubious assumption. Agencies do not advertise their corruption. Instead, they present public-regarding justifications for their actions. Those justifications may in rare cases be so thin that courts reject them as pretext: NHTSA's inexplicable refusal to consider the possibility of mandating airbags in *State Farm* is the classic example.<sup>339</sup> In the typical case, however, an agency's justification for its decision will be plausible enough to warrant deference from the courts, even if the actual motivation for the action was to advance the interests of a favored constituency. Indeed, groups that are well organized enough to capture an agency will exploit that same resource advantage to devise elaborate, public-regarding justifications for actions that are in fact designed to serve their private interests. And so a better-defended agency action—one that offers especially professional, technical, and extensive justifications—could be a signal of capture, not the reverse. At a minimum, the arbitrariness of an agency's justification for action correlates too weakly with agency capture to make it plausible that hard-look review will reliably combat it.

Fourth, for the courts-prevent-capture story to be persuasive, the benefits of invalidating capture-tainted agency actions must outweigh the costs of incorrectly striking down public-regarding actions. Strictly speaking, that's an empirical claim. But there's no reason to suppose it's true. There may be no crisp way to identify capture, but the federal bureaucracy is not shot through with bribery or other patent forms of corruption.<sup>340</sup> The salience of the capture metaphor, and its particular resonance in the American legal mind, likely overstates the extent to which private interests systematically discourage agencies from pursuing the public interest. The benefits of using hard-look review to eliminate capture may thus be smaller than are commonly assumed. At the same time, expanding the scope of judicial review in a quest to prevent capture will, on balance, raise the costs of agency action and entrench the status quo. That outcome is broadly congenial to the very business interests that, in the capture narrative, are supposed to have the whip hand over agencies.

Fifth, hard-look review can discourage capture only to the extent capture-tainted agency action is a product of an agency's discretionary choices. But capture is a complex phenomenon and may be the product of organizational dynamics at work outside the agency.<sup>341</sup> Interest-group pressures buffet Congress, for example, when it crafts the substantive rules that govern agency action, the procedural rules that constrain that action, and the appropriations laws that shape that action. What looks like agency capture may arise not because the agency has any particular affinity for well-organized

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339. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–51 (1983).

340. See CHARLES T. GOODSELL, *THE CASE FOR BUREAUCRACY* 3 (4th ed. 2004).

341. See Merrill, *supra* note 35, at 1069.



interest groups, but because it faithfully administers the law under tight resource constraints. Hard-look review can do nothing to prevent that sort of capture; to the contrary, by increasing the cost of agency action, it may exacerbate it. Alternatively, the White House may order an otherwise public-regarding agency to act in a manner that curries favor with narrow interests. The D.C. Circuit has held that an agency does not act arbitrarily when it adheres to an executive order mandating a particular course of conduct,<sup>342</sup> and while that decision is likely wrong,<sup>343</sup> it exemplifies the challenges of using hard-look review to address capture emanating from the White House. Indeed, federal judges are themselves the products of a political process in which well-organized groups may wield disproportionate influence. To the extent that judges are selected because their partisan orientation and judicial outlook align with the interests of those groups, they may facilitate capture, not the reverse.<sup>344</sup>

### III. STOP FETISHIZING PROCEDURE

It has become the central dogma of administrative law: strict procedural rules are both essential to agency legitimacy and necessary to guarantee public accountability. That dogma is false. Proceduralism has a complex, contingent, and often ambiguous connection to legitimacy and capture. Many well-intentioned efforts to promote good governance can—and do—drain agencies of their legitimacy, impair their responsiveness to the public, and expose them to capture. Instead of defending proceduralism at a high level of abstraction, lawyers should develop a more granular perspective on the effects that particular procedures have on the task of governance. The reality is usually messier than the rhetoric suggests.

In the meantime, the endless hand-wringing over agency legitimacy and accountability breeds contempt for governance. Instead of the instruments of public aspirations, agencies become the bastard stepchildren of a damaged constitutional system, rife with corruption and inside dealing. That dyspeptic vision aligns neatly with suspicion of the state; it is, however, difficult to harmonize with a progressive belief in the promise of government to achieve collective goals. We should—indeed, we must—revive a strain of thinking that connects the legitimacy of the administrative state to its ability to satisfy public aspirations: to enable a fairer distribution of wealth and political pow-

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342. See *Sherley v. Sebelius*, 689 F.3d 776, 785 (D.C. Cir. 2012) (holding that because an agency was “[b]ound” by and not free to “disregard” an executive order, it did not act arbitrarily in refusing to consider certain comments that “simply did not address any factor relevant to implementing the Executive Order”).

343. See Nicholas Bagley, *Sherley You’re Joking*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 22, 2017), <http://yalejreg.com/nc/sherley-youre-joking/> [<https://perma.cc/64EV-FT4P>].

344. See Elhauge, *supra* note 291, at 34 (“The litigation process cannot be treated as exogenous to interest group theory because that process is also subject to forms of interest group influence that would be exacerbated if judicial review became more intrusive.”).

er; to protect us from the predations of private corporations; and to minimize risks to our health, financial security, and livelihoods.

In the meantime, minimalism should be the watchword. New procedures should be greeted with suspicion; old procedures should be revisited, with an eye to cutting them back or eliminating them altogether. Administrative law could achieve more by doing less.

