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RETHINKING FORMAL RULEMAKING

Aaron L. Nielson

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3434 Washington Boulevard, 4th Floor
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(703) 993-4930
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ABOUT THE AUTHOR

Aaron L. Nielson is an associate professor of law at the J. Reuben Clark Law School, Brigham Young University, and is of counsel at the firm of Kirkland & Ellis LLP. He clerked for two federal appellate judges and was a partner at an international law firm at the time that he began his career as a law professor. His scholarship focuses on the relative competencies of courts, agencies, and legislatures to create policy. He earned his BA in economics and political science from the University of Pennsylvania, his JD from Harvard Law School, and an LLM from the University of Cambridge.

ABSTRACT

Formal rulemaking requires agencies to make policy through a process akin to a trial; it involves cross-examination, burdens of proof, and a bar on *ex parte* communications. The idea is that formal procedures can help create better substantive policy. This form of rulemaking, however, is almost never used anymore. Instead, informal rulemaking—which is conducted through written comments, with no trial-like procedures—is now essentially the only type of rulemaking used. For more than three decades, scholars have largely rejected formal rulemaking as unduly cumbersome and thus have applauded the shift to informal rulemaking. This article argues that while formal rulemaking may not be appropriate in all instances, it merits experimentation. Upon careful review, many of the arguments against formal rulemaking do not withstand scrutiny.

Many of the ideas in this paper are explored at greater length in Aaron L. Nielson, "In Defense of Formal Rulemaking," *Ohio State Law Journal* 75 (forthcoming 2014). All views, of course, are the author's alone.

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Keywords: regulatory policy, regulatory procedure, rulemaking, Supreme Court, Congress

In the modern world, even those who know a great deal about administrative law often give little thought to the fact that the Administrative Procedure Act (APA)—essentially the Bill of Rights for the administrative state—sets forth two ways for agencies to make rules. Today, many people only focus on the more common kind of rulemaking, called informal or notice-and-comment rulemaking.[1] With informal rulemaking, an agency publishes a notice in the *Federal Register*, solicits comments from the public, and then finalizes the rule. How the agency goes about finalizing the rule, however, is a largely "black box" process.[2] No one knows for sure how seriously an agency considers the comments it receives.[3]

The APA, however, also sets forth another way to promulgate regulations: formal rulemaking.[4] Formal rulemaking is very different from its informal cousin. Whereas informal rulemaking depends on paper comments, formal rulemaking requires a process somewhat similar to an actual trial, complete with burdens of proof and persuasion, bars on *ex parte* communications, presentation of evidence, cross-examination, and a written decision at the end. Through such robust procedures, formal rulemaking aspires both to help agencies make better rules and to demonstrate to the public that the agency has taken criticisms of its proposal seriously. After all, if the agency cannot support its final rule based on the evidence presented at the hearing, the rule cannot stand. The black box problem thus can be much less pronounced.

Nonetheless, despite these potential benefits, formal rulemaking is almost never used today. Whereas informal rulemaking is a core feature of modern government,

1. See 5 U.S.C. § 553 (2006).

2. Gary S. Lawson, "Reviving Formal Rulemaking: Openness and Accountability for Obamacare" (Backgrounder No. 2585, Heritage Foundation, Washington, DC, July 25, 2011), 3, http://www.heritage.org/research/reports/2011/07/reviving-formal-rulemaking-openness-and-accountability-for-obamacare; Furthermore, while an agency "must issue an explanation for any rule that is ultimately adopted, and it must defend that rule and accompanying explanation," it nonetheless "can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning process." Ibid.

3. See, e.g., Mark Seidenfeld, "Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking," *Cornell Law Review* 87 (2002): 514–15.

4. See 5 U.S.C. §§ 556–57 (2006).

formal rulemaking is remarkably rare. Indeed, it is no overstatement to say that formal rulemaking has now fallen into nearly complete desuetude.

Rather than mourning formal rulemaking's death, moreover, many regulatory scholars today celebrate it. To these scholars, formal rulemaking is a misfit for today's government because the procedural protections it provides are *too* robust. Many fear that formal rulemaking makes it too hard for agencies to act. While it is true that formal rulemaking can make the regulatory process take longer, however, there still may be times when it is a good idea or at least merits experimentation—particularly for the most complex, costly, and controversial rules. For such rules, the benefit of getting it right through more formal procedures could easily be worth the price of delay. Although when, or if, formal rulemaking is appropriate is a difficult question, it is time to reconsider today's blanket refusal to even consider formal rulemaking in any circumstances whatsoever.

THE HISTORY OF FORMAL RULEMAKING

Formal rulemaking hearkens back to the earliest days of administrative law. Back then, before an agency could act, Congress required actual hearings complete with cross-examination. For instance, before the Interstate Commerce Commission (ICC)—"the first great federal regulatory [agency]"—could set rates for trains, it had to conduct a "full hearing."[5] In 1913, the Supreme Court interpreted this statutory requirement to mean that "parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."[6] This formal hearing requirement was an important safeguard to prevent agencies from abusing their discretion. On the other hand, requiring formal procedures inherently increased the burden on agencies—it is easier for an agency to act if it does not have to muster its evidence and subject its analysis to cross-examination. The result was a compromise. In the APA, Congress mandated that agencies use formal rulemaking when an agency's organic statute—the law that empowers the agency to act—requires a hearing. In all other cases, agencies could choose to use the more truncated procedures of informal rulemaking, which allowed the agency greater flexibility.[7] It was understood at the time, however, that formal rulemaking would be an important part of the administrative state; no one thought that informal rulemaking would come to dominate the regulatory process.[8]

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5. Henry J. Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review* 123 (1975): 1271.
6. ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93 (1913).
7. For a discussion of how the APA came to be and the compromise leading to the creation of informal rulemaking, see George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwestern University Law Review* 90 (1996).
8. Soon after the APA became law, "licensing and rate-making proceedings, formal adjudications, as well as formal rulemakings dominated the administrative law landscape." *Administrative Conference of the United States, A Guide to Federal Agency Rulemaking*, 2nd ed. (1991), ix.

Although the creators of the APA intended both types of rulemaking to have a role, informal rulemaking now is essentially the only game in town. This is a consequence of *United States v. Florida East Coast Railway*.[9] In that 1973 case, certain rail lines argued that the ICC violated the APA by not holding an oral hearing complete with cross-examination. Before the Supreme Court's decision, it was understood that the ICC was obligated to use formal rulemaking—indeed, "the Commission's own general counsel [had] advised Congress that a hearing would be required before the Commission could issue a rule, in terms that obviously assumed that the hearing would be an oral evidentiary hearing."[10] Nevertheless, the Supreme Court sided against the rail lines. According to the Supreme Court, formal rulemaking was not required because the agency's organic statute, although requiring a hearing, did not use the words "on the record."[11] In dissent, Justice William Douglas criticized the court's "sharp break with traditional concepts of procedural due process."[12] The result of the court's ruling has been the near extinction of formal rulemaking because almost no statutes contain the magic words "on the record."[13] In fact, "since *Florida East Coast Railway*, no organic rulemaking statute that does not contain the specific words 'on the record' has ever been held to require formal rulemaking."[14]

In the years following *Florida East Coast Railway*, few have mourned formal rulemaking's effective demise.[15] One major reason for this is the "infamous peanut butter rulemaking," which, for many, has thoroughly discredited formal rulemaking.[16] In that rulemaking, the Food and Drug Administration (FDA) "managed to spend more than ten years (and to compile a hearing transcript of nearly 8000 pages) settling the

9. 410 U.S. 224 (1973).

10. Jonathan R. Siegel, "Textualism and Contextualism in Administrative Law," *Boston University Law Review* 78 (1998): 1067n251. For an excellent summary of *Florida East Coast Railway* showing that the conventional wisdom before the case was that formal rulemaking was required, see Gary Lawson, *Federal Administrative Law*, 6th ed. (St. Paul, MN: West, 2012), 263–89.

11. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973).

12. Id. at 246 (Douglas, J., dissenting).

13. Michael P. Healy, "*Florida East Coast Railway* and the Structure of Administrative Law," *Administrative Law Review* 58 (2006): 1039.

14. Jack M. Beermann and Gary Lawson, "Reprocessing *Vermont Yankee*," *George Washington Law Review* 75 (2007): 857n9.

15. See, e.g., American Bar Association (ABA), Section of Administrative Law and Regulatory Practice, Comments on H.R. 3010, The Regulatory Accountability Act of 2011, 20–21 (October 24, 2011), http://www.americanbar.org/content/dam/aba/administrative/administrative_law/commentson3010_final_nocover.authcheckdam.pdf; but see Yair Listokin, "Learning through Policy Variation," *Yale Law Journal* 118 (2008): 533. Listokin urges greater experimentation because although "the recordkeeping requirements of formal rulemaking undoubtedly add to costs, such costs again appear small relative to the potential impacts of policy."

16. Jason Webb Yackee and Susan Webb Yackee, "Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990," *George Washington Law Review* 80 (2012): 1472.

not-so-pressing question of the minimum peanut content of 'peanut butter.'"[17] This seems absurd—how could any rational process take so long for such a trivial issue? Because this rulemaking appears so nonsensical, it has been used to argue against all use of formal rulemaking.[18]

There is more to the story, however, than the popular retelling. For one thing, the FDA could have used better procedures to move things along, but elected not to.[19] Likewise, "a good portion of the delay" resulted from "the fact that FDA regulators viewed the peanut butter proposal as relatively unimportant, and failed to prioritize [it]."[20] In fact, the FDA waited for more than six years before holding a hearing. Tellingly, when it did hold a hearing, the process only took 30 days of actual presentation of evidence.[21] To be sure, 30 days isn't nothing, but it is a far cry from a decade. Given these more nuanced facts, condemning formal rulemaking because of peanut butter is unfair.

Nevertheless, formal rulemaking has been stigmatized. But this was not always so. In the past, leading voices defended formal procedures, at least when used prudently. Judge Henry Friendly, for instance, a giant of administrative law, believed that formal procedures were sometimes appropriate, although he certainly did not approve of them all the time.[22] Similarly, leading judges on the D.C. Circuit at the time *Florida East Coast Railway* was decided saw the value of formal procedures. Judge Harold Leventhal, for instance, felt that cross-examination could be useful.[23] Other judges, such as David Bazelon, did as well.[24] Although the D.C. Circuit's efforts to require formal procedures in informal rulemakings were rejected by the Supreme Court in 1979's *Vermont Yankee* decision as contrary to the text of the

17. Ibid. See also Robert W. Hamilton, "Rulemaking on a Record by the Food and Drug Administration," *Texas Law Review* 50 (1972): 1142.

18. See, e.g., William H. Allen, "Book Review," *Columbia Law Review* 80 (1980): 1158.

19. ACUS, Recommendation 71-7, Rulemaking on a Record by the Food and Drug Administration (1971), 1, http://www.acus.gov/recommendation/71-7.

20. Webb Yackee and Webb Yackee, "Testing the Ossification Thesis," 1472n283.

21. See William R. Pendergast, "Have the FDA Hearing Regulations Failed Us?," *Food Drug Cosmetic Law Journal* 23 (1968): 527; see also William D. Dixon, "Rulemaking and the Myth of Cross-Examination," *Administrative Law Review* 34 (1982): 419.

22. See, e.g., Henry J. Friendly, "Book Review," *New York University Law Review* 51 (1976): 899. Judge Friendly explains that "due process may . . . require evidentiary hearings on some [fact but not policy] aspects of rulemaking." It should be noted that Judge Friendly's view of formal rulemaking's benefits may be too narrow.

23. See, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973), which requires cross-examination in an informal rulemaking; Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971), which requires the agency to follow formal rulemaking procedures.

24. Although Bazelon generally favored greater procedural scrutiny while Leventhal generally favored greater substantive scrutiny, both recognized the value of cross-examination. See Ronald J. Krotoszynski Jr., "'History Belongs to the Winners': The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action," *Administrative Law Review* 58 (2006): 1003–4.

APA,[25] surely the reason why the D.C. Circuit required those procedures was that its judges believed formal procedures help make better policy.

In the years since *Florida East Coast Railway* (and *Vermont Yankee*), however, formal rulemaking has largely faded away. And in those rare times it is proposed, a series of arguments against it are raised. Scholars contend, for instance, that formal rulemaking does not make better policy, delays the regulatory process, renders administrative law less legitimate, makes it hard to eliminate outdated rules, and creates bad incentives for agencies.[26] These critics also urge that formal rulemaking should be used only when the agency itself wants it. Although these criticisms are not frivolous, they sometimes may be overstated. Contrary to today's conventional wisdom, there is good reason to think that formal rulemaking, despite its costs, could sometimes be worth it. This paper does not argue that the United States should return to the law before *Florida East Coast Railway*, much less that oral hearings should be required for all statutes with hearing requirements; the world has moved on and precedent should not be lightly overruled. But there still may be circumstances in which formal rulemaking makes a great deal of sense and should be mandated by Congress through new legislation.

FORMAL RULEMAKING CAN HELP AGENCIES MAKE BETTER POLICY

A COMMON ARGUMENT against formal rulemaking is that it does not create better policy. Agencies, it is said, are different from courts because agencies are policymakers, and formal procedures like cross-examination are a misfit for policy questions.[27] Relatedly, the unique characteristics of agencies may make formal procedures unnecessary. Both of these claims, however, go too far.

One of formal rulemaking's greatest virtues is cross-examination. With informal rulemaking, agencies make scientific claims, and the most a party can do in response is to file a comment. The agency then decides what to do with the comment (although, to be sure, it must respond to material comments).[28] Cross-examination, on the other hand, is time-tested[29] and the premise of one of the Constitution's most fundamental rights.[30] Cross-examination, moreover, has "a healthy disciplining effect."[31] Those who know they will be cross-examined are less likely to say things they cannot defend.

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25. Vt. Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519, 542–48 (1978).
26. See, e.g., *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability*, 112th Cong. 17 (2011) (statement of Matthew C. Stephenson) [hereinafter Stephenson Testimony].
27. See, e.g., ABA, Comments on H.R. 3010, 20–21.
28. See Lawson, *Reviving Formal Rulemaking.*
29. For example, "Against erroneous or mendacious testimony, the grand security is cross-examination." John H. Wigmore, *Evidence*, 3rd ed. (Boston: Little, Brown & Co., 1940), § 1367, 5:29.
30. See generally Crawford v. Washington, 541 U.S. 36, 61 (2004) (discussing U.S. Const. amend. VI).
31. Glen O. Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform," *University of Pennsylvania Law Review* 118 (1970): 521.

But does cross-examination work for so-called legislative facts? Adjudicative facts are the specific details of a single case (such as where the gun was found and who shot it), but legislative facts are more abstract or general and are used for lawmaking (one example is the notion that punishment can be a deterrent).[32] Wielding this distinction, some argue that because agencies are not trying to determine adjudicative facts in rulemakings, cross-examination is unhelpful.[33]

Placing so much weight on the distinction between adjudicative and legislative facts, however, is a mistake. For one thing, there can be both kinds of facts within a single rulemaking.[34] For another, the difference between the two is sometimes ethereal—there is a "'borderland' where the distinction has 'little or no utility'" because "it may be possible to justify any procedural result by stating the relevant issues either broadly or narrowly."[35] And finally, sometimes cross-examination may help with pure lawmaking: "To say categorically that general policy questions or 'legislative facts' cannot fruitfully be explored by testimonial procedures and cross-examination is to generalize to an extent which can only obscure analysis."[36] Legislators, for example, often ask questions of sworn witnesses, testing what they say for bias or error. Couldn't such questions be valuable in the agency context too?

Nor is it true that agencies are so unique that cross-examination is useless. Granted, agencies are filled with experts, and those experts deal with complex issues. But expertise is not limited to those within agencies; outside experts can also improve the regulatory process by offering new perspectives. Importantly, formal rulemaking, through cross-examination, forces an agency to more directly confront the views of outside experts. Similarly, cross-examination of experts has proven useful in other contexts, even contexts where the decision maker has subject-matter proficiency. Consider bankruptcy courts. Bankruptcy judges, like agency officials, are also sophisticated, and they too deal with complex issues. Bankruptcy courts, however, sometimes find cross-examination useful.[37] And while agencies are unique because, as policymakers, they do not have to be as precise as courts in their determinations,[38]

32. Fed. R. Evid. 201(a) advisory committee's note.
33. ABA, Comments on H.R. 3010, 21.
34. Samuel Estreicher, "Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law," *Columbia Law Review* 80 (1980): 911.
35. Barry B. Boyer, "Alternatives to Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues," *Michigan Law Review* 71 (1972): 115, quoting K. Davis, *Administrative Law Treatise* (1958), § 7.02, 1:413.
36. Robinson, "Making of Administrative Policy," 521.
37. See, e.g., Jack F. Williams, "The Empowerment of Bankruptcy Courts in Addressing Financial Expert Testimony," *American Banker Law Journal* 80 (2006): 391–92.
38. See Stephen F. Williams, "'Hybrid Rulemaking' under the Administrative Procedure Act: A Legal and Empirical Analysis," *University of Chicago Law Review* 42 (1975): 406–7.

shouldn't agencies do their best to get the facts right *before* they start injecting policy into their analysis?[39]

Finally, formal rulemaking is more than just cross-examination. It also includes things like evidentiary burdens and a closed record. These procedures should make it harder for political influences to distort the administrative process. They should also make it more difficult for agencies to disguise what they are doing with technical jargon. When expert witnesses try to hide their meaning behind complex terminology in civil litigation, good attorneys force them to use simple, easy-to-understand words. The same could be true for agencies. This would make it easier for the public (and courts) to understand what agencies are really up to.

FORMAL RULEMAKING'S COSTS CAN BE MANAGED

THE MOST COMMON argument against formal rulemaking is that it makes the regulatory process take too long. In fact, some argue that informal rulemaking is already "too demanding," and that formal rulemaking would just add "red tape."[40] This "ossification" argument is not frivolous; formal rulemaking likely could delay rulemaking by adding more procedures beyond those required under informal rulemaking. In other words, if an agency engages in a rulemaking, it stands to reason that it will often take longer for that particular rulemaking to occur if the agency must use formal procedures instead of informal procedures. Even so, it does not follow that formal rulemaking should be abandoned. While formal rulemaking can lead to delay (although the amount should not be overstated), it nonetheless seems reasonable to think that the benefits it provides could, in appropriate cases, outweigh the costs of that delay. In particular, although no one thinks that run-of-the-mill agency action necessarily merits formal rulemaking, the burdens of formal rulemaking might be offset by its benefits for that narrow category of rules that are especially complex, costly, or otherwise controversial. Avoiding error costs where the stakes are highest could justify greater procedural safeguards.

At the outset, ossification may not be as pervasive as some fear. An important study shows that, while some rules have been delayed, most are promulgated quickly.[41] Furthermore, agencies can sometimes move swiftly when they *want* to—hence the phenomenon of "midnight regulations."[42] Likewise, some rules will be

39. "Agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions." Wendy E. Wagner, "The Science Charade in Toxic Risk Regulation," *Columbia Law Review* 95 (1995): 1617.

40. Stephenson Testimony, 6.

41. See Webb Yackee and Webb Yackee, "Testing the Ossification Thesis," 1421–22.

42. See, e.g., Jerry Ellig, "Midnight Regulation: Decisions in the Dark?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, August 28, 2012), http://mercatus.org/publication/midnight-regulation-decisions-dark.

delayed regardless of the procedure used. As William Dixon, an actual administrative law judge, quite rightly explained, it is unfair to include "cost factors for which cross-examination is in no way responsible and then blam[e] cross-examination for the whole thing."[43]

Indeed, there is some evidence, although obviously limited, suggesting that formal rulemaking need not be especially cumbersome. While rare, some statutes do use the magic words required by *Florida East Coast Railway*. For instance, the Marine Mammal Protection Act requires formal rulemaking, and it has worked well.[44] Another example, the Agricultural Marketing Agreement Act, requires formal rulemaking for the complex task of regulating milk and certain agricultural products, and the process seems to work.[45] In fact, even one of formal rulemaking's sharpest critics conceded that these "agriculture hearings are not unduly protracted."[46] Although there have not been enough formal rulemakings in recent years to form any definite conclusions, it is noteworthy that not all formal rulemakings find themselves bogged down in procedural morasses.[47]

Nevertheless, it is fair to assume that formal rulemaking could make things more difficult, at least sometimes. But this should not be exaggerated. An agency, after all, can hurry a hearing along. In the litigation context, for example, a trial judge with a firm hand does not let litigants waste the court's time. The same could be true for agencies. A related problem, of course, is that having multiple parties involved in a hearing may make things complicated. This is a real problem; there is no getting around it. Nonetheless, there may be ways to mitigate this problem too, such as appointing a "champion to represent the entire group (or each of several conflicting interest groups)."[48] Courts manage this problem in complex litigation.

Similarly, Congress could shift resources to effectuate formal rulemaking. Congress could also require formal rulemaking only for rules that are particularly complex, costly, or controversial[49]—for instance, those that impose hundreds of

43. Dixon, "Rulemaking and the Myth of Cross-Examination," 419–20.

44. See White Eagle Co-op. Ass'n v. Conner, 553 F.3d 467 (7th Cir. 2009) (upholding a formal rulemaking that took less than a year).

45. See Hettinga v. United States, 560 F.3d 498, 501 (D.C. Cir. 2009) (explaining that a formal rulemaking was completed in approximately a year).

46. Robert W. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," *California Law Review* 60 (1972): 1299.

47. Similarly, some statutes require "hybrid" rulemaking that use some but not all of the procedures under formal rulemaking. Although "hybrid" schemes are sometimes also criticized, William Dixon, an administrative law judge, has penned a powerful defense. See Dixon, "Rulemaking and the Myth of Cross-Examination."

48. Williams, "Empowerment of Bankruptcy Courts," 404.

49. The Administrative Conference of the United States, for instance, has recognized these triggers as appropriate screens for when formal rulemaking should be used. See ACUS, Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (1976), 3, http://www.acus.gov/sites/default/files/documents/76-3.pdf. As explained below, however, the Administrative Conference has not urged that formal procedures be required when these triggers are met.

millions or even billions of dollars of costs. The precise trigger is beyond the scope of this paper, but this is the sort of thing that Congress should be thinking about.

Finally, as a matter of logic, the mere fact that delay may occur is not enough by itself to condemn formal rulemaking. The question is whether that delay is justified—and for very expensive rules, it may be. As Gary Lawson points out, "If the goal is to produce as many rules as fast as possible, informal rulemaking is the superior option," but if the goal is *better* rules then formal rulemaking is worth considering.[50] "Trials," after all, "are generally more costly than plea bargains," but they can be *better* than plea bargains too in terms of getting to the actual truth.[51] Just so with formal rulemaking.

FORMAL RULEMAKING CAN BOLSTER AGENCY LEGITIMACY

Another argument against formal rulemaking is that it can undermine the legitimacy of the administrative process. For instance, formal rulemaking can "frustrate oversight committees who want the agency to do something quickly about a pressing problem"; provide "agencies a convenient way to 'run out the clock' when they do not in fact want to do what Congress or the President want them to do"; and empower "agency lawyers who know how to navigate the labyrinthine procedures" at the expense of "political appointees and senior policy staff."[52] These arguments too should not be brushed aside—but they should not end the conversation either. Formal rulemaking can also help make the regulatory process more legitimate.

The reality is that the public respects trials. Trials, perhaps uniquely, can serve "as a check on improper government action and [ensure] its legality."[53] So why would that not be true for administrative law too? As Judge Friendly realized, "distrust of the bureaucracy is surely one reason for the clamor for adversary proceedings in the United States."[54] The reality is, whether rightly or not, many citizens "deeply" believe "that anyone affected by government decisions should have the opportunity to present his case . . . in a way that forces the agency to consider the argument."[55] Formal rulemaking can do that.

Similarly, one of formal rulemaking's vices—delay—can itself sometimes be a virtue. It has been observed, for instance, that only "significant" rules are beset with "ossification."[56] But aren't there times when we want regulations that "raise

50. Lawson, *Reviving Formal Rulemaking*, 4.
51. Ibid.
52. Stephenson Testimony, 14.
53. See, e.g., Richard E. Levy and Sidney A. Shapiro, "Administrative Procedure and the Decline of the Trial," *Kansas Law Review* 51 (2003): 504.
54. Friendly, "Some Kind of Hearing," 1279–80.
55. Philip J. Harter, "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal* 71 (1982): 19.
56. Richard J. Pierce Jr., "Rulemaking Ossification Is Real: A Response to 'Testing the Ossification Hypothesis,'" *George Washington Law Review* 80 (2012): 1503.

controversial issues"[57] to take longer? As Elena Kagan has wisely recognized, many controversial policy decisions are enacted through agencies rather than Congress.[58] From the perspective of democratic legitimacy, that can be problematic. For the most costly and controversial regulations, accordingly, formal rulemaking can add legitimacy to the process by letting the public know what is really happening.

OUTDATED RULES CAN STILL BE RESCINDED

Another common criticism is that formal rulemaking makes it too hard to eliminate bad rules.[59] The general principle in administrative law requires symmetry: that is, the same procedure used for promulgating a rule should be used for rescinding it. While that principle is usually sound, there are at least two problems with it in this context.

First, this criticism assumes that the costs of rules that should be eliminated are akin to the costs of rules that should not be promulgated at all. But that assumption is not always true. It is important to understand the difference between sunk and marginal costs. For rules that create sunk costs, such as regulations ordering that manufacturing equipment be changed, rescinding the rule will have almost zero economic effect going forward because the money is already spent. The upshot is that for rules that create sunk costs, society may want more procedures. Rules that generate marginal costs (for instance, rules that increase labor expenses), however, are different; there is good reason for those rules to be eliminated quickly if they do more harm than good.

Second, symmetry (such as rescinding a rule through formal rulemaking if it was promulgated through formal rulemaking) is not valuable in its own right. What is important is that agencies do not act arbitrarily. But formal rulemaking's critics do not contend that informal rulemaking is arbitrary; to the contrary, that is their preferred form of rulemaking in all cases! Because it is so hard to anticipate all the unintended consequences that may arise from a new regulation, it makes sense that there may be circumstances in which symmetry should fall by the wayside. Although this point should not be taken too far, why couldn't there be times where formal rulemaking is used for promulgating rules while informal rulemaking is used for eliminating them? Obviously this dichotomy can be an oversimplification, but the point is clear enough: deciding how to implement formal rulemaking is the sort of question that merits experimentation, not reflexive dismissal.

57. Ibid., 1498.
58. See, e.g., Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2248.
59. See, e.g., Stephenson Testimony, 2.

FORMAL RULEMAKING NEED NOT PERVERT THE REGULATORY PROCESS

Another risk of formal rulemaking is that it might cause agencies to "abandon . . . rulemaking [altogether] in favor of less overt mechanisms for making policy," such as greater use of guidance documents and agency adjudication.[60] Interestingly, this argument is the reverse of what we usually hear. Usually agencies complain that regulated parties are evading regulations; here, the risk is that agencies themselves would try to evade the procedure selected by Congress. But this problem is prevalent throughout administrative law, and proposals have been offered to combat it.[61] The problem of agency circumvention of legal requirements needs to be addressed generally, but as such it is not a reason to refrain from formal rulemaking. Congress, for instance, could require formal rulemaking, and then use its oversight powers to ensure that agencies are following the law. The transition to greater use of formal rulemaking would not be painless, but if Congress were serious, it could be done. This too is precisely the sort of problem that warrants experimentation.

FORMAL RULEMAKING SHOULD NOT BE DISCRETIONARY

Finally, some claim that agencies should use formal rulemaking when they want to, but that they should never be forced to do so.[62] The problem with this argument, however, is it ignores the fact that regulators are people. One of the key purposes of the APA is to control agency discretion because regulators—even with the best of intentions—make mistakes. Like all of us, they have blind spots, especially when it comes to their own authority. Indeed, agencies suffer from certain "characteristic pathologies" including "myopia, interest group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion."[63] Given these weaknesses, it makes sense that discretion is sometimes curtailed. Agencies, unsurprisingly, almost never voluntarily use formal rulemaking—indeed, an agency that would voluntarily increase the procedural burden on itself would be "the administrative equivalent of the dodo—exotic, ungainly, of a different era."[64]

It is for this reason that the Administrative Conference of the United States's recommendation that agencies have discretion concerning whether to use formal

60. Adam M. Samaha, "Undue Process," *Stanford Law Review* 59 (2006): 610.
61. See, e.g., Nina Mendelson and Jonathan Wiener, "Responses to Agency Evasion of OIRA," *Harvard Journal of Law and Public Policy* 37 (forthcoming 2014); see also the discussion of the dynamic in Jennifer Nou, "Agency Self-Insulation under Presidential Review," *Harvard Law Reivew* 126 (2013).
62. See, e.g., ABA, Comments on H.R. 3010, 21.
63. *The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?*, 112th Cong. 10 (2011) (statement of Jeffrey A. Rosen), quoting Richard H. Pildes and Cass R. Sunstein, "Reinventing the Regulatory State," *University of Chicago Law Review* 62 (1995): 4.
64. Lisa Heinzerling, "Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence," *Vermont Law Review* 37 (2013): 1014.

procedures is misguided.[65] Like this paper, the Administrative Conference recognized that formal procedures may be useful for "complex" rules involving "scientific" or "technical" questions, especially where "the problem posed" is particularly "open-ended" and important to the public and the rule may impose "significant" costs.[66] But the Administrative Conference did not follow through and recommend that formal procedures be required when those characteristics are met.[67] Given that agencies are reluctant to increase their own procedural burdens, relying on agency self-regulation is hope divorced from reason. Agencies do many things well, but they avoid formal rulemaking unless forced to use it.

HAS THE TIME FOR FORMAL RULEMAKING COME AGAIN?

For reasons explained above, the common arguments against formal rulemaking are flawed. Nonetheless, this paper does not argue that formal rulemaking is always a good idea; indeed, upon good-faith experimentation, it may prove to *never* be a good idea. But policymakers cannot know that until they have given formal rulemaking a fair hearing, complete with trial runs.[68] As explained above, recent formal rulemakings have not been unduly delayed, and there is good reason to think that formal rulemaking could be useful in even more contexts. Nevertheless, although formal rulemaking makes a lot of theoretical sense, there is not yet enough data to form firm conclusions—the only way to know for sure whether formal rulemaking as applied would live up to its promise is to experiment in a meaningful way. And let there be no mistake: informal rulemaking, while often useful, has drawbacks of its own. The black box problem can be very real. Formal rulemaking, although imperfect, could be the lesser of evils, particularly for the most costly and controversial regulations.

And now may be the right time for formal rulemaking's return. Individual rules today can impose costs of billions of dollars. Against that backdrop, it is fair to ask whether formal rulemaking could help make the process better. Rather than rejecting it out of hand, formal rulemaking merits careful consideration and thoughtful experimentation. It may not be a silver bullet for all that ails administrative law, but there is good reason to think that formal rulemaking could help sometimes, and that is important in its own right.

65. See ACUS, Recommendation 76-3.
66. Ibid.
67. Ibid.
68. See, e.g., Listokin, "Learning through Policy Variation," which urges experimentation.