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# Open Minds and Harmless Errors: Judicial Review of Post-Promulgation Notice and Comment

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# OPEN MINDS AND HARMLESS ERRORS: JUDICIAL REVIEW OF POSTPROMULGATION NOTICE AND COMMENT

Kristin E. Hickman<sup>†</sup> & Mark Thomson<sup>‡</sup>

*In 2012, the Government Accountability Office surprised many administrative law specialists by reporting that fully 35% of major rules and 44% of nonmajor rules issued by federal government agencies lacked prepromulgation notice and opportunity for public comment. For at least most of the major rules, however, the issuing agencies accepted comments from the public after issuing the rule, and in most of those cases the agencies followed up with new final rules, responding to comments and often making changes in response thereto. Agency rules that invert the procedural steps of notice-and-comment rulemaking in this way do not precisely comply with the Administrative Procedure Act, yet are arguably close enough that some courts have felt compelled to uphold them. Challenges to rules adopted in this manner have created a jurisprudential mess, as courts struggle to balance their duty to enforce the requirements of the Administrative Procedure Act with the practical realities of the modern administrative state. The sheer extent of the practice demonstrates the need for a more consistent judicial response. This Article explores the different approaches courts have taken to judicial review of postpromulgation notice and comment. The Article concludes that the all-or-nothing models embraced by some courts are doctrinally and practically untenable, but that the middle-ground alternatives employed by other courts thus far do not ensure that postpromulgation notice and comment function as an equivalent substitute for prepromulgation procedures. Fortunately, the existing jurisprudential muddle is not so rigidly fixed as to require Congress, or even necessarily the Supreme Court, to resolve it. The Article proposes a solution to the middle-ground problem, first by reviewing the doctrinal theory surrounding agency rulemaking and then by articulating a set*

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*of factors for courts to employ in evaluating postpromulgation notice and comment case by case.*

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INTRODUCTION

In December 2012, the Government Accountability Office (GAO) published a study documenting that federal agencies failed to publish a notice of proposed rulemaking and offer the public the opportunity to comment before issuing fully 35% of the 568 major rules—regulations with an annual economic impact of \$100 million or more—and 44% of the 30,000 nonmajor rules adopted from 2003 through 2010.<sup>1</sup> This practice was spread across a variety of agencies. The GAO singled out the Centers for Medicare and Medicaid Services, the Commodity Credit Corporation, and the Farm Service Agency as the largest offenders with respect to major rules; for nonmajor rules, the GAO specially mentioned Departments of Transportation,

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<sup>1</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 3 n.6, 8 (2012), <http://www.gao.gov/assets/660/651052.pdf> [<http://perma.cc/R9QA-MM56>].

Commerce, and Homeland Security, along with the Environmental Protection Agency.<sup>2</sup>

For many of those rules, the agency did not stop with the initial published rule but pursued additional postpromulgation procedures. For example, the GAO reported that for 77 of the 123 major rules issued without a notice of proposed rulemaking, the agencies requested comments from the public after promulgating the regulation.<sup>3</sup> In 51 of those 77 instances, the agency followed up with new final rules, responding to comments and often making changes in response thereto.<sup>4</sup>

This sort of “interim-final rulemaking” with only postpromulgation notice and comment is not new.<sup>5</sup> Legal scholars and the Administrative Conference of the United States (ACUS) have long recognized that agencies use interim-final rulemaking and also that the practice, in many instances, is questionable as a matter of law.<sup>6</sup> But the scope of the GAO’s findings reflects a reality of contemporary administrative practice that is both widespread and, in many instances, fundamentally at odds with the expectations of the Administrative Procedure Act (APA)<sup>7</sup> as interpreted by the federal judiciary. That reality puts the judiciary in an awkward position.

Ordinarily, § 553 of the APA requires an agency to do three things before a new substantive rule takes effect. First, the agency must give the public “notice” of the proposed rule, including “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>8</sup> Next the agency must “give interested persons an opportunity to participate in the rule making” by allowing them to submit comments

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<sup>2</sup> *Id.* at 11 & n.26, 12.

<sup>3</sup> *Id.* at 24–25.

<sup>4</sup> *Id.* at 26.

<sup>5</sup> The administrative law literature commonly refers to regulations adopted with postpromulgation notice and comment as “interim-final rules.” *See, e.g.*, Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999). The GAO reported that “agencies used 109 distinct terms” for such procedures, including but not limited to “final rules, interim rules, temporary rules, direct final rules, and notices,” but noted also that “[i]n practice, however, there may be little distinction between interim rules and certain other rules without [a notice of proposed rulemaking] that were described using different terminology.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 14.

<sup>6</sup> *See* Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,110–13 (Aug. 18, 1995) (acknowledging interim-final rulemaking as well as the slightly different “direct final rulemaking” by many agencies); Asimow, *supra* note 5, at 717–18, 725–26 (observing that, absent a legal exception from APA notice and comment requirements, “a rule adopted with post- rather than pre-adoption notice and comment is procedurally invalid”).

<sup>7</sup> 5 U.S.C. §§ 551–59 (2012).

<sup>8</sup> *Id.* § 553(b)(3).

on the proposed rule.<sup>9</sup> After an agency takes these steps and reviews the comments it receives, the APA contemplates that the agency will finalize the proposed rule by publishing it in the *Federal Register* along with an explanatory preamble or “concise general statement of [the rule’s] basis and purpose.”<sup>10</sup> Although the preamble need not respond to every comment the agency receives, it must address all “significant comments that cast doubt on the reasonableness of the rule the agency adopts.”<sup>11</sup> The APA generally requires publication of a final rule at least thirty days before the rule takes effect.<sup>12</sup>

Congress recognized in crafting § 553 that requiring notice and opportunity for public comment before a rule takes effect is not always helpful or worthwhile, and may even be problematic in some instances.<sup>13</sup> Thus, the APA includes a handful of exceptions to § 553’s public notice and comment requirements. For example, under the “good cause” exception, an agency may forgo the requirements of informal rulemaking when notice and comment would be “impracticable, unnecessary, or contrary to the public interest.”<sup>14</sup> Similarly, the “interpretative rule” exception allows agencies to skip notice and comment when the rule to be promulgated merely clarifies or explains an existing statute or rule.<sup>15</sup> Other exceptions apply to rules concerning military or foreign affairs, agency management, agency procedure, or statements of policy.<sup>16</sup>

The GAO documented agencies’ reliance on all of these exceptions, though especially the good cause exception, when agencies issue rules without prepromulgation notice and comment.<sup>17</sup> No doubt such reliance is often justified, and the GAO

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<sup>9</sup> *Id.* § 553(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Balt. Gas & Elec. Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987); see also *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012) (discussing that an agency’s obligation to respond to “significant comments raised during rulemaking” is flexible).

<sup>12</sup> 5 U.S.C. § 553(d).

<sup>13</sup> See Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 319–20 n.3 (1989) (discussing that Congress provided exemptions from the notice and comment requirements to ensure agency flexibility).

<sup>14</sup> 5 U.S.C. § 553(b)(B).

<sup>15</sup> *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978).

<sup>16</sup> 5 U.S.C. § 553(a), (b)(A)–(B).

<sup>17</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 15–21. Agencies claimed good cause in 77% of major rules and 61% of nonmajor rules issued without prepromulgation notice and comment, but the GAO documented instances in which agencies had asserted each of the other exceptions listed in APA § 553. *Id.*

did not suggest otherwise. ACUS recommends that agencies consider postpromulgation procedures even when relying on one of the APA's exceptions.<sup>18</sup> Agencies following that recommendation go beyond the APA's requirements and exemplify conscientious governance.

Nevertheless, the scope of the exceptions from APA notice and comment procedures has never been clear,<sup>19</sup> making them difficult for both agencies and courts to apply. Courts have repeatedly admonished "that exceptions to the notice and comment requirements will be narrowly construed and only reluctantly countenanced," lest the exceptions "carve the heart out of the statute."<sup>20</sup> Partly for this reason, courts frequently reject agency claims regarding the applicability of the APA exceptions.<sup>21</sup> The APA does not define when a rule is interpretative as opposed to legislative, or what it means for a rule to be "impracticable, unnecessary, or contrary to the public interest." While the Attorney General<sup>22</sup> and the courts<sup>23</sup> have at-

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<sup>18</sup> Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,112–13 (Aug. 18, 1995).

<sup>19</sup> See, e.g., John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 929 (2004) (discussing the arbitrary nature of the "interpretive rules" and "general statements of policy" exceptions to the notice and comment requirements).

<sup>20</sup> *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983); see, e.g., *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011) (holding that a subsequent statute did not demonstrate sufficient congressional intent to supersede notice and comment requirements); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1343–44 (Fed. Cir. 2005) (holding that a regulation was not exempt from the notice and comment requirements due to narrow construal of exceptions); *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 885–86 (9th Cir. 1992) (holding that enforcement of a regulation fell within agency discretion and was therefore within the narrow exceptions to the notice and comment requirements); *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (holding that the repeal of a regulation fell within an exemption from notice and comment requirements despite narrow interpretation of the exemption).

<sup>21</sup> See, e.g., *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706–07 (D.C. Cir. 2014) (rejecting agency's good cause claim as unsupported by the administrative record); *Mendoza v. Perez*, 754 F.3d 1002, 1023–24 (D.C. Cir. 2014) (rejecting Department of Labor claim that two Training and Employment Guidance Letters were exempt interpretative rules or procedural rules); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168–71 (2d Cir. 2013) (rejecting procedural rule exception claim and invalidating agency rule for procedural flaws).

<sup>22</sup> U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947).

<sup>23</sup> See, e.g., *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–53 (D.C. Cir. 2014) (attempting to explain distinctions among legislative rules, interpretative rules, and general statements of policy); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93–95 (D.C. Cir. 2012) (describing at length circumstances constituting good cause); *Public Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002) (describing a shift in standards for evaluating the procedural rule exception); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 109–11 (D.C. Cir.

tempted to supply content to those terms, the definitions offered are hardly models of clarity or precision.<sup>24</sup> Thus, agencies are often left to guess whether a court will uphold claims that an exception from prepromulgation notice and comment applies. Meanwhile, agencies face strong incentives to avoid, or at least postpone, notice and comment proceedings.<sup>25</sup> Most obviously, agencies can get their rules implemented more quickly and economically by foregoing prepromulgation notice and comment, even if they subsequently accept public comments and adjust their rules in response. It stands to reason, therefore, that at least a significant percentage of agency regulations lacking prepromulgation notice and comment are not, in fact, exempt from those procedures under the APA.<sup>26</sup>

Agencies' substantial avoidance of prepromulgation notice and comment, and their associated reliance on the murky § 553 exceptions and use of postpromulgation procedures, pose obvious difficulties for the courts. Again, the APA contemplates that some agency rules will be exempt from notice-and-comment rulemaking procedures, and agency use of postpromulgation procedures in such instances is recommended and desirable. If an agency promulgates a rule claiming an exception from § 553's prepromulgation notice and comment requirements and a court subsequently holds that the claimed exception does not apply, then the rule is simply invalid.<sup>27</sup> But what if—as ACUS has urged and the GAO says often occurs—the agency provided the public with notice and the opportunity

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1993) (identifying factors for distinguishing between legislative rules and interpretative ones).

<sup>24</sup> See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278–79 (2010); Lavilla, *supra* note 13, at 321–22; Manning, *supra* note 19, at 894.

<sup>25</sup> Manning, *supra* note 19, at 894 (“If an agency could make binding policy through a rulemaking process that does not entail notice and comment, it would have little incentive to use that more cumbersome process.”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992) (“[A]gencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process.”).

<sup>26</sup> Cf. Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1748–59 (2007) (documenting the Treasury Department’s routine overreliance on APA exceptions from notice-and-comment rulemaking procedures).

<sup>27</sup> See, e.g., 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 18.1 (5th ed. 2010) (“In most cases, successful prosecution of a review proceeding yields instead a judicial decision setting aside the agency action and remanding the proceeding for further agency action not inconsistent with the decision of the reviewing court.”); *id.* § 18.4 (recognizing role of declaratory and injunctive relief in the course of nonstatutory review).

to comment *after* issuing the rule, and then issued a final rule responding to the input received? How should courts assess the procedural validity of a final rule derived from a procedurally flawed interim-final rule? Do postpromulgation notice and comment cure the underlying procedural infirmity? Or does the procedural defect that taints the original, interim-final rule carry over to the succeeding final rule?

The APA's text might support the notion that postpromulgation procedures can substitute, at least sometimes, for prepromulgation notice and comment. Section 706 of the APA directs that courts reviewing agency action take "due account . . . of the rule of prejudicial error."<sup>28</sup> The Supreme Court has clarified that the prejudicial error language in § 706 simply "requires [courts] to apply the same kind of 'harmless-error' rule [in administrative cases] that courts ordinarily apply in civil cases."<sup>29</sup> According to several courts, that means "a mistake that has no bearing on the [agency's] ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination."<sup>30</sup> To the extent postpromulgation notice and comment ensure meaningful public input in the agency's ultimate decision, then, they might be taken to render the lack of prepromulgation notice and comment harmless under § 706.

Yet, if courts endorse that approach—by holding that postpromulgation notice and comment remedy the procedural invalidity of an interim-final rule promulgated under an inapplicable exception from § 553—would they effectively undermine the APA's command that agencies pursue prepromulgation notice and comment? Several courts have suggested as much.<sup>31</sup>

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<sup>28</sup> 5 U.S.C. § 706 (2012).

<sup>29</sup> *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009).

<sup>30</sup> *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997); *see also, e.g., Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 61 (1st Cir. 2001) (finding that a "harmless error" of procedure does not merit the remand of an agency's "reasoned finding"); *Steel Mfrs. Ass'n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994) (finding that the EPA's failure to allow comment was a harmless error because the agency had "adequate and independent grounds" for setting the standard in question, and the error thus was not fatal to the final rule).

<sup>31</sup> *See, e.g., Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) ("Agency mistakes constitute harmless error only where they 'clearly had no bearing on the procedure used or the substance of decision reached.'" (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979)); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) ("To avoid gutting the APA's procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result.").



Not surprisingly, courts have struggled to resolve these questions or find a middle ground between upholding or invalidating all such regulations. This Article explores the judicial response to agency reliance on postpromulgation notice and comment procedures as a substitute for the more traditional prepromulgation rulemaking procedures. The existing jurisprudence contemplating postpromulgation notice and comment procedures is a mess, but is not so rigidly fixed as to require Congress, or even necessarily the Supreme Court, to resolve it.

To provide context for the discussion, Part I of the Article examines three sets of cases in which the courts struggled to decide whether postpromulgation notice and comment may serve as a substitute for the prepromulgation procedures described in § 553 of the APA. Part II breaks down the alternative approaches the courts have taken and considers the justifications for and difficulties presented by each. In particular, Part II concludes that the all-or-nothing approaches embraced by some courts are doctrinally and practically untenable, but that the middle-ground alternatives employed by other courts do not ensure that postpromulgation notice and comment function as an equivalent for prepromulgation procedures. Part III proposes a solution to the middle-ground problem, first by reviewing the doctrinal theory surrounding agency rulemaking and then by articulating a set of factors for courts to employ in evaluating postpromulgation notice and comment case by case.

## I

### THREE CASE STUDIES

The judicial reaction to interim-final rules with postpromulgation notice and comment has been mixed, reflecting the difficulties encountered by the courts in balancing their obligation to enforce the APA's legal requirements with the practical realities of the modern regulatory state. Perhaps because good cause claims in particular tend to be highly contextual, the courts at times seem inconsistent in their assessment of postpromulgation notice and comment, making it difficult to sort the jurisprudence into an obvious and straightforward circuit split. Three lines of decisions—each dealing with a different set of interim-final rules that spawned multiple, nearly simultaneous circuit court cases—illustrate both the challenges these cases present and the courts' various attempts to find an appropriate response.

### A. The EPA's Nonattainment Area Regulations

Enacted in 1963<sup>32</sup> and amended many times since, the Clean Air Act requires the Environmental Protection Agency (EPA) to list all air pollutants that, in the Administrator's judgment, pose a threat to the public health and welfare, and also to establish ambient air quality standards for each such pollutant defining the levels of air quality necessary to protect the public health and welfare from the pollutants' adverse effects.<sup>33</sup> Once ambient air quality standards are established, the Act requires each state to develop a detailed implementation plan to ensure the air quality within the state meets those standards.<sup>34</sup> Areas within many states failed to achieve compliance with the standards by statutory deadlines,<sup>35</sup> so in 1977 Congress amended the Act to establish new deadlines and to detail a state and local planning process employing strict federal review to make certain that the new deadlines would be met. The amended Act directed the states to submit to the EPA by December 5, 1977, a list of nonattainment areas for all pollutants for which the agency had set primary standards.<sup>36</sup> Within sixty days thereafter, by February 3, 1978, the EPA was to promulgate these lists with any modifications it deemed necessary.<sup>37</sup> The Act then required states to develop implementation plans by January 1, 1979.<sup>38</sup>

A number of state agencies submitted initial lists of nonattainment areas that classified certain counties as "unclassifiable" for certain pollutants. On March 3, 1978—already one month after the statutory deadline, but without the notice or opportunity for prior comment required by the APA—the EPA published a final list of state nonattainment areas that changed from "unclassifiable" to "nonattainment" many of the classifications submitted by state agencies.<sup>39</sup> To justify its decision to forego prepromulgation notice and comment regarding its final classifications, the EPA asserted the APA's good cause exception, maintaining that the statutory deadlines im-

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<sup>32</sup> Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in scattered sections of 42 U.S.C.).

<sup>33</sup> 42 U.S.C. §§ 7401-7671.

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., *City of Waco v. EPA*, 620 F.2d 84, 85 (5th Cir. 1980) (mentioning the failure of states to "achieve compliance with the primary standards [of the Clean Air Act] by the statutory deadlines").

<sup>36</sup> See 42 U.S.C. § 7407(d)(1).

<sup>37</sup> See *id.* § 7407(d)(2).

<sup>38</sup> See *id.* § 7407(d)(3).

<sup>39</sup> See Attainment Status Designations, 43 Fed. Reg. 8,962 (Mar. 3, 1978).

posed by the 1977 Clean Air Act amendments made prepromulgation notice and comment “impracticable” and “contrary to the public interest.”<sup>40</sup> As a substitute for the lack of prepromulgation notice and comment, however, the EPA provided a sixty-day postpromulgation period for interested parties to submit comments.<sup>41</sup> Six months later, on September 11, 1978, after considering the comments submitted, the EPA reaffirmed many—but not all—of its nonattainment classifications.<sup>42</sup>

Affected states, cities, and businesses sued, alleging, among other things, that the EPA had violated § 553 by failing to engage in prepromulgation notice and comment. Two circuits credited the EPA’s good cause claim, obviating the need to consider the effect of the EPA’s reliance on postpromulgation notice and comment as a substitute for prepromulgation procedures.<sup>43</sup> Other circuits, however, rejected the EPA’s claim of good cause.<sup>44</sup> These courts thus had to grapple with what effect to give the EPA’s use of postpromulgation notice and comment.

Some circuits declined to give any effect whatsoever to the EPA’s use of postpromulgation notice and comment procedures, reasoning that such procedures were not an effective substitute for prepromulgation notice and comment, and that giving effect to such procedures would gut the APA’s prepromulgation notice and comment requirements. As the Third Circuit explained in one case:

If a period for comments after issuance of a rule could cure a violation of the APA’s requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation. Provision of prior notice and comment allows effective participation in the rulemaking process while the decisionmaker is still receptive to information and argument. After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change.<sup>45</sup>

The Third Circuit also rejected the EPA’s argument that its error had been harmless, offering two reasons why, notwith-

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<sup>40</sup> *Id.* at 8,962.

<sup>41</sup> *Id.*

<sup>42</sup> See Attainment Status Designations, 43 Fed. Reg. 40,412 (Sept. 11, 1978).

<sup>43</sup> Republic Steel Corp. v. Costle, 621 F.2d 797, 803–04 (6th Cir. 1980); U.S. Steel Corp. v. EPA, 605 F.2d 283, 286–89 (7th Cir. 1979).

<sup>44</sup> See, e.g., State of N.J., Dep’t of Env’tl. Prot. v. EPA, 626 F.2d 1038, 1040 (D.C. Cir. 1980) (holding that the EPA’s good cause claim was invalid).

<sup>45</sup> Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979).

standing that the procedurally invalid designations could be amended or replaced by procedurally valid designations, the invalid designations were nevertheless harmful.<sup>46</sup> First, the court said, so long as they were in effect, the procedurally invalid designations would undeniably shape regulated parties' behavior.<sup>47</sup> Second, the court explained that the procedurally invalid designations were not harmless because they "evidently [would] have some weight [on subsequent designations], even if they [would] not be dispositive."<sup>48</sup> This observation at least suggested that postpromulgation notice and comment could not compensate for a lack of prepromulgation notice and comment because of the risk that procedurally invalid initial designations would taint or influence subsequent designations.

Having found the EPA's procedural error not to have been harmless, the Third Circuit turned to the remedy. It decided to remand the matter to the EPA

with the direction that the Administrator shall forbear from applying to [the plaintiffs] any of the requirements or sanctions imposed on non-attainment areas by the 1977 amendments to the Clean Air Act until the Administrator shall have conducted a limited legislative hearing in which he gives [the plaintiffs] the required statutory notice and opportunity for participation and comment as provided by the APA . . . .<sup>49</sup>

The court held that requiring notice and a form of comment under these circumstances would restore the plaintiffs, "as nearly as possible, to the position they would have occupied if the Administrator had afforded them their rights to prior notice and an opportunity for comment."<sup>50</sup> But the court expressly left the designations in place with respect to all parties besides the plaintiffs, on the ground that vacating the designations more generally would "endanger the Congressional scheme for the control of air pollution."<sup>51</sup>

In a pair of cases on the EPA's designations, the Fifth Circuit took more or less the same tack as did the Third Circuit.<sup>52</sup> It characterized the EPA's reliance on postpromulgation notice and comment as mixing "notions of mootness, harmless error, and minimal injury to petitioners," but rejected all those bases

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 381–82.

<sup>50</sup> *Id.* at 381.

<sup>51</sup> *Id.*

<sup>52</sup> *City of Waco v. EPA*, 620 F.2d 84, 86–87 (5th Cir. 1980); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 211–14 (5th Cir. 1979).

for upholding the rule because "accepting them would lead in the long run to depriving parties affected by agency action of any way to enforce their [§] 553 rights to prepromulgation notice and comment."<sup>53</sup> The court further observed that there is a "crucial difference between comments before and after rule promulgation," namely that, before promulgating a rule, an "agency is more likely to give real consideration to alternative ideas."<sup>54</sup> Only by requiring prepromulgation notice and comment, the Fifth Circuit said, could judges ensure that interested parties have the opportunity "to make their views known to the agency in time to influence the rule making process in a meaningful way."<sup>55</sup> The court thought it was unlikely "that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *Fait accompli*."<sup>56</sup> Ultimately, the court determined that "[w]ere we to allow the EPA to prevail on this point we would make the provisions of [§] 553 virtually unenforceable. An agency that wished to dispense with prepromulgation notice and comment could simply do so, invite postpromulgation comment, and republish the regulation before a reviewing court could act."<sup>57</sup>

The Fifth Circuit, like the Third Circuit, also undertook a harmless error analysis and ultimately found the EPA's procedural error not to be harmless. Rather than expressly considering the relationship between the invalid designations and future designations, however, the Fifth Circuit rested its analysis on a presumption of prejudice in administrative cases involving procedural errors:

While [the] doctrine [of harmless error] has been held applicable to review of agency actions, and has statutory sanction in the APA, it is to be used only 'when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.' Here the Agency's error plainly affected the procedure used, and we cannot assume that there was no prejudice to petitioners. Absence of such prejudice must be clear for harmless error to be applicable.<sup>58</sup>

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<sup>53</sup> *U.S. Steel Corp.*, 595 F.2d at 214.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (quoting *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974)).

<sup>56</sup> *Id.* at 214-15 (quoting *Diamond*, 379 F. Supp. at 517).

<sup>57</sup> *Id.* at 215.

<sup>58</sup> *Id.* (quoting *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967) (footnote and citation omitted)).

Unlike the Third Circuit, the Fifth Circuit did not identify a substantive harm arising from the lack of prepromulgation notice and comment. Rather, according to the Fifth Circuit, the harm was the procedural error itself.<sup>59</sup> Based on that error, the Fifth Circuit set aside the challenged designations and remanded the matter to the EPA for proceedings consistent with § 553's prepromulgation notice and comment requirements.<sup>60</sup>

Relying expressly on the Third and Fifth Circuits' decisions on point, the Eighth Circuit also concluded that the EPA's allowance of postpromulgation notice and comment did not cure the procedural failings of the interim and final designations.<sup>61</sup> Unlike the Third and Fifth Circuits, however, the Eighth Circuit concluded that the proper remedy was to "set aside the final rule only as to the specific designations contested in this petition, but leave these designations in effect pending completion of further administrative proceedings in accordance with the APA [i.e., notice and comment]."<sup>62</sup>

The D.C. Circuit agreed with the Fifth Circuit—and, by extension, the Third Circuit—in its assessment of "the psychological and bureaucratic realities of post hoc comments in rule-making."<sup>63</sup> It therefore rejected the EPA's argument that postpromulgation notice and comment had cured the procedural defects in the designations, noting that Congress's decision to require prepromulgation notice and comment was based on a recognition that agencies are significantly less likely to revise a rule once they have promulgated it than they are to revise it based on comments received before a rule is promulgated.<sup>64</sup> The key, the court held, was whether the agency had seriously considered the comments it received after the interim designations had taken effect.<sup>65</sup> To this end, the court pointed out that even the two circuits to have found good cause for the EPA to bypass prepromulgation notice and comment "had evidence that the Agency had been sufficiently open-minded that it had actually made changes in its rules in response to comments received" during the postpromulgation period.<sup>66</sup> The D.C. Circuit, however, found that, with respect to the designations

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<sup>59</sup> *Id.* at 210.

<sup>60</sup> *Id.* at 215–18.

<sup>61</sup> *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 575–76 (8th Cir. 1981).

<sup>62</sup> *Id.* at 577.

<sup>63</sup> *State of N.J. Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1049–50 (D.C. Cir. 1980).

<sup>64</sup> *Id.* at 1049.

<sup>65</sup> *Id.* at 1050.

<sup>66</sup> *Id.*

there before it, the EPA had not “made any significant changes . . . in response to [the petitioner’s postpromulgation] comments.”<sup>67</sup> The lack of changes based on postpromulgation comments, the court said, undermined the EPA’s argument that it had kept an open mind during postpromulgation notice and comment, which in turn meant the EPA could not “rebut the presumption that post hoc comment was not contemplated by the APA and is generally not consonant with it.”<sup>68</sup> The D.C. Circuit thus invalidated the challenged designations and remanded the record for reconsideration after a new round of notice and comment proceedings.<sup>69</sup>

The Ninth Circuit also addressed the issue of the effect of postpromulgation notice and comment for the Clean Air Act designations, but only obliquely.<sup>70</sup> In a footnote, that court noted that the EPA’s use of postpromulgation proceedings “offer[ed] some support for the EPA’s argument that the petitioners have suffered no harm from the initial promulgation.”<sup>71</sup> Nevertheless, the Ninth Circuit ultimately concluded that postpromulgation notice and comment were insufficient to render the procedural error harmless.<sup>72</sup> Still, the court left the challenged designations in place while the deliberative process was reenacted, in deference to the complexity of the regulatory process and the desire to avoid thwarting operation of the Clean Air Act.<sup>73</sup>

## B. The Sex Offender Registration Regulations

The Attorney General’s application of the Sex Offender and Registration Notification Act (SORNA), enacted by Congress in 2006,<sup>74</sup> offers a much more recent example of the weight courts accord to postpromulgation notice and comment proceedings. SORNA established a national registration system for persons convicted of sex offenses under state and federal laws.<sup>75</sup> In particular, SORNA “requires those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current addresses, for inclusion on

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See* *W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 812 n.12 (9th Cir. 1980).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 812.

<sup>73</sup> *Id.* at 812–13.

<sup>74</sup> Sex Offender Registration and Notification Act, Pub. L. No. 109–248, 120 Stat. 590 (to be codified at 42 U.S.C. §§ 16901–16991).

<sup>75</sup> *Id.* at 593–94.

state and federal sex offender registries”<sup>76</sup> and imposes new criminal penalties on a convicted sex offender if the offender (1) is required to register under SORNA; (2) is a sex offender by reason of a federal conviction or, alternatively, is a person who “travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country”; and (3) “knowingly fails to register or update a registration as required” by SORNA.<sup>77</sup>

SORNA’s registration requirements were not immediately applicable to persons convicted of a sex offense prior to SORNA’s enactment. Rather, the Act provided that the registration requirements would not apply to “pre-Act offenders until the Attorney General specifie[d] that they [did] apply.”<sup>78</sup> In other words, Congress left the application of SORNA’s registration requirements to pre-Act offenders to the Attorney General’s discretion. On February 28, 2007, the Attorney General exercised that discretion and promulgated an interim-final rule making SORNA’s registration requirements applicable to all pre-Act offenders.<sup>79</sup> The Attorney General did not offer prepromulgation notice and comment, and he also bypassed the APA’s thirty-day advance publication requirement, asserting the good cause exception for both.<sup>80</sup> In support of his good cause claim, the Attorney General offered two rationales: (1) that the government had to eliminate “any possible uncertainty” about the applicability of SORNA; and (2) that further delay would endanger the public.<sup>81</sup>

Notwithstanding his claim of good cause, in May 2007 the Attorney General proposed a new set of guidelines—known as the SMART guidelines—for implementing SORNA.<sup>82</sup> In contrast to the interim-final rule, the Attorney General announced that the SMART guidelines would be subjected to notice and comment procedures.<sup>83</sup> Like the interim-final rule, however, the SMART guidelines provided that the SORNA guidelines applied to pre-Act offenders.<sup>84</sup> After notice and comment, the Attorney General published the final SMART guidelines on July

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<sup>76</sup> *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012).

<sup>77</sup> 18 U.S.C. § 2250(a) (2012).

<sup>78</sup> *Reynolds*, 132 S. Ct. at 978; see also 42 U.S.C. § 16913(d) (granting the Attorney General rulemaking authority regarding applicability).

<sup>79</sup> See Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,897 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

<sup>80</sup> See *id.*

<sup>81</sup> *Id.* at 8,896–97.

<sup>82</sup> The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210, 30,210 (May 30, 2007).

<sup>83</sup> See *id.* at 30,212.

<sup>84</sup> *Id.* at 30,212–13.



2, 2008, and those guidelines took effect on August 1, 2008.<sup>85</sup> Like the earlier, interim-final rule, and using almost the exact same language, the final SMART guidelines reaffirmed the application of SORNA to pre-Act offenders.<sup>86</sup> Subsequently, on December 29, 2010, the Attorney General adopted a “final rule” responding to comments received in response to the interim-final rule and ratifying the interim-final rule for the roughly eighteen months between February 2007 and August 2008.<sup>87</sup>

A number of pre-Act offenders were convicted of violating SORNA’s registration requirement based on the interim-final rule. Several of these offenders challenged their convictions, arguing that SORNA could not apply to them because, when they were prosecuted, the Attorney General had not promulgated a valid rule making SORNA retroactive.<sup>88</sup> The interim-final rule was invalid, they claimed, because the Attorney General had not shown good cause for bypassing § 553’s prepromulgation notice and comment requirements.<sup>89</sup>

Federal courts of appeals divided over the validity of the Attorney General’s interim-final rule. A few circuits accepted the Attorney General’s good cause claim, thereby obviating the need to evaluate his postpromulgation procedures.<sup>90</sup> But several other circuits found that the Attorney General’s stated reasons for bypassing prepromulgation notice and comment were insufficient.<sup>91</sup> Consistent with the APA’s requirement that courts reviewing agency decisions “[take] account . . . of the rule of prejudicial error,”<sup>92</sup> these five circuits then had to consider whether the Attorney General’s procedural error in

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<sup>85</sup> See The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030 (July 2, 2008).

<sup>86</sup> *Id.* at 30,035–36.

<sup>87</sup> See Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849 (Dec. 29, 2010) (to be codified at 28 C.F.R. pt. 72).

<sup>88</sup> See, e.g., *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014); *United States v. Reynolds*, 710 F.3d 498, 509 (3d Cir. 2013); *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Valverde*, 628 F.3d 1159, 1168 (9th Cir. 2010); *United States v. Dean*, 604 F.3d 1275 (11th Cir. 2010); *United States v. Utesch*, 596 F.3d 302 (6th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 412–24 (6th Cir. 2009); *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009).

<sup>89</sup> See, e.g., *Dean*, 604 F.3d at 1278; *Utesch*, 596 F.3d at 309–10.

<sup>90</sup> See *Dean*, 604 F.3d at 1281 (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)); *Gould*, 568 F.3d at 469–70; see also *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008) (rejecting defendant’s APA argument as “frivolous” without elaborating), *rev’d on other grounds sub nom. Carr v. United States*, 560 U.S. 438 (2010).

<sup>91</sup> *Brewer*, 766 F.3d at 890; *Reynolds*, 710 F.3d at 509; *Johnson*, 632 F.3d at 928; *Valverde*, 628 F.3d at 1168; *Cain*, 583 F.3d at 412–24.

<sup>92</sup> 5 U.S.C. § 706 (2012).

promulgating the interim-final rule was harmless. Their answers to that question were informed partially by how they viewed the effect of the postpromulgation notice and comment associated with adoption of the SMART guidelines.

Of the five circuit courts to address the issue, only the Fifth Circuit found the procedural invalidity of the interim-final rule to be harmless, so that the interim-final rule could be given effect as to pre-Act offenders notwithstanding the lack of prepromulgation notice and comment.<sup>93</sup> The court reached that conclusion for four reasons. First, it pointed out that the preamble of the interim-final rule addressed each of the arguments the petitioner raised in his legal challenge. “[T]he error in failing to solicit public comment before issuing the rule was not prejudicial,” it said, “because the Attorney General nevertheless considered the arguments [Petitioner] Johnson has asserted and responded to those arguments during the interim rulemaking.”<sup>94</sup> There was thus nothing to suggest that, “if given the opportunity to comment, [Petitioner] Johnson would have presented an argument the Attorney General did not consider in issuing the interim rule.”<sup>95</sup>

Second, the Fifth Circuit deemed harmless the Attorney General’s failure to undertake prepromulgation notice and comment because the interim-final rule merely “involved a yes or no decision”—i.e., whether to apply SORNA retroactively.<sup>96</sup> To the Fifth Circuit’s eye, the issue addressed in the interim-final rule did not require anything like “nuanced and detailed regulations [of the sort] that greatly benefit from expert and regulated entity participation,” a fact that further undercut the need for prepromulgation notice and comment.<sup>97</sup>

The Fifth Circuit’s two remaining reasons for finding harmless error related directly to the Attorney General’s use of postpromulgation notice and comment with respect to the SMART guidelines. First, the court noted that even when the Attorney General gave notice and reviewed public comments in promulgating the SMART guidelines, the resulting rule was substantively identical to the interim rule in regard to retroactivity.<sup>98</sup> Thus, the Fifth Circuit reasoned, there was no basis for think-

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<sup>93</sup> *Johnson*, 632 F.3d at 928.

<sup>94</sup> *Id.* at 932.

<sup>95</sup> *Id.*; see also *Dean*, 604 F.3d at 1288–89 (Wilson, J., concurring) (raising a nearly identical argument).

<sup>96</sup> *Johnson*, 632 F.3d at 932.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 932–33.

ing prepromulgation notice and comment would have altered the content of the interim-final rule.<sup>99</sup>

The Fifth Circuit also determined that the petitioner's failure to propose "comments he would have made during a comment period" and his decision not to "involve himself in the postpromulgation comment period" for the SMART guidelines undermined his claim that the lack of prepromulgation notice and comment for the interim-final rule harmed him.<sup>100</sup> As the court put it, "While [Petitioner] Johnson's participation in these alternate comment forums is not required to find prejudice, his lack of involvement in all stages of administrative decision-making points to the conclusion that Johnson was not practically harmed by the Attorney General's APA failings."<sup>101</sup> The Fifth Circuit, then, relied substantially on the Attorney General's allowance of postpromulgation notice and comment in deciding that the lack of prepromulgation notice and comment with respect to the interim-final rule was harmless.<sup>102</sup>

The remaining four circuits to consider the issue—the Third, Sixth, Eighth, and Ninth<sup>103</sup>—held that the Attorney General's failure to engage in prepromulgation notice and comment with respect to the interim-final rule was not harmless error. In doing so, these circuits expressly rejected the Fifth Circuit's arguments regarding the effect of postpromulgation notice and comment.

A few of the courts began their analyses by noting the Attorney General's complete and total failure to undertake any sort of prepromulgation notice and comment regarding the interim rule, saying that such a failure—in contrast to, say, a failure to comply with some minor technicality during the comments process—drastically undermined the purposes of § 553's notice and comment provisions.<sup>104</sup> Because the retroactivity provision in the interim-final rule was "never 'tested via exposure to diverse public comment,'" offenders prosecuted for

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<sup>99</sup> *Id.* at 933.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See* United States v. Brewer, 766 F.3d 884, 890–91 (8th Cir. 2014); United States v. Reynolds, 710 F.3d 498, 509 (3d Cir. 2013); United States v. Valverde, 628 F.3d 1159, 1168 (9th Cir. 2010); United States v. Cain, 583 F.3d 408, 412–24 (6th Cir. 2009).

<sup>104</sup> *Brewer*, 766 F.3d at 891; *Reynolds*, 710 F.3d at 519; *see also* United States v. Utesch, 596 F.3d 302, 312 (6th Cir. 2010) ("Here, the process was fatally flawed; the Attorney General provided affected parties no opportunity to participate in the crafting of the interim rule *before* it purported to take effect against them.").

violating the interim-final rule were never given *any* opportunity “to provide meaningful comments relating to the substance of the rule” or “[d]evelop evidence in the record” to enable more effective review.”<sup>105</sup> The statement that there was no opportunity to provide meaningful comments or develop evidence in the administrative record effectively dismissed as meaningless the postpromulgation notice and comment that occurred in connection with the subsequently finalized guidelines.<sup>106</sup> Indeed, two of the courts that rejected the Attorney General’s harmless error argument—the Sixth and Ninth Circuits—went so far as to suggest that giving effect to postpromulgation notice and comment procedures in the context of a criminal statute like SORNA risked violating the Constitution’s Ex Post Facto Clause.<sup>107</sup>

Several of the four circuits rejected the Attorney General’s arguments that postpromulgation notice and comment cured the procedural defects in the interim-final rule because they found no evidence that the Attorney General kept an open mind during postpromulgation proceedings.<sup>108</sup> Rather, the courts attributed to the Attorney General a “single-minded commitment to the substantive result reached” at the expense of considering alternative viewpoints.<sup>109</sup> As evidence of the Attorney General’s closed-mindedness, a few of the courts pointed to the text of the interim-final rule’s preamble, which specified that the interim-final rule was promulgated only as a precautionary measure to “foreclose[] such claims [of pre-Act offenders] by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted.”<sup>110</sup> A mission to foreclose claims, they reasoned, was the opposite of the sort of open-mindedness required for meaningful notice and comment proceedings.<sup>111</sup>

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<sup>105</sup> *Reynolds*, 710 F.3d at 519 (quoting *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011)).

<sup>106</sup> *See id.* (“Any suggestion that the postpromulgation comments to the Interim Rule can satisfy these purposes misses the point.”).

<sup>107</sup> *See Valverde*, 628 F.3d at 1168 n.3; *Utesch*, 596 F.3d at 312–13.

<sup>108</sup> *See, e.g., Reynolds*, 710 F.3d at 519 (“The Government also has not shown that the Attorney General ‘maintain[ed] a flexible and open-minded attitude towards’ the Interim Rule.” (alteration in original) (quoting *Prometheus Radio Project*, 652 F.3d at 449)); *Utesch*, 596 F.3d at 310 (“There was never any follow-up publication corresponding to the interim regulation that evidenced actual consideration of public commentary.”).

<sup>109</sup> *Reynolds*, 710 F.3d at 519.

<sup>110</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

<sup>111</sup> *See, e.g., United States v. Brewer*, 766 F.3d 884, 892 (8th Cir. 2014) (“Such an approach certainly does not suggest the sort of ‘flexible and open-minded

The Third Circuit went even further, pointing out that the timing of the rule—promulgated immediately after courts rejected the Attorney General’s argument that SORNA applied retroactively even without a rule so specifying—suggested the Attorney General promulgated the rule to advance a specific, predetermined agenda.<sup>112</sup> The weight of evidence suggesting the Attorney General had already made up his mind on retroactivity when he gave notice and solicited comment on the SMART guidelines, the courts concluded, undercut the meaningfulness of postpromulgation notice and comment procedures.<sup>113</sup>

Courts were equally skeptical of the other arguments on which the Fifth Circuit relied regarding the effectiveness of postpromulgation notice and comment in mitigating the interim-final rule’s procedural shortcomings. A few courts, for example, rejected the argument that a petitioner’s failure to participate in a postpromulgation comment period negated any possibility that the petitioner was prejudiced by the lack of prepromulgation notice and comment.<sup>114</sup> Nothing, they pointed out, requires a petitioner to participate in a rulemaking before a court may find prejudice.<sup>115</sup> Indeed, one of the purposes of notice and comment is to allow other groups to raise a regulated party’s interests from a variety of perspectives, rather than requiring a regulated party to do so itself.<sup>116</sup>

Two courts likewise dismissed the argument that, because the final rule did not depart from the reasoning or substance of the interim-final rule, even after notice and comment, there had been no prejudice to any of the petitioners.<sup>117</sup> This analysis, the courts concluded, would allow agencies to avoid notice

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attitude towards its own rules,’ that is generally required for the notice-and-comment period.” (quoting *Prometheus Radio Project*, 652 F.3d at 449)); *Reynolds*, 710 F.3d at 519 (“The Government also has not shown that the Attorney General ‘maintain[ed] a flexible and open-minded attitude towards’ the Interim Rule.” (quoting *Prometheus Radio Project*, 652 F.3d at 449)).

<sup>112</sup> See *Reynolds*, 710 F.3d at 520.

<sup>113</sup> See *id.* at 519 (“The Attorney General thus states that the purpose of the Interim Rule is to eliminate any dissenting points of view . . . . Under those circumstances, the Interim Rule can hardly be seen as fulfilling the purposes of notice and comment.”).

<sup>114</sup> See, e.g., *Brewer*, 766 F.3d at 891 (noting that the Fifth Circuit’s reasoning in *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2012), is unpersuasive); *Reynolds*, 710 F.3d at 522 (disagreeing with government’s reliance on the Fifth Circuit’s decision).

<sup>115</sup> *Brewer*, 766 F.3d at 891; *Reynolds*, 710 F.3d at 522–23.

<sup>116</sup> See *Reynolds*, 710 F.3d at 522–23 (“If a comment period had been provided, others who could have asserted his interest—such as public defenders and public-interest groups—would almost certainly have weighed in.”).

<sup>117</sup> See *Brewer*, 766 F.3d at 891–92; *Reynolds*, 710 F.3d at 522–23.

and comment by simply issuing an interim-final rule and subsequently adopting it—or something substantively identical to it—as a final rule after notice and comment.<sup>118</sup> Countenancing or validating that behavior by an agency, they concluded, would eviscerate notice and comment requirements.<sup>119</sup>

Not only did several circuits reject the argument that post-promulgation notice and comment helped render harmless the invalid interim-final rule, the Third Circuit actually used the postpromulgation comments to demonstrate that the Attorney General's prepromulgation analysis had not adequately considered potential arguments relating to the interim-final rule.<sup>120</sup> Specifically, it identified a number of arguments raised in comments to the SMART guidelines that were not addressed in the preamble to the interim rule, including several comments advocating alternatives to across-the-board retroactivity—a possibility not mentioned in the interim rule.<sup>121</sup> By demonstrating that the Attorney General had not considered alternatives to across-the-board retroactivity for all sex offenders, the Third Circuit found, the results of the postpromulgation comment undercut the notion that the lack of prepromulgation notice and comment had been harmless.

### C. The Tax Basis Overstatement Cases

A third line of cases in which courts wrestled with the effect of postpromulgation notice and comment involves regulations issued by the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS)<sup>122</sup> addressing the time period for assessing a tax deficiency—i.e., telling a taxpayer that it failed to pay enough taxes with its annual tax return. Under § 6501 of the Internal Revenue Code (IRC), the ordinary time for assessing a deficiency is within three years after the tax-

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<sup>118</sup> *Reynolds*, 710 F.3d at 523; *United States v. Utesch*, 596 F.3d 302 (6th Cir. 2010).

<sup>119</sup> *Reynolds*, 710 F.3d at 523; *Utesch*, 596 F.3d at 312.

<sup>120</sup> *Reynolds*, 710 F.3d at 520–21.

<sup>121</sup> *Id.* at 522.

<sup>122</sup> The Internal Revenue Code delegates authority for promulgating regulations to Treasury. I.R.C. § 7805(a) (2012). Treasury formally issues all regulations interpreting the IRC, and Treasury's Office of Tax Policy is significantly involved in reviewing and drafting Treasury regulations. I.R.M. § 32.1.1.3.1(1)(A) (Aug. 11, 2004). Historically, however, the Office of Chief Counsel of the IRS has performed the function of initially drafting most Treasury regulations. See *id.* §§ 32.1.1.3, 32.1.1.3.1(1)(A), 32.1.1.4.5(1) (Aug. 11, 2004) (documenting the joint agency role in regulation drafting). Accordingly, Treasury and the IRS are both recognized as the issuer of the regulations discussed in this Part.

payer in question files its tax return.<sup>123</sup> That period is extended to six years, however, when a taxpayer “omits from gross income an amount properly includible therein [which] is in excess of 25% of the amount of gross income stated in the return.”<sup>124</sup>

Availing itself of the six-year extended period, the IRS assessed deficiencies against a number of taxpayers who, between three and six years earlier, had overstated the bases—and thereby understated the gains realized—on property sold. In litigation over those assessments, the IRS argued that such basis overstatements represented omissions from gross income, thereby triggering the six-year extended limitations period for assessing deficiencies.<sup>125</sup> Decades earlier, in *Colony, Inc. v. Commissioner*, the Supreme Court had concluded that virtually identical language in an earlier version of the IRC did not encompass basis overstatements.<sup>126</sup> After two federal circuit courts relied on *Colony* to reject the IRS’s interpretation of the contemporary IRC § 6501,<sup>127</sup> and while litigation in several other cases remained pending, Treasury promulgated a “temporary” regulation—which, by its terms, was immediately effective—codifying its position that an overstatement in basis was the same thing, for purposes of the statute of limitations, as an understatement of gain.<sup>128</sup> Treasury did not rely on the good cause exception; instead, Treasury and the IRS contend that most Treasury regulations interpreting the IRC are exempt from notice-and-comment rulemaking as interpretative rules<sup>129</sup>—itself a controversial position.<sup>130</sup> Regardless, after adopting the temporary rule, Treasury utilized postpromulga-

<sup>123</sup> I.R.C. § 6501(a).

<sup>124</sup> *Id.* § 6501(e)(1)(A).

<sup>125</sup> See *Salman Ranch Ltd. v. United States*, 573 F.3d 1362, 1371 (Fed. Cir. 2009); *Bakersfield Energy Partners, LP v. Comm’r*, 568 F.3d 767, 774–75 (9th Cir. 2009).

<sup>126</sup> 357 U.S. 28, 35–36 (1958).

<sup>127</sup> *Salman Ranch*, 573 F.3d at 1372; *Bakersfield Energy Partners*, 568 F.3d at 768, 775–78.

<sup>128</sup> Definition of Omission from Gross Income, 74 Fed. Reg. 49,321, 49,323 (Sept. 28, 2009) (to be codified at 26 C.F.R. pt. 301).

<sup>129</sup> I.R.M. § 32.1.1.2.6 (Sept. 23, 2011) (“Most IRS/Treasury regulations are considered interpretative because the underlying statute implemented by the regulation contains the necessary legal authority for the action taken and any effect of the regulation flows directly from that statute.”); Jeremiah Coder, *ABA Section of Taxation Meeting: Treasury Views Most Regs as Outside Notice and Comment Rules*, 139 TAX NOTES 884, 884 (2013).

<sup>130</sup> See *Intermountain Ins. Serv. of Vail, LLC v. Comm’r*, 134 T.C. 211, 240–45 (2010) (Halpern & Holmes, JJ., concurring) (rejecting this claim); Coder, *supra* note 129, at 884 (documenting disagreement).

tion notice and comment procedures, ultimately finalizing the rule without substantive amendment.<sup>131</sup>

Throughout this rulemaking process, litigation over the government's interpretation of IRC § 6501 continued. The issue raised most prominently in these cases was whether Treasury's interpretation of the IRC, as embodied in the new rule, was entitled to deference under the Supreme Court's *Chevron* standard.<sup>132</sup> For an agency's interpretation of a statute to be entitled to *Chevron* deference, of course, the statute must be ambiguous and the agency's interpretation thereof must be permissible.<sup>133</sup> The United States Tax Court and some circuit courts concluded, in light of the Supreme Court's decision in *Colony*, that Treasury's temporary and final regulations both were inconsistent with the plain meaning of IRC § 6501 and thus invalid at *Chevron*'s first step.<sup>134</sup> Several other circuits upheld Treasury's regulation as a permissible construction of the statute at *Chevron* step two.<sup>135</sup> In several cases, however, parties or amici asserted that the rule was also procedurally invalid for Treasury's reliance on only postpromulgation notice and comment, leading to some discussion of that issue as well.<sup>136</sup>

Judges Halpern and Holmes of the United States Tax Court offered the most thorough consideration of Treasury's procedures. While the majority of that court rejected Treasury's temporary rule at *Chevron* step one, Judges Halpern and Holmes, writing in concurrence, instead declared the rule "procedurally invalid under the [APA]."<sup>137</sup> Disagreeing with the government's assertion that its regulations were exempt from notice-and-comment rulemaking requirements, Judges Halpern and Holmes stressed that, "[g]iving the public the opportunity to participate through notice and comment is important in giving

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<sup>131</sup> Definition of Omission from Gross Income, 75 Fed. Reg. 78,897 (Dec. 17, 2010) (to be codified at 26 C.F.R. pt. 301).

<sup>132</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

<sup>133</sup> *Id.* at 842–43.

<sup>134</sup> *Home Concrete & Supply, LLC v. United States*, 634 F.3d 249, 257 (4th Cir. 2011); *Burks v. United States*, 633 F.3d 347, 360 (5th Cir. 2011); *Intermountain Ins. Serv. of Vail*, 134 T.C. at 224.

<sup>135</sup> *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 650 F.3d 691, 707 (D.C. Cir. 2011); *Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929, 939–40 (10th Cir. 2011); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011); *Beard v. Comm'r*, 633 F.3d 616, 623 (7th Cir. 2011).

<sup>136</sup> *Intermountain Ins. Serv. of Vail*, 650 F.3d at 709–10; *Salman Ranch*, 647 F.3d at 940; *Grapevine Imports*, 636 F.3d at 1380–81.

<sup>137</sup> *Intermountain Ins. Serv. of Vail*, 134 T.C. at 238 (Halpern & Holmes, JJ., concurring).



regulations legitimacy.”<sup>138</sup> Although the regulation was still temporary at the time it came before the Tax Court, Judges Halpern and Holmes suggested that they would have held the succeeding final regulation invalid as well, because “[g]iving the public a chance to comment only after making the regulations effective does not comply with the APA” and “courts invalidate even final regulations when an agency does this.”<sup>139</sup> After Treasury finalized the regulation, the Fifth Circuit invalidated it at *Chevron* step one, but alternatively (and quite flatly) held that Treasury’s offer of “notice and comment after the final Regulations were enacted [was] not an acceptable substitute for prepromulgation notice and comment.”<sup>140</sup>

The outright rejection of postpromulgation notice and comment by Judges Halpern and Holmes and the Fifth Circuit put those courts at odds with the D.C. Circuit. In reviewing the Tax Court’s decision, the D.C. Circuit declared not only that Treasury’s basis omission regulation was permissible at *Chevron* step two but also that postpromulgation notice and comment proceedings could cure the procedural defect in the final regulation so long as the IRS kept an “open mind” during those proceedings.<sup>141</sup> The court found the requisite open-mindedness in the record, rejecting each of the arguments raised by plaintiffs and amici.<sup>142</sup> First, the court noted that, although the IRS, in finalizing the regulation, had not responded to several of the arguments raised by the litigants in the case, he had responded in some depth to the only comment he received after the IRS gave notice that it was accepting comments on the temporary regulation.<sup>143</sup> The court acknowledged that the Commissioner had not changed the content of the regulation based on the comment, but it observed that the lack of changes to the regulation, by itself, did not mean the IRS had not considered the comment and kept an open mind in evaluating it.<sup>144</sup> The court highlighted the thoroughness of the IRS’s response to the one comment he received, concluding that, “[g]iven the Commissioner’s ‘searching consideration’ of the comment, we have no doubt that he kept the requisite open

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<sup>138</sup> *Id.* at 246.

<sup>139</sup> *Id.* at 247.

<sup>140</sup> *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011).

<sup>141</sup> *Intermountain Ins. Serv. of Vail*, 650 F.3d at 709.

<sup>142</sup> *Id.* at 710.

<sup>143</sup> *Id.* at 709–10.

<sup>144</sup> *Id.*

mind.”<sup>145</sup> Because the court found that the IRS had kept an open mind throughout the postpromulgation notice-and-comment process, the court concluded that postpromulgation notice and comment had cured the lack of prepromulgation notice and comment with respect to Treasury’s regulation.<sup>146</sup>

The Federal Circuit was even more willing than the D.C. Circuit to enforce Treasury’s regulation, summarily dismissing the argument that, because the final regulation was first issued in temporary form without notice and comment, it was invalid. Sweeping that notion aside, the Federal Circuit declared, “[n]ow that the regulations have issued in final form, these arguments are moot. There can be little doubt that the final regulations of the Treasury Department are entitled to *Chevron* review and, where appropriate, deference.”<sup>147</sup> The Tenth Circuit, citing the Federal Circuit precedent, likewise adopted the position—again, without much explanation—that an invalid temporary regulation becomes valid so long as it is, at some point, subjected to public comment.<sup>148</sup>

Finally, the Seventh Circuit took still another approach, appearing to credit Treasury’s claim that its regulation was valid under the interpretative rule exception. In dicta addressing whether the regulation might merit *Chevron* deference, the court said that it “would have been inclined to grant” *Chevron* deference to both the temporary regulation and the final one issued after postpromulgation notice and comment.<sup>149</sup> The court elaborated that it had “previously given deference to interpretive Treasury regulations issued with [postpromulgation] notice-and-comment procedures, and the Supreme Court has stated that the absence of notice-and-comment procedures is not dispositive to the finding of *Chevron* deference.”<sup>150</sup>

## II

### SYNTHESIZING THE JURISPRUDENCE

As illustrated by these three case studies, jurisprudence concerning judicial review of postpromulgation notice and comment procedures on procedurally invalid interim-final rules is a muddle. The circuit courts have adopted at least five

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<sup>145</sup> *Id.* at 710 (quoting *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994)).

<sup>146</sup> *Id.*

<sup>147</sup> *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011).

<sup>148</sup> *Salman Ranch, Ltd. v. Comm’r*, 647 F.3d 929, 940 (10th Cir. 2011).

<sup>149</sup> *Beard v. Comm’r*, 633 F.3d 616, 623 (7th Cir. 2011).

<sup>150</sup> *Id.* (citations omitted).

distinct approaches to addressing such cases. Although each approach has something to commend it, none is perfect.

### A. Postpromulgation Procedures as Irretrievably Flawed

A few courts have declined to give any effect to postpromulgation notice and comment.<sup>151</sup> This is largely because, as the Fifth Circuit has explained, giving effect to postpromulgation notice and comment would ignore

the crucial difference between comments before and after rule promulgation. Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas. . . . Were we to [credit postpromulgation notice and comment,] we would make the provisions of [§] 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.<sup>152</sup>

The crux of the argument is twofold. First, giving effect to postpromulgation rulemaking would undoubtedly provide a powerful disincentive for agencies to comply with § 553's prepromulgation notice and comment requirements when they seek to bind the actions of regulated parties.<sup>153</sup> Notice-and-comment rulemaking takes time, ranging from months to years. While agencies may perceive value in obtaining outside input regarding their rulemaking initiatives, they may also sometimes see notice and comment procedures as an obstacle to getting things done and may be predisposed to interpret the exemptions from those requirements aggressively. To the extent agencies can rely on postpromulgation notice and com-

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<sup>151</sup> See, e.g., *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) ("That the government allowed for notice and comment after the final Regulations were enacted is not an acceptable substitute for pre-promulgation notice and comment."); *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975) ("We emphasize again . . . that, in light of the 'drastic impact' which compliance with regulations such as this will have, adherence to applicable statutory provisions is necessary."); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972) ("Section 4(b) of the [APA] requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment or repeal of a rule, granted in Section 4(e) of that Act, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of Section 4(b).").

<sup>152</sup> *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214–15 (5th Cir. 1979) (citations omitted).

<sup>153</sup> *Id.* at 214 ("[A]ccepting [postpromulgation notice and comment] would lead in the long run to depriving parties affected by agency action of any way to enforce their [§] 553 rights to prepromulgation notice and comment.").

ment to prop up procedurally invalid rules, they will be less inclined to follow the APA's procedural requirements faithfully.<sup>154</sup> By contrast, rigorous insistence on prepromulgation notice and comment—and nothing less—ensures scrupulous fidelity to the text of APA § 553.

Second, ignoring postpromulgation notice and comment acknowledges the intuitive difference in the way agencies are likely to treat pre- and postpromulgation comments. Once an agency has publicly staked out a position and given effect to that position, the argument goes, forces like regulatory inertia, status quo bias,<sup>155</sup> confirmation bias,<sup>156</sup> and commitment bias<sup>157</sup> all make it less likely the agency will deviate from its position. Stephanie Stern has suggested, for example, that the APA's notice-and-comment process itself reduces effective public participation in agency rulemaking by prematurely committing agency officials to a single set of proposed rules and increasing perceptions of agency bias in favor of one approach to a particular problem.<sup>158</sup> Assuming Stern's hypothesis is correct, it is reasonable to infer that deferring notice and comment until after an agency publishes binding interim-final regulations would only exacerbate this phenomenon. In fact, the Administrative Conference of the United States expressed precisely this concern about the practice of interim-final regulations, particularly in the absence of good cause, to discourage agency utilization of that model.<sup>159</sup> An approach that ignores postpromulgation notice and comment thus focuses on comments received at the time when, at least theoretically, the agency is most likely to be receptive.

There are at least two other clear benefits of denying effect to postpromulgation notice and comment, both having to do

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<sup>154</sup> See *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (“To avoid gutting the APA’s procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result.”).

<sup>155</sup> William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

<sup>156</sup> William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 253 (2015); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 504 (2002).

<sup>157</sup> Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 142–43 (1997).

<sup>158</sup> Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 620–30 (2002).

<sup>159</sup> Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,111–12 (Aug. 18, 1995).

with the way the public might perceive postpromulgation notice and comment. As some scholars have argued, citizens might not take seriously the opportunity to offer comments after a rule is in effect, believing that, because an agency has already committed to enforcing a particular rule, submitting comments would just be a waste of time.<sup>160</sup> If a substantial portion of the public does not think it worthwhile to submit comments, that undermines the crowdsourcing rationale of the notice and comment requirements. Thus, at least inasmuch as the public is likely to treat the opportunity for prepromulgation comment more seriously than the opportunity for postpromulgation comment, postpromulgation notice and comment constitute an inadequate substitute for prepromulgation notice and comment.

Analogous reasoning can support an argument that postpromulgation notice and comment do not legitimize regulations to the same extent as prepromulgation notice and comment. To the extent the public is more likely to participate in prepromulgation comment periods—or just more likely to believe that prepromulgation notice and comment incorporate the full spectrum of public views on a rule—notice and comment procedures strengthen the perception that the resulting rules are the product of something resembling a democratic process. This, in turn, minimizes the degree to which the resulting rules are seen as democratically illegitimate.<sup>161</sup> By contrast, if the public feels shut out of the regulatory process—as it might with postpromulgation notice and comment—the resulting rules will inevitably be perceived as less the product of a representative process and more the product of bureaucratic fiat.<sup>162</sup> Refusing to give effect to postpromulgation notice and comment, then, might make sense from a legitimacy perspective.

Predictably, however, there are problems with disregarding postpromulgation notice and comment procedures entirely. As a practical matter, for example, doing so would mean that thousands, if not hundreds of thousands, of pages of regulations—all supported only by postpromulgation notice and com-

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<sup>160</sup> Stern, *supra* note 158, at 620–30.

<sup>161</sup> Cf. Thomas A. Albright, Note, *Regulator Disqualification from Rulemaking Proceedings*, 57 TEX. L. REV. 1193, 1214 (1979) (“But for public participation to be more than a hollow formality in rulemaking proceedings, a regulator’s initial views must be tentative, and must be *perceived* to be tentative.”).

<sup>162</sup> Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 16 (1995).

ment—are almost certainly invalid.<sup>163</sup> From an administrative perspective, such wholesale invalidation of large numbers of agency regulations would be hugely destabilizing. Of course, agencies might go to the trouble of repromulgating the rules, but doing so would entail huge expenditures of time and other agency resources.<sup>164</sup> Such expenditures are particularly troubling with respect to the many rules that were previously finalized using postpromulgation notice and comment and have been in effect for years or even decades without being challenged. While agencies sift through the wreckage, parties that have reasonably relied upon those regulations would face tremendous uncertainty regarding their rights and obligations under the law.

Second, a bright-line rule that postpromulgation notice and comment can never be an adequate substitute for prepromulgation notice and comment arguably ignores the doctrine of harmless error codified in § 706 of the APA. The harmless error doctrine might be read to counsel that, to the extent a substitute procedure fulfills the essential functions of prepromulgation notice and comment, there is no need to insist on prepromulgation notice and comment over the substitute procedure.<sup>165</sup> This is not to say that postpromulgation notice and comment necessarily fulfill the essential functions of prepromulgation notice and comment. As explained above, there are good reasons to think they do not, at least not in all cases. But it is also reasonable to believe that, in at least some instances, postpromulgation notice and comment will function at least as well as prepromulgation notice and comment, and in those cases a blanket rule precluding judicial consideration of postpromulgation notice and comment procedures will be detrimental.

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<sup>163</sup> The GAO study discussed in the introduction to this Article alone contemplated approximately 13,400 potentially problematic rules, constituting an unspecified number of pages in the Federal Register, and that study only covered rules adopted from 2003 through 2010. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 8. As indicated, agency use of postpromulgation notice and comment procedures began long before 2003. See, e.g., *supra* subpart I.A. (documenting one instance from the late 1970s).

<sup>164</sup> Todd Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165 (2000) ("Promulgating a major rule [under notice and comment proceedings] often takes years and represents a substantial commitment of an agency's resources.").

<sup>165</sup> See, e.g., *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 768–69 (9th Cir. 1986) (holding that violation of the statutory notice requirement was a harmless error since the purpose of the public participation requirement was fulfilled through other means).

This second point acknowledges the reality that, even if they are not a perfect substitute for prepromulgation notice and comment, postpromulgation notice and comment almost certainly achieve, at least to some extent and perhaps even in most instances, many of the goals underlying § 553's prepromulgation notice and comment requirements. It is possible, for example, that an agency will not give as much credit to a comment received after an interim-final rule is promulgated as the agency would give to the same comment received before the interim-final rule was promulgated. Nevertheless, the agency might still give *some* credit to comments received after the interim-final rule is promulgated.<sup>166</sup> By completely ignoring the effect of postpromulgation notice and comment, then, courts disincentivize procedures that have at least some value, and that should accordingly be encouraged.<sup>167</sup>

Indeed, rejecting postpromulgation notice and comment outright as a potential cure for procedural flaws might have the paradoxical effect of completely robbing the public of any opportunity to comment on a rule. For instance, an agency might promulgate a rule without prepromulgation notice and comment under the good cause exception, genuinely believing its claim of good cause is valid. Under such circumstances, as a matter of good governance, ACUS recommends that the agency offer interested parties the opportunity to submit postpromulgation comments and publish its response to the comments received.<sup>168</sup> Judicial recognition that postpromulgation notice and comment procedures have some value will offer agencies an additional incentive to follow ACUS's recommendation—that of protecting the rule from being invalidated by a judge who disagrees with the agency's good cause claim. But if an agency knows the courts will not give any effect to postpromulgation notice and comment, the agency has substantially less incentive to open the rule up to postpromulgation public comment as a backstop to the agency's good cause claim. Thus, in at least some circumstances, a court's refusal to credit postpromulgation notice and comment might actually induce agencies to forego public comment altogether—a result inconsistent with both ACUS good governance recommendations and the principles underlying § 553.

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<sup>166</sup> See, e.g., *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983) (documenting an instance in which a final rule reflected "some changes" made in response to postpromulgation comments received in response to an interim rule).

<sup>167</sup> *Id.* at 188 ("[C]omment after the fact is better than none at all.").

<sup>168</sup> Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,113 (Aug. 18, 1995).

## B. Postpromulgation Procedures as Perfect Substitute

At the other extreme, some courts have treated postpromulgation notice and comment as curing or mooted procedural defects in interim-final rules.<sup>169</sup> This approach has a number of practical advantages. For one thing, allowing agencies to substitute postpromulgation notice and comment for prepromulgation notice and comment gives agencies greater flexibility in promulgating rules. Consider, for example, a situation in which an agency is genuinely uncertain whether a particular rule qualifies for the good cause exception. Courts that do not give any effect to postpromulgation notice and comment effectively leave the agency with just two options—promulgation under the good cause exception or prepromulgation notice and comment—no matter how unpalatable each alternative might seem. Courts that respect postpromulgation notice and comment, however, give agencies a third option: promulgate the rule now as an interim-final rule under the good cause exception and then backstop it with postpromulgation notice and comment before promulgating it as a final rule. This approach allows agencies to reap the benefits of quick enforcement as well as the benefits of the notice-and-comment process. It also offers some security to agencies that have a good faith belief that a particular rule qualifies for an exception from prepromulgation notice and comment. Those agencies can take advantage of the exception but then further ensure the rule's validity by undertaking postpromulgation notice and comment.

Crediting postpromulgation notice and comment will inevitably lead agencies to use it more frequently. In at least some circumstances, that will mean opportunities for public comment where agencies would otherwise provide none. Again, consider the scenario where an agency believes in good faith that a contemplated rule qualifies for the good cause exception. If postpromulgation notice and comment are not an option, the agency will likely go ahead and promulgate the rule under the

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<sup>169</sup> See, e.g., *Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929, 940 (10th Cir. 2011) (“While the . . . temporary regulations were issued without notice and comment, [n]ow that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot.” (first alteration in original) (internal quotation marks omitted)); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011) (“Grapevine also argues that the temporary Treasury regulations should not receive *Chevron* deference because of purported procedural shortcomings in their issuance. Now that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot.”).



exception, meaning there will be no opportunity for public comment on the rule. If, however, postpromulgation notice and comment are an option, the agency might, out of an abundance of caution, promulgate the rule as an interim-final rule, subject it to postpromulgation notice and comment, and only afterward promulgate the rule as a final rule. In that case, even assuming the rule does, in fact, qualify under the good cause exception, the effect of courts' crediting postpromulgation notice and comment fosters greater public participation in the regulatory process.

What the above discussion implicitly acknowledges is that, at some level, the jurisprudence evaluating exceptions from prepromulgation notice and comment is notoriously murky.<sup>170</sup> In many instances, agencies will be forced to make borderline decisions about whether an exception from prepromulgation notice and comment applies.<sup>171</sup> If an agency makes such a decision in good faith and then pursues postpromulgation notice and comment to shore up the rule procedurally in the event a court finds they wrongly asserted an exception, it might be unduly punitive—not to mention impractical—to require the agency to go back to the drawing board and start from scratch in promulgating the new rule. Indeed, to the extent courts invalidate rules for lack of prepromulgation notice and comment to punish an agency's conscious disregard of the public's interest in contributing to regulation, such punishment makes little sense if the agency truly believed a recognized exception from notice and comment requirements applied.

On a more practical level, treating postpromulgation notice and comment as an acceptable substitute for prepromulgation notice and comment avoids the unpalatable alternative of calling into question the validity of hundreds of thousands of pages of rules. If postpromulgation notice and comment are not an acceptable substitute for prepromulgation notice and comment, agencies will likely be forced to start from scratch and repromulgate all of the affected rules, something that will require a sizable expenditure of agency resources in the name of an arguably redundant effort.

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<sup>170</sup> Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 4-5, n.10 (1994) (documenting judicial complaints regarding the difficulty in evaluating exceptions for prepromulgation notice).

<sup>171</sup> See *id.* at 4 ("But the APA and indeed our constitutional system make the chore of confronting these questions an inescapable one."); see also Keith B. Hall, *Regulation of Hydraulic Fracturing Under the Safe Drinking Water Act*, 19 BUFF. ENVTL. L.J. 1, 41 (2012) (offering one example).

But treating postpromulgation notice and comment as a perfect substitute for prepromulgation notice and comment has its share of problems. First, it effectively reads § 553's prepromulgation notice and comment requirements out of the statute, allowing agencies to instead undertake notice and comment at whatever time they find most convenient. Indeed, from an administrative standpoint, it is hard to see why an agency would ever go to the trouble of undertaking prepromulgation notice and comment when it could more easily promulgate an interim-final rule now and then undertake postpromulgation notice and comment more or less at its leisure. This is why many courts have held that, "[t]o avoid gutting the APA's procedural requirements," courts must "focus on the process as well as the result."<sup>172</sup>

Furthermore, as already noted, to the extent agencies are already "locked in" to a particular rule at the prepromulgation stage, that path commitment will only be stronger if, by the time the agency solicits public comment, it has already enacted an enforceable interim-final rule.<sup>173</sup> Not only is this the result suggested by well-established social science,<sup>174</sup> but it is confirmed anecdotally. In casual conversation, for example, a Treasury official relayed that Treasury and the IRS typically put a lot more effort into temporary Treasury regulations than proposed ones, for the simple reason that temporary regulations are legally binding and proposed ones are not.<sup>175</sup> If agencies are less likely to take seriously postpromulgation comments than they are prepromulgation comments, it is hard to argue convincingly that postpromulgation notice and comment are a meaningful substitute for prepromulgation notice and comment.

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<sup>172</sup> *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992); see also, e.g., *United States v. Reynolds*, 710 F.3d 498, 517 (3d Cir. 2013) (noting that the risk of gutting procedural requirements "is genuine because '[a]n agency is not required to adopt a rule that conforms in any way to the comments presented to it'" (quoting *Riverbend Farms*, 958 F.2d at 1487) (alteration in original)).

<sup>173</sup> See *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 380 (D.C. Cir. 1990) ("Indeed, if the FAA had entertained prepromulgation comments and taken those comments seriously, it might very well have averted the public outcry underlying the agency's pending notice of proposed rulemaking.").

<sup>174</sup> See, e.g., Stern, *supra* note 158, at 590–600 (compiling the social science literature).

<sup>175</sup> Cf. Hickman, *supra* note 26, at 1759–60 (discussing the legal weight of Treasury regulations).

### C. The Open Mind Standard

Postpromulgation notice and comment procedures need not be treated as an all-or-nothing proposition. The D.C. Circuit, for example, has at times championed a middle ground—the open mind standard—whereby the court will uphold a rule that was only subjected to postpromulgation notice and comment if, during the postpromulgation notice-and-comment period, the agency kept an “open mind” with respect to the comments it received.<sup>176</sup> While other courts have considered an agency’s open-mindedness in evaluating the effect of postpromulgation comments,<sup>177</sup> the D.C. Circuit is clearly the open mind standard’s leading exponent.

The challenge in applying this standard is, of course, determining when an agency has kept a sufficiently open mind regarding postpromulgation comments. The D.C. Circuit has attempted to place the burden on the agency, requiring a “compelling showing” of open-mindedness by the agency to overcome a presumption that an agency did not meaningfully consider postpromulgation comments.<sup>178</sup> To date, the D.C. Circuit has identified just two criteria by which an agency can demonstrate that it kept the requisite open mind. First, the agency can change or revise a regulation in response to postpromulgation comments.<sup>179</sup> Although failing to amend a regulation in response to postpromulgation comments is not proof of a closed mind,<sup>180</sup> the D.C. Circuit has stated that changing the regulation affirmatively indicates open-mindedness.<sup>181</sup> Second, the D.C. Circuit has said that careful or “searching”

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<sup>176</sup> See, e.g., *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994); *Reeder v. FCC*, 865 F.2d 1298, 1304 (D.C. Cir. 1989); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

<sup>177</sup> See, e.g., *United States v. Reynolds*, 710 F.3d 498, 519 (3d Cir. 2013); *Mortg. Inv’rs Corp. of Ohio v. Gober*, 220 F.3d 1375, 1379 (Fed. Cir. 2000).

<sup>178</sup> *Advocates for Highway & Auto Safety*, 28 F.3d at 1292 (quoting *McLouth Steel Prods. Corp.*, 838 F.2d at 1323); *Air Transp. Ass’n of Am.*, 900 F.2d at 379–80 (“Although we have suggested that there might be circumstances in which ‘defects in an original notice [could] be cured by an adequate later notice’ and opportunity to comment, we have emphasized that we could reach such a conclusion only upon a compelling showing that ‘the agency’s mind remain[ed] open enough at the later stage.’” (quoting *McLouth Steel Prods. Corp.*, 838 F.2d at 1323) (alteration in original)).

<sup>179</sup> *Advocates for Highway & Auto Safety*, 28 F.3d at 1292.

<sup>180</sup> *Id.*

<sup>181</sup> See *Air Transp. Ass’n of Am.*, 900 F.2d at 380 (“The FAA has not come close to overcoming the presumption of closed-mindedness in this case. It made no changes . . . in response to public comments.”).

consideration of the comments—particularly by addressing them in the preamble to a final rule—evinces an open mind.<sup>182</sup>

The open mind approach possesses some appealing features. It is, for one thing, at least superficially consistent with a central purpose of prepromulgation notice-and-comment rulemaking, insofar as it ostensibly ensures that the public is given the opportunity to offer meaningful input into a rule.<sup>183</sup> After all, so long as a court has assured itself that the agency actually considered the comments before promulgating the final rule, why should the timing of the comments matter?

The open mind standard also has the virtue of giving agencies the flexibility to rely sometimes on postpromulgation notice and comment to shore up interim-final rules promulgated under exceptions from § 553's prepromulgation requirements. That, in turn, makes it easier for agencies to rely on those sometimes murky exceptions, even in close cases, where the agencies nevertheless have a good-faith belief the exceptions apply. In that way, the open mind standard alleviates some of the worst effects of the murkiness surrounding the § 553 exceptions.

Finally, the open mind standard has some basis in the text of the APA. The D.C. Circuit has implicitly rooted the open mind standard in the harmless error rule codified in APA § 706.<sup>184</sup> Doing so makes sense, since the question underlying the open mind standard is whether the agency treated post-promulgation comments differently from the way it would have treated prepromulgation comments, i.e., whether the change in timing was at all prejudicial.<sup>185</sup>

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<sup>182</sup> *Advocates for Highway & Auto Safety*, 28 F.3d at 1293; *Air Transp. Ass'n of Am.*, 900 F.2d at 380.

<sup>183</sup> See *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011) ("The purpose of notice-and-comment rulemaking is to 'assure[] fairness and mature consideration of rules having a substantial impact on those regulated.' The process allows the agency to 'educate itself before adopting a final order.' In addition, public notice requires the agency to disclose its thinking on matters that will affect regulated parties." (footnotes omitted) (alteration in original)).

<sup>184</sup> 5 U.S.C. § 706 (2012).

<sup>185</sup> *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012) ("[T]he key to whether an agency's procedural error in promulgating a rule is harmless hinges not on whether the same rule would have issued absent the error, but whether the affected parties had sufficient opportunity to weigh in on the proposed rule."); *Green Island Power Auth. v. FERC*, 577 F.3d 148, 165 (2d Cir. 2009) ("Thus, we will not disturb FERC's orders if we can determine that the outcome of the administrative proceedings will be the same absent FERC's error."); *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration."); *Friends of Iwo Jima v. Nat'l Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999).

The open mind standard is not perfect, however. Judges are not clairvoyant, and a judge can glean only so much from an agency's response to postpromulgation comments. An agency's thorough discussion of a particular comment, for example, might suggest that the agency seriously considered the substance of that comment, but it might also reflect nothing more than the agency's conscious effort to give the appearance of an open mind, all the while having committed to the proposed rule from the outset.

Further, by announcing some considerations it employs to determine open-mindedness, the D.C. Circuit has made it possible for agencies to game the system by going through the motions of open-mindedness without actually keeping an open mind. And because it is relatively clear what steps an agency can take to be found to have kept an open mind, the presumption of closed-mindedness established by the D.C. Circuit<sup>186</sup> is so easily rebutted that, in many circumstances, it might be deemed totally ineffectual. Agencies' recent successes in satisfying the open mind standard certainly support that point.<sup>187</sup>

The open mind standard is also at least somewhat problematic to the extent it gives agencies an incentive to disregard § 553's procedural requirements. Particularly when an agency knows exactly what steps it must take—more or less, what boxes it must check—to demonstrate that it kept an open mind about postpromulgation comments, it can confidently disregard § 553's prepromulgation notice and comment requirements with the knowledge that a court will uphold the agency's use of postpromulgation notice and comment. In that case, § 553's clear preference for prepromulgation notice and comment is rendered largely advisory,<sup>188</sup> a result that seems to be at odds with the premium the D.C. Circuit itself has accorded to prepromulgation notice and comment.<sup>189</sup>

Finally, even if the agency actually keeps an open mind, the public might not believe that an agency has an open mind with respect to postpromulgation comments. The public's subjective belief about an agency's open-mindedness is important because, if the public does not believe the agency will seriously

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<sup>186</sup> *Air Transp. Ass'n of Am.*, 900 F.2d at 379.

<sup>187</sup> *See, e.g., Intermountain Ins. Serv. of Vail v. Comm'r*, 650 F.3d 691, 710 (D.C. Cir. 2011) (finding agency kept an open mind); *Advocates for Highway & Auto Safety*, 28 F.3d at 1292 (finding the same).

<sup>188</sup> *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992).

<sup>189</sup> *See N. J. Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1049–50 (D.C. Cir. 1980).

consider postpromulgation comments, would-be commenters will be dissuaded from submitting comments, thereby defeating the crowdsourcing function of the notice and comment requirements.<sup>190</sup> Thus, to the extent the public perceives a difference between the chance to give prepromulgation comments and the chance to give postpromulgation comments, the open mind standard appears to wrongly disregard the significance of that difference.

#### D. The *Johnson* Harmless Error Approach

In *Johnson*, the Fifth Circuit carved out a different middle ground.<sup>191</sup> There, the court looked at the record, including the record from postpromulgation notice and comment, to ascertain whether the Attorney General's error—failing to give prepromulgation notice and an opportunity to comment—was harmless.<sup>192</sup> Ultimately, the Fifth Circuit concluded that the Attorney General's lack of prepromulgation notice and comment was harmless because, among other things: (1) the preamble to the interim rule addressed all the arguments Johnson raised on appeal; (2) the regulatory issue “involved a yes or no decision,” rather than the sort of “nuanced and detailed” analysis required for most other rules; (3) the Attorney General had not changed his mind despite receiving postpromulgation comments; and (4) Johnson had not availed himself of the opportunity to participate in the postpromulgation comment process.<sup>193</sup>

While the two approaches differ in obvious ways, the Fifth Circuit's approach in *Johnson* affords many of the same benefits as the D.C. Circuit's open mind standard. Most notably, each approach is grounded in § 706's admonition that courts not undo agency action because of harmless errors.<sup>194</sup> Thus, like the open mind standard, the *Johnson* approach is at least superficially consistent with the text of the APA, while still affording agencies some flexibility in promulgating and enforcing interim-final and final rules. The *Johnson* approach also resembles the open mind standard in that it accords significance to some postpromulgation notice and comment proceedings. As a practical matter, by crediting postpromulgation notice and

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<sup>190</sup> See Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 335–36 (2009).

<sup>191</sup> *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011).

<sup>192</sup> *Id.* at 930–33.

<sup>193</sup> *Id.* at 930–33.

<sup>194</sup> See 5 U.S.C. § 706 (2012).

comment in some instances, the *Johnson* approach makes it less likely that courts will invalidate the hundreds of thousands of pages of rules not subjected to prepromulgation notice and comment—with all the attendant destabilizing effects and waste of agency resources.<sup>195</sup>

The *Johnson* approach also avoids what might be viewed as redundant procedures. For example, Johnson did not say that he would have submitted comments had he been given a chance to do so before the rule was promulgated. Indeed, there is no reason to believe he would have done so, especially because, after the Attorney General promulgated the interim-final rule, Johnson still did not submit comments, despite having received notice of his right to do so. There is a practical argument to be made that, in cases like Johnson's, an agency should not have to go through the time and expense of another round of rulemaking in the name of a petitioner who had no interest in participating in the rulemaking to begin with.<sup>196</sup>

A related practical benefit of the *Johnson* approach is that it prevents seemingly undeserving parties from benefitting from what in some instances might seem to be minor procedural technicalities. Not every agency rulemaking is controversial or generates comments from interested parties. Many agency rulemakings make minor, narrowly tailored, or otherwise uncontroversial adjustments to existing rules. When it is clear that a party has violated a rule of which he knew or should have known, and it is equally clear that the party's violation of the rule was in no way associated with any procedural violations underlying promulgation of the rule, there is something inherently unjust about allowing that party to escape enforcement of the rule by citing a procedural violation.<sup>197</sup> The argument here resembles Cardozo's criticism of the exclusionary rule: just as there is something intuitively wrong about the

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<sup>195</sup> See *supra* notes 163–64 and accompanying text (discussing the consequences of widespread invalidation of postpromulgation procedures).

<sup>196</sup> See *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1113 n.5 (9th Cir. 2011) (Ikuta, J., dissenting) (noting party's failure to submit comments as support for finding of harmless error); *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (noting petitioners' failure to suggest "any criticism they would have raised concerning" EPA methodology at issue militated in favor of finding procedural error harmless).

<sup>197</sup> See *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012) (key to harmless error analysis is simply "whether the affected parties had sufficient opportunity to weigh in on the proposed rule," rather than rigid adherence to procedural requirements); *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989) (asking only whether the purposes of the notice and comment requirements were satisfied, rather than focusing on procedural technicalities).

criminal going free because the constable has blundered,<sup>198</sup> here there is something unpalatable about letting a regulated party engage in egregious behavior because an agency mistakenly relied on an admittedly murky exception from a procedural requirement. An undue emphasis on such technicalities can, as the Supreme Court has explained, encourage abuse of the judicial process and thereby diminish public confidence in the fair and effective operation of the judiciary.<sup>199</sup> The *Johnson* approach arguably protects against that possibility.

As with the other approaches discussed so far, however, the *Johnson* approach has its share of drawbacks. For one, just like the open mind standard, liberal application of the *Johnson* approach offers agencies a strong incentive to ignore § 553's insistence on prepromulgation notice and comment.<sup>200</sup> Even if § 706 renders the prepromulgation requirement more of a preference than a mandate, the *Johnson* approach undeniably undercuts that preference by making it easier for agencies to ignore prepromulgation notice and comment whenever the consequences of doing so might seem negligible.

Another problem with the *Johnson* approach is that, by asking whether a petitioner participated in a postpromulgation comment period or raised arguments different from those addressed by an interim-final rule or even a final rule, the approach inverts the burden of proof in harmless error analysis.<sup>201</sup> Ordinarily, that burden would rest on the agency.<sup>202</sup> However, to the extent the *Johnson* test requires a petitioner to demonstrate not only that he or she would have

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<sup>198</sup> See *People v. Defore*, 150 N.E. 585, 587 (1926) (criticizing the exclusionary rule because it allowed the criminal “to go free because the constable has blundered”).

<sup>199</sup> See *Shinseki v. Sanders*, 556 U.S. 396, 407–08 (2009) (rejecting an overly rigid approach to harmless error analysis).

<sup>200</sup> See, e.g., *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (“[I]f the government could skip [§ 553] procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not [already] presented informally—[§] 553 obviously would be eviscerated.”); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (“Were we to allow the EPA to prevail on this point we would make the provisions of [§] 553 virtually unenforceable. An agency that wished to dispense with prepromulgation notice and comment could simply do so, invite postpromulgation comment, and republish the regulation before a reviewing court could act.”).

<sup>201</sup> See *United States v. Reynolds*, 710 F.3d 498, 522 (3d Cir. 2013) (finding the *Johnson* court’s reasoning unpersuasive because its “reasoning misplaces the burden of harmless-error analysis on the defendant”).

<sup>202</sup> *United States v. Brewer*, 766 F.3d 884, 891 (8th Cir. 2014); *Reynolds*, 710 F.3d at 522; *U.S. Steel Corp.*, 595 F.2d at 215 (“Absence of such prejudice must be clear for harmless error to be applicable.”).



commented but that his or her comments would have been materially different from those comments the agency received, the test places the burden squarely on the defendant.<sup>203</sup> Thus, even though the *Johnson* court purported to require a “clear” showing of harmlessness from the government to uphold a procedurally invalid rule, in practice the burden still seems to fall more heavily on the petitioner.

More problematic is that the *Johnson* harmless error analysis treats a petitioner’s arguments made during litigation as a proxy for the arguments that would have been raised during a notice and comment period.<sup>204</sup> This is troubling for at least two reasons. First, when a court considers only arguments made in litigation, it ignores important differences in context. In particular, the public comment context lends itself to policy arguments in a way that a legal challenge simply does not. Because the same person might reasonably raise different arguments in public comments than as a litigant, it seems misguided to treat as harmless an agency’s decision to forego prepromulgation comment simply because the preamble to the contested rule addressed whatever arguments an individual made in litigation.<sup>205</sup>

Furthermore, by focusing harmless error review only upon the arguments actually raised by litigants, the *Johnson* approach ignores the community aspect of notice-and-comment rulemaking. One of the virtues of an effective notice-and-comment process is that it does not depend on any single commenter, or even class of commenters, to articulate all objections to a proposed rule. Rather, the process looks to the public as a whole to raise concerns that might not have occurred to other affected parties.<sup>206</sup> Thus, the bare fact that the petitioner in *Johnson* did not raise a particular objection during postpromulgation notice and comment, or did not explain what objections he would have raised during prepromulgation notice and comment, is more or less a straw man. Because the notice-and-comment process allows individuals to benefit from objections raised by others, the key question is not whether the *petitioner* would have identified or raised an objection had the agency undertaken prepromulgation notice and comment; rather, the question is whether *some party* might have raised

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<sup>203</sup> See *Brewer*, 766 F.3d at 891; *Reynolds*, 710 F.3d at 522.

<sup>204</sup> *United States v. Johnson*, 632 F.3d 912, 931–32 (5th Cir. 2011).

<sup>205</sup> *Id.*

<sup>206</sup> *Reynolds*, 710 F.3d at 522–23 (“If a comment period had been provided, others who could have asserted [petitioner’s] interest—such as public defenders and public-interest groups—would almost certainly have weighed in.”).

an objection had the agency afforded an opportunity for prepromulgation comment.<sup>207</sup> The *Johnson* approach improperly places the entire burden on the petitioner to identify all problems with the regulation. It thus ignores an important benefit of notice-and-comment rulemaking: the opportunity to receive comments from the entire public.

Finally, it makes little sense to suggest, as the *Johnson* court did, that failure to comply with prepromulgation notice and comment is acceptable if the question being addressed by the agency is a simple one. Allowing the prepromulgation notice and comment requirements to hinge on whether a given regulation addresses a yes-or-no decision—as opposed to something more complicated—introduces a discomfiting degree of subjectivity into the APA’s already murky requirements for notice and comment. Depending on the level of abstraction a court takes, nearly any decision can be broken down to something more complicated than a yes-or-no choice. For example, whereas the Fifth Circuit said the rule at issue in *Johnson* dealt with a simple binary decision—whether to apply SORNA to pre-Act sex offenders—the Supreme Court and several circuit courts held that the decision addressed by the rule was actually susceptible to several other resolutions.<sup>208</sup> The difference, it seems, was simply that the Supreme Court and the other circuits parsed more closely the policy options open to the Attorney General at the time he promulgated the rule.<sup>209</sup> Making the requirement of prepromulgation notice and comment turn on something so subjective arguably incentivizes judicial activism, because courts are often free to frame issues as narrowly or broadly as they wish.<sup>210</sup>

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<sup>207</sup> See *id.*

<sup>208</sup> See *Reynolds v. United States*, 132 S. Ct. 975, 981 (2012) (noting that practical considerations “might have warranted different federal registration treatment of different categories of pre-Act offenders”); *Brewer*, 766 F.3d at 891–92; *Reynolds*, 710 F.3d at 520–21.

<sup>209</sup> Compare *Johnson*, 632 F.3d at 932 (characterizing the Attorney General’s decision as “a yes or no decision—whether or not to apply SORNA’s registration requirements to pre-enactment offenders”), with *Brewer*, 766 F.3d at 892 (“[T]he Attorney General had a range of options: from applying SORNA to all pre-Act offenders to applying SORNA to no pre-Act offenders. The Attorney General also had the opportunity to distinguish between ‘offenders who have fully left the system and merged into the general population’ and those ‘who remain in the system as prisoners, supervisees, or registrants, or reenter the system through subsequent convictions.’” (quoting *Reynolds*, 710 F.3d at 521)).

<sup>210</sup> See, e.g., J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 698 (2008) (noting that “wide discretion in framing” affords judges “freedom from textual constraint” and, as a result, “the ability to issue contradictory decision after decision”).

### E. Remand Without Vacatur

Finally, thoroughness demands acknowledging that a few circuits in the EPA nonattainment designation cases, after invalidating the EPA's actions for lack of notice and comment, nevertheless sought a middle ground via the remedy imposed. Specifically, the Third, Eighth, and Ninth Circuits in those cases allowed the EPA's regulations generally to remain in effect while the challenging parties, but not the public at large, received the opportunity to submit comments before the EPA refinalized the challenged designations.<sup>211</sup> This approach effectively requires a second layer of postpromulgation comment, but with participation limited to those parties that petitioned the court for relief from the agency's lack of prepromulgation notice and comment.<sup>212</sup> In short, the courts in these cases declined to vacate a procedurally flawed rule, leaving it in place and enforceable, even while remanding it to the agency for additional procedures.<sup>213</sup>

In some respects, the remand without vacatur remedy seems to offer an attractive approach to dealing with the problems posed by postpromulgation procedures. The D.C. Circuit, which (the nonattainment designation cases notwithstanding) is the principal court to employ remand without vacatur, evaluates whether that remedy is appropriate by taking into account two elements: the seriousness of the deficiencies in the agency's action and the disruptive consequences of va-

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<sup>211</sup> *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 576–77 (8th Cir. 1981); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 812–13 (9th Cir. 1980).

<sup>212</sup> *U.S. Steel Corp.*, 649 F.2d at 577 (“On remand, the EPA should afford U.S. Steel proper notice and opportunity to comment on the designations proposed by the agency for the contested areas. Thereafter, the EPA should expeditiously, but fully, consider any comments received on the proposed designations and, upon completing its deliberative process, immediately substitute any revised designations for the existing ones.”); *W. Oil & Gas Ass'n*, 633 F.2d at 813 (“We remand to the Administrator with instructions that he provide these petitioners, who have timely filed for review according to 42 U.S.C. [§] 7607, with an opportunity to comment on the California designation. The EPA is to consider and act on these comments in accordance with 42 U.S.C. [§] 7407(d).” (citations omitted)).

<sup>213</sup> *U.S. Steel Corp.*, 649 F.2d at 577 (“We set aside the final rule only as to the specific designations contested in this petition, but leave these designations in effect pending completion of further administrative proceedings in accordance with the APA.”); *W. Oil & Gas Ass'n*, 633 F.2d at 813 (leaving the challenged designations in effect and remanding with instructions for the EPA to provide petitioners with an opportunity to comment on the designations); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (holding that the challenged rule should remain in effect except as applied to the petitioners and remanding to the EPA with instructions to allow the petitioners to comment on the rule).

cating that action.<sup>214</sup> Having studied the issue extensively, ACUS recently recommended a slightly different set of factors for courts considering the remedy:

- (a) [whether] correction is reasonably achievable in light of the nature of the deficiencies in the agency's rule or order;
- (b) [whether] the consequences of vacatur would be disruptive; and
- (c) [whether] the interests of the parties who prevailed against the agency in the litigation would be served by allowing the agency action to remain in place.<sup>215</sup>

Given the multiplicity of circumstances in which agencies issue interim-final rules with postpromulgation notice and comment, and the potentially disruptive consequences of categorically declaring all regulations so promulgated to be invalid, a remand without vacatur remedy based on some combination of these elements seems potentially appropriate.

Also, remanding procedurally flawed rules without vacating them offers at least one unique benefit, in comparison to the other approaches surveyed: it ensures that at least some of the parties most interested in a rulemaking are allowed to submit comments in a way that will lead agencies to actually consider the comments. This is true for two reasons. First, it is true because the courts limited the additional round of comment to a small group of interested parties—the litigants in the cases on appeal. The small pool of commenters makes it more likely that agencies will take seriously the comments they receive, which means that the parties that care enough about the designation to litigate it are at least more likely to have their voices heard by the agency. Second, because the agency must consider the comments pursuant to a specific court order, rather than a general statutory command to consider comments, the remand without vacatur remedy makes it more likely agencies will actually consider the comments rather than brush them aside.

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<sup>214</sup> *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); see also STEPHANIE J. TATHAM, ADMIN. CONFERENCE OF THE U.S., *THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR* 6 (2014), <https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf> [<https://perma.cc/6FUN-SRQM>] (describing *Allied-Signal* in the context of the D.C. Circuit's remand without vacatur jurisprudence).

<sup>215</sup> ADMIN. CONFERENCE OF THE U.S., ADMIN. CONFERENCE RECOMMENDATION 2013-6, *REMAND WITHOUT VACATUR* 5–6 (Dec. 5, 2013), [https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20\\_%20Final%20Recommendation.pdf](https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20_%20Final%20Recommendation.pdf) [<https://perma.cc/9ATJ-3D9A>].

In addition to focusing agencies' attention on a handful of the most determined commenters, remand without vacatur also incorporates all of the benefits that adhere to postpromulgation notice and comment. This is because remand without vacatur does not do away with postpromulgation notice and comment but rather adds another, more focused layer of postpromulgation notice and comment to the public postpromulgation comment period. This makes it all the more likely that the agency will carefully consider alternatives to a challenged designation before finalizing it once and for all.

Several reasons exist, however, for rejecting remand without vacatur as a remedy in such cases. First, the remedy is highly controversial. Judges have debated its legality, with some claiming that allowing an otherwise invalid regulation to remain in effect while the agency fixes its flaws on remand is inconsistent with the text of APA § 706.<sup>216</sup> Even if the remedy is legal, some judges and scholars have questioned its wisdom.<sup>217</sup> Perhaps as a result, courts have used it relatively sparingly. According to one study, the D.C. Circuit remanded without vacating agency actions in seventy-three cases between 1972 and 2013. The study found only ten cases during that time period in which other circuits used the remedy—three of which were the nonattainment designation cases in the Third, Eighth, and Ninth Circuits highlighted in this article.<sup>218</sup> Also, courts have generally limited the remedy's use to cases in which the agency actually pursued notice-and-comment rulemaking and the resulting rules were arbitrary and capricious for "inadequate explanation."<sup>219</sup> Notably, since the nonattainment designation cases, no court has employed re-

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<sup>216</sup> *Compare* *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (defending remand without vacatur), *and* *Checkosky v. SEC*, 23 F.3d 452, 462–66 (D.C. Cir. 1994) (Silberman, J., writing separately) (same), *with* *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (disputing the remedy's legality), *and* *Checkosky*, 23 F.3d at 490 (Randolph, J., writing separately) (same).

<sup>217</sup> *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) ("[Q]uestion[ing] the wisdom of the open-ended remand without vacatur" on the ground that "this remedy sometimes invites agency indifference"); *Milk Train*, 310 F.3d at 757 (Sentelle, J., dissenting) (contending that remand without vacatur is "often, if not ordinarily, unwise" by "substituting [the court's] decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted"); Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 601–02 (2004) (arguing that remand without vacatur has the paradoxical effect of encouraging more interventionist judicial review).

<sup>218</sup> TATHAM, *supra* note 214, at 21, 27.

<sup>219</sup> Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Rulemakings*, 80 N.Y.U. L. REV. 278, 283 (2005).

mand without vacatur as a remedy for an agency's use of interim-final rules with only postpromulgation notice and comment. It seems fair, therefore, to conclude that upon further consideration, the courts have decided that remand without vacatur is not appropriate under such circumstances.

Moreover, remand without vacatur presents certain practical challenges as well. First, it is totally impractical on a large scale. To the extent an agency must grant every petitioner something akin to a private audience, regulations and designations finalized with postpromulgation notice and comment will never be truly final, since new petitioners will almost always be waiting to come forward to challenge the designation. Thus, remand without vacatur does little to solve the administrative problems caused by the hundreds of thousands of pages of regulations that are currently in force but that were not subject to prepromulgation notice and comment. Indeed, one criticism of remand without vacatur is that agencies tend to respond to the remedy strategically, enforcing the rules in question as though they had won the case, while assigning a low priority to correcting the identified flaws that prompted the remand.<sup>220</sup> According to one study, in a third of remanded cases examined, agencies took more than five years to resolve the courts' concerns.<sup>221</sup> One can only imagine that more widespread application of remand without vacatur would, in effect, represent no remedy at all.

In addition, there is something unfair about only acknowledging that a rule is procedurally invalid, but enforcing it anyway, especially where the effect of the ruling is to give just one party an opportunity to cure the procedural defect. If a rule is invalid, giving it effect is problematic in itself. It is even more problematic when only one party will, as a result of the ruling, be given an opportunity to rectify the deficiency (absent further litigation).

### III

#### FINDING A BETTER MIDDLE GROUND

The trend in the courts seems to be toward a middle ground between the two extremes of either invalidating all regulations adopted using postpromulgation procedures without a valid APA exemption or giving agencies carte blanche to substitute postpromulgation notice and comment for prepromulga-

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<sup>220</sup> *Id.* at 301–04.

<sup>221</sup> *Id.* at 302.

tion procedures, even in the absence of a valid APA exemption. Our view is that the search for a middle ground is appropriate. Given the above analysis, we see the extremes of accepting or opposing postpromulgation procedures in all cases as ill-advised, and we also doubt that the Supreme Court would be inclined to go along with either. Yet, for the reasons outlined above, we also see the middle-ground approaches developed by the courts thus far as missing the mark. So what can we do to build a “better” middle ground? Which parts of these admittedly flawed approaches should we borrow?

Rather than reinvent the wheel, we suggest altering the existing jurisprudence in three ways: (1) to strengthen the presumption, implicit in many of the cases, that prepromulgation notice and comment should be the norm, such that postpromulgation procedures representing a deviation from that norm would require a particularized defense subject to judicial scrutiny; (2) to place the burden of rebutting that presumption clearly on the agency that issued the regulations rather than on the challenging party; and (3) to identify a more concrete list of factors for courts to consider in deciding, case by case, whether reliance on postpromulgation procedures in a rulemaking represents harmless error. Before we elaborate this proposal, however, some theoretical perspective about why we bother with prepromulgation notice and comment in the first place, as well as the doctrine surrounding that practice, is in order.

### A. Stepping Back

Agency regulations that carry the force and effect of congressionally enacted statutes are a key feature of the modern administrative state. Congress relies heavily on agencies to operationalize and implement complex regulatory statutes; agencies in turn adopt legally binding regulations to accomplish that task. Given the complexity of the modern world, Congress simply must rely on agencies in this way if it is to achieve all that the American people expect from their government.<sup>222</sup> Still, while most Americans enjoy the benefits of modern government, at least a sizeable plurality retains some residual discomfort with the prospect of unelected bureaucrats

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<sup>222</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

adopting regulations governing primary behavior without the relative public participation, transparency, and accountability of the legislative process.<sup>223</sup>

Arguably, one reason that courts in particular have ignored constitutional concerns and reconciled themselves to congressional reliance on administrative agencies to develop legally binding rules is that Congress has provided an acceptable alternative to the legislative process in the form of the APA's notice-and-comment rulemaking procedures.<sup>224</sup> Section 553's requirement of prepromulgation notice and comment, in particular, enhances good government and democratic legitimacy in several respects. For example, requiring an agency to consider a broad range of viewpoints before adopting a rule makes it more likely the agency will come up with the "best" possible rule.<sup>225</sup> "The agency benefits from the experience and input of comments by the public, which help 'ensure informed agency decisionmaking.'"<sup>226</sup>

Requiring agencies to solicit and respond to public comment before finalizing a proposed rule also makes it more likely—at least in theory—that the agency will take seriously the comments it receives. Social science suggests that, once an agency has begun administering a particular rule, the agency's interests in stability and continuity will make the agency reluctant to change the rule.<sup>227</sup> Under those circumstances, the agency is less likely to view public comments as helpful sugges-

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<sup>223</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (expressing concern about a "significant degree of independence" enjoyed by administrative agencies); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 96–99 (2010) (summarizing systemic concerns about agency regulation); Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 370 (2010) (describing Americans' "complex and conflicted relationship with government").

<sup>224</sup> 5 U.S.C. § 553; see, e.g., *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 170–71 (7th Cir. 1996) (exploring the democratic legitimacy rationale underlying the notice and comment requirements).

<sup>225</sup> See, e.g., *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (noting that one purpose of the APA's notice and comment requirements is "to ensure that agency regulations are tested via exposure to diverse public comment" (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005))); *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) ("Fairer and wiser rules result from the APA-required 'mature consideration.'" (quoting *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005))).

<sup>226</sup> *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (quoting *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980)); see also *Dismas*, 401 F.3d at 678 (noting that one purpose of the notice and comment requirements is "to get public input so as to get the wisest rules").

<sup>227</sup> Seidenfeld, *supra* note 156, at 522–23; Stern, *supra* note 158, at 614–15.



tions and more likely to treat them as obstacles to be overcome in the name of maintaining the status quo. Insisting on prepromulgation notice and public comment avoids this problem by “ensur[ing] that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.”<sup>228</sup>

Correspondingly, notice-and-comment rulemaking procedures “reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”<sup>229</sup> “Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence.”<sup>230</sup> Some degree of agency independence is inevitable—even desirable—especially because elected representatives typically lack the time and technical expertise required to address the complex regulatory problems modern society poses.<sup>231</sup> But too much independence on the part of unelected agency representatives threatens the ideal of democratic representation.<sup>232</sup> Providing for direct, meaningful public involvement through prepromulgation notice and comment procedures inserts an element of democracy into the rulemaking process and thereby legitimates resulting rules.<sup>233</sup>

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<sup>228</sup> *United States v. Dean*, 604 F.3d 1275, 1280–81 (11th Cir. 2010) (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).

<sup>229</sup> *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)); see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–60 (1992) (observing that notice-and-comment rulemaking procedures facilitate access and public interest-oriented discourse); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755 (1996) (noting that notice-and-comment rulemaking procedures allow all interested persons to participate on an equal footing).

<sup>230</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

<sup>231</sup> ECONOMICS OF ADMINISTRATIVE LAW xv (Susan Rose-Ackerman ed., 2007) (listing agency expertise and legislators’ lack of time as reasons legislatures delegate policy-making authority to agencies); David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 701 (1994) (“One of the reasons that bureaucracies are created in the first place is to implement policies in areas where Congress has neither the time nor expertise to micromanage policy decisions.”).

<sup>232</sup> See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 728 (2001) (“The advent of the administrative state exponentially increases the difficulties that political representation creates for the theory of self-government.”).

<sup>233</sup> See *Monahan v. Winn*, 276 F. Supp. 2d 196, 214 (D. Mass. 2003) (explaining the “democratic legitimacy” rationale underlying the notice and comment requirements).

Section 553's prepromulgation notice and comment requirements also facilitate judicial review, which is important because the APA relies on courts to check agency abuses in the exercise of rulemaking power.<sup>234</sup> Requiring agencies to consider and address comments before issuing final rules gives affected parties "an opportunity to develop evidence in the record to support their objections to the [final] rule."<sup>235</sup> A better-developed record makes it easier for agencies to address and resolve regulatory disputes themselves, making it less likely that courts will be called on to resolve every such dispute. A better-developed record also "enhance[s] the quality of judicial review" by giving courts more information on which to decide administrative litigation.<sup>236</sup> The APA's prepromulgation notice and comment procedures thus conserve judicial resources while facilitating judicial oversight of agency action.

## B. Moving Forward

Those, then, are the purposes of § 553's prepromulgation notice and comment requirements.<sup>237</sup> Under § 706, a procedural error is harmful only if it undermines the purposes of a procedural requirement.<sup>238</sup> It follows that an agency's failure to undertake prepromulgation notice and comment is harmless so long as some substitute procedure fulfills the purposes set out above.<sup>239</sup>

It seems clear that postpromulgation notice and comment can, in at least some cases, fulfill the purposes of § 553's prepromulgation notice and comment requirements. Most fed-

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<sup>234</sup> See 5 U.S.C. §§ 701–06 (2012) (providing for judicial review of agency action); see *Abbott Labs. v. Gardner*, 387 U.S. 136, 153–54 (1967) (recognizing a presumption in favor of pre-enforcement judicial review of agency rulemaking efforts).

<sup>235</sup> *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

<sup>236</sup> *Id.*

<sup>237</sup> See also *United States v. Reynolds*, 710 F.3d 498, 517 (3d Cir. 2013) (summarizing "purposes of the APA's notice and comment requirements" (quoting *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011)); *Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1174 (D.C. Cir. 1996) (same)).

<sup>238</sup> See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1174 (6th Cir. 1983) ("[W]hen the purposes of the procedural requirements have been fully met, there is no need for the courts to require rigid adherence to formalistic rules."); see also *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (same).

<sup>239</sup> See, e.g., *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012) (explaining that determining whether an agency's failure to undertake prepromulgation notice and comment is harmless is dependent on "whether the same rule would have issued absent the error" and "whether the affected parties had sufficient opportunity to weigh in on the proposed rule").

eral appellate courts have suggested as much.<sup>240</sup> As a practical matter, there is nothing inherent in postpromulgation notice and comment that precludes such procedures from fulfilling the purposes of prepromulgation notice and comment. There may, of course, be instances where postpromulgation notice and comment are an inadequate substitute for prepromulgation notice and comment.<sup>241</sup> But that will not always be so.<sup>242</sup> The question, then, is not whether postpromulgation notice and comment can render harmless an agency's failure to engage in prepromulgation notice and comment, but under what circumstances postpromulgation notice and comment actually do so. In other words: How can courts tell when postpromulgation notice and comment have resulted in the same kind of meaningful opportunity to participate in the rulemaking process as prepromulgation notice and comment would have provided? At the risk of resorting to what some might label "th'ol' 'totality of the circumstances' test,"<sup>243</sup> we suggest the following doctrinal adjustments.

### 1. *A Stronger Presumption of Invalidity*

First, courts should expressly adopt a strong—if rebuttable—presumption that rules promulgated using postpromulgation notice and comment are invalid. Thus far, for the most part, courts generally have alluded only to a vague "presumption against a 'late' comment period following adoption of an interim rule,"<sup>244</sup> and have required little evidence to overcome that presumption.<sup>245</sup> The lack of discernible teeth in the pre-

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<sup>240</sup> See, e.g., *id.*; *Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929, 940 (10th Cir. 2011) (holding that although the regulation at issue was issued in response to litigation and did not undergo notice and comment, "[n]either factor alters our conclusion"); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380–81 (Fed. Cir. 2011) (dismissing a challenge on an agency's rule based on a lack of notice and comment); *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011) (same); *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1291–93 (D.C. Cir. 1994) (same); *Riverbend Farms*, 958 F.2d at 1487; *Levesque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983) (same).

<sup>241</sup> See, e.g., *Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005) (finding no harmless error because agency's mistake "clearly had a bearing on the procedure used").

<sup>242</sup> See *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989) (explaining that not every error affecting procedure is harmful).

<sup>243</sup> *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). Justice Scalia used this phrase to describe the *Skidmore* standard of judicial review and did not intend the description to be complimentary.

<sup>244</sup> *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984).

<sup>245</sup> See, e.g., *Advocates for Highway & Auto Safety*, 28 F.3d at 1292–93 (finding the presumption against "open-mindedness" overcome where agency merely responded to the four comments it received opposing the interim-final rule).

sumption against postpromulgation notice and comment is problematic, both statutorily and practically.

First, as a statutory matter, unless the agency can validly claim one of the statutory exceptions from notice-and-comment rulemaking requirements, the APA expressly contemplates that agencies will provide notice and opportunity for comment *before*, rather than *after*, adopting regulations that carry legal force.<sup>246</sup> For all of the reasons discussed above,<sup>247</sup> § 553(c) calls for giving interested persons an opportunity for comment “[a]fter notice” and for agencies to publish explanatory preambles along with adopted regulations “[a]fter consideration of the relevant matter presented” through that comment process.<sup>248</sup> Section 706 in turn instructs courts to take “due account . . . of the rule of prejudicial error” but does not specify which errors courts ought to consider harmless.<sup>249</sup> The Attorney General’s Manual on the Administrative Procedure Act offers only that “not every failure to observe the requirements of this statute . . . is ipso facto fatal to the validity of” agency action—suggesting at least that harmless error analysis ought to be case-by-case rather than categorical.<sup>250</sup> In the absence of a valid exemption claim, a strong presumption against the validity of postpromulgation notice and comment best respects the balance between an express statutory command for prepromulgation notice and comment and a particularized harmless error rule.

As a practical matter, if agencies see no disadvantage to relying on postpromulgation notice and comment, they will more frequently disregard § 553’s prepromulgation requirements and rely on § 706’s harmless error doctrine to sustain rules against procedural objections. A robust, well-defined presumption of invalidity—rather than the weak, indeterminate one that courts have applied thus far—will help diminish the attractiveness of postpromulgation notice and comment by making it less likely courts will sanction such an end run around the prepromulgation notice and comment requirements. A strong presumption against the validity of postpromulgation notice and comment is all the more significant

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<sup>246</sup> Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,111–12 (Aug. 18, 1995) (“Under current law, agencies must be able to justify use of the good cause or other exemptions from notice and comment procedures under the APA if they are providing only post-promulgation comment opportunity.”).

<sup>247</sup> See *supra* subpart III.A.

<sup>248</sup> 5 U.S.C. § 553(c).

<sup>249</sup> *Id.* § 706.

<sup>250</sup> U.S. DEP’T OF JUSTICE, *supra* note 22, at 138.

given the presumption of validity that applies when agencies use prepromulgation notice and comment.<sup>251</sup>

## 2. *The Agency Should Bear the Burden of Rebuttal*

Consistent with the APA's harmless error rule, however, the presumption against postpromulgation notice and comment should be rebuttable on a case-by-case basis. As the existing jurisprudence recognizes implicitly, a harmless error determination is probably appropriate in some instances.<sup>252</sup> Rather than the challenging party bearing a burden of demonstrating that the alleged procedural defect was harmful, however, in the context of postpromulgation notice and comment, the burden should fall on the agency to rebut the presumption of invalidity.

In many litigation scenarios, the party challenging a statute or ruling bears the burden of showing that an alleged defect in the statute or ruling was harmful. But placing the burden of proof on the challenging party is not a blanket rule. As the Supreme Court has recognized, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'"<sup>253</sup> When an agency adopts a rule without prepromulgation notice and comment, there are a number of considerations involving policy and fairness that militate in favor of requiring the agency to demonstrate the harmlessness of its error, rather than expecting a challenging party to prove that the agency's procedural failure was harmful.

First, fairness militates in favor of placing the burden of proof on the agency because the consequences of forgoing prepromulgation notice and comment are often potentially severe. Relying solely on postpromulgation notice and comment in adopting a rule threatens to entirely freeze the public out of meaningful participation in the rulemaking process.<sup>254</sup> Where

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<sup>251</sup> See, e.g., *Am. Radio Relay League v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980) (noting that review of rulemaking conducted pursuant to § 553 "is generally quite limited" and that the court "presumes agency action to be valid").

<sup>252</sup> As Parts I and II of this Article reflect, the mere fact that courts have generally sought a middle-path approach to evaluating postpromulgation notice and comment suggests their intuition that invalidating every procedurally flawed rule is overkill, and that sometimes postpromulgation notice and comment are good enough.

<sup>253</sup> *Keyes v. Sch. Dist. No. 1., Denver, Colo.*, 413 U.S. 189, 209 (1973) (quoting 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940)).

<sup>254</sup> See, e.g., *United States v. Reynolds*, 710 F.3d 498, 518 (3d Cir. 2013) (explaining that the purposes of notice and comment "often cannot be fulfilled

an agency validly asserts an exception from APA notice-and-comment rulemaking requirements, the opportunity for comment postpromulgation is almost certainly preferable to the alternative, which is no chance for public participation at all.<sup>255</sup> But, as several courts have recognized, in the absence of a valid exception, relying on postpromulgation procedures alone represents a complete failure on the part of the agency that disadvantages interested parties in a way that other, more technical procedural failures do not.<sup>256</sup> Relying solely on postpromulgation procedures significantly increases the likelihood that helpful or valuable comments will be ignored, and thus that the rule in question will be different from what it would have been had procedures been followed.<sup>257</sup> Moreover, because an agency has total control over whether it undertakes prepromulgation notice and comment, the agency alone is in a position to avoid the consequences of failing to comply with the APA. The potential consequences of ignoring notice and comment, combined with the agency's ability to prevent such a defect in the first place, makes it fair to put the burden of proving harmlessness on the agency.

Second, as a matter of policy, placing the burden of proof on the challenging party risks undermining the APA's procedural requirements for rulemakings. An agency is never required to adopt a particular version of a rule or act on particular comments.<sup>258</sup> Indeed, no matter how much evidence a party marshals in support of a given rule, the agency is free to adopt the opposite rule, so long as it articulates some rational basis for doing so.<sup>259</sup> Thus, except in the most unusual of cases—for example, if an agency were to concede expressly that it would have adopted a different rule had a party's comments been before it—a claimant will never be able to carry the burden of

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because there has been no effort to have the kind of exchange of views and information the requirements are intended to generate" with postpromulgation notice and comment).

<sup>255</sup> See *Adoption of Recommendations*, 60 Fed. Reg. 43,108, 43,112 (Aug. 18, 1995) ("[I]t is still advantageous to provide such procedures, even if offered after the rule has been promulgated. Public comment can provide both useful information to the agency and enhanced public acceptance of the rule.")

<sup>256</sup> See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323–24 (D.C. Cir. 1988) (refusing to adopt a rule that the party challenging the agency rule must show "specific prejudice" as "normally inappropriate where the agency has completely failed to comply with § 533").

<sup>257</sup> See *supra* notes 173–77 and accompanying text.

<sup>258</sup> *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992).

<sup>259</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring an agency defending a rule to demonstrate merely the rationality of its choices).

proving that an agency's failure to comply with § 553 affected the result of a rulemaking. Faced with such a claim, an agency wishing to establish harmlessness need only reply that it would have adopted the same rule irrespective of the procedures followed.<sup>260</sup> Giving agencies such an easy "out" from prepromulgation notice and comment would dramatically reduce any incentive for agencies to comply with § 553, and the requirements in that section would become afterthoughts.<sup>261</sup> To avoid that result—which is plainly contrary to Congress's statutorily expressed preference for prepromulgation notice and comment—the agency, rather than the party challenging the rule, must be required to demonstrate the harmlessness of its failure to comply with § 553.

But what of *Shinseki v. Sanders*, in which the Supreme Court held that, under the APA, the challenger rather than the agency bears the burden of proving that the agency's procedural errors are harmful?<sup>262</sup> *Shinseki* concerned an agency adjudication of a benefits claim, rather than a rulemaking, and important differences between the two justify assigning the burden of proof differently as well. A party subject to an agency adjudication can demonstrate the presence or absence of relevant facts and thereby establish its entitlement, under the law, to a favorable outcome. Because it is thus within said party's power to show that the agency's mistake led to a ruling that was erroneous as a matter of law, it is not categorically unfair in the context of agency adjudications to follow the traditional rule "that the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'"<sup>263</sup> By contrast, because "[a]n agency is not required to adopt a rule that conforms in any way to the comments presented to it,"<sup>264</sup> a party challenging a rule will never be able to establish that the outcome of a rulemaking—i.e., the substance of the resulting rule—would have changed had the agency given the party proper notice and the opportunity to submit comments before the agency promulgated the rule. Placing the burden of proof on a party challenging a rule thus asks the challenging party to do the impossible. Given that fundamental distinction between adjudications and rulemakings, treating the two similarly for purposes of allocat-

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<sup>260</sup> *Riverbend Farms*, 958 F.2d at 1487.

<sup>261</sup> See *United States v. Reynolds*, 710 F.3d 498, 517 (3d Cir. 2013).

<sup>262</sup> 556 U.S. 396, 408–09 (2009).

<sup>263</sup> *Id.* at 409 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)).

<sup>264</sup> *Riverbend Farms*, 958 F.2d at 1487.

ing burdens of proof contravenes common sense. The few circuits to have even touched on this issue appear to agree,<sup>265</sup> or have at least left open the possibility of distinguishing *Shinseki* on this ground.<sup>266</sup>

### 3. *Factors for Rebutting the Presumption*

Although courts should require agencies to demonstrate the harmlessness of their reliance on postpromulgation procedures, courts should not make rebutting the presumption of invalidity too onerous. Courts should consider several factors in deciding whether postpromulgation notice and comment fulfill the key purposes of prepromulgation notice and comment.

#### a. *Agency Responsiveness*

The D.C. Circuit has already identified two relevant factors: an agency's responsiveness to postpromulgation comments and actual changes made to the interim-final rule.<sup>267</sup> Both are indicators of an agency's willingness to take seriously the comments it receives even after promulgating an interim-final rule. Courts should be mindful of both those factors when determining whether postpromulgation notice and comment were harmful.

An agency's thorough explanation of its reason for rejecting a particular comment, for example, is evidence that the agency at least reviewed the comment—albeit not necessarily with an open mind.<sup>268</sup> Whether or not the agency approached comments received with an open mind, the agency's responses to those comments at least facilitate judicial review of the agency's rulemaking for reasoned decision making under APA § 706(2)(A) and *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*<sup>269</sup> Like-

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<sup>265</sup> See *Reynolds*, 710 F.3d at 518–19; *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072 (9th Cir. 2011). But see *Cal. Wilderness Coal*, 631 F.3d at 1109–10 (Ikuta, J., dissenting) (interpreting *Shinseki* to require that, when a party challenges a rule on procedural grounds, that party bears the burden of showing that the procedural defect was harmful).

<sup>266</sup> In *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011), the Fifth Circuit both cited *Shinseki* and placed at least some burden on the challenging party to demonstrate that he was prejudiced by the agency's procedural failures. See *id.* at 930–33 & nn.107 & 120. But the *Johnson* court did not precisely link the two, and its statements regarding the burden of proof are too mushy to represent a clear and unequivocal conclusion regarding the proper application of *Shinseki* in the rulemaking context.

<sup>267</sup> *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292–93 (D.C. Cir. 1994).

<sup>268</sup> *Id.* at 1292.

<sup>269</sup> 463 U.S. 29 (1983).



wise, an agency's decision to actually change parts of a final rule in response to comments means that the agency was responsive to at least some of the comments it received, even if it may not have been willing to seriously consider all of them.<sup>270</sup>

An agency's responsiveness to comments received through postpromulgation procedures offers at most an incomplete picture of whether an agency has given meaningful consideration to postpromulgation comments it received. An agency decision not to make any change to a rule in the face of postpromulgation comments may, for example, be less a reflection of the seriousness of the agency's consideration than a commentary on the lack of merit in the comments themselves. Discerning an agency's mindset regarding notice and comment—reading the administrative tea leaves—based solely on the agency's official response to proposed comments ignores other factors that may offer greater insight into an agency's good faith in undertaking postpromulgation notice and comment.

b. *Evidence of Agency Motives*

For this reason, courts should look behind the form of an agency's responsiveness to ascertain and evaluate an agency's motives for foregoing prepromulgation notice and comment. Circumstances suggesting an agency's bad faith in foregoing prepromulgation notice and comment should effectively discredit its postpromulgation procedures.

For instance, if it is clear a rule was promulgated specifically to achieve a particular result in litigation—e.g., so that a court would give *Chevron* deference to an agency's preferred interpretation of a statute—it is reasonable to assume the issuing agency will be disinclined to seriously consider comments that, if incorporated into the rule, could defeat the result sought.<sup>271</sup> Courts generally have allowed agencies to obtain *Chevron* review for such "fighting regulations"<sup>272</sup> on the theory that notice-and-comment rulemaking procedures ensure reasoned decision making and adequately protect against agency

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<sup>270</sup> See *Advocates for Highway & Auto Safety*, 28 F.3d at 1292–93.

<sup>271</sup> This was certainly the experience with the tax basis overstatement regulations discussed in subpart I.C of this Article. See Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondents at 31–32, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012) (No. 11–139) (documenting the reaction to postpromulgation procedures in that instance).

<sup>272</sup> See generally Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 648 (2012) (using the term "fighting regulations" to describe agency rules adopted during litigation).

arbitrariness, pending litigation notwithstanding.<sup>273</sup> But an agency's reliance on interim-final rules and postpromulgation procedures under such circumstances suggests the opposite: that the agency is behaving strategically.<sup>274</sup> The same analysis would apply whenever circumstances suggest obvious incentives—beyond the standard costs of modifying a rule—for an agency to avoid deviating from a position staked out in an interim-final rule. When an agency has a vested institutional interest in a particular version of a rule, courts should be less inclined to believe the agency seriously considered postpromulgation comments.<sup>275</sup>

Outside the litigation context, the administrative record may offer other indications of an agency's motives for foregoing prepromulgation notice and comment. Where an agency's actions suggest a genuine, good-faith belief and effort to demonstrate that good cause exists for skipping prepromulgation notice and comment, followed by prompt pursuit of postpromulgation procedures as ACUS and others suggest reflect best practices, then it is more reasonable to presume the agency took seriously postpromulgation comments received, and courts should be more willing to countenance postpromulgation notice and comment as a substitute for prepromulgation notice and comment.<sup>276</sup> By contrast, when it appears that an agency haphazardly or pretextually claimed any of the statutory exemptions from notice-and-comment rulemaking requirements in an effort to either avoid bureaucratic hassle or expedite the agency's policy preferences, a court could justifiably infer that the agency was unlikely to have taken postpromulgation public input seriously. Correspondingly, courts should also consider the time the agency spent considering comments before promulgating the rule in final form.<sup>277</sup> For

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<sup>273</sup> See, e.g., *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (“That it was litigation which disclosed the need for the regulation is irrelevant.”).

<sup>274</sup> *Lederman*, *supra* note 272, at 671–74 (describing strategic scenarios for adopting regulations in the midst of litigation).

<sup>275</sup> *Cf. Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975) (“The reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision-making process.”).

<sup>276</sup> *Cf. Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 613 (D.C. Cir. 1982) (upholding agency's invocation of good cause exception where agency promulgated regulations under exceptional circumstances and agreed to expeditiously undertake postpromulgation notice and comment); see also *Mid-Tex Elec. Coop. Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) (same).

<sup>277</sup> See *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (recognizing argument that “the four-day interval between the close of the public comment period . . . and the issuance of the [final

example, if an agency finalizes a rule a mere day or two after the close of a comment period, despite having received thousands of comments, a court could reasonably conclude the agency did not pay those comments much heed.

Notably, the reverse is not true. If an agency delays in finalizing an interim rule after receiving public comments concerning the rule, the delay might just as easily be the product of agency inattentiveness as the product of agency deliberation about the comments. For that reason, although courts should treat an unusually speedy turnaround as evidence that an agency ignored public comments, they should not treat delay as evidence that the agency seriously considered the comments it received.

### c. *Concerns for Democratic Legitimacy*

Courts should be more inclined to credit postpromulgation notice and comment where agencies make significant efforts to publicize the opportunity to postpromulgation public comment, for instance, by hosting public meetings on the interim-final rule or conducting significant online campaigns encouraging postpromulgation comments.<sup>278</sup> When an agency does more than is necessary or goes out of its way to encourage public comment, it suggests the agency is taking the post-promulgation notice-and-comment process at least as seriously as it would have taken a prepromulgation notice-and-comment process.<sup>279</sup>

The considerations we have suggested thus far address whether an agency took seriously the postpromulgation notice-and-comment process, so that the public receives a “full and fair opportunity to be heard” and the agency correspondingly derives actual benefit from public comment.<sup>280</sup> In addition to

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rule]” was evidence that the agency “gave the comments only cursory examination”).

<sup>278</sup> See, e.g., *Sherwin v. Sec’y of Health & Human Servs.*, 685 F.2d 1, 5–6 (1st Cir. 1982) (noting with approval that “SSA adopted the Grid only after a substantial effort to ‘obtain as much public input over as broad a spectrum as possible,’” including by holding public meetings in three major cities (quoting Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55,349, 55,356–57 (Nov. 27, 1978))).

<sup>279</sup> See *Latin Ams. for Soc. & Econ Dev. v. Adm’r of Fed. Highway Admin.*, 756 F.3d 447, 461, 468 (6th Cir. 2014) (detailing extensive public outreach efforts by agency and relying on that outreach to support the conclusion that the agency’s decision was the result of “a lengthy, reasoned process based on an objective analysis subject to public scrutiny throughout”).

<sup>280</sup> See *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (quoting *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 769 (9th Cir. 1986)).

ensuring serious consideration of comments received, however, courts reviewing postpromulgation notice and comment for harmless-ness should also consider the extent to which an agency's use of postpromulgation notice and comment gives rise to concerns about democratic legitimacy. The fact is that some rulemakings are simply more consequential than others, maybe because of their subject matter, or perhaps because of their scope. In some cases involving interim-final rules and postpromulgation procedures, the regulations are hugely controversial, making public participation in the rulemaking process especially important as a means of achieving public acceptance of the ultimate outcome. But some rulemakings are small, pursue narrow amendments to existing regulations, or otherwise lack controversy. No matter when they occur, notice and comment procedures will yield little public input.<sup>281</sup>

To resolve these concerns, courts should consider things like the extent to which the public is actually made aware of an opportunity for postpromulgation comment. Widespread awareness of such an opportunity will generally make it substantially more likely the public will see the resulting rule as the result of a democratic process and therefore democratically legitimate. Courts can gauge public awareness of a postpromulgation comment period in a number of ways. One consideration is whether the measures an agency has employed to notify the public of an opportunity for postpromulgation comment are likely to work. To this end, a widespread multimedia campaign undertaken in connection with a postpromulgation comment period is more likely to lend the resulting rule an air of democratic legitimacy than is a simple publication in the *Federal Register*.

Another way for courts to test the democratic legitimacy of postpromulgation notice and comment would be to compare the nature and volume of the public's response to postpromulgation notice and comment with what might have been expected from prepromulgation notice and comment. There are several ways a court might undertake such a comparison. For example, if a particularly obvious or important argument was not raised and addressed at some point in the postpromulgation notice-and-comment process, a court might be more in-

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<sup>281</sup> For example, one rulemaking study identified thirty-one Treasury Department rulemakings in a three-year period that generated no public comments—seventeen of which involved the use of temporary regulations with postpromulgation procedures, but fourteen of which used prepromulgation notice and comment. See Hickman, *supra* note 26, at 1758–59.

clined to conclude that postpromulgation notice and comment failed in their essential purpose. By contrast, if the most obvious and important arguments were raised and addressed during postpromulgation notice and comment, a court should be more willing to believe the rule elicited the sort of public input that would render it more democratically legitimate. Along the same lines, if a court would ordinarily expect a particular rule to elicit thousands of public comments, but postpromulgation notice and comment only yielded a dozen comments, the court could reasonably assume not only that the timing of the notice and opportunity to comment are to blame for the difference but that the dearth of public input is likely to undermine the resulting rule's democratic legitimacy.

Projecting the public response to prepromulgation notice and comment is far from an exact science. But that is not to say it is impossible, or that courts lack the expertise or familiarity with the administrative process necessary to discern when public participation has been adversely affected by the lack of prepromulgation notice and comment. A court can make some estimate of how the public would have responded to a prepromulgation opportunity to comment by examining the public's response to similar proposed rules in the past. The court could also consider whether certain key stakeholders—parties that would be expected to weigh in under normal circumstances—actually utilized the postpromulgation comment period. If such comparisons suggest that the postpromulgation notice and comment procedures did not adequately replicate similar instances involving prepromulgation notice and comment, a court should be less likely to find the lack of prepromulgation notice and comment to have been harmless error.

#### 4. *Potential Criticism*

One virtue of our approach is that it builds on the current jurisprudential trend toward a middle-ground compromise, even as we advocate a stricter approach to judicial review than provided in most past cases. Nevertheless, the approach we have outlined is not immune from certain criticisms.

Some may argue that crediting postpromulgation notice and comment as an occasional substitute for prepromulgation notice and comment will in effect undermine § 553's command that agencies undertake prepromulgation notice and comment. In one sense, that criticism is valid, since permitting any kind of substitute for prepromulgation notice and comment makes it

inherently less likely that agencies will use prepromulgation notice and comment.<sup>282</sup> But the criticism misses the mark. The harmless error rule codified in § 706 itself recognizes that a procedural deviation is not necessarily enough to invalidate a rule.<sup>283</sup> The proper concern, courts have explained, is not with enforcing procedural requirements for procedural requirements' sake.<sup>284</sup> Instead, consistent with the harmless error rule, courts reviewing agency action should look to whether the purposes of the procedural requirement were addressed.<sup>285</sup> Thus, whether postpromulgation notice and comment detract from the appeal of prepromulgation notice and comment is somewhat beside the point. The real question is whether they do so in a way that deviates from the purpose of § 553's prepromulgation requirement. The answer, as we have tried to show, is that postpromulgation notice and comment are not inherently deficient and that courts can at least make a determination as to its efficacy on a case-by-case basis.

Our approach also guards against the temptation to forego prepromulgation notice and comment. Under our approach, when an agency goes the postpromulgation notice and comment route, it must overcome a meaningful presumption against validity and must do so using concrete, objective criteria. That hurdle is not one that agencies have to overcome when they use prepromulgation notice and comment. Quite the contrary, rules adopted using prepromulgation notice and comment are presumptively valid.<sup>286</sup> Thus, our method imposes an incentive on agencies to follow § 553, just without locking them in a procedural straightjacket.

Furthermore, from a practical perspective, some deviation from the prepromulgation requirement is necessary because, as discussed above, strict compliance with prepromulgation notice and comment would require agencies to repromulgate, at great cost, a glut of regulations that have been in force for years.<sup>287</sup> If the alternative is invalidating hundreds of thousands of pages of rules at tremendous costs—both monetary and in terms of governmental efficiency—then fundamen-

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<sup>282</sup> *Riverbend Farms*, 958 F.2d at 1487.

<sup>283</sup> *Id.* at 1488 (“While some may argue that would be all for the good, we cannot and will not presume that Congress intended the APA’s harmless error rule to be a nullity.”).

<sup>284</sup> *See Texas v. Lyng*, 868 F.2d 795 (5th Cir. 1989).

<sup>285</sup> *Id.*; *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012); *Sagebrush Rebellion*, 790 F.2d at 764–65.

<sup>286</sup> *Am. Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980).

<sup>287</sup> *See supra* notes 1–4 and accompanying text.

tal policy concerns arguably dictate that harmless error analysis be construed to afford agencies more latitude within which to operate. Those who insist on absolute adherence to the prepromulgation requirement ignore this practical reality.

A final criticism of our approach might be that even if courts consider all the factors we recommend, they might still end up sanctioning rules where agencies did not really give meaningful consideration to postpromulgation comments. But that argument sets the bar too high. Indeed, scholars have derided *prepromulgation* notice and comment as an expensive and time-consuming form of Kabuki theatre in which agencies merely feign open-mindedness without actually considering the comments they receive.<sup>288</sup> These notice-and-comment skeptics like to point out, for example, that agencies rarely make major changes to rules as a result of the comments they receive, meaning that most final rules are materially indistinguishable from the versions agencies propose without the benefit of public comment.<sup>289</sup> According to these commentators, the APA's *prepromulgation* notice and comment requirements are simply a waste of the government's and the public's time and resources. To the extent our approach to postpromulgation notice and comment might be said to allow agencies to pass judicial review just by "going through the motions," that criticism applies at least as much to *prepromulgation* notice and comment. Indeed, by requiring agencies to provide objective indicia of their receptiveness to postpromulgation public comments, our method arguably guarantees more meaningful public participation than the *prepromulgation* requirement.

## CONCLUSION

Sometimes agency procedural failures are harmful, but not always. A bright-line rule that either approves as harmless or rejects as harmful an agency's use of postpromulgation notice and comment in all instances fails to accommodate this reality. Harmlessness, however, is more concept than constant. Pre-

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<sup>288</sup> See, e.g., E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (calling notice-and-comment rulemaking "a highly stylized process for displaying . . . something which in real life takes place in other venues").

<sup>289</sup> See Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 259 (1998); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1447 (2013); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 74 (2004).

scribing a precise formula that reliably and consistently identifies those occasions where postpromulgation notice and comment renders harmless the failure to undertake prepromulgation notice and comment is not a simple task because the harmless inquiry frequently turns on the interplay of multiple context-specific considerations.

But the mere fact that developing a coherent standard by which to adjudicate such cases is difficult does not mean that courts and commentators should abstain from the effort altogether. On the contrary, as agencies increasingly rely on postpromulgation notice and comment as a substitute for the rulemaking procedures imposed by APA § 553, it becomes all the more essential that courts develop meaningful standards by which to ascertain harmless. Ideally, the criteria on which the courts settle will be uniform. To achieve that uniformity, congressional or Supreme Court guidance may ultimately be necessary.

To advance that process, this Article both highlights the problem and, rationalizing the existing jurisprudence, suggests a few key elements for evaluating when postpromulgation notice and comment adequately substitute their prepromulgation counterparts. We harbor no illusions that our approach is perfect, but it is defensible. Refining our proposal or figuring out some alternative approach going forward is imperative, because the problems attendant to postpromulgation notice and comment are not going away.



