Jason & Susan Yackee engage in an empirical study and claim to find relatively weak evidence that ossification is neither a serious or widespread problem. After a review of the Yackee’s methodology, dataset, time period, and suggestion of appropriate normative criteria, I conclude that nothing in the Yackee’s study contradicts or undermines the ossification hypothesis. In fact, ossification is a real problem that has a wide variety of serious adverse effects.

“Rulemaking Ossification” means that it takes a long time and an extensive commitment of agency resources to use the notice and comment process to issue a rule. Proponents attribute the ossification of the rulemaking process primarily to the courts, with secondary roles for Congress and the White House. Like many administrative law scholars and proponents of rulemaking ossification, I accepted the ossification hypothesis as true and important given the large body of evidence that supports the hypothesis. I therefore, respond to Yackee’s study as a non-neutral observer; and while I admire the scholarship of the study, I do not support their findings because the Yackees misunderstand the ossification hypothesis.

I. The Methodology of the Study: The Yackees first selected rules that are issued by the Department of Interior through the notice and comment process from 1950 – 1990. The Yackees then compared the average time between the issuance of the notice of proposed rulemaking (NPRM) and the issuance of the final rule during two periods (1950 – 1975 and 1976 – 1990). They found a relatively small difference in the average issuance time when comparing the two periods and conclude that “agencies promulgated the vast majority of rules in their dataset within one year and the majority within two.” The Yackees therefore concluded ossification is neither a serious nor widespread problem.

However, the Yackees understate the total time needed to issue a rule through the notice and comment procedure, leaving out the great deal of time the agency devotes to drafting an NPRM that has a reasonable prospect of surviving the inevitable challenges to its adequacy in a review proceeding. While there are few studies that determine the total length of the rulemaking process, those that do take into account the pre-NPRM process conclude that the total time to complete issue a rule is six to eight years, significantly longer than the two years of review time the Yackees found in their study. The lengthy pre-NPRM process is primarily attributable to judicial decisions that impose a heavy burden on agencies, well beyond those required by statute.
II. The Dataset for the Study: The Yackees relied on the average time between the issuance of the NPRM and issuance of the final rule for every rulemaking the Department of Interior issued through notice and comment during the observed time period. The choice of the dataset is based on a misunderstanding of the ossification hypothesis. Proponents of the hypothesis, including myself, believe that rulemaking ossification accurately characterized in the context of proposed rules that create or reflect high stake controversies, otherwise known as economically significant rules. Most rulemakings conducted by agencies involve issues that are not particularly controversial and do not have major economic consequences, and in those cases, the notice and comment procedure is not ossified. Every study of economically significant rulemakings has found strong evidence of ossification – a decision making process that takes many years to complete and that requires an agency to commit a high proportion of its scarce resources to a single task. The Yackees’ study provides no data that are useful in determining whether, and to what extent, ossification is a real problem in the context of economically significant rules.

III. The Time Periods used for the Study: Additionally, the time period observed in the Yackees’ study, 1950 – 1975, provides no data that has value in testing the ossification hypothesis. The Yackees misunderstood the ossification hypothesis once again; claiming that in the mid-to-late 1970’s federal rulemaking became ossified. Instead, the Yackee’s should have compared the duration of rulemakings before 1906 with the duration of rulemakings after 1906. The year 1906 marked a major turning point between the courts and agencies – before 1906 the courts rarely engaged in any review of agency actions and agencies were free to choose their own decision making procedures. The Steamboat Act of 1852 illustrates the potential efficiency and efficacy of rulemaking in the absence of judicially enforced requirements. It took only five years to take actions needed to reduce the incidence of steam boat explosions in the 1850’s. In contrast, it took the National Highway Traffic Safety Administration (established in 1970) twenty years to issue a rule to address a single well-known hazard.

IV. Choice of Appropriate Normative Criteria: The Yackees recognize that it is difficult to identify an appropriate baseline to determine how long is too long for a rulemaking to be issued. I can suggest two possibilities for a baseline. First, we could use agency compliance with statutory deadlines for issuing rules. Measured by that criterion, ossification is a serious problem because agencies rarely comply with these deadlines. The second possibility would be to use the views of the people who have expertise with respect to agencies’ ability to further their statutory missions as a normative measure of how long is too long. Measured by that criterion ossification is a serious problem. There is a veritable army of people with agency specific substantive expertise who have expressed the view that ossification is a source of many serious problems. Rulemaking ossification is real and a serious problem measured with reference to any plausible normative baseline.

4 Economically significant rules, as defined in Executive Order 12866, are those rules that will have an annual impact on the economy of $100 million or more.

5 Congress enacted the Hepburn Act in 1906 – a statute that imposed for the first time mandatory procedures on an agency, coupled with instructions to the courts to review agency decisions.