POLITICAL CYCLES OF RULEMAKING: AN EMPIRICAL PORTRAIT OF THE MODERN ADMINISTRATIVE STATE

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COMMENTATORS chastised President William Clinton for the flurry of regulatory activity in the final months of his administration. That last-minute action included, among other activities, finalizing energy efficiency standards for washing machines and workplace ergo-

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nomic regulations to protect against musculoskeletal injuries.[1] *Mere hours after President George W. Bush's inauguration, then-Chief of Staff Andrew Card fired off a memorandum to the heads of federal executive agencies directing them to send regulatory actions to the Federal Register only if a Bush appointee gave approval, to withdraw regulatory actions that had already been sent to the Federal Register but had not yet been published, and to freeze the effective dates of final actions that had been published but had not yet taken effect.*[2]

President Clinton's rulemaking activities in his closing days were not unique. Slightly over eight years earlier, in the waning months of an administration that had instituted a regulatory moratorium, President George H.W. Bush's Secretary of Transportation proposed loosening the rules on how long truck drivers could stay on the road between rest breaks, prompting a flood of comments.[3] *The Department of Transportation did not finalize the rulemaking proposal, and the Clinton administration formally scrapped it two weeks after entering office.*[4] *The Secretary of Transportation behind this attempt at last-minute (de)-regulatory activity was Andrew Card.*

[1] The incoming George W. Bush administration kept the new standards for washing machines. Matthew L. Wald, Administration Keeps 2 Rules on Efficiency of Appliances, N.Y. Times, Apr. 13, 2001, at A14. Congress, with President Bush's approval, cancelled the ergonomic standards under the Congressional Review Act, 5 U.S.C. §§ 801–808 (2000). See Pub. L. No. 107-5, 115 Stat. 7 (2001) ("Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68261 (2000)), and such rule shall have no force or effect."). This cancellation marked the first successful use of the Congressional Review Act, which was enacted in 1996, to repeal an agency action. Robert V. Percival, Presidential Management of the Administrative State: The Not-So-Unitary Executive, 51 Duke L.J. 963, 1000 (2001).

[2] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) [hereinafter Card Memorandum]. The memorandum did not require independent agencies, such as the Federal Communications Commission ("FCC"), to follow its instructions, though it did ask independent agencies to comply voluntarily. See id. The memorandum also made several exceptions, including for agencies facing statutory or judicial deadlines or acting in response to an emergency or some other urgent situation related to health and safety. See id.

[3] Hours of Service of Drivers; On-Duty Time, 57 Fed. Reg. 37,504 (proposed Aug. 19, 1992).

[4] Hours of Service of Drivers; On-Duty Time, 58 Fed. Reg. 6937, 6938 (withdrawn Feb. 3, 1993) (noting that the Federal Highway Administration received 67,922 comments and petition signatures).

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INTRODUCTION

Around each change of presidential administration, the press reports that the outgoing President is rushing to extend his policy legacy by promulgating late-term "midnight" regulations, even if the next President is from the same party. Just after January 20, commentators identify the new President's mirror-image behavior: "crack-of-dawn" regulations or suspensions issued straight out of the gate, and withdrawals of uncompleted regulations begun under his predecessor. The 2008 election is quickly approaching, which will bring a change in the administration, though not necessarily in

party control of the White House. A new round of midnight rulemaking has already begun.[5]

These news-making events are the tip of a lawmaking iceberg. The federal administrative state does more lawmaking, by some measures, than Congress. In 2001, Congress passed 24 major statutes[6] and 112 other public laws.[7] By contrast, in that year, cabinet departments, the Executive Office of the President, and independent agencies promulgated 70 significant rules and 3,383 other rules.[8] Agencies operate in a dynamic political environment but retain certain attributes as political control shifts. Agency rulemaking, particularly during political transitions, provides a critical perspective both on what can be changed easily and quickly by rotating political masters—including appointees within the agency, other political actors in the Executive Branch, and members of Congress—and on what remains stable for an agency over the years, such as its primarily career staff, its mostly fixed mission, and its internal culture. In other words, agency rulemaking can be a story both of politics and of bureaucratic momentum. An understanding of how

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[5] See John M. Broder, A Legacy Bush Can Control, N.Y. Times, Sept. 9, 2007, at A37 (quoting Susan E. Dudley, a critic of President Clinton's midnight regulations and current head of the Office of Information and Regulatory Affairs, defending such action under President George W. Bush because "we're determined to do it right, based on the best science and the best technology, with ample opportunity for the public to get involved"); Kent Hoover, New Regulatory Czar Will Have Plenty to Review, Phila. Bus. J., May 14, 2007 (quoting head of the Small Business Administration's ("SBA") Office of Advocacy as comparing regulatory activity in the final year of an administration to "the end of the NBA playoffs"); Robert Pear, Business Lobby Presses Agenda Before '08 Vote, N.Y. Times, Dec. 2, 2007, at A1 (reporting that commercial trucking companies are pressing the Department of Transportation to issue a final rule increasing the maximum number of permissible hours for drivers).

[6] See Jill Barshay, 2001 Legislative Summary: A Year of Power Struggles and Common Purpose, CQ Weekly, Dec. 22, 2001, at 3018–55.

[7] 149 Cong. Rec. D456 (daily ed. May 6, 2003) (Final Résumé of Congressional Activity: First Session of the One Hundred Seventh Congress).

[8] GAO Federal Rules Database Research, http://www.gao.gov/fedrules/ (for all rules, set Agency to "All" and leave other fields blank; for significant rules, set Agency to "All" and Rule Type to "Major") (last visited Feb. 3, 2007). The law defines "significant," or "major," rules as those that have at least an annual $100 million, or otherwise "material[ly]" adverse, effect on the economy. Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 638–42 (2000). Counts of rulemaking activity by various government sources (such as the GAO, Federal Register, and the Regulatory Information Service Center) vary. See Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government 102–17 (2008).

administrative agencies actually work is essential to any prescription concerning bureaucratic conduct or judicial review of agency actions.

Federal rulemaking activity therefore raises a range of positive and normative questions. The positive questions are often descriptive and sometimes causal: What is the scope of federal regulatory activity? How do independent regulatory commissions, such as the Federal Communications Commission ("FCC"), differ from traditional executive agencies, such as the Department of Labor ("DOL") and the Environmental Protection Agency ("EPA")? On the causal side, what drives rulemaking activity? What is the role, if any, of changes in the White House or Congress? Despite the vast scope and variability of regulatory activity, there is little empirical examination of these questions in the legal[9] or political science[10] literature.

[9] See Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47 (2006) (survey of EPA political officials under Presidents George H.W. Bush and Clinton concerning presidential control of agency decisions); Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. Chi. L. Rev. 821 (2003) (examining nearly 20 years of Office of Management and Budget ("OMB") review of agency rulemaking); 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 (2007) (study of 232 rulemakings by the Treasury Department between 2003 and 2005); Jason M. Loring & Liam R. Roth, Note, After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations, 40 Wake Forest L. Rev. 1441 (2005) (analysis of midnight regulations by the EPA, Occupational Health and Safety Administration ("OSHA") and National Highway Traffic Safety Administration ("NHTSA") by Presidents George H.W. Bush and Clinton).

[10] See Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 7–21 (3d ed. 2003) (tracking of various macro trends in rulemaking activities); Scott R. Furlong, The 1992 Regulatory Moratorium: Did it Make a Difference?, 55 Pub. Admin. Rev. 254 (1995) (descriptive analysis of regulatory trends in President George H.W. Bush's administration); Cornelius M. Kerwin & Scott R. Furlong, Time and Rulemaking: An Empirical Test of Theory, 2 J. Pub. Admin. Res. & Theory 113 (1992); William G. Howell & Kenneth R. Mayer, The Last One Hundred Days, 35 Pres. Stud. Q. 533 (2005) (descriptive and statistical analysis of Executive Orders, Federal Register pages, and national monument designations over time, with a focus on presidential transitions); Stuart Shapiro, Two Months in the Life of the Regulatory State, Admin. & Reg. L. News, Spring 2005, at 12 [hereinafter Shapiro, Two Months] (descriptive analysis of rules promulgated in November and December 2003 in the Federal Register, including type, number of comments, and length of rulemaking process); Stuart Shapiro, Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations, 23 J.L. & Pol.

The answers to these descriptive and causal questions, in turn, raise normative and legal inquiries important to the functioning and oversight of the administrative state. How should agencies operate during political transitions? Currently, courts do not distinguish rules enacted at the start of an administration from rules enacted at the end of an administration. Should it make a difference for judicial review if regulations are issued after an election that changes party control of Congress or the White House but before the change actually takes place in January? How much power should agencies have to rescind regulations promulgated or proposed under a previous administration or Congress? Agency actions during transitions may influence how courts should treat delegation and deference issues outside of such moments of political change as well. There has been discussion of some of these issues by legal scholars.[11]

393 (2007) [hereinafter Shapiro, Presidents and Process] (comparison of rules printed in the Federal Register from late in President Clinton's administration (November and December 1999) and early in President George W. Bush's administration (November and December 2003)); Jason Webb Yackee & Susan Webb Yackee, Is Federal Rulemaking "Ossified"? The Effects of Congressional, Presidential, and Judicial Oversight on the Agency Policymaking Process (Jan. 3, 2008) (unpublished manuscript, on file with author) (analysis of duration of notice-and-comment rulemaking). There has also been some discussion of these issues by journalists and think tanks. See Cindy Skrzycki, The Regulators 30–33, 67–68 (2003) (Washington Post columnist summarizing rulemaking activity by agency and staffing by issue); Clyde Wayne Crews, Jr., Ten Thousand Commandments (2006) (annual Competitive Enterprise Institute publication, previously a Cato Institute publication, summarizing counts of Federal Register pages and rulemaking entries in the Unified Agenda of Federal Regulatory and Deregulatory Actions); Susan Dudley & Melinda Warren, Upward Trend in Regulation Continues: An Analysis of the U.S. Budget for Fiscal Years 2005 and 2006 (2005) (Mercatus Center and Weidenbaum Center Report summarizing regulatory spending and staffing by issue areas); James L. Gattuso, Reining In the Regulators: How Does President Bush Measure Up? (Heritage Found., Backgrounder No. 1801, 2004) (Heritage Foundation report summarizing counts of Federal Register pages, Code of Federal Regulations pages, and major rules in the GAO's database); Jay Cochran, III, The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters (Mar. 8, 2001), (Mercatus Center working paper, available at http://www.mercatus.org/Publications/pubID.4198,cfilter.0/pub_detail.asp) (examination of variation in Federal Register pages, with a focus on post-election quarters).

[11] See Jack M. Beermann, Presidential Power in Transitions, 83 B.U. L. Rev. 947 (2003) (discussing legal and normative issues connected to presidential transitions, with a focus on the Clinton-Bush transition); Nina A. Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives, 78 N.Y.U. L. Rev. 557 (2003) (analyzing actions by outgoing presidential administrations, including rulemaking and personnel burrowing); Jim Rossi, Bargaining in the Shadow of Ad-

This Article brings many of these important positive and normative inquiries together by taking advantage of a new, extensive database on agency rulemaking activities I constructed from twenty years' (1983–2003) worth of federal agency semi-annual reports in the Unified Agenda of Federal Regulatory and Deregulatory Actions ("Unified Agenda").[12] It provides, to the best of my knowledge, the first comprehensive empirical examination of agency rulemaking, with and without prior opportunity for public comment, from President Ronald Reagan to President George W. Bush, in either the legal or political science literature. It thus fills important gaps in our knowledge of the administrative state. Among other topics, it examines (1) how the use of notice-and-comment rulemaking has varied over time and across agencies; (2) which agencies have promulgated binding rules without allowing prior public comment, and at what times; (3) which agencies have rushed to finish regulations before the arrival of a new President or

ministrative Procedure: The Public Interest in Rulemaking Settlement, 51 Duke L.J. 1015 (2001) (examining "rulemaking settlements" by outgoing and incoming presidential administrations); see also; Jack M. Beermann & William P. Marshall, The Constitutional Law of Presidential Transitions, 84 N.C. L. Rev. 1253, 1253 (2006) ("[T]he outgoing President is under no obligation to implement the new President's political agenda or to end implementing his own even if the new President may be forced by the outgoing President's actions to expend her political capital to undo the previous administration's work . . . ."); John P. Burke, Presidential Transitions: From Politics to Practice (2000) (examining decisions made in recent presidential transitions and their subsequent effects on policymaking); Andrew P. Morriss et al., Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining, 55 Admin. L. Rev. 551 (2003) (industry-funded article criticizing midnight regulations at the end of the Clinton administration); William M. Jack, Comment, Taking Care that Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum, 54 Admin. L. Rev. 1479 (2002) (examining crack-of-dawn regulatory actions, delays in effective dates of regulations, and withdrawals of regulations sent to but not yet published in the Federal Register, and suggesting reforms to increase transparency and accountability); Loring & Roth, supra note 9 (examining midnight regulations enacted by the EPA, OSHA, and NHTSA before Presidents Clinton and George W. Bush took office); B.J. Sanford, Note, Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking, 78 N.Y.U. L. Rev. 782, 801–07 (2003) (arguing that delays imposed by new Presidents of effective dates of rules enacted at the end the previous administration are illegal).

[12] For an overview of the Unified Agenda, see Regulatory Information Service Center: Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 68 Fed. Reg. 72,399–406 (Dec. 22, 2003). The Unified Agenda for Fall 2003, for example, appears in The Regulatory Plan, 68 Fed. Reg. 72,407–74,159 (Dec. 22, 2003).

shift in party control of Congress; and (4) which agencies have withdrawn unfinished regulations after political transitions.

Some of the results are striking. For example, some agencies withdrew more proposed rules after a political transition in Congress than after a new President took office. Rather than capitalizing quickly on their electoral mandates, Presidents usually have started fewer, not more, rules through notice-and-comment rulemaking in the first year of their terms than in later years. Many agencies completed more rules in the final quarter of each presidential administration, though cabinet departments, as a whole, finished slightly more regulatory actions after the 1994 election than in President Clinton's final quarter. And although the press feasted on President Clinton's midnight regulatory activity, President George H.W. Bush started nearly 50 percent more notice-and-comment rulemakings in the final quarter of his term than did President Clinton and nearly 40 percent more than did President Reagan.

This empirical analysis provides the necessary foundation to consider several important legal and normative issues. In so doing, it questions dominant positions in the existing debates on regulatory ossification and presidential control of the administrative state. First, the results suggest that the administrative state is not significantly ossified. Agencies appear to engage in considerable notice-and-comment rulemaking. There are, however, several forms of rulemaking. Agencies can enact binding rules without going through notice-and-comment procedures and increasingly have done so, suggesting that there are considerable costs to notice-and-comment rulemaking. This trend may be strong enough to persist despite the Supreme Court's 2001 decision in *United States v. Mead Corp.*, which appears to give more deference to notice-and-comment rulemaking than to less formal agency actions.[13]

Second, the results highlight the important role Congress plays in the regulatory process. Political transitions involve not only changes in the White House but also those in the legislature. Legal scholars likely have focused too heavily on the President in examining the operation and legitimacy of the administrative state. Finally, the results have critical implications for theories of judicial

[13] 533 U.S. 218, 226–27 (2001).

review of agency action. Many agencies are politically accountable, to Congress and the President, but that accountability has temporal dimensions. Perhaps courts should look to the source and timing of agency action as well as to the type of procedure used by the agency in determining the level of deference to give to agency action.

The Article will proceed as follows. In Part I, I will briefly explain the different types of Executive Branch agencies; the processes available for rulemaking under the Administrative Procedure Act[14] ("APA") and its associated case law; and connected debates in administrative law and political science about regulatory ossification, judicial deference, political control, and political transitions. I also will generate hypotheses about the scope of agency rulemaking, particularly during political transitions, that could help shed light on these debates as well as larger questions in administrative law. In Part II, I first will describe the advantages and limitations of the new database I have constructed from the Unified Agenda. From this database, I then will investigate the use of rulemaking without prior opportunity for comment, the commencement and completion of traditional notice-and-comment rulemaking, and the withdrawal of regulatory actions that have not been completed. This investigation will focus on rulemaking around times of political transition, but also will devote some attention to rulemaking outside periods of political change.

In Part III, I will explore this empirical work's normative and legal implications for the political and bureaucratic momentum stories of agency rulemaking. Some implications are tied to political transitions, including the need to pay more attention to congressional transitions as well as an assessment of proposed reforms to limit midnight and crack-of-dawn regulatory activity. Some implications are broader, including skepticism of the conventional story of ossification of regulatory activity as well as alternative perspectives on theories of delegation to agencies and judicial deference to agency actions. In the conclusion, I call for more empirical work in administrative law.

[14] 5 U.S.C. §§ 551–559, 701–706 (2000).

I. AGENCY RULEMAKING PROCESS(ES): DETAILS, DEBATES, AND HYPOTHESES

The rulemaking process in the modern administrative state determines both relatively trivial and important public policies. Most agencies have authority to promulgate rules with legally binding effects on individuals and companies.[15] Those effects can be quite substantial. The EPA's Clean Air Interstate Rule, for example, establishes a cap and trade system for sulfur dioxide and nitrogen oxides from power plants in some states, a regime that, if ultimately upheld by the courts, is sure to have important effects on the power industry.[16] Before looking more systematically at patterns of rulemaking over the past four presidential administrations, it is necessary to provide some brief background information. This Part first reviews the major types of agencies and rulemaking procedures. It then summarizes four important discussions in the legal and political science literature connected to rulemaking: regulatory ossification, judicial deference, political control, and political transitions. Finally, it concludes by generating hypotheses about rulemaking activities that can be examined, at least in part, by data reported in the Unified Agenda.

A. Agency Design

This Article focuses on agencies that are at least partially within the Executive Branch: cabinet departments, executive agencies, and independent agencies.[17] Some agencies are located fully within the Executive Branch; others have more structured independence. The President directly oversees fifteen cabinet departments, such as the Department of Justice ("DOJ"), and a variety of executive agencies, such as the EPA and the Office of Management and Budget ("OMB"). The President appoints, with Senate confirma-

[15] One classic debate in administrative law centers on how to distinguish legislative from nonlegislative or interpretative rules. See, e.g., Jacob Gersen, Legislative Rules Revisited, 74 U. Chi. L. Rev. 1705 (2007). I assume here that agencies have authority to issue binding and nonbinding rules.

[16] Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (Mar. 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72, et al.).

[17] Accordingly, the Article does not discuss agencies within the Legislative Branch (e.g., GAO, Congressional Budget Office) or within the Judicial Branch (e.g., Sentencing Commission).

tion, leaders to run these organizations. These leaders serve at the President's pleasure and can be removed for any reason.[18] Dozens of independent agencies, including the Federal Trade Commission ("FTC") and Securities and Exchange Commission ("SEC"), function outside the President's direct control.[19] The President also appoints the leaders of independent agencies, typically with Senate confirmation, but cannot remove most of them except for cause.[20] Thus, the level of presidential control differs across agencies.

Agency employees have diverse levels of technical expertise, which include scientific, medical, or other significant training in a particular field. For example, the National Aeronautics and Space Administration ("NASA"), an executive agency, and the Nuclear Regulatory Commission ("NRC"), an independent agency, employ numerous scientists and engineers, with expertise in aeronautics and nuclear energy, respectively. The OMB, an agency in the Executive Office of the President, needs trained economists and policy analysts to carry out its functions. Independent agencies often possess more technical expertise than other agencies, but that is not always the case.[21] Not only do agencies differ in independence and technical expertise, but they also generate diverse levels of attention and controversy. Loosely defined, controversial agencies face more media attention and challenges, including litigation, per decision than less controversial agencies. The EPA, for instance, receives considerable scrutiny. Cabinet departments and executive agencies are often more controversial than independent agencies, but the opposite can be true in particular circumstances.[22] While

[18] See, e.g., Myers v. United States, 272 U.S. 52, 134 (1926); Marshall J. Breger & Gary J. Edles, Established By Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1141–44 (2000).

[19] A consolidated list of such agencies is hard to find. See 44 U.S.C. § 3502(5) (2000) (listing 16 agencies as non-exhaustive examples); 1 Kenneth Culp Davis, Administrative Law Treatise § 2.8 (2d ed. 1978) (noting 63 agencies); Breger & Edles, supra note 18, at 1236–94 (describing 32 agencies).

[20] See, e.g., Humphrey's Executor v. United States, 295 U.S. 602, 626–32 (1935).

[21] The National Institutes of Health ("NIH"), an agency within the Department of Health and Human Services ("HHS"), has considerable scientific and medical expertise but is not an independent agency. Likewise, the FTC, an independent agency, deals with many of the same issues as the Antitrust Division of the DOJ.

[22] The SEC, an independent agency, faced considerable attention in the aftermath of Enron's collapse and other corporate scandals. Conversely, the Department of Commerce ("DOC") has not generated much controversy in President George W. Bush's

technical expertise is relatively stable, agency controversy likely varies across political regimes.

B. Rulemaking Details

1. General

Federal agency rulemaking for cabinet departments, executive agencies, and independent agencies is governed by a mix of statutory and constitutional requirements, related case law, and Executive Orders.[23] The mix varies in intensity depending on the rulemaking category, but does not usually depend on the timing within a presidential administration.[24] As a general matter, rulemaking can be divided into four major categories: formal rulemaking, notice-and-comment rulemaking, legislative rulemaking without previous opportunity for comment, and nonlegislative rulemaking. The first three categories typically have legally binding effects; the last one usually does not.[25]

If agencies engage in formal rulemaking, they must satisfy a slew of statutory mandates.[26] Under the APA, formal rulemaking is conducted through extensive trial-like mechanisms, with an agency

administration. Indeed, Congress may want to structure a controversial agency as an independent agency in order to exercise more control over it. See David E. Lewis, Presidents and the Politics of Agency Design 44–48 (2003).

[23] For an overview of agency rulemaking, see Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 479–692 (6th ed. 2006); Kerwin, supra note 10; Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* (4th ed. 2006). The main statute governing agency rulemaking is the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2000). Other statutes specific to particular agencies or topics often govern rulemaking as well.

[24] Recent Presidents have, however, issued directives at the start of their administrations to exert oversight of rulemaking initiatives that were started but not completed by the outgoing administration or were completed at the very end of the administration. See infra note 152 and accompanying text.

[25] See M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1394 (2004).

[26] Interestingly, while the APA may impose considerable requirements on formal rulemaking, the Executive Orders governing regulatory review do not, instead excluding such regulatory activity, once begun, from White House oversight. See Exec. Order No. 12,866, §§ 3(d)(1), 3(e), 6, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 638–42 (2000), as amended by Exec. Order No. 13,422, §§ 3(b), 3(e), 6, 72 Fed. Reg. 2763 (Jan. 23, 2007); cf. Exec. Order No. 13,422, § 5(a) (requiring consultation with Office of Information and Regulatory Affairs ("OIRA") before engaging in formal rulemaking).

reaching a decision "on the record after opportunity for [a] . . . hearing."[27] In *United States v. Florida East Coast Railway Co.*, the Supreme Court held that the magic words "on the record after opportunity for [a] . . . hearing" were typically sufficient to require agencies to undertake formal rulemaking procedures.[28] Later cases have made those words necessary as well.[29] Because so few statutes contain the phrase, agencies generally do not conduct formal rulemakings when promulgating legally binding regulations. In those few situations in which agencies are required to employ formal rulemaking, courts generally review the resulting rule under the APA's "substantial evidence" standard.[30]

Most rulemaking occurs through "informal" mechanisms, such as notice-and-comment rulemaking, legislative rulemaking without prior opportunity for comment, or nonlegislative rulemaking (including interpretative rules, guidance documents, or policy statements). Notice-and-comment rulemaking has far fewer procedural requirements than formal rulemaking but certainly maintains some important formalities. The process begins when an agency publishes a notice of its intent to promulgate a particular rule in the Federal Register, along with information about the legal authority for the rule. For a certain period, such as sixty days, the agency collects written comments submitted by the public, including from individuals and organized interest groups. The agency considers the comments and eventually must decide either to withdraw the proposed rule or to publicly promulgate a final rule. The final rule must be a "logical outgrowth" of the proposed rule, and the agency is required to provide a discussion of all materially relevant comments and a "concise general statement of [the rule's] basis and purpose," at least thirty days before it becomes effective.[31] In addi-

[27] 5 U.S.C. § 553(c) (2000).

[28] 410 U.S. 224, 236–38 (1973).

[29] See, e.g., Mobil Oil Corp. v. Fed. Power Comm'n, 483 F.2d 1238, 1250–51 (D.C. Cir. 1973); Breyer et al., supra note 23, at 519.

[30] 5 U.S.C. § 706(2)(E) (2000). In practice, the "substantial evidence" standard often is not significantly different from § 706(2)(A)'s nominally more deferential "arbitrary and capricious" standard. Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 683–86 (D.C. Cir. 1984) (noting that distinction is "largely semantic").

[31] See Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978) (striking down EPA regulations because they were not a "logical outgrowth" of the proposed rules); see also 5 U.S.C. § 553(b)–(d) (2000) (setting out the rulemaking process).

tion to these statutory requirements of the APA, since President Reagan's administration, agencies have been required by executive order to seek review of legally binding rules by the OMB, typically prior to issuing notice and before promulgating the final rule.[32]

Rulemaking with legally binding effects can also occur without meeting many of the traditional notice-and-comment requirements.[33] The APA explicitly exempts particular subjects (such as the military, foreign affairs, and government contracting) from

[32] See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 638–42 (2000), as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) [hereinafter Exec. Order No. 12,866]; Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (repealed by Exec. Order No. 12,866). Specific statutes can impose additional procedural requirements on agency notice-and-comment rulemaking, creating a hybrid rulemaking category of agency action.

[33] Indeed, much rulemaking does not occur through traditional notice-and-comment procedures. The GAO, the investigative arm of Congress, has estimated that approximately half of the final regulatory actions listed in the Federal Register during 1997 were completed without prior notice and comment. U.S. Gen. Accounting Office, GAO/GGD-98-126, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules 2 (1998); see also Michael Asimow, Interim-Final Rules: Making Haste Slowly, 51 Admin. L. Rev. 703, 712–15 (1999) [hereinafter Asimow, Interim-Final Rules] (examining rulemaking in 1989, 1991, 1994, and 1997 and noting increasing use of interim rules by agencies); Michael Asimow, Public Participation in the Adoption of Temporary Tax Regulations, 44 Tax Law. 343, 343 (1991) (noting that the Treasury Department increasingly did not follow traditional notice-and-comment procedures in the 1980s); Hickman, supra note 9, at 1748 (finding that 95 of 232 Treasury rulemakings studied "did not follow the traditional APA procedures"); Stuart Shapiro, Two Months, supra note 10, at 13 (reporting that 40.6% of rules promulgated in November and December 2003 were direct or interim final rules); Shapiro, Presidents and Process, supra note 10, at 403 (finding that over 47% of rules promulgated in November and December 1999 were direct or interim rules). According to the GAO's study, most of these actions without prior notice and comment concerned "administrative or technical issues with limited applicability," where rulemaking is unnecessary under the APA, but about fifteen percent were "major" legally binding rules. U.S. Gen. Accounting Office, supra, at 2. In some cases, agencies failed to explain the omission of prior notice and comment clearly, as the APA requires. Id. A major rule promulgated without notice and comment not only saves the agency time and resources that would have been devoted to notice-and-comment procedures; it also frees the agency from other requirements activated by notice of a proposed rulemaking, such as those in the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1981), *amended by* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601 et seq. (2000)); see also U.S. Gen. Accounting Office, supra, at 3–4. Even if an agency is exempt from prior notice and comment, the agency still must publish the legally binding rule to be able to enforce it. See 5 U.S.C. § 552(a)(1)(D) (2000).

such mandates.[34] The APA also permits an agency to promulgate a legally binding rule without prior notice and opportunity for comment if the agency determines and publicly explains that such procedures are "impracticable, unnecessary, or contrary to the public interest," a process known as good-cause rulemaking.[35]

Two larger categories of legally binding rulemaking without prior opportunity for comment have developed in recent years, though the APA does not mention them directly.[36] First, agencies can promulgate "direct final rules," which become effective a certain time after publication in the Federal Register unless "adverse" comments are received.[37] Direct final rules are thus intended to expedite the enactment of noncontroversial rules. Second, agencies can promulgate "interim final rules" that take effect immediately upon publication or shortly thereafter, and then can take comments on them after the fact.[38] Interim final rules are intended for use when the agency has good cause to enact rules immediately, such as in emergency situations.

The informal rulemaking described above generally qualifies for review under the "arbitrary and capricious" standard of the APA.[39] If agency rulemaking, whether formal or notice-and-comment, interprets an ambiguous statute and if Congress has delegated to the agency authority to make binding rules, the agency's interpretation

[34] 5 U.S.C. § 553(a) (2000).

[35] 5 U.S.C. § 553(b)(3)(B) (2000).

[36] See Administrative Conference of the United States, Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,108, 43,110–13 (Aug. 18, 1995); U.S. Gen. Accounting Office, supra note 33, at 6–7; Lars Noah, Doubts About Direct Final Rulemaking, 51 Admin. L. Rev. 401, 401–02 (1999).

[37] See Ronald M. Levin, Direct Final Rulemaking, 64 Geo. Wash. L. Rev. 1, 1 (1995); see also Office of the Vice President, Improving Regulatory Systems: Accompanying Report to National Performance Review, at Recommendation 5 (1993), available at: http://govinfo.library.unt.edu/npr/library/reports/reg.html (calling for increased use of direct final rulemaking); Noah, supra note 36, at 411–28 (arguing that direct final rulemaking does not comport with the APA's requirements or with meaningful judicial review).

[38] Asimow, Interim-Final Rules, supra note 33, at 704. Technically, agencies are supposed to issue "final-final" rules, but most agencies do not, leaving interim final rules in force. Id. at 705, 736.

[39] See 5 U.S.C. § 706(2)(A) (2000); Asimow, Interim-Final Rules, supra note 33, at 704 (noting that "[i]nterim-final rules have the same legal effect and are judicially reviewed in the same manner as any other final rules").

typically receives *Chevron* deference.[40] In other words, the agency's interpretation will be upheld so long as it is permissible under the statute.[41]

Finally, agencies can issue nonlegislative rules, including guidance documents, policy statements, and interpretative rules. For such nonbinding statements, agencies generally do not have to give prior notice or provide the opportunity for comment.[42] Agencies must, however, publish such statements in the Federal Register.[43] Executive Orders on regulatory review have generally excluded nonlegislative rulemaking until recently.[44] These nonbinding rules are also reviewed under the APA's "arbitrary and capricious" standard.[45] If they interpret an ambiguous statute, they likely will receive only *Skidmore* deference.[46] In other words, they will be upheld only if they have the "power to persuade."[47] In rare circumstances, such interpretations may be entitled to more generous *Chevron* deference.[48] In addition to formal and informal rulemaking, with and without binding effects, agencies can often announce

[40] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[41] United States v. Mead Corp., 533 U.S. 218, 230–31 (2001). Courts generally apply *Chevron* deference to interpretations of ambiguous statutes contained in direct or interim final rules, assuming that such rules count as final actions under the APA. See, e.g., Cinema '84 v. Comm'r of Internal Revenue, 294 F.3d 432, 438 (2d Cir. 2002); Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 97–98 (D.D.C. 2006); cf. Kikalos v. Comm'r of Internal Revenue, 190 F.3d 791, 796 (7th Cir. 1999); Jacob E. Gersen, Temporary Legislation, 74 U. Chi. L. Rev. 247, 274 & n.101 (2007); Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 846–47 (2001).

[42] See 5 U.S.C. § 553(b)(3)(A) (2000). Specific statutes could require an agency to seek comments on nonbinding statements.

[43] See 5 U.S.C. § 552(a)(1)(D) (2000).

[44] See Exec. Order No. 12,291, § 1(a), 3 C.F.R. 127 (1981); Exec. Order No. 12,866, § 3(d), 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 638–42 (2000). President George W. Bush recently issued Executive Order 13,422, which requires that significant guidance documents from non-independent agencies now be submitted for OMB review. See Exec. Order No. 13,422, § 3, 72 Fed. Reg. 2763 (Jan. 23, 2007).

[45] See 5 U.S.C. § 706(2)(A) (2000).

[46] United States v. Mead Corp., 533 U.S. 218, 234 (2001) (noting that "an agency's interpretation may merit some deference whatever its form").

[47] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[48] *Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no . . . administrative formality was required and none was afforded.").

policies through either formal or informal adjudications.[49] This Article focuses on informal rulemaking that creates legal obligations, particularly during political transitions.

2. Political Transitions

Administrative law doctrine does not expressly distinguish agency rulemakings on temporal grounds. This missing distinction may result from a lack of cases. If a midnight regulation is rescinded or modified, any challenge to the original regulation's timing is mooted.[50] Crack-of-dawn regulatory actions, however, do not share the same mootness issues. A rulemaking that rescinds a midnight regulation may make a challenge to the midnight regulation—but not the new rulemaking—moot.[51] Although administrative law does not turn explicitly on the timing of the regulation, such timing may be relevant to whether the agency has met material constitutional and statutory requirements. Because members of Congress and the President can exercise their powers while in office, regulations enacted immediately after taking office or near the end of their tenure are constitutional as a structural matter.[52] Har-

[49] See SEC v. Chenery Corp., 332 U.S. 194, 201–02 (1947) (holding that the SEC had discretion to choose between rulemaking and adjudication in formulating generally applicable, prospective rules); Breyer et al., supra note 23, at 488–94.

[50] In January 2001, before President Clinton left the White House, the U.S. Department of Agriculture ("USDA") promulgated the "roadless rule" barring construction in particular areas of National Forests. Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001). Wyoming and others brought a legal challenge, relying in part on the rule's timing in order to contest its legitimacy. See Wyoming v. USDA, 277 F. Supp. 2d 1197, 1218–20 (D. Wyo. 2003). The case was mooted when the USDA, under President Bush, rescinded the rule. See Wyoming v. USDA, 414 F.3d 1207, 1212 (10th Cir. 2005); see also Croley, supra note 8, at 206–12 (explaining timeline of various rulemakings and court decisions regarding the "roadless rule").

[51] Challenges to the freezing of effective dates of published final rules may, however, become moot if the agency "unfreezes" the effective date in the face of a judicial challenge. See Beermann, supra note 11, at 984 n.122, 993.

[52] See Beermann & Marshall, supra note 11, at 1271–80 (analyzing the Term Clauses, the Take Care Clause, and the Oath Clause to conclude that the outgoing President cannot refuse to give information to the incoming President but does not have to abandon his domestic agenda in his final months in office). Foreign relations issues may prove trickier. See id. at 1281–82. Transition teams and politicians can ask outgoing officials not to promulgate new regulations, but such requests are roundly ignored. See, e.g., Viveca Novak, The Stroke of a Pen, Nat. J., Dec. 5, 1992, at 2762, 2767 (request by Senator Pryor (D-Ark.)); Regulation: Last Words, Economist, Jan. 31, 1981, at 22 (request by President Reagan's transition team). In January 2001, be-

ried decisionmaking procedures could implicate due process or other rights of affected parties, but agency action is rarely struck down on constitutional grounds.[53]

Early and late term activity may, however, still violate the APA or some other agency-specific statute. Such rulemaking typically must satisfy the requirements of Sections 553 and 706(2)(A) of the APA.[54] In assessing new rulemakings that rescind previous regulations, courts apply the same standard they would use in reviewing the original regulation.[55] Likewise, in reviewing challenges to the suspension of effective dates of published regulations or to original regulations promulgated just after a political transition, courts assess the validity of the agency action under similar standards.[56]

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fore he took office, George W. Bush said of President Clinton: "He's a man, obviously, who's going to work up to the last minute of the last day of his administration, which is what the American people expect, and so do I." Jim Landers, Sprint to the Finish, Dallas Morning News, Jan. 6, 2001, at 1A.

[53] Cf. Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 528–29 (2003) (contending that "hard look" review promotes critical constitutional concerns, although courts do not treat it as a constitutional matter).

[54] Assuming no exception applies, § 553 imposes a number of important obligations on agencies engaged in rulemaking. Agencies must provide notice of a proposed rulemaking and its underlying legal authority, data supporting the proposed rulemaking, an opportunity for the public to comment on the proposed rulemaking, responses to materially cogent comments, and a defense of the final rulemaking. The final rulemaking must, moreover, be a logical outgrowth of the proposed rule. See 5 U.S.C. § 553 (2000); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251–53 (2d Cir. 1977). The agency decisionmaker must also have a sufficiently open mind. See Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1154 (D.C. Cir. 1979). But cf. Beermann, supra note 11, at 1002–03 (noting the weaknesses of the "unalterably closed mind" doctrine). Under § 706(2)(A), the agency must not act in an arbitrary and capricious manner. See 5 U.S.C. § 706(2)(A) (2000); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983). Other statutes may impose additional requirements such as public hearings. See, e.g., 15 U.S.C. § 57a (2000) (providing for hybrid rulemaking procedures in FTC rulemaking proceedings, including procedures for informal hearings).

[55] See *State Farm*, 463 U.S. at 41–44 (applying § 706(2)(A)'s arbitrary and capricious standard to the NHTSA's rescission of an occupant crash protection rule).

[56] See Natural Res. Def. Council, Inc. v. Abraham, 355 F.3d 179, 204–06 (2d Cir. 2004) (holding that the Department of Energy's suspension of the effective date of prior regulation did not comply with APA requirements); Public Citizen v. Steed, 733 F.2d 93, 99–105 (D.C. Cir. 1984) (holding that the NHTSA's indefinite suspension of treadwear grading requirements did not comply with the APA); Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 760–62 (3d Cir. 1982) (scrutinizing the EPA's indefinite postponement of amendments to pollution regulations for compliance with

Agencies can, however, usually withdraw proposed regulations that have not been finalized without providing notice and comment.[57]

The more pressed the agency is in a political transition, the more likely statutory procedural requirements are to be violated. An agency may neglect a requirement entirely. For example, an agency may enact a rule that is not a logical outgrowth of the proposed rule because there is no time before the transition to reopen the rulemaking for comments. Or an agency may promulgate a rule rescinding a midnight regulation immediately after the transition to placate particular interest groups. The decisionmaker may have an "unalterably closed mind," and thus fail to consider adequately opposing viewpoints.[58] An agency may also insufficiently meet a procedural mandate. For instance, an agency may address materially cogent comments in too cursory a fashion.

These statutory mandates, however, are generally not that hard to meet.[59] The agency may properly rely on an exception to APA rulemaking requirements. Or the agency may comply in a rather perfunctory manner with all of the requirements of the APA and any other relevant statutes. Courts also cannot impose additional requirements on agencies beyond those required by statute or the Constitution.[60] In sum, so long as the agency pays some attention to statutory and constitutional requirements, it can often engage in

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the APA's procedural requirements); Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 580–83 (D.C. Cir. 1981) (reviewing the DOL's postponement of implementation of mine safety regulations under the APA); see also Beermann, supra note 11, at 994 (noting that brief delays in effective dates of rules are typically legal). But see Sanford, supra note 11, at 784 (arguing that presidential, non-statutory delays in effective dates of rules are illegal because they are an arbitrary exercise of executive authority). This analysis presumes that delays are considered final actions under the APA.

[57] See, e.g., Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (allowing agencies to withdraw regulations "until virtually the last minute before public release"); see also Jack, supra note 11, at 1491–92.

[58] See supra note 54; cf. Nat'l Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1144–46 (2d Cir. 1974) (refusing, absent a showing of serious bad faith, to inquire whether agency's appointed decisionmaker had actually been involved in decision under review); United States v. Morgan, 313 U.S. 409, 421–22 (1941) (same). But see Beermann, supra note 11, at 1001–02 (noting that no court has disqualified an official under this standard).

[59] But see, e.g., *State Farm*, 463 U.S. at 57 (1983); New York v. EPA, 413 F.3d 3, 44 (D.C. Cir. 2005).

[60] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543–48 (1978).

relatively rushed rulemakings during political transitions without facing legal repercussions.

C. Major Debates Surrounding Rulemaking

The rulemaking process has generated extensive commentary. In this Section, I briefly lay out key academic debates over regulatory ossification, judicial deference, political control, and political transitions. Central to these discussions are empirical assumptions, both explicit and implicit, about agency rulemaking. Section I.D draws out some of these assumptions, which are then tested in Part II.

Discussion of regulatory ossification centers on the costs of procedural requirements for notice-and-comment rulemaking, with an emphasis on the costs on agencies imposed by judicial review (which then can lead to social costs). Many scholars contend that agencies shy away from notice-and-comment rulemaking because of these costs, thereby ossifying regulatory policies that already exist as well as preventing unrelated policies from being enacted—that is, discouraging rulemaking that would be socially beneficial.[61] Other scholars suggest that judicial review does not significantly discourage such rulemaking and therefore conclude that there is sufficient fluidity in the administrative state.[62] Do agencies use notice-and-comment rulemaking despite its considerable procedural costs, and how long does that rulemaking take?[63] In order to contribute to this discussion, Part II examines the quantity and duration of rulemaking actions across a wide range of agencies and across two decades.

[61] See, e.g., Stephen Breyer, Breaking the Vicious Circle (1993); Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety (1990); Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525 (1997) [hereinafter McGarity, The Courts]; Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385 (1992) [hereinafter McGarity, Some Thoughts].

[62] See, e.g., William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 Nw. U. L. Rev. 393 (2000); Peter L. Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1470 (1992).

[63] Some empirical work has looked at this debate. See Cary Coglianese, Empirical Analysis and Administrative Law, 2002 U. Ill. L. Rev. 1111, 1125–31 (2002); Shapiro, Presidents and Process, supra note 10, at 412–17; Yackee & Yackee, supra note 10.

A second discussion focuses on the connection between the procedures the agency uses (but not the timing of those procedures) and the level of deference the courts give to the agency's decision—in essence, the benefits of notice-and-comment rulemaking to the agency (which can in turn lead to social benefits). In *United States v. Mead Corp.,* the Supreme Court held that if Congress has delegated authority to an agency to interpret an ambiguous statute with "the force of law" and the agency used that authority, then courts should uphold the agency's interpretation so long as it is permissible under the statute.[64] Scholars and courts have debated what procedural steps an agency must take in order to obtain this deference from reviewing courts. Some argue that notice-and-comment mechanisms not only guarantee that the courts will apply *Chevron* deference in assessing an agency interpretation of an ambiguous statute, but also that such procedures are necessary for *Chevron* deference, unless the agency engages in more formal procedures.[65] Others suggest that notice-and-comment procedures are neither necessary nor sufficient for *Chevron* deference.[66]

The deference discussion is connected to the previous discussion on regulatory ossification. As Professor Matthew Stephenson (building on work by Professors Elizabeth Magill, John Manning, and others) has pointed out, rulemaking procedures have potential benefits as well as costs to the agency. Professor Stephenson's core insight is that "from the perspective of an agency subject to judicial review, textual plausibility and procedural formality function as strategic substitutes: greater procedural formality will be associated with less textual plausibility, and vice versa."[67] Do agencies make such strategic choices? Part II creates an opening to pursue this question empirically.

[64] 533 U.S. 218, 231–32 (2001). In other words, courts should apply *Chevron* deference. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[65] See, e.g., *Mead*, 533 U.S. at 245–46 (Scalia, J., dissenting) (lamenting majority's push for more formality). More formal procedures would include formal rulemaking or adjudication procedures under §§ 556 and 557 of the APA.

[66] See, e.g., Edelman v. Lynchburg College, 535 U.S. 106, 114 (2002).

[67] Matthew C. Stephenson, The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations, 120 Harv. L. Rev. 528, 528 (2006).

A third major discussion concerns political control of agencies, a broad topic in the political science and legal literature. This discussion takes two primary forms: positive and normative. Political scientists and some legal scholars explore the positive dimension, asking which institutions exert control over administrative agencies. Agency leaders face a variety of principals, including the executive branch, which nominates them, the legislative branch, which confirms them and delegates work to them, and the judicial branch, which interest groups, states, and others can use to monitor their actions. All of these principals tug at political appointees, often in conflicting directions. A debate erupted (and still persists) over the strength of presidential and congressional oversight of the bureaucracy. Some scholars argue that Congress is the dominant overseer,[68] relying on statutory controls, the appropriations process, hearings, investigations, and other tools to keep agencies in line.[69] Others (including most legal scholars) suggest that the President, who appoints all (and can fire on a whim most) top officials and can request "opinions" from them, wields considerable power.[70] Scholars disagree on whether judicial oversight changes agency de-

[68] See, e.g., Jonathan Bendor et al., Stacking the Deck: Bureaucratic Missions and Policy Design, 81 Am. Pol. Sci. Rev. 873 (1987); Randall Calvert et al., A Theory of Political Control and Agency Discretion, 33 Am. J. Pol. Sci. 588 (1989); Louis Fisher, Micromanagement by Congress: Reality and Mythology, *in* The Fettered Presidency: Legal Constraints on the Executive Branch 139 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Matthew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431 (1989); Barry R. Weingast & Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765 (1983); Barry R. Weingast, The Congressional-Bureaucratic System: A Principal Agent Perspective (With Applications to the SEC), 44 Pub. Choice 147 (1984); Barry R. Weingast & Mark J. Moran, The Myth of Runaway Bureaucracy: The Case of the FTC, Regulation, May/June 1982, at 33.

[69] For a short summary of these techniques, see Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* 354–61 (10th ed. 2006).

[70] See, e.g., Richard P. Nathan, The Administrative Presidency (1983); Richard W. Waterman, Presidential Influence and the Administrative State (1989); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001); Terry M. Moe, An Assessment of the Positive Theory of 'Congressional Dominance,' 12 Legis. Stud. Q. 475 (1987) [hereinafter Moe, Congressional Dominance]; Joseph Stewart Jr. & Jane S. Cromartie, Partisan Presidential Change and Regulatory Policy: The Case of the FTC and Deceptive Practices Enforcement, 1938–1974, 12 Pres. Stud. Q. 568 (1982); B. Dan Wood, Does Politics Make a Difference at the EEOC?, 34 Am. J. Pol. Sci. 503 (1990).

cisions.[71] Others consider the influence of interest groups and other outside parties as well as the agencies themselves.[72] What roles do Congress and the President play in agency rulemaking? Part II directly engages this institutional debate.

Many legal scholars concentrate instead on the normative or doctrinal dimension—that is, asking which institutions should control administrative agencies.[73] Although the normative dimension

[71] Some have noted that courts can influence agency outcomes. See R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act (1983); James F. Spriggs II, The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact, 40 Am. J. Pol. Sci. 1122 (1996). Yet, studies also suggest that courts defer to agency action, or that even if courts remand decisions to agencies, initial agency decisions ultimately stand. See C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947, at 167–97 (1948); Donald W. Crowley, Judicial Review of Administrative Agencies: Does the Type of Agency Matter?, 40 W. Pol. Q. 265 (1987); Roger Handberg, The Supreme Court and Administrative Agencies: 1965–1978, 6 J. Contemp. L. 161 (1979); Peter H. Schuck & E. Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1057; Reginald S. Sheehan, Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcomes, 43 W. Pol. Q. 875 (1990); Harold J. Spaeth & Stuart H. Teger, Activism and Restraint: A Cloak for the Justices' Policy Preferences, *in* Supreme Court Activism and Restraint 277 (Stephen C. Halpern & Charles M. Lamb eds., 1982);.

[72] Interest groups can also exert pressure on agencies outside of the courts, for instance, through comments in the rulemaking process. See Daniel P. Carpenter, Protection Without Capture: Product Approval by a Politically Responsive, Learning Regulator, 98 Am. Pol. Sci. Rev. 613 (2004); Scott Furlong, Interest Group Influence on Rule Making, 29 Admin. & Soc'y 325 (1997); Jason Webb Yackee & Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. Pol. 128 (2006); Susan Webb Yackee, Assessing Inter-Institutional Attention to and Influence on Government Regulations, 36 Brit. J. Pol. Sci. 723 (2006). Other agencies and states can also pressure agencies. See J.R. DeShazo & Jody Freeman, Public Agencies as Lobbyists, 105 Colum. L. Rev. 2217 (2005); Jonathan R. Macey, Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act, 80 Notre Dame L. Rev. 951 (2005). And, quite critically, internal agency factors can be important. Marc Allen Eisner & Kenneth J. Meier, Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust, 34 Am. J. Pol. Sci. 269 (1990); Jerry L. Mashaw, Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability, Law & Contemp. Probs., Spring 1994, at 185, 210–12; Peter L. Strauss, Rules, Adjudications and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 Colum. L. Rev. 1231, 1245–47 (1974); Mark Seidenfeld, Agency Decisions to Act (Fla. State Univ. Coll. Of Law, Public Law Research Paper No. 286, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020313.

[73] Some legal scholars argue that the President should be the primary overseer of agencies, often within particular limits. See, e.g., Nicholas Bagley & Richard L.

directly follows from the positive debate, the discussions typically have occurred separately.[74] Thus, many important questions have been left largely unanswered: How should courts take into account actual political control of agency rulemaking? Does political con-

Revesz, Centralized Oversight of the Regulatory State, 106 Colum. L. Rev. 1260 (2006); James F. Blumstein, Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues, 51 Duke L.J. 851 (2001); Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533 (1989); Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075 (1986); Kagan, supra note 70; Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1 (1994); Richard J. Pierce, Jr., The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469 (1985); Daniel B. Rodriguez, Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State, 43 Duke L.J. 1180 (1994); Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 Iowa L. Rev. 1 (1994); Kevin M. Stack, The President's Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263 (2006); Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Admin. L. Rev. 181 (1986); Cass R. Sunstein, Congress, Constitutional Moments, and the Cost-Benefit State, 48 Stan. L. Rev. 247 (1996). Other legal scholars contend that the President should not exercise considerable oversight or should share oversight with Congress. See, e.g., Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J.L. & Pub. Pol'y 227 (1998); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725 (1996); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123 (1994); Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443 (1987); Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059 (1986); Robert V. Percival, Presidential Management of the Administrative State: The Not-So-Unitary Executive, 51 Duke L.J. 963 (2001); Thomas O. Sargentich, The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration, 59 Admin. L. Rev. 1 (2007); Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 Ark. L. Rev. 161 (1995); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965 (1997). Some legal scholars support other oversight models, with less focus on political control. See, e.g., Bressman, supra note 53, at 463–64 (arguing against "presidential control" model because accountability is not sufficient to provide legitimacy, and instead proposing that agency legitimacy derives from avoiding arbitrariness).

[74] See supra notes 68–73. To be sure, there are important exceptions. See, e.g., Joseph Cooper & William F. West, Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules, 50 J. Pol. 864 (1988) (providing a descriptive analysis of agency oversight and a normative argument that Congress should increase oversight to match growing presidential control); Croley, supra note 9 (providing one of the first empirical studies in law or political science on OMB review of agency rulemaking and a rare example of scholarship combining empirical, legal, and normative analysis).

trol legitimate agency decisions? Parts II and III address these positive and normative dimensions together.

A final discussion explores the desirability of agency action during political transitions. Such activity may be attractive or unappealing, as a normative matter, on two major grounds: efficiency and democratic legitimacy.[75] Much commentary on midnight and crack-of-dawn regulatory activity has been disapproving.[76] Critics emphasize that such activity hurts social welfare. An agency may promulgate a midnight rule, so the argument goes, knowing that it will not survive.[77] The midnight rule thus does not generate any social benefits because it never goes into effect, and revoking it imposes procedural costs on the new Congress or President.[78] Alternatively, an agency, under new leadership, may suspend the effective date of a regulation that improves social welfare or enact

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[75] Scholars emphasize the second point, but pay some attention to the first argument. See Beermann, supra note 11, at 951–52; Morriss et al., supra note 11, at 558, 598. Professor Beermann notes that he finds it hard "to articulate exactly what is wrong with the late term increase in activity." Beermann, supra note 11, at 952 n.8. Efficiency and democratic legitimacy are often themselves in tension, and political transitions likely increase inefficiency and instability while fostering democratic legitimacy in agency decisionmaking. See Gregory H. Gaertner et al., Federal Agencies in the Context of Transition: A Contrast Between Democratic and Organizational Theories, 43 Pub. Admin. Rev. 421, 421 (1983); Jonathan Masur, Judicial Deference and the Credibility of Agency Commitments, 60 Vand. L. Rev. 1021, 1037–41 (2007).

[76] See, e.g., Sanford Levinson, Presidential Elections and Constitutional Stupidities, 12 Const. Comment. 183, 184–85 (1995); Jack, supra note 11; Morriss et al., supra note 11; Sanford, supra note 11; Jay Cochran, Op-Ed., Clinton's 'Cinderellas' Face Regulatory Midnight, USA Today, Dec. 13, 2000, at 17A; Murray Weidenbaum, Op-Ed., Hold Those Midnight Rules, Christian Sci. Monitor, Jan. 17, 2001, at 11.

[77] Either Congress will use the Congressional Review Act to strike down the regulation or the President will complete a new rulemaking to rescind the rule. See 5 U.S.C. §§ 801–808 (2000); Mendelson, supra note 11, at 592.

[78] The agency's motivations are unimportant. It could be, as Professor Beermann suggests for presidential transitions, that the outgoing Congress or President pushes the agency to enact the final rule to "embarrass" the incoming legislature or President. See Beermann, supra note 11, at 951. Or it could be that outgoing political actors back the rule because of its positive symbolic value for them. Or indeed the rule could be socially beneficial but the incoming politicians may benefit politically from revoking the rule. In any event, the promulgation of the midnight regulation is inefficient, although perhaps generating political rewards or repercussions, because the high procedural costs of rulemaking are wasted when a rule is destined never to go into effect.

a crack-of-dawn rule rescinding it, heading off regulatory change that would have benefited society.[79]

Midnight regulations may also raise democratic concerns, depending on the clarity of voter and politician preferences.[80] An agency may promulgate a final rule before power is transferred to the victors that the majority of voters would have rejected. Or, in the aftermath of a transition, an agency may rescind a popular regulation that was enacted after intense public participation.[81] An agency may also promulgate a new regulation supported only by certain interest groups that gave considerable campaign contributions to the electoral victors. The regulatory activity may look like payback for the campaign funding, creating at least the appearance of corruption.[82] To the extent that agency actions compress or ig-

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[79] The agency may change its mind if it is surprised by the backlash. Cf. Skrzycki, supra note 10, at 211–12 (summarizing the attempt, eventually abandoned, in March 2001 to reconsider a Clinton administration rule reducing arsenic levels in drinking water); Mendelson, supra note 11, at 602 (same); Percival, supra note 73, at 1000 (same). Although the agency may ultimately promulgate a socially beneficial rule, the rush to withdraw the rule without adequate examination creates social loss in the interim from the added procedural costs and the delay in implementation. An agency may also promulgate a rule soon after the transition that benefits concentrated groups at the expense of the overall society because voters are not monitoring as carefully as they might were it closer to an upcoming election.

[80] Although the agency action may be legal, in that it satisfies constitutional and statutory requirements, the action by an unelected institution may be perceived as normatively problematic. See Mendelson, supra note 11, at 564. Such perceptions may undermine the administrative state's legitimacy and ultimately its efficacy. Cf. id. at 565 (suggesting that midnight actions "could threaten the expressive and constitutive value to the voter of participating in the presidential election"). Election outcomes may not, however, represent public preferences concerning agency regulation. See id. at 617–19 (noting that voters may lack well-developed preferences with respect to agency decisions and that their votes may not be influenced by what preferences they do possess); Sargentich, supra note 73, at 28 (noting that Presidents may not possess broad public support, and that even if they do, it is unlikely to be based on particular policy issues); Seidenfeld, supra note 73, at 20 & n.114 (noting that narrow policy disputes will rarely mobilize large segments of the population); Shane, supra note 73, at 199 (suggesting that Presidents know that their detailed stances on policy issues are unlikely to influence the broad public satisfaction polls they care about).

[81] The election may have turned on matters unrelated to the regulatory agendas now being pushed by officials, and the incoming administration's victory thus may not represent a popular mandate to overturn the prior rulemaking. See supra note 80.

[82] See McConnell v. Fed. Election Comm'n, 540 U.S. 93, 155 (2003) (noting the connection between campaign contributions and "actual or apparent indebtedness" of public officials).

nore public participation, such early or late actions may be especially undemocratic.

Alternatively, agency actions during political transitions also may improve social welfare or accord with democratic principles.[83] For example, an agency may promulgate a final rule that improves social welfare but that is unpopular politically.[84] Or an agency may enact a rule after years of research and public involvement, using the upcoming transition to mollify opposition to the rule because interest groups prefer some regulation to none.[85] An agency may also withdraw or rescind an extremely inefficient regulation immediately after a political transition. In addition, agency actions before a political transition may spark broader public discussion on specific issues and provide needed information to the public so that they can participate more meaningfully in policy debates.[86] If an

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[83] See Beermann, supra note 11, at 952–53; Mendelson, supra note 11, at 616–60. As Professor Beermann explains, "Late in the President's term, and especially during the period between the end-of-term election and the inauguration of a new President, the President's need for ongoing interest group support may be reduced so that the President can act with a much greater focus on the overall public interest." Beermann, supra note 11, at 952–53.

[84] The agency may know that the new Congress or President would never permit the regulation to be promulgated because of these political costs but also may realize that the political actors will not be able to rescind it. This argument presumes that outgoing Presidents do not face political repercussions for these socially desirable actions. See Beermann, supra note 11, at 952–53. If the President's actions reflect on his political party in future elections, this possible advantage to midnight action is less likely.

[85] In other words, the political transition acts as a needed credible commitment device for the agency to enact a socially beneficial rule. See Uri Gneezy et. al, Bargaining Under a Deadline: Evidence from the Reverse Ultimatum Game, 45 Games & Econ. Behav. 347 (2003); Don A. Moore, The Unexpected Benefits of Final Deadlines in Negotiation, 40 J. Experimental Soc. Psychol. 121 (2004); Alvin E. Roth et al., The Deadline Effect in Bargaining: Some Experimental Evidence, 78 Am. Econ. Rev. 806 (1988); Alice F. Stuhlmacher & Matthew Champagne, The Impact of Time Pressure and Information on Negotiation Process and Decision, 9 Group Decision & Negotiation 471 (2000). This explanation differs from the "hurrying" rationale proposed by Professor Beermann, which suggests that agencies engage in midnight regulations because they have run out of time to finish projects started before a transition was foreseeable. Beermann, supra note 11, at 950–51. It also differs from Professor Mendelson's "tangible achievements" explanation, which suggests that midnight regulations are produced by administrators' desire to complete a chosen task before leaving office during a political transition. See Mendelson, supra note 11, at 597.

[86] See Mendelson, supra note 11, at 603, 660–62. There are also checks on outgoing politicians' actions, and these checks can help legitimate the political process. Since 1953, party control of the White House and both chambers of Congress has not changed together, leaving at least one institution that continues in essentially the

agency's crack-of-dawn rulemaking activity reflects voter preferences, the agency may appear to be acting democratically. In addition, if an agency freezes the effective date of midnight regulations that were promulgated with little discussion, that later action may generate more public participation and legitimacy for the regulatory action, if ultimately implemented. Do agency activities shift in the periods preceding and following a political transition? How should agencies and the courts deal with these regulatory periods? Should it be easier or harder for agencies to enact rules during transition periods? Parts II and III explore these questions.

The current discussions on regulatory ossification, judicial deference, political control, and political transitions in administrative law and political science cover tremendous ground. This Article does not attempt to resolve them. Rather, the Article provides empirical investigation of some of their key underlying assumptions and predictions and then pulls from that investigation several implications for these discussions. The next Section will draw out specific hypotheses for empirical study. Part II then will test, to varying degrees, many of the proposed theories. Part III will address the legal and normative ramifications.

D. Theories for Empirical Examination

This Section develops a set of empirical propositions from the debates over regulatory ossification, judicial deference, political control, and political transitions. It first considers the ossification and deference discussions together (in other words, the costs and

same form after the transition to serve as a potential governmental check on midnight regulatory actions. The remaining institution may not, however, take up this task. In 1981, control of the White House and the Senate shifted from the Democrats to the Republicans, while power in the House remained with the Democrats. One could argue that the House Democrats did not carefully monitor President Carter's actions before the transition. In addition, party control of Congress has shifted in midterm elections to the party that did not control the White House, leaving no internal check on congressional attempts to push midnight regulations. For instance, the 1954, 1994 and 2006 elections created three such opportunities. In these and similar circumstances, the minority party before the transition still has certain oversight tools at its disposal, such as requesting a GAO investigation. See Anne Margaret Joseph, Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy 208–25 (2002)(unpublished Ph.D. dissertation, Harvard University) (on file with the Virginia Law Review Association) (providing empirical analysis of congressional requests by minority members for GAO investigations).

benefits of procedural choices to agencies) and then addresses discussions concerning political control and political transitions. Underlying all of these empirical propositions is the idea that there is some equilibrium of regulatory activity. Shocks to the administrative system—new statutes, changes in Congress, new Presidents, and others—then change that equilibrium.

1. Regulatory Ossification and Judicial Deference

An agency's choice of rulemaking process—formal rulemaking, traditional notice-and-comment rulemaking, rulemaking without prior opportunity for comment (direct and interim final rulemaking), or nonlegislative rulemaking—is strategic. An agency must weigh the costs and benefits of various procedures, assuming that it has a choice among them. More formal procedures consume agency resources and discretion but likely also produce greater deference from reviewing courts. Changes to these costs and benefits, all else being equal, should change how an agency promulgates rules. As net costs of notice-and-comment rulemaking increase, an agency should issue fewer rules through notice and comment; when net costs decrease, an agency should respond by completing more notice-and-comment rulemakings. For example, divided government likely imposes more costs on agency rulemaking than united government. More stringent judicial review also likely makes rulemaking more costly than less stringent review. Some hypotheses that can be examined with the database constructed from the Unified Agenda include:

> *"Ossification" Hypothesis*: If the costs usually outweigh the benefits of notice-and-comment rulemaking to agencies, then there is little such rulemaking. If the costs are not too great, then agencies often engage in notice-and-comment rulemaking.
>
> *"Judicial Deference" Hypothesis*: After *United States v. Mead Corp.*,[87] agencies perceive that the benefits of notice-and-comment rulemaking are higher than the benefits of less formal decisionmaking processes (in other words, that notice-and-

[87] 533 U.S. 218 (2001).

comment rulemaking likely will receive greater deference than less formal processes) and thus engage in more such rulemaking.

"Direct Final Rules" Hypothesis: Because less controversial agencies expect fewer adverse comments, they are more likely to use direct final rulemaking than are more controversial agencies. But controversial agencies may use direct final rulemaking to avoid scrutiny even though such rulemaking is intended for non-controversial rules. Highly technical agencies are usually less controversial and thus use direct final rulemaking more than less technical agencies.

"Interim Final Rules" Hypothesis: Because controversial agencies prefer avoiding high conflict public comment periods, they are more likely to use interim final rulemaking than are less controversial agencies.

2. Political Control and Political Transitions

Because of its various stages, the notice-and-comment rulemaking process allows examination of various political pressures on agencies.[88] I focus on two: the President and Congress. The President appoints, with Senate confirmation, individuals to lead cabinet departments, executive agencies, and independent agencies.[89] The President can also send directives to agencies to prompt particular action, pressure agencies through public statements, and use informal tools to cajole or punish agency action.[90] All agencies, whether independent or not, must regularly report to the OMB concerning their rulemaking activities.[91] In addition, non-independent agencies must obtain OMB approval before publishing notices of proposed rulemaking and then again before publishing final rules.[92] The President thus has tremendous potential power over the rulemaking process:

[88] Cf. Moe, Congressional Dominance, supra note 70, at 504 (noting that rulemaking leads to more opposition from affected groups than does case-by-case adjudication).
[89] See supra notes 18, 20.
[90] See, e.g., Kagan, supra note 70, at 2290–99.
[91] See Exec. Order No. 12,866, supra note 32.
[92] See id.

> *"Presidential Control: Ideology" Hypothesis*: Assuming that rulemaking is more likely, on average, to be regulatory than deregulatory, agencies engage in less rulemaking activity under Republican Presidents than Democratic Presidents.[93] The President's party affects the quantity of rulemaking by independent agencies, whose leaders are more shielded from the White House, less than it affects the quantity of rulemaking by non-independent agencies.

> *"Presidential Control: Crack-of-Dawn Action" Hypothesis*: A new presidential administration wants to put its mark on the regulatory process, with agencies commencing rulemaking proceedings in a variety of areas. This effort begins near the start of a new President's administration, but because of the preparation required for proposals of rulemaking, it usually takes months to materialize. A new presidential administration is also more likely to withdraw rules proposed but not finalized by the previous administration than to withdraw rulemakings it proposes itself (and even more likely if party control shifted). Thus, early regulatory action is more connected to reversing past rulemakings than establishing new regulatory programs. Shifts in presidential administrations affect the commencement of rulemakings by independent agencies less than they affect such activity by agencies directly under the President's control.

> *"Presidential Control: Midnight Action" Hypothesis*: Presidential administrations try to complete rulemakings before leaving office. Completions of rulemakings increase in the last three months of an administration as compared to the last quarter of previous years of a President's term. This hypothesized effect is larger when the party controlling the White House changes. Shifts in presidential administrations affect the completion of

[93] To be certain, this assertion can be contested. First, rulemaking can be regulatory or deregulatory. Second, Republicans may regulate more in certain areas; Democrats may regulate more in other areas. The hypothesis depends only on rulemaking being more regulatory than deregulatory in the aggregate and Republicans preferring a lower overall level of regulation than Democrats. But cf. Steven K. Vogel, Freer Markets, More Rules: Regulatory Reform in the Advanced Industrial Countries 3 (1996) (finding "reregulation" in the reformulation of old rules during periods when politicians supported deregulation).

> rulemakings by independent agencies less than they affect such activity by agencies directly under the President's control.

Congress exercises control over agency rulemaking ex ante and ex post. Ex ante, Congress designs agency structure and procedures to influence how agencies carry out their mandates.[94] In addition, Congress chooses what authority to delegate[95] and how much money to provide to agencies. The Senate also confirms most agency leaders. Ex post, Congress, typically acting through committees, exercises control over agency efforts using its oversight tools, including information requests, hearings, and investigations.[96] These mechanisms permit Congress to shape the rulemaking process in multiple ways:

> *"Congressional Control: Ideology" Hypothesis*: Again assuming that rulemaking is more likely, on average, to be regulatory than deregulatory, agencies engage in more rulemaking if both chambers of Congress are controlled by Democrats than if both chambers are controlled by Republicans. The hypothesized effect of party control of Congress on independent agencies is unclear. If independent agencies are more removed from the political process, what party controls Congress affects independent agency rulemaking less than it affects non-independent agency rulemaking. But if Congress has more authority over independent agencies than non-independent agencies, what party controls Congress affects independent agency rulemaking more than it affects executive agency rulemaking.

> *"Congressional Control: Crack-of-Dawn Action" Hypothesis*: A new majority party in Congress wants to put its mark on the regulatory process, so agencies commence numerous rulemaking proceedings after party control shifts. Agencies are also more likely to withdraw rules that were proposed but not finalized under the previous Congress than rulemakings proposed under the

[94] See Lewis, supra note 22, at 44-48; Mathew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243 (1987).

[95] See David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers (1999).

[96] See Joel D. Aberbach, Keeping a Watchful Eye: The Politics of Congressional Oversight (1990).

new Congress. The hypothesized effects are larger if the new majority party is not the same party that controls the White House. The hypothesized effects could be stronger or weaker for independent agencies, depending on whether Congress exerts more pressure over independent agencies than non-independent agencies.

"Congressional Control: Midnight Action" Hypothesis: An outgoing majority party pushes agencies to complete rulemakings before it loses power. In particular, completions of rulemakings increase in the last few months of the majority's hold on power. The hypothesized effect is larger if the new majority party is not the same party that controls the White House. The hypothesized effect could be stronger or weaker for independent agencies, depending on whether Congress exerts more pressure over independent agencies than non-independent agencies.

"Congressional Dominance" Hypothesis: Independent agencies are designed to have more independence from the White House than non-independent agencies, but they do not have additional protection from Congress. Therefore, independent agencies likely face more pressure from Congress than from the White House.

When party control is divided between Congress and the White House, agencies face more conflicting pressures than when party control is unified.[97] Variation in institutional control therefore has potential effects on rulemaking:

"Divided Government" Hypothesis: Agency rulemaking, if completed, takes longer and undergoes more changes under divided government. Such rulemaking is also less likely to be started, and if it is started, less likely to be completed.

[97] Cf. Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2341 (2006) (noting that during periods of divided government, Congress is less willing to delegate authority to executive agencies and limits their discretion through restrictive procedural constraints).

Part II summarizes and tests evidence concerning the validity of some of these propositions. In many cases, the data are consistent with multiple theories described in this Section.

II. EMPIRICAL INVESTIGATION OF RULEMAKING

We know astoundingly little about agency rulemaking as an empirical matter. There are, to be sure, various aggregate measures of administrative activity used in discussions concerning the breadth of the administrative state.[98] There are also some studies that focus on particular agencies.[99] But administrative law scholarship does not typically discuss variation in activity across a large range of agencies and across a range of Presidents and Congresses.[100] This Article, by introducing a new extensive database on agency rulemaking and presenting initial results, aims to change that state of affairs.[101]

This Part begins by describing a new extensive database I constructed from twenty years' worth (1983–2003) of agency reports in

[98] See supra note 10. Some of these aggregate measures are also problematic. The number of pages an agency fills in the Federal Register, for instance, may be a misleading measure of rulemaking activity, particularly because a rule's explanatory documents can take up many more pages than its actual regulatory content. See Skrzycki, supra note 10, at 26–28.

[99] See, e.g., Mashaw & Harfst, supra note 61 (discussing rulemaking by the NHTSA).

[100] Many have called for more empirical work in administrative law. See, e.g., Coglianese, supra note 63, at 1113, 1137; Cass R. Sunstein, Paradoxes of the Regulatory State, 57 U. Chi. L. Rev. 407, 409 (1990).

[101] There is one important caveat: this Article explores this database mostly by looking at counts of various rulemaking activities. The counts, because they are aggregate measures, miss many details of individual rulemakings. In other work, I have shifted the level of observation from yearly counts of categories of rulemaking activities (for example, proposed rulemakings, completed regulatory actions) to individual regulatory actions. By analyzing individual actions with duration models, one can better consider not only the effects of intervening events (for example, shifts in presidential administrations), but also individual attributes of a particular rulemaking (for example, source and age of legal authority, existence of statutory or judicial deadlines, expected effect on the economy, expected effect on levels of government, etc.). See, e.g., Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923 (2008); cf. Shapiro, Presidents and Process, supra note 10, at 415–17 (comparing the length of the rulemaking process during November and December 1999 to November and December 2003); Shapiro, Two Months, supra note 10, at 15 (reporting descriptive information on the length of the rulemaking process for rules promulgated in November and December 2003); Yackee & Yackee, supra note 10, at 13–23 (analyzing duration of notice-and-comment rulemaking from 1983 to 2006).

the Unified Agenda, which is used to examine most of the hypotheses proposed in Section I.D. It compares the use of notice-and-comment rulemaking with the use of direct and interim final rulemaking. In so doing, it provides an important perspective on the regulatory ossification and judicial deference debates. It then focuses on political transitions—investigating the commencement and completion of traditional notice-and-comment rulemaking, and the withdrawal of regulatory actions that have not been completed. In that effort, it provides some important insights on the political control and political transition debates.

Five key findings emerge from this research on agency rulemaking from President Reagan to President George W. Bush. First, many agencies engaged in considerable notice-and-comment rulemaking, suggesting that the traditional regulatory process may not be greatly ossified. Rulemaking without prior opportunity for comment, however, has increased across a wide range of agencies. Second, rather than capitalizing quickly on their electoral mandates, Presidents generally started fewer, not more, rules in the first year of their terms than in later years. In addition, independent agencies may have counterbalanced commonly perceived regulatory preferences of political parties, commencing fewer notice-and-comment rulemakings under President Clinton and Democratic Congresses but starting more under Republican Presidents and Congresses.[102] Third, agencies generally completed more rules in the final quarter of each presidential administration. But some agencies also rushed to finish regulations before party control in Congress shifted. Fourth, President Clinton may not have been the biggest midnight regulator. President George H.W. Bush, for instance, started considerably more midnight rulemakings in the final quarter of his term than did President Clinton or President Reagan. Fifth, agencies withdrew uncompleted regulations after a political transition. Certain agencies withdrew more proposed rules after a political transition in Congress than after a new President took office. The results also suggest future avenues for empirical research.

[102] See infra note 149.

A. Unified Agenda Database

I have constructed a large database of agency rulemaking from federal agency reports in the Unified Agenda, which is published twice a year in the Federal Register, from 1983 to 2003.[103] These semi-annual reports list many important features of the rulemaking process. For notice-and-comment rulemaking, they provide the date on which the Notice of Proposed Rulemaking ("NPRM") was issued, the date(s) of the comment period(s), the date when the final rule was promulgated (if the process was completed), and the date the regulatory action was withdrawn (if the process was not completed). For rulemaking without prior opportunity for public comment, the reports give the dates of direct and interim final rules. The reports also provide additional information about each

[103] The Unified Agenda exists in hard copy in the Federal Register. But each Unified Agenda contains several thousand entries, making coding extremely difficult, even with Westlaw or LexisNexis. I was able to obtain the data files for the Unified Agenda from 1983 to 2003 from the Regulatory Information Service Center ("RISC") in XML format (a "markup language" that combines text and structure in a manner that facilitates data sharing). The GAO keeps a similar database on completed rules under the Congressional Review Act using information reported by agencies. 5 U.S.C. § 801(a) (2000); Skrzycki, supra note 10, at 30–33, 158–60. If the rule is major, the GAO must report to Congress on the agency's compliance with procedural requirements. 5 U.S.C. § 801(a)(2)–(3). I am not the first to use data from the Unified Agenda. See Crews, supra note 10, at 12–25, 29–30, 32–37 (totaling, by type, rules reported in each edition, regardless of year in which rule was made, and providing some counts for individual agencies); Steven J. Groseclose, Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections, 53 Md. L. Rev. 521 (1994) (analyzing estimated dates from the EPA for Clean Air Act rulemaking from 1989 to 1992 and finding that the EPA rarely met those dates); Loring & Roth, supra note 9 (analyzing durability of midnight regulations promulgated by the EPA, OSHA, and NHTSA before Presidents Clinton and George W. Bush took office); Sarah Cohen & Laura Stanton, Comparing Presidential Action on Regulations, Wash. Post, Aug. 15, 2004, at A14, available at http://www.washingtonpost.com/wp-srv/politics/daily/graphics/regulations_081604.html (summarizing by issue area initiation of rulemakings and providing totals of completed and withdrawn rulemakings for the last three Presidents); Amy Goldstein & Sarah Cohen, Bush Forces a Shift in Regulatory Thrust, Wash. Post, Aug. 15, 2004, at A1 (examining data for OSHA under Presidents George W. Bush and Clinton); Jonathan Rauch, The Regulatory President, 23 Nat'l J. 2902 (1991)(totaling rules reported in each edition, regardless of year in which rule was made); Yackee & Yackee, supra note 10 (examining factors influencing the duration of notice-and-comment rulemaking in the past four presidential administrations).

rulemaking.[104] The database contains information for all unique Regulation Identification Numbers ("RIN") in the reports, whether or not the agency reported an NPRM with an actual date.

The database I created provides a comprehensive picture of rulemaking activity from President Ronald Reagan to President George W. Bush. It contains information on all reported rulemaking activities of the fifteen cabinet departments, as well as thirty-two executive and independent agencies, including the EPA, FTC, and SEC. Table 1 lists the agencies in the database. The database includes, if applicable, relevant dates of traditional notice-and-comment rulemaking as well as binding rulemaking without prior opportunity for public comment (direct and interim final rules).[105] It notes particular characteristics of rulemaking actions, including their significance and the existence of legal and statutory deadlines. The database also removes duplicate entries from the Unified Agenda reports. After those duplicate entries are removed, there are 39,537 unique RINs in the database. Each RIN contains all relevant regulatory actions. Of those RINs, 20,253 report at least one NPRM, 23,973 report at least one final action, 2804 report at least one interim final rulemaking, 236 report at least one direct final rulemaking, and 6725 report at least one withdrawal or deletion of action.[106] In sum, the database allows for considerable exploration of agency rulemaking activity.[107]

[104] The Unified Agenda reports represent a successive picture of agency activity. There is considerable overlap among the semi-annual reports. A rule may appear multiple times: the first appearance may reflect the NPRM, the second may indicate the end of the commenting period, and the third may describe the final promulgation of the rule. Each appearance typically includes all previously disclosed information. Thus, it is critical to remove duplicate entries in the analysis so particular rulemaking actions, such as an NPRM, are counted only once. Almost all other work on the Unified Agenda appears simply to tally the rulemakings reported in each edition, without filtering out these duplicate entries. See, e.g., Crews, supra note 10; Rauch, supra note 103. The inclusion of duplicate entries makes comparisons across years invalid.

[105] For the analysis presented infra, several key assumptions and coding decisions were made concerning the counts of particular regulatory actions (for example, direct final rules, interim final rules, NPRMs, completions, withdrawals). See Data Appendix, infra.

[106] Agencies do not always report dates for these actions. These numbers reflect actions reported with and without actual dates.

[107] The database will be made freely available to other scholars upon publication of this and related papers.

Table 1: Agencies Covered by Unified Agenda Database

Cabinet Departments	*Executive Agencies*	*Independent Agencies*
Department of Agriculture ("USDA"), not including Federal Crop Insurance Corporation (2592)	Environmental Protection Agency ("EPA") (3119)	Commodity Futures Trading Commission ("CFTC") (185)
Department of Commerce ("DOC") (2556)	Federal Emergency Management Agency ("FEMA") (303)	Consumer Product Safety Commission ("CPSC") (206)
Department of Defense ("DOD") (1441)	General Services Administration ("GSA") (761)	Equal Employment Opportunity Commission ("EEOC") (63)
Department of Education ("Education") (747)	Internal Revenue Service ("IRS") (2706)	Farm Credit Administration ("FCA") (215)
Department of Energy ("DOE"), not including Federal Energy Regulatory Commission (479)	National Aeronautics and Space Administration ("NASA") (267)	Federal Communications Commission ("FCC") (763)
Department of Health and Human Services ("HHS"), not including Social Security Administration (2803)	National Archives and Records Administration ("NARA") (129)	Federal Crop Insurance Corporation ("FCIC") (175)
Department of Homeland Security ("DHS") (360)	Office of Management and Budget ("OMB") (120)	Federal Deposit Insurance Corporation ("FDIC") (246)
Department of Housing and Urban Development ("HUD"), not including Office of Federal Housing Enterprise Oversight (1630)	Office of Personnel Management ("OPM") (914)	Federal Energy Regulatory Commission ("FERC") (243)
Department of Interior ("DOI") (3657)	Small Business Administration ("SBA") (458)	Federal Home Loan Bank Board ("FHLBB") (97)
Department of Justice ("DOJ") (1240)	U.S. Agency for International Development ("USAID") (51)	Federal Housing Finance Board ("FHFB") (127)
Department of Labor ("DOL"), not including Pension Benefit Guaranty Corporation (751)		Federal Maritime Commission ("FMC") (227)
Department of State ("State") (164)		Federal Reserve Board ("FRB") (260)
		Federal Trade Commission ("FTC") (90)
		Interstate Commerce Commission ("ICC") (206)
		National Credit Union Administration ("NCUA") (283)
		Nuclear Regulatory Commission ("NRC") (726)

Cabinet Departments	*Executive Agencies*	*Independent Agencies*
Department of Transportation ("DOT"), not including Surface Transportation Board or Saint Lawrence Seaway Development Corporation (3877)		Office of Federal Housing Enterprise Oversight ("OFHEO") (27)
Department of Treasury ("Treasury"), not including Internal Revenue Service (1640)		Pension Benefit Guaranty Corporation ("PBGC") (93)
Department of Veterans Affairs/Veterans Administration ("VA") (1128)		Saint Lawrence Seaway Development Corporation ("SLSDC") (17)
		Securities and Exchange Commission ("SEC") (790)
		Social Security Administration ("SSA") (532)
		Surface Transportation Board ("STB") (73)

Source for Table 1: Unified Agenda Reports (Spring 1983-Fall 2003). Number of unique RINs in parentheses. In 2003, FEMA became an agency within DHS.

Like all data sources, this new database has some disadvantages. First, individual agencies submit data on their own activities to the Unified Agenda.[108] Independent observers are not verifying the data.[109] Under the Regulatory Flexibility Act and Executive Orders

[108] Professor Mashaw argues that the self-reporting nature of the data makes it impossible to compare rulemaking activity across agencies. See Mashaw, supra note 72, at 198 n.41. At the very least, however, the data permit comparison of a single agency's activity over time, allowing analysis of political transitions. Mashaw remarks, without citation, that the EPA "does not report any rulemaking activity that it considers insignificant." Id. I do not find that to be true. In the Unified Agenda files, the EPA marks many actions as routine after 1994, when agencies start to label actions as significant or routine. In addition, the EPA appears to report a range of regulatory actions before that period as well. Granted, the EPA does not appear to report every action to the Unified Agenda. See Cary Coglianese & Margaret Howard, Getting the Message Out: Regulatory Policy and the Press, at 8 (April 1998) (unpublished manuscript, on file with author) Although they provide a critical perspective on the administrative state, the Unified Agenda data are not perfect; they need confirmatory research.

[109] Agencies report two main categories of data in the Unified Agenda: actual regulatory actions and anticipated regulatory actions. This Article focuses on the former category because that information is more reliable. Under Presidents Reagan and George H.W. Bush, the OMB appears to have exercised control over what agencies reported in the latter category. See Shane, supra note 73, at 179–80; see also Exec. Order No. 12,498 § 1, 3 C.F.R. 323, 323 (1985) (establishing prospective reporting requirements); Exec. Order No. 12,291 § 6, 3 C.F.R. 127, 130–31 (1981) (establishing

13,422 and 12,866,[110] agencies are required to report on their regulatory activities, though they face no specific penalty for not doing so. Agencies, however, have particular incentives for accurately reporting rulemaking activities. Publication in the Federal Register is the official means of notifying the public of new regulations, and agency activity cannot be hidden if agencies expect anyone to comply with their rules.[111]

Second, the Unified Agenda reports miss many complexities of rulemaking. Professor Jerry Mashaw contends that counts of rules are a misleading indicator of agency rulemaking activity.[112] Mashaw correctly notes that it is not feasible "for the untutored eye to discern from the reporting in the Unified Agenda . . . whether activity levels are primarily in a regulatory or deregulatory direction."[113] Nonetheless, the database of Unified Agenda entries can provide a big-picture perspective on agency rulemaking. This perspective is perhaps most problematic in assessing the effects of ideology on rulemaking,[114] because the volume of rulemaking may be poorly correlated with its content. For instance, some agencies may engage in considerable deregulatory rulemaking while others engage in considerable regulatory rulemaking, and focusing on aggregate rulemaking may obscure these offsetting efforts. But this macro

respective reporting requirements). Under President Clinton's administration, the OMB did not exercise such control. See Shane, supra note 73, at 181–82.

[110] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1981); Exec. Order No. 12,866, supra note 32, § 3(f).

[111] To be certain, some agency activity, such as a withdrawal of a proposed rule, could be hidden because that action does not typically create any obligations requiring notice to affected parties. Many withdrawals, however, appear to be reported in the Unified Agenda. For example, OSHA first announced its withdrawal of its 1997 proposed rule limiting occupational exposure to tuberculosis in the Unified Agenda in 2003. See Occupational Exposure to Tuberculosis, 68 Fed. Reg. 73,224 (Dec. 22, 2003); OSHA Decision to Ax TB Rulemaking Upsets Labor, Gains Hospital Backing, Inside OSHA (Arlington, Va.), June 9, 2003.

[112] Mashaw, supra note 72, at 198 n.41. Mashaw also notes, without detail, that RISC changed how it classified rules in 1986. Id. But, in my examination, there seems to be no significant change in agency reporting after 1986. In the mid-1990s, however, the reports began consistently to classify regulatory actions as significant or routine; consequently, all comparisons involving the significance of rulemaking use data after that shift.

[113] Id.

[114] See supra note 93. This concern parallels in some ways the discussion on the activism of judges. Both conservative and liberal judges can be activist in overturning precedent; they just go after different precedent.

perspective is less problematic in evaluating the ossification of rulemaking. For that debate, the amount and length of rulemaking is important, whether the content is regulatory or deregulatory. The empirical analysis in this Article is intended to complement more contextual work, such as case studies of particular agencies. Each approach provides valuable information.

Third, it is important to emphasize that agency action encompasses more than rulemaking. Rulemaking is considered by many to be the core of agency decisionmaking.[115] Agencies, however, can often make policy decisions through other processes. They can announce rules in individual adjudications.[116] They can also issue guidance and policy announcements.[117] These actions are not typically captured in the Unified Agenda data.[118] But none of these limitations on the data makes the subsequent analysis invalid; instead, they suggest only that confirmatory research is warranted.

The extensive database allows analysis of many of the hypotheses described in Section I.D. The results are broken down as follows: the choice among notice-and-comment rulemaking, direct final rulemaking, and interim final rulemaking; the initiation of notice-and-comment rulemaking; the completion of regulatory activity; and the withdrawal of uncompleted regulatory activity.

B. Choice of Rulemaking Procedure

Agencies seeking to enact a binding rule often get to choose among notice-and-comment rulemaking (which commences with an NPRM), direct final rulemaking, and interim final rulemaking, though some procedures may not be warranted in particular cir-

[115] See Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1761–63 (2007).

[116] See Magill, supra note 25, at 1386; see also Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. Empirical Legal Stud. 783, 785 (2004) (noting that trials have shifted from courts to adjudications in agency forums).

[117] See Mendelson, supra note 11, at 574.

[118] More empirical work needs to examine how agencies choose among these possibilities. See Magill, supra note 25, at 1386; Stephenson, supra note 67, at 566. There are a few isolated examples of such work. See, e.g., Mashaw & Harfst, supra note 61; cf. Beermann, supra note 11, at 967–69 (discussing electronic Federal Register searches for nonlegislative rules issued at the end of the Clinton administration). Professors Steven Croley and Elizabeth Magill are in the process of collecting information on a wide range of agency activities.

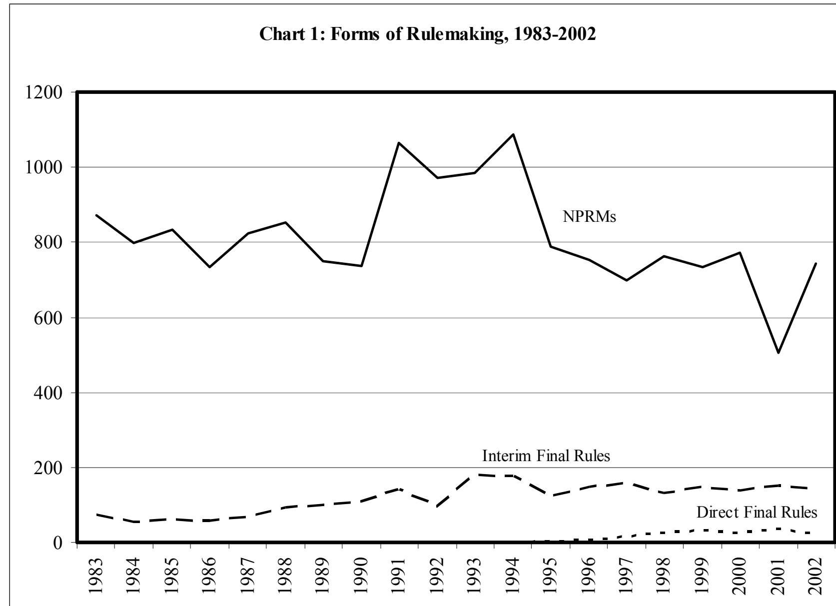
cumstances. Because agencies face this array of options, and presumably choose the most advantageous one, that choice can provide needed information about agency perceptions of the costs and benefits to particular forms of rulemaking.[119] Chart 1 displays trends in all three forms of rulemaking (NPRMs, direct final rules, interim final rules), across all agencies listed in Table 1 from 1983 to 2002.[120] Chart 2 shows only the direct and interim final rulemakings from Chart 1.

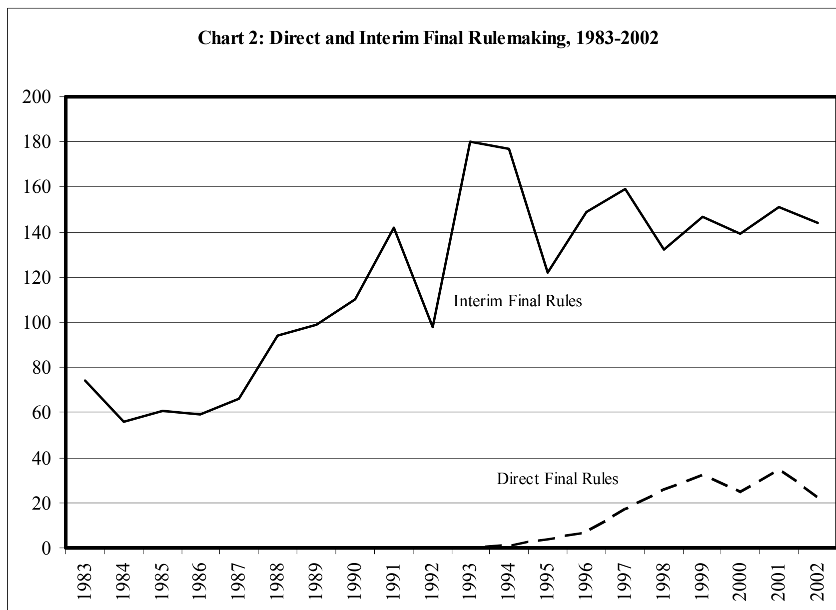
As these charts show, direct and interim final rulemaking have been increasing over time. NPRMs increased in the early 1990s, and decreased in 2001. Interim final rulemaking seems to have tracked the trends in NPRMs in the early 1990s, but both interim and direct final rulemaking increased in 2001 as NPRMs dropped sharply. The 2001 and 2002 data may represent the regulatory response to September 11, 2001, with agencies promulgating interim final rules without notice and comment under the APA's "good cause" exemption.[121] They may also be the result of the start-up costs to rulemaking faced by a new administration. The 1989, 1993 and 2001 upticks in interim final rulemaking may also show that agencies rely on interim final rulemaking in the first year of a presidential administration to achieve regulatory objectives more quickly than they could with notice-and-comment rulemaking.

[119] For some regulatory processes reported in the Unified Agenda, an agency engages in multiple forms of rulemaking, such as notice-and-comment rulemaking and interim final rulemaking.

[120] I dropped data on 2003 rulemakings because it appeared incomplete on the actual commencement and completion of rulemaking activities. Importantly, this is not the same as dropping data from the 2003 Unified Agenda reports. The 2003 Unified Agenda reports also have information on rulemaking activities that occurred before 2003. For example, a 2003 entry on the completion of a rulemaking would have information about an earlier NPRM. Information about pre-2003 rulemaking activities was retained.

[121] See 5 U.S.C. § 553(b)(3)(B) (2000) (excluding agency rulemaking from notice-and-comment procedures when the agency finds "good cause" that such procedures are "impracticable, unnecessary, or contrary to the public interest").





Source for Charts 1 and 2: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs with an NPRM, Direct Final Rule, or Interim Final Rule action listed with an actual date between 1983 and 2002. Regulatory actions are defined in the Data Appendix.

First, these simple counts shed some light on the "Ossification," "Judicial Deference," "Direct Final Rules," and "Interim Final Rules" Hypotheses. First, on the "Ossification" Hypothesis, Chart 1 suggests that the procedural costs to rulemaking (from the agency's perspective) are not so high as to prohibit considerable rulemaking activity by agencies. The administrative state, at least on a macro level, does not seem to be substantially ossified. To be certain, this chart does not resolve the ossification debate. The counts, for example, cannot tell us what the optimal level of rulemaking is, or what the content of the rules should be. Nor can they tell us how much more rulemaking would occur with fewer procedural constraints, or provide any sense of the length of the rulemaking process. From a social welfare or democracy perspective, perhaps there should be more rulemaking of a particular kind,[122] or less. But the counts do show that federal agencies, as a group, issue from 500 to over 1000 NPRMs per year, along with a generally increasing number of direct and interim final rules per year.[123]

Second, with respect to the "Judicial Deference" Hypothesis, Chart 1 provides some support for the conclusion that agencies' use of notice-and-comment rulemaking increased after the Supreme Court's 2001 decision in *United States v. Mead Corporation*.[124] There is, however, only one year of data after 2001, and many factors having nothing to do with *Mead* (for instance, the second year of a President's term) are consistent with a rise in rulemaking in 2002.[125] In addition, the most relevant information for the "Judicial Deference" Hypothesis would be a comparison of the relative use of notice-and-comment rulemaking and nonlegislative rulemaking (such as guidance documents and interpretative

[122] See Bressman, supra note 53, at 544 (calling for a preference for notice-and-comment rulemaking in order to decrease arbitrary agency action).

[123] The length of the rulemaking process is also important for assessing the ossification debate, which leads to a number of additional questions. See infra Section II.D. For example, does it take longer to enact a rule now than it did when there were fewer procedural requirements? Has e-rulemaking, which presumably makes it easier for agencies to process comments, increased or decreased the length of the rulemaking process? In addition, for traditional notice-and-comment rulemaking, these counts focus only on the commencement of rulemaking and thus do not indicate how many NPRMs fail to produce final rules.

[124] 533 U.S. 218 (2001).

[125] Cf. infra Section II.C (discussing how Presidents start fewer rulemakings in their first year of office).

rules) as the perceived benefits to the former increased while the perceived benefits to the latter decreased. Because the net costs of direct and interim final rulemaking did not change after *Mead* (in other words, such rulemaking still likely qualifies for *Chevron* deference),[126] their use by agencies over traditional notice-and-comment rulemaking does not help test the "Judicial Deference" Hypothesis.[127]

Finally, Chart 2 and the underlying data give some backing to the "Direct and Interim Final Rules" Hypotheses.[128] The agencies reporting the greatest number of direct final rules, with and without actual dates, were, in decreasing order: the EPA (109 direct final rules), USDA (27), NRC (27), DOT (26), and HHS (13). As a percentage of an agency's rulemaking activities,[129] the most frequent users were, in decreasing order: the NRC (11.2%), EPA (4.8%), NARA (4.7%), FCA (4.4%), and SBA (2.7%).[130] To the extent that independent agencies are less controversial and more technical than executive agencies,[131] the NRC's choices seem to comport with the "Direct Final Rules" Hypothesis, but the choices of the EPA, DOT, HHS, and USDA do not. Overall, independent agencies are not the greatest users of direct final rulemaking. In-

[126] See supra note 41.

[127] More research needs to be done on the implications of *Mead* for agency rulemaking. For instance, have agencies that have faced more judicial challenges increased notice-and-comment rulemaking more than agencies that have faced fewer ones?

[128] These hypotheses predict that less controversial and more technical agencies are more likely to use direct final rulemaking than are other agencies because they expect fewer adverse comments. These hypotheses also predict that more controversial and less technical agencies are more likely to use interim final rulemaking than other agencies because they want to avoid public scrutiny.

[129] An agency's rulemaking activities, for these calculations, consist of NPRMs, direct final rules, and interim final rules.

[130] The percentages are low because agencies did not engage in direct final rulemaking for the first half of the period being studied, 1983 to 1994. Looking at agency rulemaking activities reported from 1995 to 2003 in the Unified Agenda, the percentage of direct final rulemaking for those agencies increases: NRC (29.7%), FCA (10.3%), EPA (10.1%), NARA (6.9%), SBA (5.5%).

[131] Systematic evidence concerning the contentiousness of federal agencies (as manifested by media coverage, for instance) is hard to find. See Terry Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. Econ. & Org. 213 (1990); cf. Coglianese & Howard, supra note 108, at 6 n.5 (reporting that the EPA received more press coverage than the CPSC, FERC, FCC, FTC, NHTSA, NRC, and OSHA in 1993).

stead, at least some controversial agencies use direct final rulemaking more, perhaps to avoid scrutiny even though such rulemaking is intended for noncontroversial rules. Such choices are understandable as a strategic matter.[132]

The biggest users of interim final rulemaking, reported with and without actual dates, were, in decreasing order: the USDA (332 interim final rules), OPM (285), DOD (258), HUD (253), DOJ (245), and DOT (224). As a percentage of an agency's rulemaking activities,[133] the most frequent users were: State (49.4%), DHS (46.2%), OPM (42.3%), DOD (37.6%), NASA (36.5%), and DOJ (34.2%). Eighteen additional agencies devoted more than ten percent of their rulemaking activities to interim final rules: HUD, EEOC, FCIC, USAID, FHFB, FEMA, GSA, USDA, DOL, SBA, NARA, Treasury, DOC, SSA, NCUA, DOE, FMC, and HHS. Chart 3 displays the number of interim rules reported by the five greatest users of the procedure (USDA, OPM, DOD, HUD, and DOJ) by presidential terms (President Reagan, 2nd term; President George H.W. Bush; President Clinton, 1st term; President Clinton, 2nd term). During President Clinton's first term, the USDA, OPM, DOD, and HUD promulgated significantly more interim rules than during other presidential terms, including President Clinton's second.[134] That pattern does not hold for the DOJ.[135]

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[132] More research should be conducted, particularly looking at the content of direct final rules. For example, are controversial agencies using direct final rulemaking for narrow or broad subjects? Are agencies using direct final rulemaking for significant rules? In addition, if agencies receive adverse comments to a direct final rule, they are supposed to go through traditional commenting procedures, and interim rules technically are supposed to be temporary. See supra notes 37–38. The database can be used to investigate how often direct final and interim final rulemaking turns into traditional notice-and-comment rulemaking.

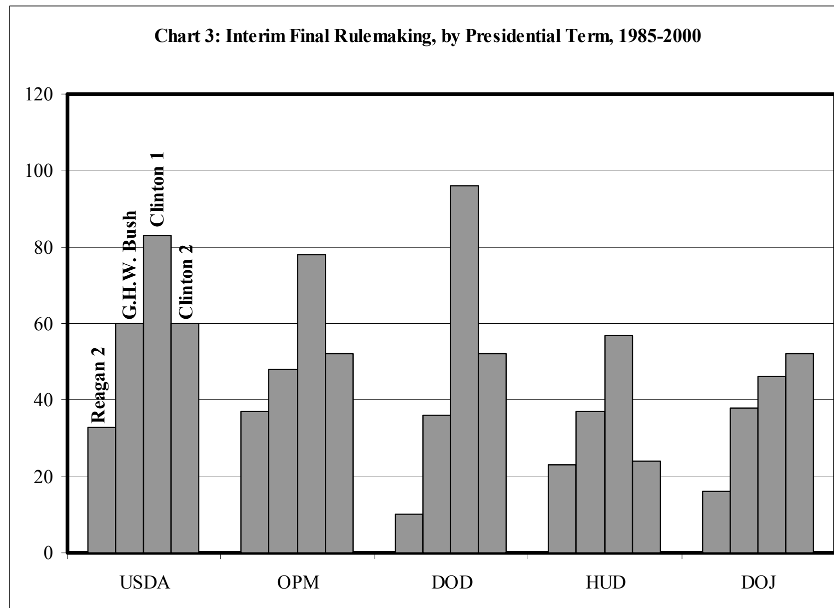
[133] See supra note 129.

[134] The USDA was substantially reorganized in 1994. Ronald Smothers, U.S. Shutting 1,274 Farm Field Offices, N.Y. Times, Dec. 7, 1994, at A16.

[135] Through a Chi-Square test (a statistical test that examines differences among observed frequencies of particular events), the null hypothesis that there are equal numbers of interim rules under President George H.W. Bush's term and each of President Clinton's two terms is rejected with statistical significance at or over 95 percent for the OPM, DOD, and HUD. The Chi-Square results for each agency are listed as follows (Agency (χ^2 value, degrees of freedom, significance level)): USDA (5.212, 2, 0.074); OPM (8.944, 2, 0.011); DOD (31.478, 2, 0.000); HUD (14.051, 2, 0.001); DOJ (2.176, 2, 0.337).

Much of this interim final rulemaking may be explained without reference to politics. The DOD and State are largely exempted from the APA's notice-and-comment rulemaking requirements; the DHS and FEMA, from visual examination of the data, appear to rely heavily on emergency rationales for their interim rulemaking, which the "good cause" exemption of the APA explicitly permits. NASA does relatively little rulemaking of any kind. Interestingly, the EPA devotes below four percent of its rulemaking activity to interim final rulemaking, perhaps because it anticipates that such rulemaking would lead to procedural challenges in the courts. But many politically charged agencies—such as HUD, USDA, DOL, SBA, DOC, and HHS—use interim final rulemaking for a significant minority of their rulemaking activity. Independent agencies, overall, devote a significantly smaller percentage of their rulemaking activities to interim final rulemaking than cabinet departments and executive agencies. With a few exceptions, these results are consistent with (but not definitive support of) the "Interim Final Rules" Hypothesis that more controversial agencies, preferring to avoid high conflict comment periods and to make it harder for Congress to intervene in the process by holding hearings or using other oversight tools, are more likely to use interim final rulemaking than less controversial agencies.[136]

[136] It is possible that the causality runs the other way—that is, that agencies engaging in more interim rulemaking become more controversial—though I find that alternative explanation less plausible. As with direct final rulemaking, more research should be conducted, particularly looking at the content of interim final rules and their significance. In other work, I have examined the connection between direct and interim final rulemaking and the presence of statutory or judicial deadlines. See Gersen & O'Connell, supra note 101, at 943–44.



Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for the USDA, DOC, DOD and DOJ with an Interim Final Rule action listed with an actual date between 1985 and 2000.

In sum, the main finding of this Section is that many agencies engage in a significant volume of notice-and-comment rulemaking, indicating that the traditional rulemaking process may not be significantly ossified. That finding, however, has one major limitation. Rulemaking without prior opportunity for comment has increased relative to notice-and-comment rulemaking across a wide range of agencies, which suggests that notice-and-comment rulemaking has significant costs that agencies want to avoid. The use of these alternative forms of regulating—direct and interim final rules—permits agencies to ignore particular ex ante procedural constraints and thereby raises questions about the accountability of agency decisionmaking.[137]

[137] Other forms of agency action, such as interpretative rules and guidance documents, present similar concerns. Unfortunately, agencies do not report such actions in the Unified Agenda; thus, the database analyzed here does not have information on them.

The remainder of this Part focuses on notice-and-comment rulemaking: its commencement, its completion, and its interruptions.

C. Initiation of Notice-and-Comment Rulemaking

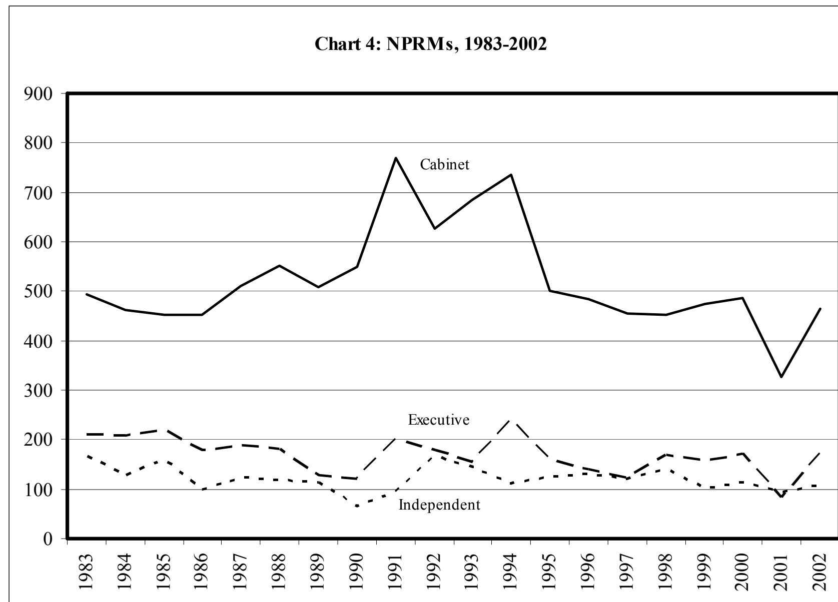
Traditional notice-and-comment rulemaking typically begins when an agency publishes an NPRM in the Federal Register.[138] This public decision to commence rulemaking creates an opportunity to examine the strength of various political pressures and institutional structures on agency action. In the database I constructed, the commencement of notice-and-comment rulemaking between 1983 and 2002 does not display an overall increasing or decreasing trend.[139] Chart 4 shows the trends in NPRMs for cabinet departments, executive agencies, and independent agencies listed in Table 1.[140]

Generally, the three categories of agencies experienced the same direction of change (increasing or decreasing) from the preceding year, especially cabinet departments and executive agencies. In the early 1990s, however, independent agencies' proposals of rulemaking seem to move in opposite directions from non-independent agencies. In the cabinet departments, there were increases in NPRMs in the third year of President George H.W. Bush's administration and in the first two years of President Clinton's administration, but rulemaking proposals came close to settling at earlier levels after the 1994 midterm congressional elections. Independent and executive agencies seem to have had remarkably steady levels of NPRMs, though there is a drop in executive agency proposals after the 1994 mid-term elections. In 2001, rulemaking proposals for comment dropped for all agencies.

[138] Cabinet departments and executive agencies must get OMB approval before publishing an NPRM. See supra note 32 and accompanying text. An agency may have also issued an Advanced Notice of Proposed Rulemaking ("ANPRM") or engaged in negotiated rulemaking, see 5 U.S.C. §§ 561–570 (2000), before publishing an NPRM.

[139] This Section focuses on all NPRMs, significant and nonsignificant. Since 1995, the Unified Agenda has collected consistent data on the significance of the reported regulatory activity. By law, significant or major activities are activities that are likely to have an effect of at least $100 million on the economy or have other considerable effects. See supra note 8.

[140] See Data Appendix, infra.

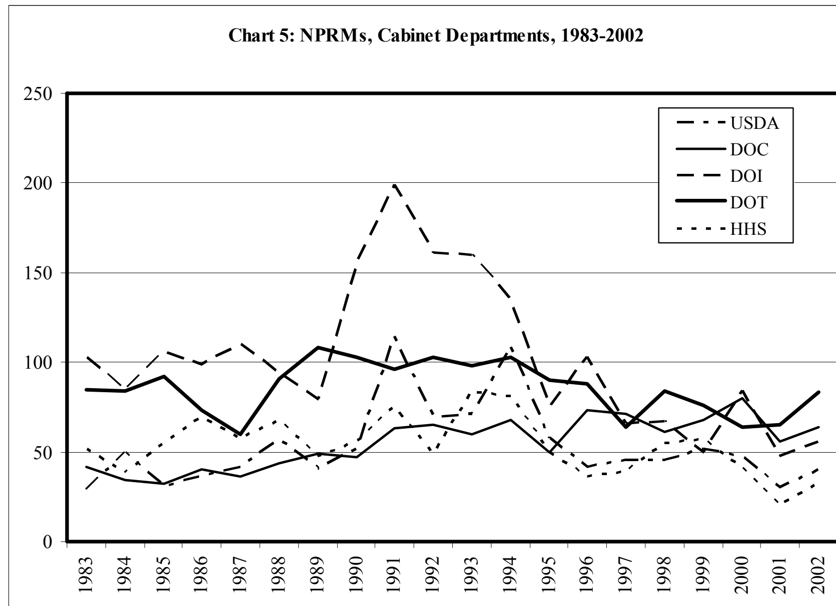


Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for agencies listed in Table 1 with an NPRM with an actual date between 1983 and 2002. Agencies are categorized as described in Table 1 and the Data Appendix. NPRMs are defined in the Data Appendix.

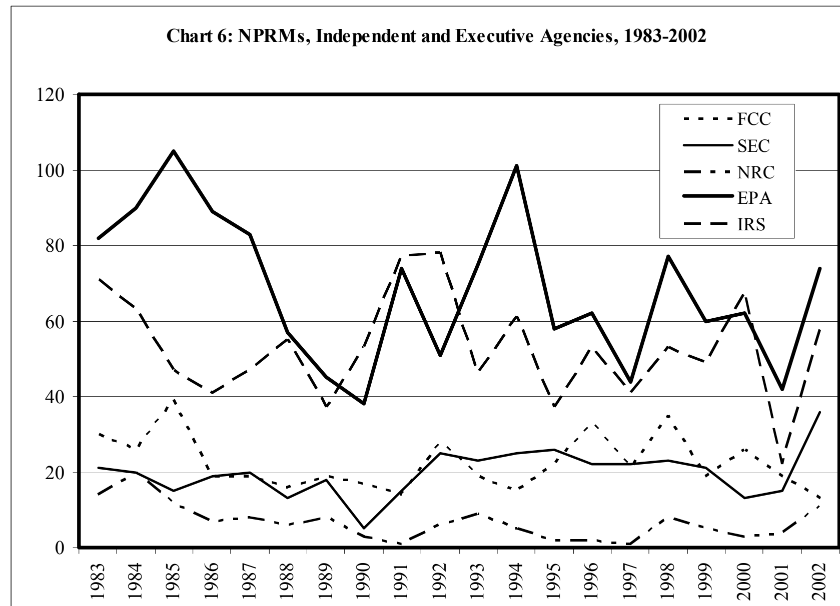
Charts 5 and 6 show trends in all NPRMs, significant and non-significant, for the agencies with the most rulemaking activity in this period: cabinet departments and executive and independent agencies, respectively.[141] In Chart 5, of the five cabinet departments with the most rulemaking, the DOI displays the greatest gap between its lowest and highest yearly totals, from 48 in 2001 to 199 in 1991. From Chart 6, NPRMs from independent agencies with the most rulemaking—the FCC, NRC, and SEC—display smaller

[141] Looking at only significant NPRMs with an actual date in the 1983–2003 Unified Agenda, the cabinet departments with the most activity are: the DOT (241 significant NPRMs), HHS (222), USDA (220), DOI (131), HUD (102), and DOL (80). See also supra note 8. The non-cabinet executive agencies with the most activity were: the EPA (257 significant NPRMs), SBA (59), GSA (18), and IRS (18). The independent agencies with the most activity were: the FCC (82 significant NPRMs), SSA (24), and SEC (23). Summing up significant NPRMs across all agencies listed in Table 1, the trends across time are unclear. For each year from 1995 to 2002, there were 194, 162, 151, 205, 234, 176, 124, and 194 significant NPRMs, respectively. As with all NPRMs, there was a drop in significant NPRMs in President George W. Bush's first year in office.

jumps in absolute terms than the cabinet departments and executive agencies, but those independent agencies also report smaller numbers of NPRMs. From the mid-1980s to 1990, among executive agencies with the most rulemaking, the EPA proposed fewer and fewer rules.[142]



[142] The 1990 Amendments to the Clean Air Act required 452 separate actions by the EPA. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 7412 (2000)); U.S. Gov't Accountability Office, GAO-05-613, Clean Air Act: EPA Has Completed Most of the Actions Required by the 1990 Amendments, but Many Were Completed Late 3 (2005).



Source for Charts 5 and 6: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for USDA, DOC, DOI, DOT, HHS, FCC, SEC, NRC, EPA, and IRS with an actual date between 1983 and 2002.

Regression analysis permits me to examine the relationship between multiple factors and the initiation of notice-and-comment rulemaking by the ten agencies in Charts 5 and 6. Regulatory activity is observed across multiple agencies (i.e., cross-sectional) and across nearly two decades (i.e., time series); in other words, these data can be described as cross-sectional time series data. I focus on within-agency variation over time. To do this, I use a fixed effects Poisson regression model, a type of regression model that controls for omitted explanatory variables that may differ among agencies but remain constant within one agency over time. In other words, a fixed effects model may help correct bias that results from omitted variables without actually having to find measurements for the potentially important excluded variables. It does not, however, address the time series component of the data.[143]

[143] From Chart 4, there does not appear to be a time trend in NPRMs. I ran some preliminary regressions with a lagged dependent variable as an explanatory variable (that is, the value of the dependent variable in the preceding year). The lagged dependent variable is positive and significant. The other results do not change, except

The dependent variable is the number of NPRMs—that is, a count of regulatory activity. The counts may not, however, be independent; one rulemaking may contribute to another rulemaking. Although a Poisson model normally assumes that the occurrences of the dependent variable are independent, a fixed effects Poisson model with robust standard errors provides consistent results even if overdispersion is present.[144] Table 2 reports regression results of various factors on the initiation of notice-and-comment rulemaking.[145]

that the interaction variable between Agency Independence and the President's Party is barely no longer significant. Nevertheless, the time series nature of the data could be more systemically examined. Cf. Nathaniel Beck & Jonathan N. Katz, What to Do (and Not to Do) with Time-Series Cross-Section Data, 89 Am. Pol. Sci. Rev. 634 (1995) (recommending that political scientists add a lagged dependent variable and use panel corrected standard errors with a standard OLS regression model); Sven E. Wilson & Daniel M. Butler, A Lot More to Do: The Sensitivity of Time-Series Cross-Section Analyses to Simple Alternative Specifications, 15 Pol. Analysis 101, 104, 114 (2007) (noting that fixed effects models often perform well, but recommending robustness checks for cross-sectional time series models); see also Nathaniel Beck & Jonathan N. Katz, Nuisance v. Substance: Specifying and Estimating Time-Series-Cross-Section Models, 6 Pol. Analysis 1 (1996) (arguing that modeling dynamics using a lagged dependent variable is superior to using serially correlated errors, because the former approach allows for more natural generalizations and makes it easier for researchers to examine dynamics).

[144] Jeffrey M. Wooldridge, Econometric Analysis of Cross Section and Panel Data 674-76 (2001).

[145] The regression coefficients, once exponentiated, can be roughly interpreted as percentage changes in the number of NPRMs. There is no considerable collinearity among the explanatory variables (correlation coefficient greater than 0.60) other than between the variables for the President's First Year and Party Change in the White House (correlation coefficient: 0.79). I did not include counts of statutory or legislative deadlines because of potential aggregation concerns; looking at aggregate NPRMs and aggregate deadlines together makes inferences about individual NPRMs and deadlines problematic. Cf. Gersen & O'Connell, supra note 101, at 945–49, 989 (finding that deadlines decrease the duration of rulemaking with individual rulemakings as the unit of observation). I should note that the regression models presented here ask a lot of the data; the number of total parameters estimated (multiplicative product of number of unique categories of each explanatory variable, which rise geometrically with each additional explanatory variable) is greater than the number of observations (20 years * 10 agencies = 200).

Table 2: Notices of Proposed Rulemaking by Ten Agencies

Variable	*Coefficient (Standard Error)*
President's Party (R)	-0.102 (0.087)
Congress's Party (R)	-0.223 (0.131)
President's First Year	-0.294 (0.134)*
President's Last Year	-0.048 (0.044)
Indep.*Congress's Party (R)	0.332 (0.086)**
Indep.*President's Party (R)	0.154 (0.075)*
United Government	0.009 (0.244)
Party Change in Congress	-0.177 (0.052)**
Party Change in White House	0.117 (0.156)
n=200	
* p < .05, ** p < .01	
Fixed-effects Poisson model with robust standard errors; 10 groups (USDA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, SEC); 1983-2002.	

Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs per year for the USDA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, and SEC with an NPRM with an actual date, from 1983 to 2002.[146]

The Executive Branch, along with agency characteristics, appears to influence the initiation of rulemaking activities, at least to some extent. As a general matter, there is no statistically significant relationship between the party of the President and the initiation of rulemaking, contrary to the "Presidential Control: Ideology" Hypothesis, which predicts less rulemaking under Republican Presidents than under Democratic Presidents.[147] But the interaction of a Republican President and agency independence is positive and significant. In other words, independent agencies may counterbal-

[146] For explanations of how the variables are coded, see Data Appendix, infra.

[147] Cf. Cochran, supra note 10, at 13 (finding no statistically significant relationship between the President's party and the number of Federal Register pages produced per month by federal agencies). But cf. Terry M. Moe, Regulatory Performance and Presidential Administration, 26 Am. J. Pol. Sci. 197, 197 (1982) (finding that regulatory behavior of the NLRB, FTC, and SEC "varies systematically with presidential partisanship"); Valentin Estevez Rios, Liberals, Conservatives and Your Tax Return: Partisan Politics and the Enforcement Activities of the IRS viii (Aug. 2005) (unpublished Ph.D. dissertation, University of Chicago) (available at http://home.uchicago.edu/~vestevez/dissertation.pdf) (concluding that the IRS audits individual returns less frequently and business returns more frequently when the President is a Democrat); supra note 70.

ance commonly perceived regulatory preferences of the President,[148] commencing significantly fewer notice-and-comment rulemakings under President Clinton and more such rulemakings under Republican Presidents. An alternative interpretation, however, is that party control of the White House affects only non-independent agencies.[149]

Timing within a presidential administration also seems relevant, though perhaps in the opposite direction than is first predicted by the "Presidential Control: Crack-of-Dawn Action" Hypothesis. Presidents in their first year are associated with fewer, not more, rulemaking proceedings.[150] There is a significant start-up period for each President, likely because of the lag associated with learning about the administrative state, finding and appointing agency leaders, having those leaders confirmed by the Senate, having confirmed leaders learn about their agencies and the rulemaking process, and other similar tasks.[151] Moreover, Presidents often quickly

[148] See supra note 93.

[149] Coefficients on interaction variables cannot be interpreted as simple unconditional effects on the dependent variable. Their interpretation here depends on values of independence of the agencies (included through the fixed effects of the model rather than as a constitutive term) and partisan control of Congress or the White House. Given the variability in the data, the net effect of the interaction term (between independence of the agency and party control of the White House) and its partisan component (party control of the White House) is consistent with both explanations. In other words, sampling from the data, the net effect could be positive (consistent with the original explanation), zero (consistent with the alternative explanation) or even negative. If the net effect were zero, independence of the agency would not be linked to more NPRMs under a Republican President. Because the interaction term is itself statistically significant, this would mean that the party control of the White House affected only the commencement of rulemaking by non-independent agencies.

[150] Cf. David E. Lewis, Staffing Alone: Unilateral Action and the Politicization of the Executive Office of the President, 1988–2004, 35 Presidential Stud. Q. 496, 506–07 (2005) (finding a decrease in politicization of Executive Office of the President appointments in a President's first year following a change in party, followed by an increase in politicization in subsequent years).

[151] Presidents often "take office woefully uninformed about the job" and need over a year, on average, to learn about their responsibilities. Dom Bonafede, The White House Personnel Office from Roosevelt to Reagan, *in* The In-and-Outers: Presidential Appointees and Transient Government in Washington 30, 54 (G. Calvin Mackenzie ed., 1987); see also Beermann & Marshall, supra note 11, at 1262 (noting that incoming Presidents face many challenges in preparing to take office). Since 1963, Congress has given funding to the incoming President "to establish a transition

impose moratoriums on rulemaking "to assert control over the rulemaking process" as well as freeze or suspend the effective dates of rules finalized right before they took office.[152] To enact policy changes in their first year, Presidents may turn to more unilateral devices, such as Executive Orders, instead of using the rulemaking process.[153] Interestingly, Presidents do not make up for this delay at the end of their terms: they do not seem to start more rulemakings in their final year.[154]

team and to bring potential appointees to Washington for interviews and general vetting." Id. at 1264.

[152] Curtis W. Copeland, Cong. Res. Serv., Report for Congress RL32356, Federal Regulatory Reform: An Overview 22 (2004). Presidents Reagan, Clinton, and George W. Bush instituted some form of rulemaking moratorium at the start of their administrations. Id. at 22–23. President George H.W. Bush implemented a ninety-day regulatory moratorium on non-independent agencies on January 28, 1992, which continued through various extensions until the inauguration of President Clinton. See Furlong, supra note 10, at 256–57. This moratorium seems to have had little impact. See id. at 260–61. In February 1995, the House of Representatives passed legislation imposing a regulatory moratorium. Regulatory Transition Act of 1995, H.R. 450, 104th Cong. § 3 (1995). The Senate, under pressure from the Clinton administration and Democrats, did not act. See Skrzycki, supra note 10, at 153–55; Sunstein, supra note 73, at 273–74. Presidents Reagan and George W. Bush also postponed the effective dates of rules issued by their predecessors that had not yet taken effect. See Memorandum of January 29, 1981: Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981) (Reagan order delaying effective dates of Carter administration rules); Card Memorandum, supra note 2 (George W. Bush order postponing the effective date of Clinton administration regulations for 60 days). Although President Clinton implemented a moratorium on new regulation (unless a Clinton appointee approved), he did not suspend the effective dates of already published regulations. Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12,291, 58 Fed. Reg. 6074 (Jan. 25, 1993). Even if party control of the White House does not change, new administrations still often reexamine regulatory activities of the outgoing administration. See Cass Peterson, Lujan to Review Reagan's Last-Minute Regulatory Decisions, Wash. Post, Feb. 4, 1989, at A4. Professor Rossi has also examined the use of "rulemaking settlements" by incoming administrations to repeal or weaken existing regulations through consent decrees with private parties. See Rossi, supra note 11, at 1039–43.

[153] President Clinton issued more executive orders in his first year than any other year of his administration. Likewise, President George W. Bush signed more orders in his first year than in his next six years. Data are available on the National Archives website; see The National Archives, Executive Orders Disposition Tables Index, http://www.archives.gov/federal-register/executive-orders/disposition.html (last visited Mar. 19, 2008); see generally Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power (2001).

[154] But see infra Table 3 and Charts 7–8 (reporting the number of "midnight" rulemakings begun after an election changes control of the White House or Congress but before power actually shifts).

Party control of Congress also shapes agency rulemaking in certain respects. As predicted by the "Congressional Control: Ideology" Hypothesis,[155] the sign of the congressional control variable is negative (Republican control of both chambers of Congress is connected with fewer NPRMs, and Democratic control of both chambers is connected with more NPRMs), but the variable just misses being statistically significant at the five percent level.[156] As with the President's party, there is a relationship between control of Congress and NPRMs by independent agencies. The interaction of a Republican Congress and agency independence is positive and significant. In other words, independent agencies may start more rulemakings when Republicans control Congress and fewer when Democrats are in control; they may thus counterbalance the regulatory preferences of Congress, as well as the President.[157] This finding goes against the "Congressional Dominance" Hypothesis.[158] In addition, agencies issue fewer NPRMs the year after party control shifts in one or both chambers of Congress, the opposite of

[155] But cf. supra note 93 (noting the difficulties associated with the common assumption that Democrats will produce more new rules than Republicans).

[156] But cf. Cochran, supra note 10, at 13 (finding no statistically significant relationship between the percentage of Democrats in Congress and the number of Federal Register pages produced per month by federal agencies).

[157] Cf. supra note 149.

[158] Cf. David Hedge & Renee J. Johnson, The Plot that Failed: The Republican Revolution and Congressional Control of the Bureaucracy, 12 J. Pub. Admin. Res. & Theory 333, 342–46 (2002) (finding that the EEOC and NRC reduced regulation immediately after the Republicans took control of Congress in 1995 but that regulatory actions increased several years later); Keith S. Brown & Adam Candeub, Independent Agencies and the Unitary Executive 1 (Michigan State University College of Law Legal Studies Research Paper No. 06-04), available at: http://ssrn.com/abstract=1100125 (determining that FCC commissioners "pursue individual agenda[s], not the President's or Congress's as an institution"); but cf. Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 592 (1984) ("[A]s a former FTC Chairman recently remarked, the independent agencies 'have no lifeline to the White House. [They] are naked before Congress, without protection there,' because of the President's choice not to risk the political cost that assertion of his interest would entail."); Weingast & Moran, supra note 68, at 792 (finding that "the FTC [an independent agency] is remarkably sensitive to changes in the composition of its oversight committee and in its budget caseload reveals substantial congressional influence"); Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 1 (Stanford Law School Working Paper, 2007), available at: http://dho.stanford.edu/research/partisan.pdf (concluding that congressional "partisan requirements [on the appointment of FCC commissioners] may have considerable effects on substantive policy outcomes").

what the "Congressional Control: Crack-of-Dawn" Hypothesis predicts.

The regression results do not strongly support the "Divided Government" Hypothesis, which predicts less rulemaking under divided government.[159] The coefficient on the United Government variable is of the expected direction (that is, a positive relationship between united government and NPRMs) but is not statistically significant in this specification; it is significant and of the expected direction in other model specifications.[160]

Overall, the magnitudes of many of the coefficients (which, when exponentiated, roughly approximate percentage changes in the dependent variable) are small, suggesting that political and bureaucratic momentum stories are both at work in agency rulemaking. Also, the time period of the data includes only a handful of political transitions in the White House and Congress. The first part of this Section still yields two important findings. First, independent agencies may work against regulatory preferences of the President and Congress, starting more rulemakings when there was a Republican President or Republican Congress and fewer when there was a Democratic President or Congress. Second, rather than capitalizing quickly on their electoral mandates, Presidents generally started fewer, not more, rules in the first year of their terms than in later years. This empirical work thus marks a first step in analyzing notice-and-comment rulemaking.[161]

[159] Cf. Gersen & O'Connell, supra note 101, at 945–49, 989 (finding that if party control of Congress changes after an NPRM is issued, the rulemaking process takes longer to complete, if it is not withdrawn, and is withdrawn sooner than other processes that end in withdrawal without a change in congressional control).

[160] Due to collinearity, individual dummy variables for each President cannot be included with the Presidential Party variable and the interaction variable between Independent Agency and Presidential Party. In a regression with presidential dummy variables (dropping the one for President Clinton) instead of those two variables, United Government becomes significant in the expected direction (in other words, united government is correlated with more NPRMs). The other three statistically significant effects remain: the first year of a President's term is negatively related to the commencement of rulemaking, the interaction between a Republican Congress and agency independence may be positively related to the start of rulemaking, and a change in party control of one or both chambers of Congress from the preceding year is negatively related to the issuance of NPRMs. Of the Presidential dummy variables, only the positive estimate for President George H.W. Bush is statistically significant.

[161] Additional research should examine these hypotheses with different measures of rulemaking activity—for instance, its content (regulatory or deregulatory) and its

The second part of this Section examines a subset of NPRMs—those issued in the months immediately preceding a political transition. I evaluate the "Midnight Action" Hypotheses by devoting some attention to the commencement of rulemaking activity after an election changes power in Congress or the White House but before control actually shifts—the period between November 1 and January 19 in an election year.[162] The next Section investigates the completion of regulatory activity in that same period. Table 2 displays the number of NPRMs issued by all agencies in the database between the beginning of November and the end of January in election years in which either a new President was elected or party control of Congress shifted.[163] Charts 7 and 8 display the results of

length. The analysis here does not distinguish rulemakings related to previous regulations (for instance, a rescission of an earlier rule) from rulemakings less connected to past regulations (for instance, the creation of a new regulatory or deregulatory program). Do most rulemakings in the first year after a political transition involve rescissions or modifications of existing regulations? Or are most rulemakings creating new regulatory structures? The analysis here also focuses only on the start of the rulemaking process. How does the number of comment periods (for example, reopening of comments due to a change in the rulemaking proposal) vary across time and agencies? How does the length of the rulemaking process from start to finish vary across time and agencies? Do the structure (for example, independence from President), resources (for example, agency budgets), availability of other regulatory tools (for example, enforcement actions), or perceived ideological preferences of the agency correlate with particular attributes of the rulemaking process? Cf. Lewis, supra note 22 (examining relationship between political factors and agency design); Joshua D. Clinton & David E. Lewis, Expert Opinion, Agency Characteristics, and Agency Preferences, Pol. Analysis), available at http://www.princeton.edu/~clinton/Published/CL_PA2007.pdf (using survey of experts to place agencies on conservative-liberal metric). I have begun some of this research. See Gersen & O'Connell, supra note 101. Future research should also consider different regulatory regimes. See Charles R. Shipan, Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence, 98 Am. Pol. Sci. Rev. 467 (2004). As Professor Shipan finds, "whether an agency is affected by the legislature, and by a committee within the legislature, depends on the nature of the regime—that is, the configuration of these actors' preferences." Id. at 470. Sometimes, political actors will matter; at other times, they will not. A regression of a particular regulatory output on political variables over a time period containing different regulatory regimes may show that political actors are not so important, when in fact they are critical under particular conditions.

[162] Election Day is the first Tuesday after the first Monday of November. 3 U.S.C. § 1 (2000). Presidents are inaugurated on January 20. Members of Congress take office on January 3. Thus, the lag is slightly shorter for changes in Congress than for changes in the White House. See U.S. Const. amend. XX; see also Beermann & Marshall, supra note 11, at 1260.

[163] Technically, the counts should be from Election Day to the date of the political transition. See supra note 162. These results presented, however, would not change in

Table 2 for a subset of the agencies with the most midnight NPRM activity.[164]

Through Chi-Square tests, which analyze differences among observed frequencies of particular events, the null hypothesis that there are equal numbers of NPRMs across these election years is rejected with statistical significance at or over 95 percent for the following agencies from Charts 7 and 8: the USDA, DOI, DOT, EPA, and IRS.[165] In other words, some administrations engage in significantly more or less midnight rulemaking.

Most striking are the midnight NPRMs by agencies under President George H.W. Bush. After President Bush lost reelection but before he left office, the USDA, DOI, and DOT issued significantly more NPRMs than during any other political transition period. This pattern has an intuitive explanation. President Bush presumably hoped and expected to have a second term as President to push his (de)regulatory priorities. When he lost, it appears that he tried to push those priorities through before President Clinton took office. Indeed, these NPRMs were issued despite a regulatory moratorium that President Bush had put in place.[166] Also telling are the midnight NPRMs issued by the EPA after the 1994 mid-term elections. The EPA during the Clinton administration may have begun those rulemakings to gain some power against the new Republican congressional majorities.

any meaningful way. The counts for the end of President Clinton's administration may be lower than they would have been if it were clear on Election Day that the next President would be a Republican. Until the Supreme Court ruled in *Bush v. Gore*, 531 U.S. 98 (2000), in early December, agencies may have expected the next President to be a Democrat.

[164] Midnight regulation can be defined in a variety of ways. It could include the commencement of rulemaking in the November to January period or the completion of rulemaking that was typically started before the final three months of an administration. Although the second category is more frequently discussed and is harder to undo, the first category still sets agency agendas before an important political transition. This Article examines both categories.

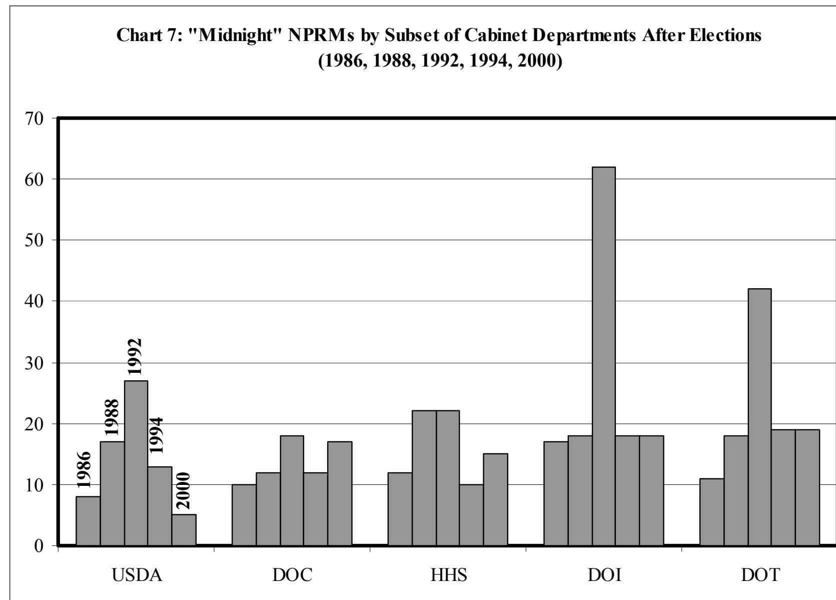
[165] The Chi-Square results for each agency are listed as follows (Agency (χ^2 value, degrees of freedom, significance level)): USDA (21.143, 4, 0.000); DOC (3.536, 4, 0.472); HHS (7.704, 4, 0.103); DOI (58.917, 4, 0.000); DOT (25.450, 4, 0.000); FCC (2.478, 4, 0.649); SEC (7.091, 4, 0.131); EPA (10.977, 4, 0.027); IRS (22.371, 4, 0.000).

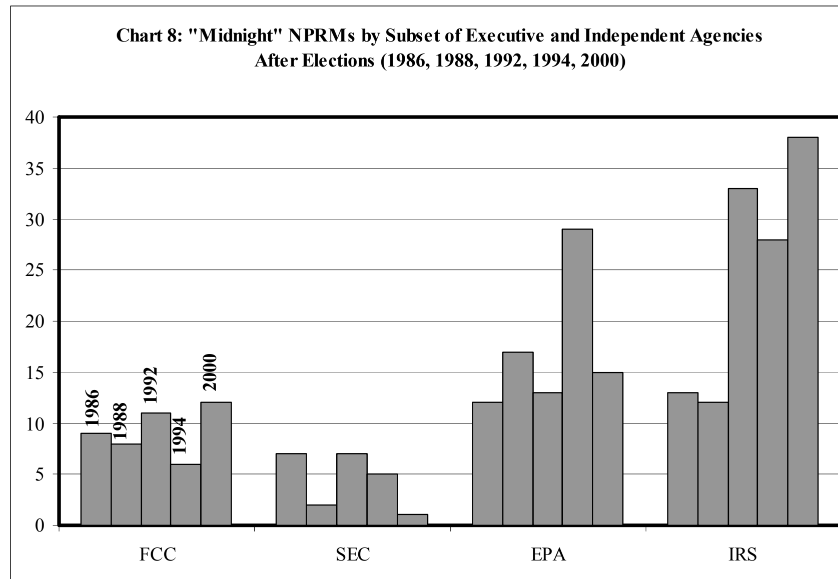
[166] See supra note 152. To be certain, these NPRMs could have been deregulatory in nature, and not been at odds with the moratorium.

Table 3: "Midnight" Notices of Proposed Rulemaking after 1986, 1988, 1993, 1994, and 2000 Transition Elections, by Agency

	1986	1988	1992	1994	2000
Cabinet					
USDA	8	17	27	13	5
DOC	10	12	18	12	17
DOD	6	5	3	10	2
Education	1	10	3	2	0
DOE	2	6	1	4	2
HHS	12	22	22	10	15
DHS	0	0	0	0	8
HUD	2	7	3	2	3
DOI	17	18	62	18	18
DOJ	3	4	4	4	8
DOL	5	11	5	8	2
State	0	0	1	0	2
DOT	11	18	42	19	19
Treasury	4	4	12	13	10
VA	2	7	5	1	3
Executive					
EPA	12	17	13	29	15
FEMA	1	3	0	2	1
GSA	0	7	1	4	1
IRS	13	12	33	28	38
NARA	0	2	1	0	0
NASA	0	3	1	2	1
OMB	0	0	1	1	0
OPM	5	1	3	8	3
SBA	0	2	1	2	2
USAID	0	2	0	2	1
Independent					
CPSC	0	3	0	1	1
FCA	1	4	2	1	0
FCC	9	8	11	6	12
FDIC	0	1	3	1	1
FERC	0	0	3	4	0
FHFB	0	0	1	0	1
FHLBB	0	4	0	0	0
FMC	1	2	2	2	0

	1986	1988	1992	1994	2000
ICC	0	0	0	1	0
NCUA	1	0	4	0	1
NRC	2	0	1	2	1
OFHEO	0	0	0	0	3
OFTC	0	2	3	1	1
PBGC	1	0	2	0	2
SEC	7	2	7	5	1
SSA	0	1	2	1	3





Source for Table 3, Chart 7 and Chart 8: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for each agency with any NPRM with an actual date between November 1, 1986 and January 19, 1987 (Senate changed from Republican to Democratic control), November 1, 1988 and January 19, 1989 (White House changed from President Reagan to President George H.W. Bush), November 1, 1992 and January 19, 1993 (White House changed from President George H.W. Bush to President Clinton), November 1, 1994 and January 19, 1995 (House and Senate changed from Democratic to Republican Control), and November 1, 2000 and January 19, 2001 (White House changed from President Clinton to President George W. Bush). Agencies listed in Table 1 with no such NPRMs are not included here.

These results do not directly test the "Presidential Control: Midnight Action" Hypothesis or "Congressional Control: Midnight Action" Hypothesis, which predict that agencies try to complete rulemakings before an outgoing President leaves office or a congressional majority loses power. To be certain, to complete a regulatory action, agencies have to start such an action. But to test the Hypotheses, as applied to the commencement of rulemaking, we need to compare midnight rulemakings with final-quarter rulemakings in non-election years. The main finding, instead, says more about individual Presidents. President Clinton may not have been the biggest midnight regulator, if the term includes the commencement of rulemaking activity. As Table 3 shows, agencies under President George H.W. Bush issued nearly 50 percent more

NPRMs in the final quarter of his term than did President Clinton, and nearly 40 percent more than did President Reagan.

D. Completion of Rulemakings

NPRMs, of course, just start the traditional rulemaking process. This Section turns to the completion of regulatory activity. Agency decisions to finish rulemakings also provide an opportunity to analyze the influence of various political pressures and institutional structures on agency action.

Chart 9 shows the trends in the completion of regulatory activity for cabinet departments, executive agencies, and independent agencies in the final quarter of each year (November 1 to January 19), from 1983 to 2002.[167] For both of the Republican Presidents in the data, cabinet departments completed more regulatory actions in the administration's final year than in any other year of the same administration.[168] But while commentators have noted that President Clinton engaged in considerable midnight regulatory activity,[169] Chart 9 shows that his cabinet departments finished slightly more regulatory activity after the Republicans won the 1994 midterm elections (but before the Republicans gained control of Congress in January 1995) than during any other final quarter of his administration, including the last quarter before President George W. Bush took office.[170]

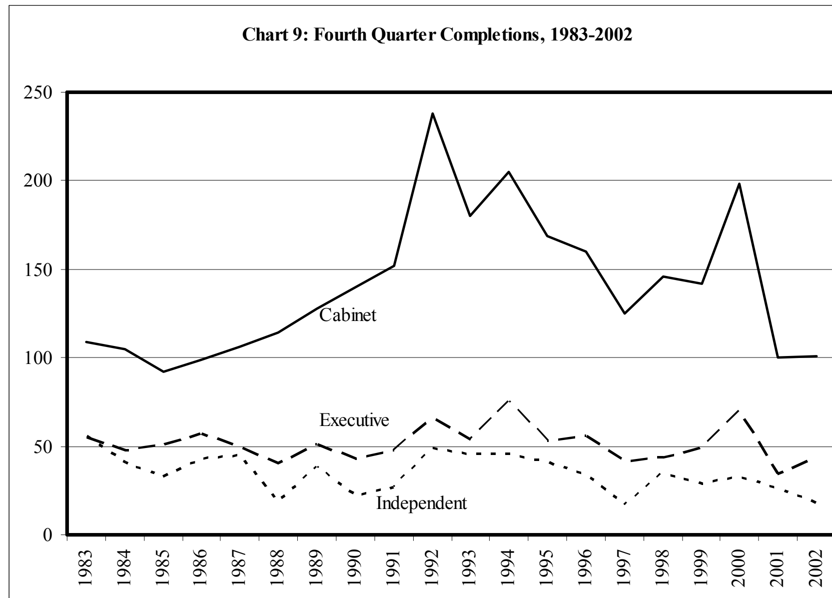
[167] See supra note 163. Completions consist of direct final rulemaking, interim final rulemaking, promulgation of rules after notice-and-comment rulemaking, and other "final action" (a category in the Unified Agenda). See Data Appendix, infra.

[168] President Reagan's midnight activities are particularly interesting because party control of the White House did not change when he left office. Commentators have remarked that the Reagan administration "scrambl[ed] to put on the books regulations that were too hot to handle during the campaign, hoping to minimize the divisive controversy George Bush might otherwise face as he launch[ed] his vision of a 'kindler, gentler' nation on January 20." Here Come Ronald Reagan's "Midnight" Regs, U.S. News & World Rep., Nov. 28, 1988, at 11.

[169] See, e.g., Beermann, supra note 11, at 960–69; Mendelson, supra note 11, at 565–66.

[170] President Clinton's end-of-term national monument designations under the Antiquities Act of 1906 do, however, appear unique, when compared to other recent Presidents. See Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2000); National Park Service History: Antiquities Act of 1906, http://www.cr.nps.gov/history/hisnps/NPSHistory/antiq.htm (last visited March 20, 2008) (listing presidential monument designations, seven of which came in President Clinton's last week in office, including one on his final day); see also Beermann, supra note 11, at 973–77; Eric Pianin, White House Won't Fight

By contrast, independent agencies do not seem to complete more regulatory activity in the final quarter of a President's administration, except under President George H.W. Bush. Executive agencies show small increases in completed regulatory activity (from the preceding year) before a President leaves office, but those jumps are narrow and do not demonstrate a flurry of activity as compared to the entire period a President serves.



Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for agencies listed in Table 1 with a completed regulatory action with an actual date between 1983 and 2002. Agencies are categorized as described in Table 1 and the Data Appendix. Completed actions are defined in the Data Appendix.

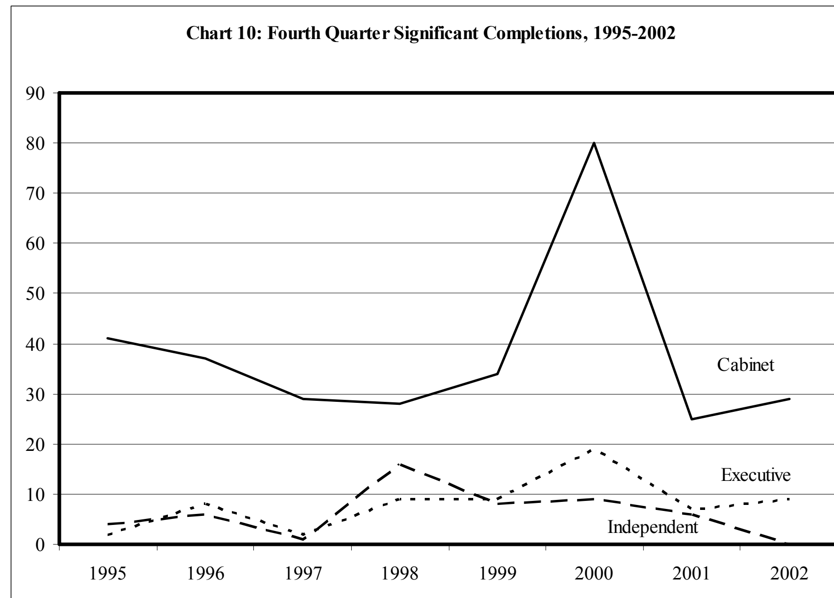
These completion effects are heightened for significant rulemaking. Since 1995, the Unified Agenda has collected consistent data on the importance of reported regulatory actions. Significant or major actions are those that are likely to have an effect of at least

Monument Designations, Wash. Post, Feb. 21, 2001, at A7. President Clinton's clemency activity at the end of his administration also was roundly criticized as unusual. But most Presidents issue considerable "last-minute" pardons. See P.S. Ruckman, Jr., "Last-Minute" Pardon Scandals: Fact and Fiction (paper prepared for delivery at the Annual Meeting of the Midwest Political Science Association, Apr. 15-18, 2004), http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf.

$100 million on the economy or have other considerable effects.[171] Because the database includes the significance of regulatory actions only starting in the mid-1990s, analysis is restricted to President Clinton's last term and the start of President George W. Bush's first term.

Chart 10 displays the trends in the completion of significant regulatory activity in the last quarter of each year (November 1 to January 19), from 1995 to 2002. It shows that cabinet departments and executive agencies, as groups, completed more significant regulations in the final three months of President Clinton's administration than in any other last quarter in the data; independent agencies, as a group, completed the most such rulemakings in the final quarter of 1998. When the data are broken down for the same agencies in Charts 5 and 6, only the USDA, HHS, DOI, and EPA finished more significant actions at the very end of 2000 than in other time periods. In late 2000, the DOT and IRS had a relative increase from the year before, but churned out more significant actions in other years. The DOC, FCC, NRC, and SEC did not complete more major actions at the end of 2000 than in the previous year.

[171] See supra note 8.



Source: Unified Agenda Reports (Spring 1995-Fall 2003). Counts of unique RINs for agencies listed in Table 1 with a significant completed regulatory action with an actual date between 1995 and 2002. Agencies are categorized as described in Table 1 and the Data Appendix. Completed actions and significant actions are defined in the Data Appendix.

As with initiation of rulemakings, regression analysis allows analysis of the relationship between multiple factors and the completion of regulatory actions by the ten agencies in Charts 5 and 6. Table 4 reports regression results for regulatory completions (significant and non-significant) in the final quarter of each year (November 1 to January 19), between 1983 and 2002.[172]

[172] Like the regression presented in Table 2, Table 4 reports the results of a Poisson fixed-effects regression with robust standard errors. There is no considerable collinearity among the explanatory variables (correlation coefficient greater than 0.60) other than between the variables for United Government and Midnight Congress (correlation coefficient: 0.69). From Chart 9, there does not appear to be a time trend in completions. I ran some preliminary regressions with a lagged dependent variable as an explanatory variable (that is, the value of the dependent variable in the preceding year). The significant relationships in Table 4 (between the President's Party and regulatory completions and between the President's Last Year and regulatory completions) remain. No other variable becomes significant. The lagged dependent variable is positive but not significant. See also supra notes 143, 145.

Table 4: Completion of Regulatory Actions in the Last Quarter by Ten Agencies

Variable	*Coefficient (Standard Error)*
President's Party (R)	-0.181 (0.077)*
Congress's Party (R)	-0.102 (0.074)
President's Last Year	0.353 (0.097)**
Indep.*Congress's Party (R)	-0.052 (0.091)
Indep.*President's Party (R)	-0.023 (0.102)
United Government	0.073 (0.159)
Midnight Congress	0.086 (0.225)
Midnight Senate	0.025 (0.081)
n=200	
* p < .05, ** p < .01	
Fixed-effects Poisson model with robust standard errors; 10 groups (USDA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, SEC); 1983-2002.	

Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for the USDA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, and SEC with a completed action with an actual date in the final quarter of the year, from 1983 to 2002.[173]

As with the commencement of rulemaking, aspects of political control seem to influence the completion of regulatory activity.[174] The President's party is significantly related to regulatory completions in the final quarter of each year, as predicted by the "Presidential Control: Ideology" Hypothesis. The estimated coefficient

[173] For explanations of how the variables are coded, see Data Appendix, infra.

[174] Charts 9-10 and Table 4 examine regulatory completions in the fourth quarter of each year, from November 1 to January 19. The fourth quarter is the most relevant period for examining midnight regulatory activity between an election and any change of power in Congress or the White House. The results of the Poisson fixed-effects model with the explanatory variables in Table 4 change somewhat when the dependent variable is changed to regulatory completions for the entire year. The President's Party and President's Last Year variables keep their signs and significance. But other variables in Table 4 become significant. Party Control of Congress becomes significant in the expected direction (that is, Republican control of Congress is linked to fewer regulatory completions) as does the Midnight Congress variable for 1994 (that is, agencies finish more regulatory actions in 1994). The interaction of a Republican President and Agency Independence is positive and significant; this interaction variable is also positive and significant for the commencement of rulemakings. See Table 2. Finally, contrary to the "Divided Government" Hypothesis, the United Government variable is negative and significant (that is, fewer actions are completed in years of united government).

shows that agencies completed more rulemakings during President Clinton's term than during the administrations of Republican Presidents, all else held constant.[175] This variable was not significant for the initiation of rulemakings in Table 2. Presidents seem to push harder for final actions than for preliminary actions. Timing within a presidential administration, no matter the party affiliation of the President, also appears to function as expected under the "Presidential Control: Midnight Action" Hypothesis:, agencies complete more rulemaking actions in the final three months of a President's administration than in any other year's final quarter.[176]

Party control of Congress, however, is not statistically related to the completion of rulemaking during the fourth quarter of each year. This finding cuts against the "Congressional Control: Ideology" Hypothesis, which predicts that Republican control of Congress would be negatively correlated with completed actions. The last quarter of 1994, immediately before the Republicans took control of Congress in January 1995, has the expected positive sign under the "Congressional Control: Midnight Action" Hypothesis, which predicts that agencies complete more rulemakings before a party change in Congress, but the variable is not significant. Unlike the regression results for the initiation of rulemaking, the interaction of party control of the White House or Congress and the independence of an agency is not significant.[177]

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[175] Due to collinearity, individual presidential dummy variables cannot be included with the Presidential Party variable and the interaction variable between Independent Agency and Presidential Party. In a regression with presidential dummy variables (dropping the one for President Clinton) instead of those two variables, the last year of a President's administration remains significant. The coefficients for the United Government variable, the Congress's Party variable, and the dummy variable for President George H.W. Bush are positive and significant.

[176] This effect would presumably be larger if party control shifts in the White House after the transition. Cf. Howell & Mayer, supra note 10, at 541–42 (finding no relationship between regulatory activity, as measured by Federal Register pages, before political transitions where political control does not shift from one party to the other, but a positive relationship when party control does shift).

[177] One variable missing from this regression model is the amount of rulemaking that had previously commenced. Presumably, an agency will complete more actions in a given period if it begins that period with more previously started actions. There are aggregation concerns if the level of NPRMs in the previous year is included in the regression, however. When the number of an agency's NPRMs in the previous year is included in the model presented in Table 4, it is positively related to completions in the subsequent year; the coefficient on the President's Party variable remains nega-

As with NPRMs, the magnitudes of most of the coefficients related to regulatory completions are modest, again suggesting that agency rulemaking is influenced both by political change (of which the data include only several transitions) and internal stability.[178] The first part of this Section produces one main finding, which accords with commonly held intuition. Agencies typically completed more rules in the final quarter of each presidential administration than in the final quarter of other years. But some agencies, such as the group of cabinet departments after the 1994 election, also rushed to finish regulations before party control in Congress shifted.[179]

Some attention should also be paid to the duration of the rulemaking process. The average duration of completed rulemakings, both significant and more routine, for the ten agencies in Charts 5 and 6 ranged from 243.74 days for the DOC to 760.93 days for the

tive and significant, and the coefficient on the President's Last Year variable remains positive and significant. This model suggests that the midnight regulation effect may begin further back than a President's final year—that is, agencies may commence more regulatory actions before the final year of the President's administration in anticipation of a rush to complete rulemakings during the final year.

[178] The magnitude of the coefficient of the President's Last Year variable, however, is much higher.

[179] Like the initiation of rulemaking, see supra note 161, further research is called for here as well. That research should examine different measures of rulemaking activity, such as content, length, and durability. The analysis here does not distinguish completed regulatory actions that overturn previous regulatory policies from actions that establish new regulatory or deregulatory programs, which leads to the question whether most completed rulemakings in the last year before a political transition involve the creation of new regulatory structures. The analysis also focuses only on the end of the rulemaking process, leading to a number of important questions: Do regulatory actions that are completed right before a political transition differ in particular ways from actions completed further from such a transition? How many actions that are completed in the final quarter were also started in the final quarter or soon before? How long do agencies take between the end of the comment period and the promulgation of the final rule? How does that period vary by agency and by President? If the period is very short, public participation in rulemaking appears to be more of a formality than substantive. Future research should thus ask how the length of the rulemaking process (from start to finish) varies. The analysis here also does not consider the durability of these actions. That is, do rules completed right before a transition face more judicial challenges? Are they less likely to survive judicial challenges? Are they more likely to be rescinded? Other scholars and I have examined the length of the rulemaking process in other research. See supra note 101.

HHS.[180] All agencies but the HHS completed rulemakings started by an NPRM in less than two years, on average. Many factors likely influence the length of the regulatory process. In other work, using more complex duration analysis with competing risks hazard models, Professor Jacob Gersen and I have analyzed some of these factors. We found that deadlines appear to shorten the rulemaking process. Changes in political control of the White House or Congress after the NPRM is issued make the regulatory process longer. In addition, significant rulemakings take longer.[181]

These results on the length of the rulemaking process provide additional evidence regarding the "Ossification" Hypothesis. All but one of the ten main agencies studied here took under two years, on average, to go from an NPRM to a final rule or action.[182] I explore this issue in more detail in Part III. The next Section considers the interruption of the rulemaking process, during and outside political transitions.

E. Withdrawal of Rulemakings

A proposed but unfinished rule usually can be withdrawn for any reason, without an opportunity for comment on the with-

[180] For this analysis, I looked at reports from the agencies in Charts 5 and 6 to the Unified Agenda from Spring 1983 to Fall 2003 and kept RINs only if they had an NPRM with an actual date reported. A completed rulemaking was defined as a final rule, final action, interim final rule, or direct final rule. The average duration for each agency was as follows (Agency (average duration, standard error)): USDA (388.30 days, 13.80 days); DOC (243.74 days, 11.74 days); HHS (760.93 days, 25.54 days); DOI (448.90 days, 8.99 days); DOT (555.39 days, 15.83 days); EPA (622.42 days, 17.91 days); IRS (714.13 days; 26.52 days); FCC (719.20 days, 44.72 days); NRC (465.97 days, 38.93 days); SEC (331.20 days; 17.42 days).

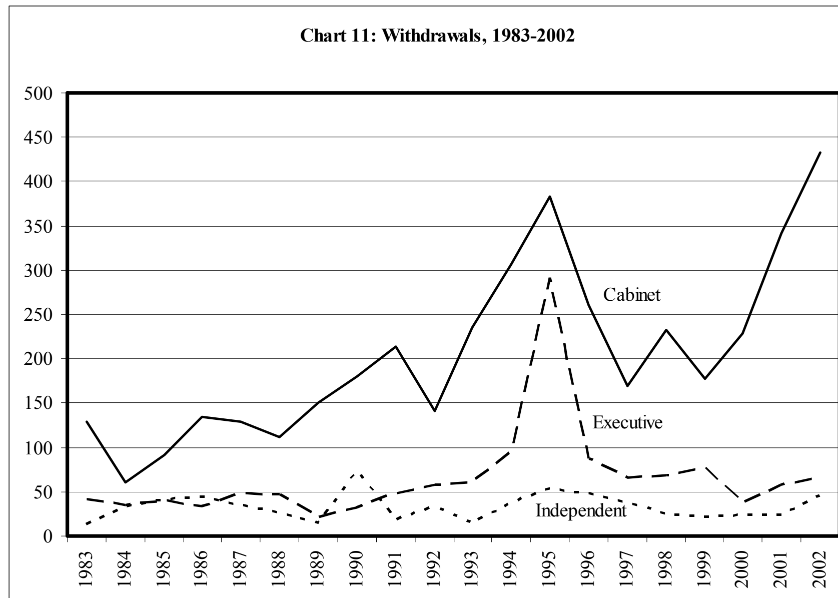
[181] Gersen & O'Connell, supra note 101, at 945–49, 989.

[182] Cf. U.S. Gen. Accounting Office, GAO-01-821, Aviation Rulemaking: Further Reform Is Needed to Address Long-Standing Problems 45 (2001) (examining average duration of significant rulemaking from fiscal year 1995 through fiscal year 2000 by the Animal and Plant Health Inspection Service ("APHIS"), EPA, FDA, and NHTSA and finding that "except for APHIS, which finalized all of its significant rules within 2 years of the close of the public comment period, agencies generally finalized between two-thirds and three-fourths of their significant rules within 24 months of the close of the public comment period."); Kerwin & Furlong, supra note 10, at 122–23, 134 (finding average duration for rules completed by the EPA between 1986 and 1989 to be 523 days); but cf. Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L.J. 1255, 1283–84 (1997) (noting that the EPA rules studied, some of which were preceded by negotiated rulemaking, took approximately three years to complete).

drawal. By contrast, a completed legislative rule typically can be rescinded only after notice and comment.[183] Withdrawals of uncompleted rules thus create another area for investigation of the role of political transitions on agency action.

Chart 11 shows trends in withdrawals of uncompleted regulatory activity for cabinet departments, executive agencies, and independent agencies from 1983 to 2002. The highest number of withdrawals by cabinet departments occurred in 1995, 2001, and 2002. The largest number by executive agencies took place in 1995, mostly created by IRS regulatory terminations. These observations are consistent with the "Presidential Control: Crack-of-Dawn" and "Congressional Control: Crack-of-Dawn" Hypotheses, which predict that, after a political transition, agencies withdraw uncompleted rulemakings started under a previous administration or Congress. Both of the years in which withdrawals spiked involved political transitions: party control shifted from the Democrats to the Republicans in Congress in 1995 and in the White House in 2001.

[183] See supra notes 55–57 and accompanying text.



Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for agencies listed in Table 1 with a withdrawal action with an actual date between 1983 and 2002. Agencies are categorized as described in Table 1 and the Data Appendix. Withdrawals are defined in the Data Appendix.

Withdrawal data at the individual agency level are quite noisy. Among the ten agencies in Charts 5 and 6, the EPA and IRS withdrew the highest number of their regulatory actions in 1995; the DOI terminated the greatest number of regulations in 2001. Regression analysis is needed to consider multiple potential explanations for withdrawals of rules. Accordingly, Table 5 reports regression results for the withdrawal of regulatory activities (significant and non-significant) between 1983 and 2002 for these ten agencies.[184]

[184] As in Tables 2 and 4 above, the regression reported in Table 5 is a Poisson fixed-effects regression with robust standard errors. There is no considerable collinearity among the explanatory variables (correlation coefficient greater than 0.60) other than between the variables for the President's First Year and Party Change in the White House (correlation coefficient: 0.79). From Chart 11, there does appear to be a time trend in withdrawals by cabinet departments. I ran some preliminary regressions with a lagged dependent variable as an explanatory variable (that is, the value of the dependent variable in the preceding year). The results change somewhat; the United Government variable is positive and significant, and the Congressional Change variable is barely no longer significant. The lagged dependent variable is positive but is

Table 5: Withdrawal of Regulations by Ten Agencies

Variable	*Coefficient (Standard Error)*
President's Party (R)	-0.033 (0.163)
Congress's Party (R)	0.400 (0.198)*
President's First Year	0.137 (0.324)
President's Last Year	0.012 (0.142)
Indep.*Congress's Party (R)	0.024 (0.078)
Indep.*President's Party (R)	0.285 (0.114)*
United Government	0.844 (0.503)
Party Change in Congress	0.677 (0.343)*
Party Change in White House	-0.217 (0.639)
n=200	
* p < .05, ** p < .01	
Fixed-effects Poisson model with robust standard errors; 10 groups (USDA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, SEC); 1983-2002.	

Source: Unified Agenda Reports (Spring 1983-Fall 2003). Counts of unique RINs for the USDA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, and SEC with a withdrawal action with an actual date per year, from 1983 to 2002.[185]

As suggested by Chart 11, the 1994 election seemed to be an important factor in rulemaking withdrawals. Any change in party control of Congress in the preceding year is significantly related to more withdrawals, supporting the "Congressional Control: Crack of Dawn" Hypothesis. In addition, Republican control of the House and Senate is linked to significantly more withdrawals.

Timing within a presidential administration has the expected sign in the regression model as predicted by the Presidential Control: Crack-of-Dawn" Hypothesis (that is, the first year has more withdrawals) but is not statistically significant. Agency structure also interacts in interesting ways with withdrawals of rulemakings.

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not significant. The other significant results do not change. See also supra notes 143, 145. Due to collinearity, individual presidential dummy variables cannot be included with the Presidential Party variable and the interaction variable between Independent Agency and Presidential Party. In a regression with presidential dummy variables (dropping the one for President Clinton) instead of those two variables, the two significant relationships in Table 5 are no longer significant (but barely so). The coefficients for the United Government variable and the dummy variable for President George W. Bush are positive and significant.

[185] For explanations of how the variables are coded, see Data Appendix, infra.

The interaction of a Republican President and agency independence is positive and significant. In other words, independent agencies under President Clinton may have withdrawn significantly fewer rulemakings, all else equal.[186] In sum, this Section yields one main finding. Many agencies do withdraw uncompleted regulations after major political transitions. Certain agencies withdrew more proposed rules after the 1994 political transition in Congress than after a new President took office.[187]

The next Part discusses some of the implications of the empirical work presented here for discussions about regulatory ossification, judicial deference, political control, and political transitions.

III. NORMATIVE AND DOCTRINAL IMPLICATIONS OF EMPIRICAL INVESTIGATION

To assess the implications, mainly normative and doctrinal, of the Article's empirical work, this Part proceeds in three sections. Section A, which directly engages the regulatory ossification and judicial deference discussions from Section I.C, addresses an agency's choice to issue a rule. It primarily looks at the frequency and duration of agency rulemaking and argues that agency rulemaking does not appear greatly ossified. It also lays out some of the strategic considerations facing an agency that wants its rulemaking to endure.

Section B, which tackles the political control and political transition debates from Section I.C, concentrates on external pressures on agencies from the White House and Congress. It examines what qualifies as a political transition and, in particular, urges legal scholars and the courts to pay more heed to congressional transi-

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[186] Cf. supra note 149 and accompanying text.

[187] As with previous Sections, additional research should examine these and other hypotheses with different measures of rulemaking activity—for instance, its content and its length. A number of questions come to mind: Are withdrawals after political transitions more likely to be of significant or nonsignificant regulatory actions? For withdrawn regulations, how long after the start of rulemaking did the withdrawal happen? Is a regulation more likely to be withdrawn if it is started earlier or later within a presidential administration? I have conducted some of this research. See Gersen & O'Connell, supra note 101, at 945–49, 989 (finding that the rulemaking process is shorter for ultimate withdrawals if the party in control of the White House or Congress changes after the NPRM is issued than if party control does not change in either branch).

tions. It also addresses policy reform proposals to stem midnight and crack-of-dawn regulatory actions.

Section C, which is both more preliminary and more ambitious, sketches some ideas for how this empirical work might shape theories of delegation and deference to agencies more generally. It suggests that congressional influence may ameliorate concerns underlying the nondelegation doctrine. It also contends that judicial theories of deference could be revised to better comport with how agencies actually behave.

A. Cost-Benefit Analysis of Rulemaking

Rulemaking has costs and benefits. We normally think of a rule's costs and benefits to society; indeed, the executive orders governing regulatory review target net social benefits.[188] But this Article has concentrated instead on a rule's costs and benefits to the regulating agency. These costs are central to the explanations for regulatory ossification of the administrative state.[189] The benefits are central to the explanations for judicial deference to agency action.[190]

If costs to rulemaking were as high as feared, agencies presumably would engage in little notice-and-comment rulemaking and what rulemaking they did undertake would take at least several years to complete.[191] From 1983 to 2002, federal agencies, however, commenced and completed substantial notice-and-comment rulemaking.[192] From 1983 to 2000 and in 2002 federal agencies issued more than 690 official NPRMs each year; from 1995 to 2002, they announced more than 120 significant NPRMs each year.[193] In addition, the average duration of completed rulemakings for nine of the ten agencies used in this Article's regression analyses was under two years.[194] These empirical findings suggest that the administrative state is not greatly ossified.

[188] Exec. Order No. 12,866, supra note 32.
[189] See supra notes 61–63 and accompanying text.
[190] See supra notes 64–67 and accompanying text.
[191] See McGarity, The Courts, supra note 61, at 533–36, 548; McGarity, Some Thoughts, supra note 61, at 1387–96.
[192] See supra Charts 1, 4, 9-10; supra note 141.
[193] See supra Chart 1; supra note 141.
[194] See supra note 180 and accompanying text.

These findings, of course, are not determinative of the ossification debate. Most importantly, they do not test how costly rulemaking is to agencies. Agencies could still face considerable costs when they undertake rulemaking. We do not know how much rulemaking would occur if agencies faced less scrutiny by the courts (or the OMB) or how much rulemaking is optimal in terms of social welfare. Assuming that more rulemaking would be beneficial, rulemaking is ossified, to some extent. In addition, the generally constant level of rulemaking described here could be squared with the ossification theory if the growing complexity of the administrative state had led to increased rulemaking and canceled out the decrease we would expect from ossification. Finally, the findings do not assess the quality or significance of the rules that agencies do produce. Agencies may be promulgating low-quality rules or rules that slightly modify earlier regulations.

Agency decisions in recent years to turn to rulemaking procedures without prior opportunity for public comment indicate that there are real costs to traditional notice-and-comment rulemaking. Agencies have increasingly used direct and interim final rulemaking,[195] which allow them, in particular circumstances, to promulgate legally binding rules without prior opportunity for public comment.[196] The empirical findings are consistent with the proposition that some agencies use these abbreviated procedures more than their designers intended, in order to avoid scrutiny of controversial actions.

On the other side of the cost-benefit calculation (from the agency's perspective), the benefits to agencies of engaging in traditional notice-and-comment rulemaking may be significantly higher after the Court's 2001 decision in *United States v. Mead Corp*.[197] The empirical results are consistent with agencies issuing more NPRMs in the aftermath of *Mead*, but they are also consistent with other explanations. Considerably more research needs to be done to assess the implications of *Mead* for agency rulemaking. In particular, we would want to examine how *Mead* has shifted the proportion of notice-and-comment rulemaking to other forms of deci-

[195] See supra Chart 2.
[196] See supra notes 36–38 and accompanying text.
[197] 533 U.S. 218 (2001); see supra note 64 and accompanying text.

sionmaking (such as guidance documents) that usually receive less deference from the courts.

This inquiry into the costs and benefits to agencies of rulemaking also raises wider strategic considerations about the timing and form of agency rulemaking. I can only sketch some preliminary thoughts concerning these considerations here. Agencies presumably want at least some of their rules to "stick," likely because of the rules' economic, political, or career benefits. In other words, agencies want their rules not to be withdrawn before final enactment, not to be rescinded after promulgation, not to face hostile OMB or congressional oversight, and not to be struck down by the courts. In deciding how to further this goal of rule longevity, agencies face a number of questions: How should an agency promulgate a rule to maximize its chance for survival? Should an agency engage in notice-and-comment rulemaking or try to use direct final or interim final rulemaking? When in a President's term or congressional session should an agency issue an NPRM? When in the political cycle should an agency complete the rule? What should the content of the rule be and how should the content depend on the rule's timing?[198]

This inquiry is not merely academic; it has real effects for the durability of agency rulemaking. Future empirical research could calculate survival rates for particular types of regulations and institutional structures so that the durability of regulations promulgated in the first year of a presidential administration could be compared against the longevity of rules enacted in the final year. To be certain, the administrative state is a dynamic system. If agencies strategically shift rulemaking practices, political actors and the courts presumably will respond to those changes. Nevertheless, more investigation of even static views of the administrative state could provide needed information for current discussions concerning regulatory ossification, judicial deference, and political control.

[198] For example, because it is generally easier to overturn a newer rule than an older one, an administration might promulgate a bolder version of a rule early in its tenure than it would near its end for fear its successor would overturn the rule.

B. Political Transitions

Agency rulemaking occurs in a complex political and bureaucratic environment that combines both internal and external pressures. This Section addresses external political pressures. Agencies face oversight from multiple sources: the White House, Congress, courts, interest groups, the media, and others.[199] Legal scholars have recently concentrated almost exclusively on the President's role in shaping the administrative state.[200] This Article has investigated pressures on agency rulemaking from the President and Congress, as well as the interaction of the two. These pressures are critical to discussions about political control and political transitions.

1. The Missing Branch of Government

Political transitions consist not only of changes in the White House but changes in Congress as well.[201] After all, elections can shift power in both branches of government.[202] There is a presidential election every four years; all members of the House of Representatives and one-third of Senators face the voters every two years. What counts as a presidential transition? The easiest case, of course, is when the presidency moves from one party to another. A slightly harder but still compelling case is when the presidency transfers from one person to another person within the same party after an election. An even more complex but still straightforward case is when the presidency shifts from one person to another due to death, resignation, or, possibly in the future, impeachment.

What qualifies as a congressional transition? Here, too, there is a range of cases. The simplest example is when control of the House of Representatives and the Senate moves from one party to another. A more complicated scenario is when control of either the

[199] See supra notes 68–72 and accompanying text.

[200] See supra note 73.

[201] There are other, more minor, transitions relevant to agency rulemaking. For instance, there are often transitions in agency leadership within an administration. See, e.g., Thom Shanker & Mark Mazzetti, New Defense Chief Eases Relations Rumsfeld Bruised, N.Y. Times, March 12, 2007, at A6.

[202] Indirectly, of course, elections also shift power in the courts. See, e.g., Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (2005).

House of Representatives or the Senate changes in the November election, but control of the other body does not. As with the White House, control can also shift due to non-electoral reasons.[203] Much more complicated, in my view, is when party control of the House and the Senate does not change but grows stronger or weaker, or stays constant with changes in the actual individuals serving in Congress. As above, all of these cases arguably mark some change in control, even if only in the identity of individuals in a particular party that wields legislative power.

When examining regulatory activities during political transitions, legal scholars uniformly consider only changes in the White House. Professor Jack Beermann's thoughtful examination of the "legality of . . . administrative action in periods of transition" is limited to presidential transitions.[204] Professor Nina Mendelson has investigated attempts by outgoing presidential administrations to embed particular policies or people in the administrative state.[205] Other scholars have evaluated efforts by new presidential administrations to withdraw or suspend regulatory actions promulgated by the outgoing administration.[206] This work is mostly doctrinal or normative, examining such questions as whether midnight or crack-of-dawn actions are illegal or undesirable and what limits, if any, should be placed on agency actions during presidential transitions.[207]

This focus on presidential transitions complements the legal literature's heavy emphasis over the past several decades on the President's involvement in the administrative state more generally.[208] Deservedly classic, widely cited articles by Professors Elena

[203] In May 2001, Vermont Senator James Jeffords announced he would caucus with the Democrats, instead of with the Republicans, shifting power in the Senate. See John Lancaster & Helen Dewar, Jeffords Tips Senate Power: Democrats Prepare to Take Over as Vermont Senator Quits GOP, Wash. Post, May 25, 2001, at A1.

[204] Beermann, supra note 11, at 950.

[205] Mendelson, supra note 11; see also Morriss et al., supra note 11; Rossi, supra note 11.

[206] Jack, supra note 11; Loring & Roth, supra note 9; Sanford, supra note 11.

[207] But cf. Loring & Roth, supra note 9 (providing empirical study as well as normative and doctrinal analysis).

[208] See supra note 73 and accompanying text; see also Cynthia R. Farina, The "Chief Executive" and the Quiet Constitutional Revolution, 49 Admin. L. Rev. 179, 179 (1997) (criticizing the "cult of the Chief Executive" in administrative law); Sargentich, supra note 73, at 3 ("Over the past two decades, much constitutional and administra-

Kagan, Lawrence Lessig, and Cass Sunstein emphasize the relationship between the President and agencies.[209] For these scholars, the President is and should be a major player in the administrative state; Congress is often pushed to the side.[210] Recent empirical legal scholarship on agency action also considers the President's role.[211] To be sure, some legal scholars seriously engage with Congress's capacities to influence agency action.[212] But, overall, recent administrative law scholarship currently seems to discuss the White House more than Congress.

Part II's empirical investigation suggests that administrative law needs to attend more to Congress and, in particular, to congressional transitions. Agency regulatory agendas shifted in distinct ways around the 1994 election. First, although agencies generally completed more rules in the final quarter of each presidential administration, cabinet departments (as a group) finished slightly more actions after the 1994 election than in President Clinton's last quarter.[213] Second, executive branch agencies withdrew far more

tive law discourse has emphasized the President as an actor whose oversight can legitimate the existence of far-reaching agency authority.").

[209] Kagan, supra note 70; Lessig & Sunstein, supra note 73.

[210] Some scholars explicitly dismiss the argument that Congress plays an important role. See, e.g., Kagan, supra note 70, at 2259; Mendelson, supra note 11, at 570–72; Rodriguez, supra note 73, at 1184–89.

[211] See Bressman & Vandenbergh, supra note 9; Croley, supra note 9. These important pieces do not discuss in any depth the role of Congress in the periods they are studying. See, e.g., Croley, supra note 9, at 849, 851 (offering no discussion of the 1994 congressional elections, despite empirical observations of increased changes to rules by OMB starting in 1995 and a decrease in significant rules being submitted to OMB in 1995).

[212] See, e.g., Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61 (2006); Bressman, supra note 115, at 1767–71; J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 Tex. L. Rev. 1443 (2003) [hereinafter DeShazo & Freeman, Congressional Competition]; J.R. DeShazo & Jody Freeman, Public Agencies as Lobbyists, 105 Colum. L. Rev. 2217 (2005); Neal E. Devins, Regulation of Government Agencies Through Limitation Riders, 1987 Duke L.J. 456; Richard J. Lazarus, The Neglected Question of Congressional Oversight of EPA: *Quis Custodiet Ipsos Custodes* (Who Shall Watch the Watchers Themselves)?, 54 Law & Contemp. Probs. 205 (1991); McGarity, supra note 73; Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369 (1989); Mark Seidenfeld, The Psychology of Accountability and Political Review of Agency Rules, 51 Duke L.J. 1059 (2001); Strauss, supra note 158.

[213] See supra Chart 9 and accompanying text.

proposed rules in the year after the 1994 election than in the year after each new President took office.[214]

This Article does not examine the mechanism by which Congress influences agencies, although I can speculate on some plausible options. As a general matter, the legislature has a variety of tools at its disposal, including, among others, agency appropriations, delegation of authority to agencies, and oversight hearings. Cabinet departments, in particular, often confront more congressional oversight than other agencies because of their higher visibility.[215] Expecting to face hostile oversight (including calls to stop certain regulatory activities) in January 1995, cabinet departments may have rushed to complete rulemakings to make it harder for those rules to be overturned by their new congressional masters. Congressional transitions also may change presidential preferences. For example, President Clinton likely tempered regulatory activity after the 1994 election because he wanted to be reelected in 1996. Finally, congressional transitions may be associated with personnel changes within agencies. President Clinton's executive agencies may have stopped uncompleted rulemakings after the 1994 election either because of congressional pressure, or because the White House shifted course in anticipation of the 1996 election, or both.

The empirical results here should not be overstated. They derive primarily from one congressional transition. Moreover, many of the effects are small in magnitude, indicating that political institutions alone do not explain agency rulemaking; rather, internal bureaucratic explanations—and random noise—also matter. In addition, the political institutions influence some agencies more than others. The most recent congressional election in 2006 provides another data point and a critical opportunity for further empirical investigation. Which agencies withdrew unfinished regulations when the Democrats regained control of Congress in January 2007? Which agencies rushed to finish rulemakings before the change in power? Future research should also consider even smaller components of agencies, for example, particular offices

[214] See supra Chart 11 and accompanying text.

[215] See Davidson & Oleszek, supra note 69, at 336–41; Anne M. Joseph, Called to Testify: Congressional Oversight of Presidential Appointees and the Administrative State 50, 54–55 (Feb. 7, 2003) (unpublished manuscript).

within the EPA or agencies within the DOC, to explore variation in the influence of political institutions in more detail.

By widening their understanding of political transitions to include changes in Congress, legal scholars need not take a position in the debates in political science over whether the President or Congress is the primary overseer of administrative agencies.[216] Rather, they need only acknowledge that multiple institutions can significantly influence agencies.[217] Political transitions in both branches of government may have important ramifications for how we think descriptively, doctrinally, and normatively about administrative actions.

2. Reforming Midnight and Crack-of-Dawn Regulatory Actions

As discussed in Part II, many agencies appear to shift their regulatory activities in the period immediately preceding and following a political transition. Outgoing officials, in the White House or the legislature, often defend their authority to act even in the final weeks before a transition. Incoming decisionmakers, particularly if from the opposing party, typically question the legitimacy of midnight regulatory actions. Likewise, incoming officials in the White House or the legislature try to push their policy preferences, especially in the initial days of a transition.[218] Agencies seem to take some time to start notice-and-comment rulemaking after most po-

[216] See supra notes 68, 70 and accompanying text.

[217] See, e.g., B. Dan Wood & Richard W. Waterman, Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy (2004).

[218] See Paul C. Light, The President's Agenda: Domestic Policy Choice from Kennedy to Clinton 43 (3d ed. 1999) ("[The President's first year] presents the greatest opportunity for programmatic impact."); Beermann & Marshall, supra note 11, at 1255 ("The incoming President . . . will be focused on beginning her own initiatives and on establishing a record in the first one hundred days that can set the stage for success throughout the next four years."); Robin Toner, G.O.P. Blitz of First 100 Days Now Brings Pivotal Second 100, N.Y. Times, Apr. 9, 1995, at A1 ("Exhausted House Republicans, who began a three-week recess this weekend, have set the stage for a fundamental re-ordering of the Federal budget and a sweeping reconstruction of 60 years of social welfare policy [in their first 100 days]."); see also Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking 46 (1998); John Frendreis et al., Predicting Legislative Output in the First One-Hundred Days, 1897–1995, 54 Pol. Res. Q. 853 (2001); Richard E. Neustadt, The Contemporary Presidency: The Presidential "Hundred Days": An Overview, 31 Presidential Stud. Q. 121 (2001); Mark Leibovich, Among His Official Duties, Keeping On Top of the 100-Hour Clock, N.Y. Times, Jan. 10, 2007, at A18.

litical transitions.[219] But they often do not hesitate to freeze or suspend the effective dates of rules promulgated before the transition,[220] or to withdraw unfinished rules.[221]

The arguments for these midnight and crack-of-dawn regulations mix grounds of efficiency and democratic legitimacy.[222] Because the implications are conflicting, it is not straightforward how agencies and the courts should deal with the regulatory period preceding or following a political transition. And even if the path of reform were clear as a normative matter, it might be politically infeasible to implement.[223]

Consider, first, potential reform of the regulatory process at the agency level for midnight regulations. Reform could specifically target midnight regulations. For example, the APA could be amended to make it impossible or much harder for agencies to promulgate regulations before a political transition.[224] For example, agencies could be banned from enacting regulations in the last quarter of a presidential administration unless the agency shows that the regulations are necessary for public health or safety or are otherwise justified. Alternatively, reform could target all regulations, with the effect of curbing midnight regulations. For instance, the APA could establish a minimum comment period (for example, 120 days) for nonemergency regulations, which would make it impossible for an agency to propose and promulgate a regulation between an election and a change in political control.[225] Or the APA could impose more severe repercussions for agency violations of procedural requirements, which would discourage agencies from engaging in harried rulemaking activities.

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[219] See supra Section II.C.

[220] See supra note 152.

[221] See supra Section II.E.

[222] See supra notes 75–86 and accompanying text.

[223] Cf. Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 Cal. L. Rev. 1655, 1700–16 (2006) (offering an analytical framework for evaluating political and legal feasibility of intelligence reforms).

[224] See Beermann, supra note 11, at 1004–05; Morriss et al., supra note 11, at 597.

[225] This reform is not implausible: several state constitutions prevent legislatures from introducing legislation in the final days of their session. Adrian Vermeule, The Constitutional Law of Congressional Procedure, 71 U. Chi. L. Rev. 361, 434–36 (2004).

Consider, next, potential reform of the regulatory process to deal with crack-of-dawn regulations. As above, reform could apply only to crack-of-dawn action or to all regulatory actions with the intent to affect crack-of-dawn activity in particular. The APA could be amended to make it easier (or harder) for agencies to rescind or modify existing rules. For example, agencies could be permitted to forego notice-and-comment procedures when rescinding regulations enacted immediately before a political transition.[226] Or agencies could be required to follow additional procedures (for instance, multiple comment periods or a public hearing) when rescinding a regulation, particularly if the regulation has been in effect for some time or if the rescission attempt came early in a new administration. The APA could also be amended to make it explicit that agencies typically must (or need not) provide notice and the opportunity for comment when suspending the effective date of a regulation; such reform could also be tied to the timing of the suspension or the underlying regulation.

Reform efforts could also target the judicial review stage, specifically of midnight and crack-of-dawn activity. The APA could be amended to raise the standard for judicial review of agency action undertaken in the weeks (or several months) before a political transition.[227] For example, agencies could be required to show that they acted as most reasonable persons would have acted, rather than that they did not act arbitrarily or capriciously. Or if an even more stringent standard were desired, agencies could be required to demonstrate that no reasonable person would have acted differently. Similarly, the APA could be amended to make judicial review more searching (or more lenient) for agencies that undo or change existing final rules after a transition. For instance, agencies could have to show that they acted as most reasonable persons would have done (or that it was not completely unreasonable for them to act as they did).[228]

[226] See Beermann, supra note 11, at 1007 (proposing that notice-and-comment procedures be dispensed with when rescinding or amending final rules that have not yet gone into effect); Morriss et al., supra note 11, at 597 (arguing that midnight regulations should be rescindable after giving notice in the Federal Register, but not requiring opportunity for comment).

[227] See Beermann, supra note 11, at 1004–05.

[228] Broader institutional changes could also stem midnight and crack-of-dawn regulatory activity. For instance, the "midnight" period could be shortened. If an election

The desirability of any of these proposals is not immediately clear, either on social welfare or democratic legitimacy grounds. Even assuming that midnight or crack-of-dawn regulations are troubling on efficiency or legitimacy grounds, many of these proposals may create more problems on balance. Agencies and political actors would presumably react strategically to these changes. For instance, agencies might try to evade these restrictions by promulgating policies through informal adjudications, guidance, or policy statements.[229] If rescission of finalized regulations were made more procedurally difficult, agencies might forego trying to change the regulations and instead just refuse to enforce them.[230] In addition, what counts as "midnight" might be pushed back to right before an election, creating the same problems as before.[231] And if the reforms were to apply to congressional as well as presidential transitions, agencies would have little time to act without these additional restraints.

Finally, even assuming that these proposals would be beneficial and effective, they may not be politically feasible to implement. To the extent that agency rulemaking is more likely to regulate than deregulate,[232] most of the proposals in this Section have a deregulatory bias, making them unattractive to politicians who support government regulation in particular areas. The proposals also tie the hands of current politicians, making them unappealing unless officials think they will be better off if everyone's hands are tied in the future. And finally, the hypothesized benefits for these reforms might go unrecognized: even in their absence, agencies still face

occurs in November, the Constitution could be amended so that a new Congress or a new President takes control several weeks later.

[229] See SEC v. Chenery Corp., 332 U.S. 194, 201–03 (1947) (providing the SEC with discretion to choose between rulemaking and adjudication in formulating generally applicable, prospective rules); Magill, supra note 25, at 1438–39 (noting these common evasions of rulemaking procedures and suggesting potential judicial responses).

[230] See Beermann, supra note 11, at 975.

[231] This point depends on the expectation of a political transition. For example, a second-term President must leave the White House at the end of his or her second term. President George H.W. Bush, however, would have had less incentive to push through regulations in the months preceding the 1992 election because he expected (or at least hoped for) a second term.

[232] See supra note 93.

constraints on midnight and crack-of-dawn regulatory activity from political institutions, interest groups, and the media.[233]

C. Wider Implications for Administrative Law Doctrine

This final Section suggests some broader normative and doctrinal implications of the empirical work in Part II—for legislative delegation to agencies and judicial deference to agencies on statutory interpretation questions. In particular, I argue that congressional pressure on agencies may alleviate some concerns underlying the nondelegation doctrine. I also posit, more preliminarily, that judicial theories of deference could be revised to better comport with how agencies actually function.[234]

1. The Nondelegation Doctrine

Congressional delegation of authority to administrative agencies raises issues critical to the legitimacy of the administrative state. The nondelegation doctrine may be moribund as a constitutional matter,[235] but the desirability of such delegation is still contested.[236] Although typically discussed for the doctrinal point, *Whitman v.*

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[233] For example, imagine that Republican control of Congress did not change in an election, but that the voters elected a Republican President to replace a Democrat in the White House. If agencies under the outgoing President try to enact controversial regulations in the weeks before the inauguration of the new President, they will face opposition from Congress as well as potentially from the courts, interest groups, and the media.

[234] Professor Jacob Gersen and I develop some of these and other related ideas in more detail. Jacob E. Gersen & Anne Joseph O'Connell, Timing of Agency Action 36–43 (Mar. 2008) (working paper, on file with the author).

[235] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); cf. Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097 (2004) (arguing for a principle of exclusive delegation that would require Congress to select delegatees of its lawmaking power but would not require it to tie those delegatees' hands as to specific policy decisions).

[236] See, e.g., Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297 (2003); Thomas R. McCarthy & Richard W. Roberts, Jr., *American Trucking Associations v. Environmental Protection Agency*: In Search and In Support of a Strong Non-Delegation Doctrine, 23 Whittier L. Rev. 137 (2001).

American Trucking Associations provides a helpful perspective on this normative debate.[237]

The core doctrinal ruling from *American Trucking* is that almost any statutory directive to an agency will provide the necessary "intelligible principle" so as not to violate Article I's vesting of lawmaking power in Congress.[238] The secondary ruling from that case bars agencies from cabining their statutory discretion through rulemaking in order to cure any delegation problem created by a broad delegation of discretion from Congress.[239] The empirical work in Part II suggests a normative perspective on this secondary issue, mainly that *Congress* might be able to constrain broad legislative delegations to agencies in ways other than narrowing the substance of the delegated authority. For example, without violating *Immigration & Naturalization Service v. Chadha*,[240] Congress could limit delegations of legislative authority to agencies through procedural deadlines at the front end or through oversight—procedural or substantive—at the back end.[241] As a functional matter, if Congress shapes regulatory agendas outside of the scope and definition of the delegated authority itself, then the delegation

[237] Before the Supreme Court's decision in *American Trucking*, Professor Bressman argued that the D.C. Circuit's ruling in that case (that agencies might be able to provide sufficient limits on legislative delegation by constraining their own discretion through rulemaking) "ensures that agencies exercise their delegated authority in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty." Lisa Schultz Bressman, *Schechter Poultry* at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1402 (2000). I focus here on the argument that Congress, ex post, might provide similar benefits by exerting more oversight over administrative agencies.

[238] See *Am. Trucking*, 531 U.S. at 473–76.

[239] Id. at 472–73. Judge Leventhal's procedural defense of agency action in *Amalgamated Meat Cutters* is thus no longer viable. See Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F.Supp. 737, 758–59 (D.D.C. 1971) (suggesting that an agency could cure an otherwise unconstitutionally vague delegation of authority by binding itself to self-limiting regulations).

[240] 462 U.S. 919, 959 (1983) (holding the legislative veto device unconstitutional).

[241] See, e.g., Bressman, supra note 53, at 519–21 (discussing scholarship that sees "*Chadha* as constitutionally prohibiting Congress from reclaiming power once it has delegated that power to an executive branch agency" and contending that the case should be studied for constraints on how control over agencies should be conducted, not on who should conduct it); but cf. Kagan, supra note 70, at 2270 (arguing that courts have refused, "in the face of broad delegations, to ratify alternative mechanisms of legislative control over agency decisionmaking").

seems more limited.[242] Congress, too, may have important "completion power."[243]

The timing of congressional control may be determinative. The Congress that delegates authority is rarely the same Congress that oversees the delegation, leading to "legislative drift."[244] Deadlines imposed at the time of delegation that fall before a congressional transition do not create the same problem of legislative drift as oversight hearings about an old statute in a new Congress.[245] Ex ante actions, such as statutory deadlines, may also be more transparent than ex post actions, such as information requests to agencies or informal pressure. In addition to concerns about legislative drift and transparency, we would want to know more about Congress's role—at the time of delegation and afterward—before drawing any sharp inferences for delegation doctrine and theory.[246]

Despite legislative drift and other concerns, congressional involvement in the regulatory process might make agency action more democratically legitimate. The idea that the President better represents the public interest because he faces a national electorate and that members of Congress operate only in "iron triangles" with special interests lacks needed complexity.[247] Despite being a multi-

[242] See Bressman, supra note 115, at 1811.

[243] Jack Goldsmith & John F. Manning, The President's Completion Power, 115 Yale L.J. 2280, 2282 (2006) (defining the President's "completion power" as the "authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme").

[244] Murray J. Horn & Kenneth A. Shepsle, Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 Va. L. Rev. 499, 503–04 (1989); see also DeShazo & Freeman, Congressional Competition, supra note 212, at 1496–97 (describing the multiple principals problem associated with legislative drift); Kenneth A. Shepsle, Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey, 8 J.L. Econ. & Org. 111, 114–15 (1992) (describing legislative drift as "coalitional drift").

[245] See Gersen & O'Connell, supra note 101, at 936.

[246] To be certain, many scholars have written about Congress's role in agency oversight. See supra note 212.

[247] See Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. 1217, 1221–22 (2006) (arguing that skewed Electoral College incentives produce Presidents with a less national orientation than (a supposedly parochial) Congress); Sargentich, supra note 73, at 27–30 (arguing that Electoral College incentives can lead Presidents to pursue localized interests at the expense of the nation as a whole).

member body with higher transaction costs for acting than the President,[248] Congress may be better suited, in particular circumstances, to promote certain values underlying the nondelegation doctrine. Professor Kevin Stack has discussed three such values: democratic accountability, nonarbitrariness, and judicial manageability.[249] Congress's role in the administrative state plausibly fosters all of these values. If agencies are politically accountable to Congress, their decisions will gain added legitimacy. If Congress promotes agency "regularity, rationality, and transparency," agency actions will be less arbitrary and contribute to the rule of law.[250] And if Congress improves the articulation of agency rationales for decisions, courts will have an easier time reviewing agency action.[251]

2. Judicial Deference to Agency Actions

Under the current nondelegation doctrine, as framed by the courts, Congress can legally assign considerable legislative authority to agencies. While courts no longer seriously engage in reviewing the legitimacy of that delegation, they continue to wrestle with what quantum of deference to give an agency that has exercised that authority by interpreting an ambiguous statute. Courts and commentators typically rely on one of two primary theories of agencies to defend the modern practice of considerable deference

[248] See Nzelibe, supra note 247, at 1246–47.

[249] Kevin M. Stack, The Constitutional Foundations of *Chenery*, 116 Yale L.J. 952, 993–1000 (2007). Stack discusses these values in the context of the *Chenery* principle that courts can affirm agency action only on the rationale given by the agency when it acted. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

[250] Stack, supra note 249, at 996.

[251] It seems likely, however, that congressional influence could also undermine these values. If members of congressional committees have policy preferences that are quite different from the median voter, congressional oversight may produce skewed accountability. See David Epstein & Sharyn O'Halloran, Legislative Organization Under Separate Powers, 17 J.L. Econ. & Org. 373, 373–75 (2001) (summarizing distributive view of congressional committees). If congressional oversight produces conflicting and changing directions to agencies (from a congressional committee structure that encourages overlapping jurisdictions), agency decisions may become less rational. O'Connell, supra note 223, at 1694. Also, some communication between members of Congress and agency decisionmakers is not readily transparent, such as information requests and personal telephone calls (unlike statutes, hearings and formal investigations). And if there is less transparency, judicial oversight will be more difficult.

to agency decisions. First, under a political accountability theory, courts defer to agency interpretations of ambiguous statutes because agencies are more accountable (to the national electorate, through the President) than are courts.[252] Second, under an expertise theory, courts defer to agency interpretations because agencies have more expertise in their respective areas than do courts.[253]

In many ways, current doctrine represents a combination of these two theories. If it is clear that Congress has delegated to the agency the authority to act with the force of law in interpreting an ambiguous statute, and if the agency actually acted with the force of law, then courts will uphold the agency's interpretation so long as it is reasonable.[254] The easy categories of *Mead*—explicit delegation of authority to enact legislative rules and agency interpretation of an ambiguous statute through notice-and-comment rulemaking—fit well with the political accountability theory. Congress has delegated explicit authority to an agency run by someone chosen by and responsible to the President. In addition, the agency has used procedures that solicit feedback from voters in making policy decisions.

The harder categories—no explicit delegation of authority and agency interpretation through informal adjudication or nonlegislative rulemaking—seem to call on courts to rely, at least in part, on the expertise theory. In *Barnhart v. Walton*, the Court laid out a list of factors courts should consider in assessing whether to give more (*Chevron*) or less (*Skidmore*) deference to agency interpretations:

[252] See Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."). But cf. Nzelibe, supra note 247, at 1266 (noting that Congress, as an institution, is also accountable to national electorate).

[253] See Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) ("Pursuit of [the agency official's] duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."). Professors Jody Freeman and Adrian Vermeule have argued that courts may force agencies to rely on their expertise instead of on political influence. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA*: From Politics to Expertise, Sup. Ct. Rev. (forthcoming 2008), available at http://www.law.harvard.edu/faculty/freeman/vermeule.freeman.paper.pdf.

[254] See United States v. Mead Corp., 533 U.S. 218, 227–29 (2001).

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[255]

These factors are very much in line with the expertise theory of agencies.

Judicial review of agency decisionmaking seems somewhat unstable at present, with courts cascading between political accountability and expertise theories of deference. Neither theory is sufficient on its own, because agency decisionmaking can derive from both political and internal, technocratic factors. Empirical work on agency regulatory activities, including from Part II, may provide needed complexity to these theories of deference. Some agencies' regulatory agendas are shaped considerably by political actors, while other agencies' agendas seem far less affected.[256] The political accountability theory appears more applicable to the first group; the expertise theory appears more relevant to the second group.

Judicial doctrine could better reflect these realities. In assessing how much to defer to an agency's decision, courts perhaps should focus less on the procedures used by the agency (for example, notice-and-comment rulemaking, informal adjudication, guidance documents) and more on the type of agency, the agency's track record, the agency's expertise, the level of presidential and congressional control over the agency, and the timing of the agency's action. Some of these factors may track the formal independence of the agency.[257] In addition, some may shift depending on control of the White House and Congress.

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[255] 535 U.S. 212, 222 (2002).

[256] However, if agencies anticipate changes in their political superiors' preferences—looking forward, for example, to a change in presidential administration—then their rulemaking activity could exhibit little change as political actors shift, but nonetheless be driven to a great extent by those incoming political actors' preferences.

[257] Compare Bressman, supra note 115, at 1807 (arguing that *Chevron*'s equal applicability to independent and non-independent agencies is not puzzling because Congress "fill[s] the gaps" for the former and the President does so for the latter) with Kagan, supra note 70, at 2376–77 (arguing that courts should give less *Chevron* deference to independent agencies than to executive agencies); Randolph J. May, Defining

To illustrate, take one factor: the level of presidential and congressional control over the agency. If an agency faces considerable oversight from Congress and the White House, then perhaps courts should defer to that agency's reasonable decisions, no matter how they are reached (that is, with or without particular procedures) and irrespective of whether the agency possesses specialized expertise.[258] If an agency receives minimal political scrutiny but has extensive expertise, then perhaps courts should also defer to that agency's reasonable actions. However, if an agency confronts little oversight from these actors and does not possess special expertise, then courts should scrutinize that agency's decisions more carefully.[259]

CONCLUSION

Despite the immense scope and variability of regulatory activity, the legal and political science literature contains remarkably sparse empirical investigation of agency rulemaking. This Article, by introducing a new extensive database on agency rulemaking from twenty years (1983–2003) of reports in the Unified Agenda and by presenting preliminary results, hopefully has helped to change that situation. Specifically, it analyzed (1) how the use of one form of rulemaking, notice-and-comment rulemaking, has varied over time and across agencies; (2) which agencies have most frequently promulgated binding rules without providing for prior opportunity for public comment, and at what times; (3) which agencies have rushed to finish regulations before the arrival of a new President or politically transformed Congress; and (4) which agencies withdrew unfinished regulatory actions after transitions. The Article also has examined several normative and doctrinal implications of this em-

Deference Down: Independent Agencies and *Chevron* Deference, 58 Admin. L. Rev. 429 (2006) (arguing the same).

[258] See Kagan, supra note 70, at 2377–80 (suggesting that courts should often give more deference to actions with more presidential involvement).

[259] These ideas need further exploration. Two important questions, for example, will be how courts should measure political oversight and how they should evaluate agency expertise. The former calculation might look to the prevalence of deadlines in statutes administered by the agency, the frequency of congressional hearings focusing on the agency, and how often agency officials meet with OMB officials. Measures of expertise could include the level of technicality in the statutes administered by the agency or the percentage of agency employees with specialized backgrounds.

pirical work, contributing to—and often challenging—conventional wisdom in debates on regulatory ossification, judicial deference, political control, and political transitions.

The research here has several consequences for administrative law. When examining regulatory activity surrounding political transitions, legal scholars should not limit their attention to midnight regulatory actions and attempts by the next presidential administration to counter them. Crack-of-dawn regulations that do not rescind midnight regulations but rather start new regulatory or deregulatory programs are also important agency actions during political transitions. In addition, legal scholars have concentrated on presidential transitions and the President's role more generally in the administrative state. Legal scholars should, applying the political science literature on competing political influences on agencies, consider congressional influence as well as presidential oversight when assessing the legitimacy of agency actions. Studying only one branch of government may not provide a complete view of agency actions in and out of transitions. Finally, legal scholars and the courts should consider alternative dimensions by which to evaluate agency action, including political control and timing of such action.

The research may also help us anticipate particular changes in the administrative state in the shadow of the 2008 election. What shifts in rulemaking should we expect to see under a Democratic administration or a new Republican one? What might happen if Congress remains in the hands of the Democrats or if the Republicans recapture control? At the least, some midnight and crack-of-dawn activity awaits.

There is still, of course, much we do not know about agency rulemaking. This Article and future empirical studies will set the stage for reassessment of core administrative law doctrines. As my results illustrate, empirical investigation will support certain theories and undermine others, although definitive conclusions will take longer to emerge. Empirical work may also permit more sophisticated evaluation of proposed institutional reforms. Ultimately, this data-driven approach may shape both academic analysis of agency behavior and oversight by the courts, Congress, and the White House. Ideally, it can help promote more effective, effi-

cient, and legitimate regulatory activity in the contentious political environment of a democracy.

DATA APPENDIX

I. DESCRIPTION OF UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS DATA

For a particular Regulation Identification Number (RIN), a unique identifier of a rule, possible information fields include: Agency, Publication, Title, Regulatory Plan Entry, Affect CFR, Agenda Entry, Related RINs, Related Agencies, Rule Making Stage, Major Rule, Priority Category, RFA Analysis, Small Entities, Unfunded Mandate, Federalism, Government Level, Legal Authority, Legal Basis (text), CFR Citation, Energy, Abstract (text), Legal Deadlines (type and dates), Timetable (actions in rulemaking process and dates), Federal Register Citation, Initial Public Cost, Base Year, Recurring Public Costs, Costs and Benefits (text), Risks (text), Statement of Need (text), North American Industry Classification System Codes, Contact Information, and a few other housekeeping fields.

II. CODING ASSUMPTIONS

A. Years

Years run from January 20 to January 19 of the following year. Thus, a regulatory action that occurred on January 5, 2001 is, for example, counted as a 2000 action.

B. Types of Actions

Actions are counted only if they had an actual date reported, unless indicated in the text. Actions are counted as direct final rules if the rulemaking action listed in the Timetable field was coded as 325=Direct Final Rule. Actions are counted as interim final rules if the rulemaking action listed in the Timetable field was coded as 50=Interim Final Rule. Actions are counted as NPRMs if the rulemaking action listed in the Timetable field was coded as

30=NPRM. Actions are counted as completed regulatory actions if the rulemaking action listed in the Timetable field was coded as 50=Interim Final Rule, 325=Direct Final Rule, 330=Final Rule, or 600=Final Action. Actions are counted as withdrawals if the rulemaking action listed in the Timetable field was coded as 700=Withdrawal or 800=Deleted at Agency Request. Withdrawals are almost entirely of uncompleted regulatory actions, but some are of direct and interim final rules. Most critically, some regulatory actions described above are coded as 300=Other. Such actions are not counted in the analysis presented here. More investigation needs to be done to see how many actions are being missed because of the coding scheme employed here. Approximately ten percent of the regulatory action fields are listed as 300=Other.

C. Significance of Actions

Actions are deemed significant if Priority Code was coded as 10= Economically Significant or as 20=Other Significant or if Major was coded as Yes.

D. Types of Agencies

Data for the cabinet departments include information from the VA before it became a cabinet department in 1989. The executive agencies in the database include the EPA, FEMA (before it joined DHS), GSA, IRS, NARA, NASA, OMB, OPM, SBA, and USAID. All of these agencies are headed by a single Senate-confirmed appointee. Except for the IRS after 1998, that appointee serves at the will of the President and can be fired for any reason. The IRS Restructuring and Reform Act of 1998 set a five-year term of office for the IRS Commissioner, which applied to the leader at the time as well, Charles Rossotti. I included the IRS as an Executive Agency because most of the data here involve action prior to 1998 and because the IRS is often treated as an Executive Agency. The independent agencies in the database include the CFTC, CPSC, EEOC, FCA, FCC, FCIC, FDIC, FERC, FHFB, FHLBB, FMC, FRB, FTC, ICC, NCUA, NRC, OFHEO, PBGC, SEC, SLSDC, SSA, and STB. All of these agencies are led by appointees who serve fixed terms and typically can be removed by the President only for cause. The SSA became an independent

agency under the Social Security Independence and Program Improvements Act of 1994.

E. Political Variables

The variable for President's Party takes a positive value (1) if the President is Republican and a negative value (-1) if the President is a Democrat. The variable for Congress's Party takes a positive value (1) if Republicans control both chambers, a zero value if control is split, and a negative value (-1) if Democrats control both chambers in a particular year. I treat the Senate as controlled by Democrats from 2001 to 2003, because Senator Jeffords, an independent, caucused with the Democrats to give them control. The variable for President's First Year takes on a value of 1 if it is the President's first year, and 0 otherwise. The variable for President's Last Year takes on a value of 1 if it is the President's last year, and 0 otherwise. The variable for Independent takes on a value of 1 if the agency is independent, and 0 otherwise. The interaction variables for Independent*Congress's Party and Independent*President's Party are the product of the values for the separate variables. The variable for United Government is assigned a value of 1 if the same party controls the White House and both chambers of Congress, and 0 otherwise. The variable for Congressional Change takes on a value of 1 if party control of one or both chambers of Congress changes from the previous year, and 0 otherwise. The variable for Presidential Change is given a value of 1 if party control of the White House shifts from the previous year, and 0 otherwise. The variable for Midnight Congress takes a value of 1 if it is the final quarter of 1994, and 0 otherwise. The variable for Midnight Senate takes a value of 1 if it is the final quarter of 1986 or 2000, and 0 otherwise.

III. DUPLICATE ENTRIES

Only the most recent entry containing information on a specific regulatory action was retained for each RIN. This means that if an earlier entry for a RIN contained certain information but a later entry for that same RIN did not, that information would not be captured in the database. Thus, the analysis undercounts regulatory actions. I used the latest entry on a particular action on the as-

sumption that it was the most reliable. I treat the RIN as a unique identifier. In practice, however, the RIN does change in rare cases.