Political Cycles of Rulemaking:
An Empirical Portrait of the Modern Administrative State

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Abstract

Despite the administrative state's vast scope, we know frighteningly little about how it operates as an empirical matter. This Article provides the first comprehensive empirical examination of agency rulemaking, with and without prior public comment, from President Ronald Reagan to President George W. Bush. It uses an immense new dataset I constructed from twenty years' (1983-2003) worth of federal agencies' semi-annual reports in the *Unified Agenda of Federal Regulatory and Deregulatory Actions* to analyze variation in agency rulemaking activities. The Article focuses on rulemaking at the beginning and end of Presidential Administrations and around shifts in party control of Congress—midnight and crack-of-dawn regulatory activity—while also assessing some patterns outside those periods.

The empirical results offer rich new insights into the rulemaking process and the interplay of politics and regulation. Some of these insights are surprising. For example, certain agencies withdrew more proposed rules after political transitions in Congress than after a new President took office. 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. Agencies generally did complete more rules in the final quarter of each Presidential Administration. Cabinet departments (as a group), however, finished more actions after the 1994 election than in President Clinton's last quarter. Although the press highlighted President Clinton's spate of midnight regulations, President George H.W. Bush began over one-third more rulemakings in the final quarter of his term than did President Clinton or President Reagan.

The results have potentially far-reaching normative and doctrinal implications for the functioning and oversight of the administrative state. Politics aside, many agencies have engaged in considerable notice and comment rulemaking, suggesting that the traditional regulatory process may not be significantly ossified. Nevertheless, rulemaking without prior comment has increased across a wide range of agencies, a trend that may be strong enough to persist despite the Supreme Court's 2001 decision in *United States v. Mead Corporation*, which makes notice and comment rulemaking more attractive. Focusing on politics, these shifts in regulatory agendas during political transitions undermine theories of judicial deference based entirely on agency expertise. But they do not support a political accountability theory based solely on the President. Rather, the shifts call attention to the importance of Congress, in addition to the President, for bureaucratic oversight. In sum, the timing of rulemaking raises interesting questions about the effectiveness and legitimacy of the administrative state.

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Commentators publicly 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 ergonomic 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.*

I. 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 change the Administration, though not necessarily party control of the White House. A new round of midnight and crack-of-dawn rulemaking activity awaits.

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,

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[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. Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (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) or the Federal Election Commission (FEC), to follow its instructions, though it did ask independent agencies to comply voluntarily. 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 healthy and safety.

[3] 57 Fed. Reg. 37,504 (Aug. 19, 1992).

[4] 58 Fed. Reg. 6937 (Feb. 3, 1993).

Congress passed 21 major statutes[5] and 115 other public laws.[6] In contrast, in that year, cabinet departments, the Executive Office of the President, and independent agencies promulgated 70 significant rules and 3,383 other rules.[7] Because agencies operate in a dynamic political environment, agency rulemaking, particularly during political transitions, provides a critical perspective on both what remains stable for an agency over the years—due to its primarily career staff, its mostly fixed mission, and its internal culture—and 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. An understanding of how 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[8] and political science[9] literature.

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[5] Jill Barshay, *2001 Legislative Summary: A Year of Power Struggles and Common Purpose*, CQ WEEKLY, Dec. 22, 2001, at 3018.

[6] 149 CONG. REC. D456 (daily ed. May 16, 2003) (Final Résumé of Congressional Activity: First Session of the One Hundred Seventh Congress).

[7] GAO Federal Rules Database Research – Search, http://www.gao.gov/fedrules/ (for all rules, Agency=all and other fields blank; for significant rules, Agency=all and Rule Type=Major) (last visited May 20, 2007). The law defines "significant," or "major," rules as those that have at least a $100 million, "or otherwise significant," effect on the economy. Exec. Order No. 12,866 § 3(f) (Sept. 30, 1993).

[8] *See* Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 1 (2006); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); 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); 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).

[9] *See* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (3d ed. 2003); Scott R. Furlong, *The 1992 Regulatory Moratorium: Did it Make a Difference?*, 55 PUB. ADMIN. REV. 254 (1995); William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRES. STUD. Q. 533 (2005); Stuart Shapiro, *Two Months in the Life of the Regulatory State*, ADMIN. & REG. L. NEWS, Spring 2005, at 12; Stuart Shapiro, Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations (Sept. 29, 2006) (unpublished manuscript on file with author). There also has been some discussion of these issues by journalists and think tanks. *See* CINDY SKRZYCKI, THE REGULATORS 30-33, 67-68 (2003); CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS (2006); SUSAN DUDLEY & MELINDA WARREN, UPWARD TREND IN REGULATION CONTINUES: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2005 AND 2006 (2005); James L. Gattuso, REINING IN THE REGULATORS: HOW DOES PRESIDENT BUSH MEASURE UP? (2004); Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mar. 8, 2001), at http://www.mercatus.org/pdf/materials/459.pdf.

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 end of an Administration from rules enacted at the start 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 but not by political scientists and public administration researchers.[10]

This Article connects many of these important positive and normative inquiries together, by taking advantage of a new extensive database on agency rulemaking activities I constructed from federal agency semi-annual reports in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*. It provides, to the best of my knowledge, the first comprehensive empirical examination of agency rulemaking, with and without prior 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 providing for public comments, and at what times; (3) which agencies have rushed to finish regulations before the arrival of a new President or 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 political transitions 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 more regulatory actions after the 1994 election than in President Clinton's final quarter. Although the press feasted on President Clinton's midnight regulations, President George H.W. Bush started greater than one-third more rules in the final quarter of his term than did President Clinton or President Reagan.

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[10] *See* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001); *see also* JOHN P. BURKE, PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE (2000); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006); Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551 (2003); 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); Loring & Roth, *supra* note 8; B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782 (2003).

The original empirical study provides the necessary foundation to consider several important legal and normative issues. In so doing, it calls into question much of the existing debate on regulatory ossification and presidential control of the administrative state. First, the results strongly suggest that the administrative state is not 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 increasing have done so, suggesting that there are significant 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*, which appears to give more deference to notice and comment rulemaking than less formal agency actions.

Second, the results highlight the important role Congress plays in the regulatory process. Political transitions involve not only changes in the White House but those in the legislature as well. Legal scholars 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 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 instead of to the level of procedure used by the agency in determining the level of deference to give to agency interpretations of ambiguous statutes.

The Article proceeds as follows. In Part II, I briefly explain the different types of Executive Branch agencies, the processes under the Administrative Procedure Act (APA) and case law available for rulemaking, and connected debates in administrative law and political science about regulatory ossification, judicial deference, political control, and political transitions. I also generate hypotheses concerning 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 III, I first describe the advantages and limitations of the new dataset I have constructed from the *Unified Agenda of Federal Regulatory and Deregulatory Actions* (*Unified Agenda*). From this database, I then investigate the use of rulemaking without prior comment, the commencement and completion of traditional notice and comment rulemaking, and the withdrawal of proposed rules that have not been completed. This investigation focuses on rulemaking around times of political transition, though some attention is devoted to rulemaking outside periods of political change.

In Part IV, I explore several normative and legal implications of this empirical work. Some are specific to political transitions, including the need to pay more attention to congressional transitions and an assessment of proposed reforms to limit midnight and crack-of-dawn regulatory activity. Some are much broader, including a challenge to the perceived ossification of regulatory activity and larger questions about delegation to agencies and judicial deference to agency actions. Part V concludes.

II. Agency Rulemaking Process(es): Details, Debates, and Hypotheses

The rulemaking process in the modern administrative state determines both relatively trivial and important public policies. In many circumstances, agency rules

have legally binding effects on individuals and companies.[11] Those effects can be quite substantial. The EPA's Clean Air Mercury Rule, for example, established a cap and trade system for mercury emissions from coal-fired power plants in a number of states.[12] 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 some 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 at least partially within the Executive Branch: cabinet departments, executive agencies, and independent agencies.[13] Some agencies operate fully within the Executive Branch; some fit less easily. The President directly oversees fifteen cabinet departments, such as the Justice Department (DOJ), and a variety of executive agencies, such as the EPA and the Office of Management and Budget (OMB). The President appoints, with Senate confirmation, leaders to run these organizations. These leaders serve at the President's pleasure and can be removed for any reason.[14] More than fifty independent agencies, including the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC), function outside the President's direct control.[15] The President appoints the leaders of independent agencies, too, typically with Senate confirmation, but cannot remove most of them except for cause.[16] Thus, the level of Presidential control varies across agencies.

Agencies also have varying levels of technical expertise, which includes 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 then other agencies, but that is not always the case.[17] Not only do

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[11] One classic debate in administrative law centers on how to distinguish legislative from non-legislative or interpretative rules. *See, e.g.*, Jacob Gersen, *Legislative Rules Revisited*, U. CHI. L. REV. (forthcoming 2007). I assume here that agencies have authority to issue binding and nonbinding rules.

[12] Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (Mar. 15, 2005) (to be codified at 40 C.F.R. pts. 60, 72, and 75).

[13] The Article does not discuss agencies within the Legislative Branch (*e.g.*, Government Accountability Office (GAO), Congressional Budget Office) or within the Judicial Branch (*e.g.*, Sentencing Commission).

[14] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 690 (1981); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 8 n.19 (2007).

[15] ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 321 (9th ed. 2004).

[16] *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[17] 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.

agencies differ in independence and technical expertise, they also generate diverse levels of attention and controversy. 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 generally are more controversial than independent agencies; the opposite can also be true in particular circumstances.[18] While 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.[19] The mix varies in intensity depending on the rulemaking category, but does not generally depend on the timing within a Presidential Administration.[20] As a general matter, rulemaking can be divided into four major categories: formal rulemaking, notice and comment rulemaking, legislative rulemaking without previous comment, and interpretative rulemaking. The first three categories typically have legally binding effects; the last one generally does not. In all categories of rulemaking—formal or informal, binding or nonbinding—the agency must construct a record of its actions for judicial review.[21]

If agencies engage in formal rulemaking, they must satisfy a slew of statutory mandates. Under the APA, formal rulemaking is conducted through extensive trial-like mechanisms, with an agency reaching a decision "on the record after opportunity for [a] . . . hearing."[22] In *United States v. Florida East Coast Railway*, 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.[23] Later cases have made those words necessary as well.[24] Because so few statutes contain the phrase, agencies generally do not conduct formal rulemakings when promulgating legally binding regulations. Interestingly, while the APA may impose considerable requirements on formal rulemaking, the Executive Orders governing regulatory review

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Likewise, the Federal Trade Commission (FTC), an independent agency, deals with many of the same issues as the Antitrust Division of the Department of Justice (DOJ).

[18] The SEC, an independent agency, faced considerable attention in the aftermath of Enron and other corporate scandals. Likewise, the Department of Commerce (DOC) has not generated much controversy in this Administration.

[19] 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 9; JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (4th ed. 2006). The main statute governing agency rulemaking is the Administrative Procedure Act (APA). 5 U.S.C. §§ 551-559, 701-706 (2000). Other statutes specific to particular agencies or topics often govern rulemaking as well.

[20] 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.

[21] *See* 5 U.S.C. § 706; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971).

[22] 5 U.S.C. § 553(c).

[23] 410 U.S. 224, 226 (1973).

[24] *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1250 (D.C. Cir. 1973); BREYER ET AL., *supra* note 19, at 519.

do not, excluding such regulatory activity from White House oversight.[25] Formal rulemaking qualifies for review under the "substantial evidence" standard of the APA.[26]

Most rulemaking occurs through "informal" mechanisms, such as notice and comment rulemaking, legislative rulemaking without prior comment, or interpretative or policy statements. Notice and comment rulemaking has far fewer procedural requirements than formal rulemaking but certainly maintains certain formalities. 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 60 days, the agency collects written comments submitted by the public, including from individuals and organized interests. The agency considers the comments and eventually either withdraws the proposed rule or publicly promulgates the rule, which must be a "logical outgrowth" of the proposed rule, with a discussion of all materially relevant comments and a "concise general statement of their basis and purpose", at least one month before it becomes effective.[27] Executive Orders since President Reagan have required non-independent agencies to seek review of legally binding rules, typically prior to issuing notice and before promulgating the final rule.[28]

Rulemaking with legally binding effects can also occur without meeting many of the traditional notice and comment requirements.[29] The APA explicitly exempts particular subjects (such as the military, foreign affairs, or government contracts) from such mandates.[30] The APA also permits an agency to promulgate a legally binding rule without notice and comment if the agency determines and publicly explains that such procedures are "impracticable, unnecessary, or contrary to the public interest," which is

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[25] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2703 (Jan. 18, 2007). The latest Executive Order does, however, order agencies to consider using formal rulemaking. Exec. Order No. 13,422, § 5.

[26] 5 U.S.C. § 706(2)(E). The "substantial evidence" standard is not significantly different than the "arbitrary and capricious" standard. *See* BREYER ET AL., *supra* note 19, at 217.

[27] Weyerhauser v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978); *see* 5 U.S.C. § 553(b)-(d).

[28] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993), as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2703 (Jan. 18, 2007); Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981) (repealed by Exec. Order No. 12,866).

[29] 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/GGC-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); Michael Asimow, *Public Participation in the Adoption of Tax Regulations*, 44 TAX L. 343 (1991); Hickman, *supra* note 8, at 1748; Stuart Shapiro, *Two Months*, *supra* note 9, at 12; Shapiro, Presidents and Process, *supra* note 9, at 11. According to the GAO's study, most of these actions concerned "administrative or technical issues with limited applicability," where rulemaking is unnecessary under the APA, but about 15 percent of the "major" legally binding rules were not preceded by notice and comment. GENERAL ACCOUNTING OFFICE at 2. In some cases, agencies failed to explain that omission, as the APA requires. 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. *Id*. at 3.

[30] 5 U.S.C. § 553(a).

known as good-cause rulemaking.[31] 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.[32]

Two larger categories of legally binding rulemaking without prior comment have developed in recent years, though the APA does not mention them directly.[33] First, agencies can promulgate "direct final rules", which become effective a certain time after publication in the *Federal Register* unless "adverse" comments are received. Direct final rules are intended to expedite the enactment of non-controversial rules.[34] 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. Interim final rules are intended for use when the agency has good cause to enact rules immediately, such as in emergency situations.[35] The informal rulemaking described above qualifies for review under the "arbitrary and capricious" standard of the APA.[36] If it, or formal rulemaking, interprets an ambiguous statute, assuming Congress delegated to the agency authority to make binding rules, the interpretation typically receives *Chevron* deference; in other words, such an interpretation will be upheld so long as it is permissible under the statute.[37]

Finally, agencies can issue nonbinding interpretative rules or policy statements. For nonbinding statements, agencies generally do not have to give prior notice or provide the opportunity for comment.[38] Agencies must, however, publish such statements in the *Federal Register*.[39] Executive Orders on regulatory review have alternated in their coverage of interpretative rules.[40] These nonbinding rules also are

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[31] 5 U.S.C. § 553(b).

[32] *See* 5 U.S.C. § 552(a)(1)(D).

[33] GENERAL ACCOUNTING OFFICE, *supra* note 29, at 6-7; Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 401-02 (1999).

[34] Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995); *see also* Noah, *supra* note 33, at 411-28 (arguing that direct final rulemaking does not comport with the APA's requirements or with meaningful judicial review).

[35] Asimov, *Interim-Final Rules: Making Haste Slowly*, *supra* note 29, at 704. Technically, agencies are supposed to issue "final-final" rules, but most agencies do not, leaving interim final rules in force. *Id*. at 705-06, 736.

[36] 5 U.S.C. § 706(2)(A).

[37] United States v. Mead Corp., 533 U.S. 218, 230-31 (2001). If the agency were entitled to use abbreviated procedures, courts generally apply *Chevron* deference to interpretations of ambiguous statutes in direct or interim final rules, assuming such rules count as final actions under the APA. *See, e.g.*, Natural Resources Defense Council v. Abraham, 355 F.3d 179, 198-99 (2d Cir. 2004); Cinema '84 v. Commissioner of Internal Revenue, 294 F3d 432, 438 (2d Cir. 2002); National Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Service, 416 F. Supp. 2d 92, 97 (D.D.C. 2006); *cf*. Kikalos v Commissioner of Internal Revenue, 190 F3d 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).

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

[39] *See* 5 U.S.C. § 552(a)(1)(D).

[40] Under Executive Order 12,291, which was in force during the Administrations of Presidents Ronald Reagan and George H.W. Bush, non-independent agencies had to submit interpretative rules to the OMB for review. Under Executive Order 12,866, which operated under President William Clinton's Administration and the first six years of President George W. Bush's Administration, interpretative rules were exempted from review. *See* Exec. Order No. 12,291, § 1(a), 46 Fed. Reg. 13,193 (Feb. 17, 1981).

reviewed under the "arbitrary and capricious" standard of the APA.[41] If they interpret an ambiguous statute, they likely will receive only *Skidmore* deference;[42] in other words, they will be upheld only if they have the "power to persuade."[43] In rare circumstances, such interpretations may be entitled to *Chevron* deference.[44] In addition to formal and informal rulemaking, with and without binding effects, agencies can often announce policies through adjudication, formal and informal.[45] 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. The lack of 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.[46] 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.[47] Although administrative law does not turn explicitly on the timing of the regulation, such timing may be relevant to whether the agency has met relevant 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 likely constitutional as a structural matter.[48] Harried decision-

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President Bush recently issued Executive Order 13,422, which requires that significant interpretative statements from non-independent agencies now be submitted for OMB review. *See* Exec. Order No. 13,422, § 3, 72 Fed. Reg. 2703 (Jan. 18, 2007).

[41] 5 U.S.C. § 706(2)(A).

[42] United States v. Mead Corp., 533 U.S. 218, 234 (2001).

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

[44] Mead, 533 U.S. at 231.

[45] *See* Securities & Exchange Comm'n v. Chenery, 332 U.S. 194, 201-02 (1947); BREYER ET AL., *supra* note 19, at 488-94.

[46] In January 2001, before President Clinton left the White House, the Department of Agriculture (USDA) promulgated the "roadless rule" barring construction in particular areas of National Forests. Roadless Area Conservation Rule, 66 Fed. Reg. 3244 (Jan. 12, 2001). Wyoming and others brought a legal challenge, relying in part on the rule's timing to contest its legitimacy. *See* Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197 (D. Wyo. 2003). The case was mooted when the USDA under President Bush rescinded the rule. Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207 (10th Cir. 2005).

[47] 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 10, at 984 n.122, 993.

[48] *See* Beermann & Marshall, *supra* note 10, at 1271-80 (analyzing Term Clauses, Take Care Clause, and 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). Foreign relations issues may present trickier issues. *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 (request by Senator Pryor (D-AK)); *Regulation: Last Words*, ECONOMIST, Jan. 31, 1981, at 22 (request by President Reagan's transition team).

making procedures could implicate due process or other rights of affected parties, but agency action is rarely struck down on constitutional grounds.[49]

Early and late term activity may, however, still violate the APA or some other statute specific to the particular regulation. Such rulemaking typically must satisfy the requirements of Sections 553 and 706(2)(A) of the APA.[50] In assessing new rulemakings rescinding previous regulations, courts apply the same standard they would use in reviewing the original regulation.[51] Likewise, in reviewing challenges to the suspension of effective dates of published regulations or to original regulations promulgated right after a political transition, courts assess the validity of the agency action under similar standards.[52] Agencies can, however, usually withdraw proposed regulations that have not been finalized without providing notice and comment.[53]

The more pressed the agency is in a political transition, the more likely statutory procedural requirements may 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 not adequately consider opposing viewpoints.[54] An agency may also insufficiently meet a procedural mandate. For instance, an agency may address materially cogent comments in a cursory fashion. Or an agency may try to rely on an exception to procedural requirements that does not

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[49] *Cf.* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 462, 528-29 (2003) (contending that "hard look" review promotes critical constitutional concerns although courts do not treat it as a constitutional matter).

[50] Assuming no exception applies, agencies must, under Section 553, provide notice of a proposed rulemaking and its underlying legal authority, data supporting the proposed rulemaking, the opportunity for the public to comment on the proposed rulemaking, responses to materially cogent comments, and a defense of the final rulemaking, which must be a logical outgrowth of the proposed rule. *See* 5 U.S.C. § 553; Weyerhauser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); United States v. Nova Scotia Food Products Corp., 568 F.2d 20 (2d Cir. 1977). The agency decisionmaker must also have a sufficiently open mind. *See* Assoc. of Nat'l. Advertisers v. Fed. Trade Comm'n, 627 F.2d 1151 (D.C. Cir. 1979); Beermann, *supra* note 10, at 1003. Under Section 706(2)(A), the agency must not act in an arbitrary and capricious manner. *See* 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). Other statutes may impose additional requirements such as public hearings. *See, e.g.*, Federal Trade Commission Improvement Act of 1974, 15 U.S.C. § 57(a) (2000) (hybrid rulemaking procedures).

[51] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[52] *See* Nat. Res. Def. Council v. Abraham, 355 F.3d 179 (2d Cir. 1984); Public Citizen v. Steed, 733 F.2d 93 (D.C. Cir. 1984); Nat. Res. Def. Council v. EPA, 683 F.2d 752 (3d Cir. 1982); Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981). *See also* Beermann, *supra* note 10, at 994 (brief delays in effective dates of rules are typically legal); *but see* Sanford, *supra* note 10, at 784 (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.

[53] Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191 (D.C. Cir. 1996); *see also* Jack, *supra* note 10, at 1491-92.

[54] *See supra* note 50; Beermann, *supra* note 10, at 1001-02 (noting that no court has disqualified an official under this standard); *cf.* Nat. Nutritional Foods Ass'n v. Food & Drug Admin., 491 F.2d 1141 (2d Cir. 1974) (involvement of decisionmaker); United States v. Morgan, 313 U.S. 409 (1941) (same).

apply. For example, an agency may promulgate a rule without notice and comment, claiming it meets the good cause exception when it does not.

These statutory mandates, however, are not that hard to meet.[55] The agency may properly rely on an exception to APA rulemaking requirements. Or the agency may comply in a rather perfunctory fashion with all of the requirements of the APA and any other relevant statutes. Courts also cannot impose additional requirements on agencies.[56] In sum, so long as the agency pays some attention to the statutory requirements, it can often engage in 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 discussions over regulatory ossification, judicial deference, political control, and political transitions. Central to these discussions are empirical assumptions, explicit and implicit, about agency rulemaking. Section II.D draws out some of these assumptions, which are then tested in Part III.

The first discussion on regulatory ossification centers on the costs of procedural requirements for notice and comment rulemaking, with an emphasis on the costs imposed by judicial review. Many scholars contend that agencies shy away from notice and comment rulemaking because of these costs, thereby ossifying regulatory policies.[57] Other scholars suggest that judicial review does not significantly discourage such rulemaking and therefore that regulatory policies do not usually become ossified.[58] Is the regulatory process ossified?[59] Part III examines the quantity and duration of rulemaking actions across a wide range of agencies and across two decades to contribute to this discussion.

The second discussion focuses on the connection between the procedures the agency uses and the level of deference the courts give to the agency's decision—in essence, the benefits to notice and comment rulemaking. In *United States v. Mead Corporation*, 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.[60] Scholars and courts have debated the sufficiency of

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[55] *But see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); New York v. Environmental Protection Agency, 413 F.3d 3 (D.C. Cir. 2005).

[56] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).

[57] *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); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

[58] *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 (1992).

[59] Some empirical work has looked at this debate. *See* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002); Shapiro, Presidents and Process, *supra* note 9.

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

procedural requirements for this greater deference.[61] 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 that such procedures are necessary for *Chevron* deference, unless the agency engages in more formal procedures.[62] Others suggest that notice and comment procedures are neither necessary nor sufficient for *Chevron* deference.[63]

This deference discussion is connected to the previous one on regulatory ossification. As Matthew Stephenson (building on work by Elizabeth Magill, John Manning, and others) points out, rulemaking procedures have potential benefits as well as costs. 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."[64] Do agencies make such strategic choices? Part III creates an opening to pursue this question empirically.

The 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—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,[65] relying on statutory controls, the appropriations process, hearings, investigations, and other tools to keep agencies in line.[66] Others suggest that the President, who appoints all (and can fire at whim most) top officials, and can request "opinions" from them, wields considerable power.[67] Some scholars disagree on whether

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[61] *See* Merrill & Hickman, *supra* note 37, at 850 n.90 (conflict in lower courts).

[62] *See, e.g.*, Mead, 533 U.S. at 245-46 (Scalia, J., dissenting). More formal procedures would include formal rulemaking or adjudication procedures under Sections 556 and 557 of the APA.

[63] *See, e.g.*, Edelman v. Lynchburg College, 535 U.S. 106, 115 (2002).

[64] Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 528 (2007).

[65] *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 & Theodore Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

[66] For a short summary of these techniques, *see* DAVIDSON & OLESZEK, *supra* note 15, at 311-33.

[67] *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. 2246 (2001); Terry M. Moe, *An Assessment of the Positive Theory of Congressional Dominance*, 12 LEG. STUD. Q. 475 (1987); Joseph Stewart, Jr. & Jane S. Cromartie, *Partisan Presidential Change and Regulatory Policy: The Case of the FTC and Deceptive Practices*

judicial oversight changes agency decisions.[68] Others consider the role of interest groups and other outside parties as well as the agencies themselves.[69] What roles do Congress and the President play in agency rulemaking? Part III directly engages this institutional debate.

Most legal scholars concentrate instead on the normative or doctrinal dimension—which institutions should control administrative agencies.[70] Although the

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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).

[68] Some have noted that courts can have an impact on agency outcomes. *See* R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); RICHARD W. WATERMAN ET AL., BUREAUCRATS, POLITICS, AND THE ENVIRONMENT (2004); 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 overwhelmingly defer to agency action, or that even if courts remand decisions to agencies, initial agency decisions ultimately stand. *See* Harold J. Spaeth & Stuart Teger, *Activism and Restraint: A Cloak for the Justices' Policy Preferences*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 277 (Stephen Halpern & Charles Lamb eds., 1982); 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 (1990); 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).

[69] Interest groups can also exert pressure on agencies outside of the courts, for instance, through comments in the rulemaking process. *See* Scott Furlong, *Interest Group Influence on Rulemaking*, 29 ADMIN. & SOC. 325 (1997); Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POLITICS 128 (2006). Other agencies and states can also pressure agencies. 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 of Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951 (2005). Internal agency factors can also be important. Marc Allen Eisner & Kenneth J. Meier, *Presidential Control versus Bureaucratic Power*, 34 AM. J. POL. SCI. 269 (1990); Jerry Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 211-12 (1994); 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 Regulate (unpublished manuscript on file with the author).

[70] 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. 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); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Kagan, *supra* note 67; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, J. L. ECON. & ORG. 81 (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). 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); Thomas O. McGarity, *Presidential Control of Regulatory Decisionmaking*, 36 AM. U.L. REV. 443 (1987); Alan B. Morrison, *OMB Interference with Agency*

normative dimension directly follows from the positive debate, the discussions typically have occurred separately.[71] How should courts take into account political control of agency rulemaking? Does political control legitimate agency decisions? Parts III and IV address these positive and normative dimensions together.

The 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.[72] Much commentary on midnight and crack-of-dawn regulatory activity is disapproving.[73] Critics emphasize that such activity hurts social welfare. An agency may promulgate a midnight rule that it knows will not survive.[74] The midnight rule does not generate any social benefits because it does not go into effect, and it imposes procedural costs on the new Congress or President to revoke.[75] Or an agency, under new leadership, may suspend the effective date of a regulation that improves social welfare or enact a crack-of-dawn rule rescinding it.[76]

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); 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 49, at 463.

[71] *See supra* notes 65-70. To be sure, there are important exceptions. *See, e.g.*, Croley, *supra* note 8; 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).

[72] Scholars emphasize the second point, but pay some attention to the first argument. *See* Beermann, *supra* note 10, at 951-52; Mendelson, *supra* note 10, at 564-67; Morriss et al., *supra* note 10, at 558, 598. Beermann notes that he finds it hard "to articulate exactly what is wrong with the late term increase in activity." Beermann, *supra* note 10, at 952 n.8. Efficiency and democratic legitimacy are often themselves in tension. Political transitions likely increase inefficiency and instability but foster democratic legitimacy when it comes to agency decisionmaking. *See* Gregory H. Gaertner et al., *Federal Agencies in the Context of Transition: A Contrast of Democratic and Organizational Theories*, 43 PUB. ADMIN. REV. 421, 421 (1983); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, VAND. L. REV. (forthcoming).

[73] *See, e.g.*, Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENT. 183, 184-85 (1995); Jack, *supra* note 10; Morriss et al., *supra* note 10; Sanford, *supra* note 10; Jay Cochran, *Clinton's "Cinderellas" Face Regulatory Midnight*, USA TODAY, Dec. 13, 2000, at 17A (opinion); Murray Weidenbaum, *Hold Those Midnight Rules*, CHRISTIAN SCI. MONITOR, Jan. 17, 2001, at 11 (opinion).

[74] 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. §§ 801-08; Mendelson, *supra* note 10, at 592.

[75] The agency's motivations are unimportant. It could be, as 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 10, 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, perhaps generating political rewards or repercussions, but creating only costs on social welfare grounds.

[76] The agency may change its mind, if it is surprised by the backlash. *Cf.* SKRZYCKI, *supra* note 9, at 211-12 (summarizing the attempt, eventually abandoned, in March 2001 to reconsider a Clinton Administration rule reducing arsenic levels in drinking water). Although the agency may ultimately promulgate a socially beneficial rule, the rush to withdraw the rule without adequate examination creates

Midnight regulations may also raise democratic concerns, depending on the clarity of voter and politician preferences.[77] An agency may promulgate a final rule that voters clearly rejected in the election, before power is transferred to the victors. Or, in the aftermath of a transition, an agency may rescind a popular regulation that was enacted after intense public participation.[78] 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.[79] To the extent that agency actions compress or ignore public participation, such early or late actions may be especially undemocratic.

On the other hand, agency action during political transitions may improve social welfare as well as accord with democratic principles.[80] An agency may promulgate a final rule that improves social welfare but that is unpopular politically.[81] 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.[82] 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

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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. An agency may engage in particularly harmful regulatory activities in the immediate aftermath of a political transition because voters are not monitoring as carefully as they might were it closer to an election.

[77] 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 10, at 564. Such perceptions may undermine the administrative state's legitimacy and ultimately its efficacy. *Cf. id.* at 565 (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; Sargentich, *supra* note 14, at 28; Seidenfeld, *supra* note 70, at 20 & n.114; Shane, *supra* note 70, at 199.

[78] The election may have turned on matters unrelated to the regulatory agendas now being pushed by officials. *See supra* note 77.

[79] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 95 (2003).

[80] *See* Beermann, *supra* note 10, at 952-53; Mendelson, *supra* note 10, at 616-60.

[81] The agency may know that the new Congress or President will 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 10, 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.

[82] 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); D.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 of Beermann and the Mercatus Center, where agencies engage in midnight regulations because they have run out of time to finish projects started before a transition was foreseeable. Beermann, *supra* note 10, at 950-51; Cochran, *supra* note 9. It also differs from Mendelson's "tangible achievements" explanation. Mendelson, *supra* note 10, at 597.

needed information to the public so that they can participate more meaningfully in policy debates.[83] If an 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 III and IV explore these questions.

The current discussions on regulatory ossification, judicial deference, political control, and political transitions cover tremendous ground in administrative law and political science. This Article does not attempt to resolve them. Rather, the Article provides needed 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 draws out specific hypotheses for empirical study. Part III then tests, to varying degrees, many of the proposed theories. Part IV addresses 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 (*i.e.*, the costs and benefits of procedural choices), 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, etc.—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 comment (direct and interim final rulemaking), or interpretative 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. 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:

[83] *See id.* at 603, 660-62.

"Ossification" Hypothesis: If the costs usually outweigh the benefits to notice and comment rulemaking, there should be little such rulemaking. If the costs are not too great, agencies should often engage in notice and comment rulemaking.

"Deference" Hypothesis: After *United States v. Mead Corporation*, agencies should perceive that the benefits to notice and comment rulemaking are higher and thus should engage in more notice and comment rulemaking.

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

"Interim Final Rules" Hypothesis: Because controversial agencies prefer avoiding high conflict comment periods, they are more likely to use interim final rulemaking than 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.[84] I focus on two: the President and Congress. The President appoints, with Senate confirmation, individuals to lead cabinet departments, executive agencies, and independent agencies.[85] 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.[86] All agencies, whether independent or not, must regularly report to the OMB concerning their rulemaking activities.[87] In addition, non-independent agencies must get OMB approval before publishing notices of proposed rulemaking and then again before publishing final rules.[88] The President thus has tremendous potential power over the rulemaking process:

"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. 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

[84] *See* Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance"*, 12 LEG. STUD. Q. 475, 504 (1987).
[85] *See supra* notes 14, 16.
[86] *See, e.g.*, Kagan, *supra* note 67, at 2290-99.
[87] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2703 (Jan. 18, 2007).
[88] *Id*.

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. 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. Shifts in Presidential Administrations affect the completion of rulemakings by independent agencies less than they affect such activity by agencies directly under the President's control.

Congress generally designs agency structure and procedures to influence how agencies carry out their mandates (*i.e.*, it attempts to exert *ex ante* control over agencies).[89] In addition, Congress chooses what authority to delegate.[90] The Senate also confirms most agency leaders. Finally, Congress determines how much money to provide to agencies. *Ex post*, Congress, typically through committees, oversees agency efforts through information requests, hearings, and investigations.[91] These mechanisms permit Congress to shape the rulemaking process in multiple ways:

"Congressional Control—Ideology" Hypothesis: Assuming rulemaking is more likely, on average, to be regulatory than deregulatory, if both chambers of Congress are controlled by Democrats, agencies engage in more rulemaking than if both chambers are controlled by Republicans. The 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 proposed but not finalized under the previous Congress than rulemakings proposed under the new Congress. This effect could be stronger or weaker for independent agencies, depending on whether Congress exerts more pressure over independent agencies than non-independent agencies.

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[89] *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN (2003); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

[90] *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

[91] *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE (1990).

"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. This effect could be stronger or weaker for independent agencies, depending on whether Congress exerts more pressure over independent agencies than non-independent agencies.

When party control is divided between Congress and the White House, agencies face more conflicting pressures than when party control is unified.[92] 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 more likely not to be started or completed.

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

III. Empirical Investigation of Rulemaking

Despite the administrative state's vast scope, we know astoundingly little about how it functions as an empirical matter. There are various aggregate measures of administrative activity given in discussions concerning the breadth of the administrative state.[93] There are also some studies that focus on particular agencies.[94] 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.[95] The Article, by introducing a new extensive database on agency rulemaking and presenting initial results, aims to change that state of affairs.

This Part begins by describing a new extensive dataset I constructed from the *Unified Agenda of Federal Regulatory and Deregulatory Actions* (*Unified Agenda*), which is used to examine most of the hypotheses proposed in Section II.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 proposed rules 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. First, many agencies engage in considerable notice and comment rulemaking, suggesting that the traditional regulatory process may not be significantly ossified. Rulemaking without prior comment, however,

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[92] *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

[93] *See supra* note 9. 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. *See* SKRZYCKI, *supra* note 9, at 26-28.

[94] *See, e.g.*, MASHAW & HARFST, *supra* note 57.

[95] Many have called for more empirical work in administrative law. *See, e.g.*, Coglianese, *supra* note 59, at 1113, 1137; Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 409 (1990).

has increased across a wide range of agencies, a trend that may be strong enough to persist despite the Supreme Court's 2001 decision in *United States v. Mead Corporation*, which makes notice and comment rulemaking more attractive. Second, rather than capitalizing quickly on their electoral mandates, Presidents generally start fewer, not more, rules in the first year of their terms than in later years. In addition, the major independent agencies seem to counterbalance commonly perceived regulatory biases of political parties. Independent agencies commenced significantly fewer notice and comment rulemakings under President Clinton and Democratic congresses but started more under Republican Presidents and congresses. Third, agencies generally complete more rules in the final quarter of each Presidential Administration. But some agencies also rush to finish regulations before party control in Congress shifts. Fourth, Democrats are not the biggest midnight regulators. President George H.W. Bush started more midnight rulemakings in the final quarter of his term than did President Clinton or President Reagan. Fifth, some agencies do withdraw uncompleted regulations after a political transition. Certain agencies withdraw more proposed rules after a political transition in Congress than after a new President takes office. The results also suggest future avenues for empirical research.

A. *Unified Agenda* Database

I have constructed a vast database of agency rulemaking from federal agency semi-annual reports in the *Unified Agenda*, which is published twice a year in the *Federal Register*, from 1983 to 2003.[96] 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 rulemaking process was withdrawn (if the process was not completed). For rulemaking without prior public comment, the reports give the dates of direct and interim final rules. The reports also provide additional information about each rulemaking.[97]

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[96] 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 Lexis. 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). I am not the first to use data from the *Unified Agenda*. *See* Crews, *supra* note 9; 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); Loring & Roth, *supra* note 8; Sarah Cohen & Laura Stanton, *Comparing Presidential Action on Regulations*, WASH. POST, Aug. 16, 2004; Amy Goldstein & Sarah Cohen, *Bush Forces a Shift in Regulatory Thrust*, WASH. POST, Aug. 15, 2004, at A1; Jonathan Rauch, *The Regulatory President*, NAT. J., Nov. 30, 1991, at 2902. This Article, however, provides the most comprehensive use of that data.

[97] 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. Other work on the *Unified Agenda* does not appear to remove duplicate entries, making comparison across years problematic. *See, e.g.*, Crews, *supra* note 9; Rauch, *supra* note 96.

The database I created provides an incredibly comprehensive picture of rulemaking activity from President Ronald Reagan to President George W. Bush. It contains information on the rulemaking activities of all 15 cabinet departments and 15 executive and independent agencies, including the EPA, FTC, and SEC.[98] It contains relevant dates of traditional notice and comment rulemaking as well as rulemaking without prior public comment (direct and interim final rules).[99] It notes particular characteristics of rulemaking actions, including their significance and the existence of legal and statutory deadlines.[100] The database also removes duplicate entries from the *Unified Agenda* report.[101] In sum, the database allows for considerable exploration of agency rulemaking activity. To foster more studies, it will be made freely available to other scholars.

Like all data sources, however, this new database has some disadvantages. First, individual agencies submit data on their own activities to the *Unified Agenda*.[102] Independent observers are not verifying the data.[103] Under the Regulatory Flexibility Act and Executive Orders 13,422 and 12,866, agencies are required to report on their

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[98] From RISC's xml data files, I created an extensive electronic database of agency rulemaking activity. I examined data from the following agencies: Department of Agriculture (USDA), Department of Commerce (DOC) (including National Oceanic and Atmospheric Administration (NOAA)), Department of Defense (DOD), Department of Education (Education), Department of Energy (DOE) (not including Federal Energy Regulatory Commission (FERC)), Department of Health and Human Services (HHS) (not including Social Security Administration (SSA)), Department of Homeland Security (DHS), Department of Housing and Urban Development (HUD) (not including Office of Federal Housing Enterprise Oversight (OFHEO)), Department of Interior (DOI), Department of Justice (DOJ), Department of Labor (DOL) (not including Pension Benefit Guaranty Corporation (PBGC)), Department of State (State), Department of Transportation (DOT) (not including Surface Transportation Board (STB)), Department of Treasury (Treasury) (not including Internal Revenue Service (IRS)), Department of Veterans Affairs/Veterans Administration (VA), Consumer Product Safety Commission (CPSC), Environmental Protection Agency (EPA), Federal Communications Commission (FCC), Federal Emergency Management Agency (FEMA), FERC, Federal Trade Commission (FTC), IRS, National Aeronautics and Space Administration (NASA), Nuclear Regulatory Commission (NRC), OFHEO, PBGC, Securities and Exchange Commission (SEC), Small Business Administration (SBA), SSA, and STB. In 2003, FEMA was placed in DHS.

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

[100] *See id*.

[101] *See id*.

[102] Mashaw argues that the self-reporting nature of the data makes it impossible to compare rulemaking activity across agencies. *See* Mashaw, *supra* note 69, at 198 n.41. At the very least, the data permit comparison of an 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 non-significant or routine. The *Unified Agenda* data may not be perfect and indeed needs confirmatory research, but it provides a critical perspective on the administrative state.

[103] Agencies now 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 70, at 179-80; *see also* Exec. Order No. 12,498 (Jan. 4, 1985) (establishing prospective reporting requirements); Exec. Order No. 12,291 (Feb. 17, 1981) (establishing respective reporting requirements). Under President Clinton's Administration, the OMB did not exercise such control. *See* Shane, *supra* note 70, at 181-82.

regulatory activities, though they face no specific penalty for not doing so. Agencies, however, have particular incentives for accurately reporting rulemaking activity. Because publication in the *Federal Register* is the official means of notifying the public of new regulations, agency activity cannot be hidden if agencies expect anyone to comply with their rules. 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.[104]

Second, the *Unified Agenda* reports miss many complexities of rulemaking. Jerry Mashaw contends that counts of rules are a misleading indicator of agency rulemaking activity.[105] 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."[106] The database provides a big-picture perspective on agency rulemaking. That perspective is perhaps most problematic in assessing the effects of ideology on rulemaking. The quantity of rulemaking may be poorly correlated with its content. For instance, some agencies may engage in considerable deregulatory rulemaking. But the macro perspective is less problematic in evaluating the ossification of rulemaking; the amount and length of rulemaking is important, whether the content is regulatory or deregulatory. The database research 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. Agencies can often make policy decisions through other processes. They can announce rules in individual adjudications.[107] They can also issue guidance and policy announcements.[108] These actions are not typically captured in the *Unified Agenda* data.[109] None of these limitations on the data makes the subsequent analysis invalid. They suggest only that confirmatory research is warranted in some circumstances.

The extensive database allows analysis of many of the hypotheses described in Section II.D. The results are broken down as follows: the choice among notice and

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[104] 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. *OSHA Decision to Ax TB Rulemaking Upsets Labor, Gains Hospital Backing*, INSIDE OSHA, June 9, 2003.

[105] Mashaw, *supra* note 69. Mashaw also notes, without detail, that RISC changed how it classified rules in 1986. *Id*. at 198 n.41. But, in my examination, there seems to be no meaningful change in agency reporting after 1986. Classification of the significant of rules does shift in the 1990s; consequently, any comparisons about the significance of rulemakings, *infra*, uses only consistent data after that shift.

[106] *Id*.

[107] *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004).

[108] *See* Mendelson, *supra* note 10, at 574.

[109] Steven Croley and Elizabeth Magill are collecting information on a wide range of agency activities. More empirical work needs to examine how agencies choose among these possibilities. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form.* 71 U. CHI. L. REV. 1383, 1386 (2004); Stephenson, *supra* note 64, at 566. There are a few isolated examples of such work. *See, e.g.*, MASHAW & HARFST, *supra* note 57; *cf*. Beermann, *supra* note 10, at 967-69 (discussing electronic searches on non-legislative rules at the end of the Clinton Administration).

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 proposed rulemaking.

B. Choice of Rulemaking Procedure

Agencies seeking to enact a binding rule often get to choose among notice and comment rulemaking (the commencement of which is an NPRM), direct final rulemaking, or interim final rulemaking, though some procedures may not be warranted in particular circumstances. That choice can provide needed information about agency perceptions of the costs and benefits to particular forms of rulemaking. Chart 1 displays trends in all three forms of rulemaking (NPRMs, direct final rules, interim final rules), across all agencies listed in note 98 from 1983 to 2002.[110] Chart 2 shows only the direct and interim final rulemakings from Chart 1.

Direct and interim final rulemaking have been increasing over time. NPRMs increase in the early 1990s, and decrease in 2001. Interim final rulemaking seems to track the trends in NPRMs in the early 1990s, but both interim and direct final rulemaking increase in 2001 as NPRMs drop 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. The 1993 and 2001 data may also show that Presidents lean toward interim final rulemaking in the first year of their Administrations to achieve regulatory objectives more quickly than they could with notice and comment rulemaking, though this does not appear to be true for President George H.W. Bush in 1989.

[110] I dropped the data from 2003 because it appeared incomplete on the actual commencement and completion of rulemaking activities.

Chart 1: Forms of Rulemaking, 1983-2002

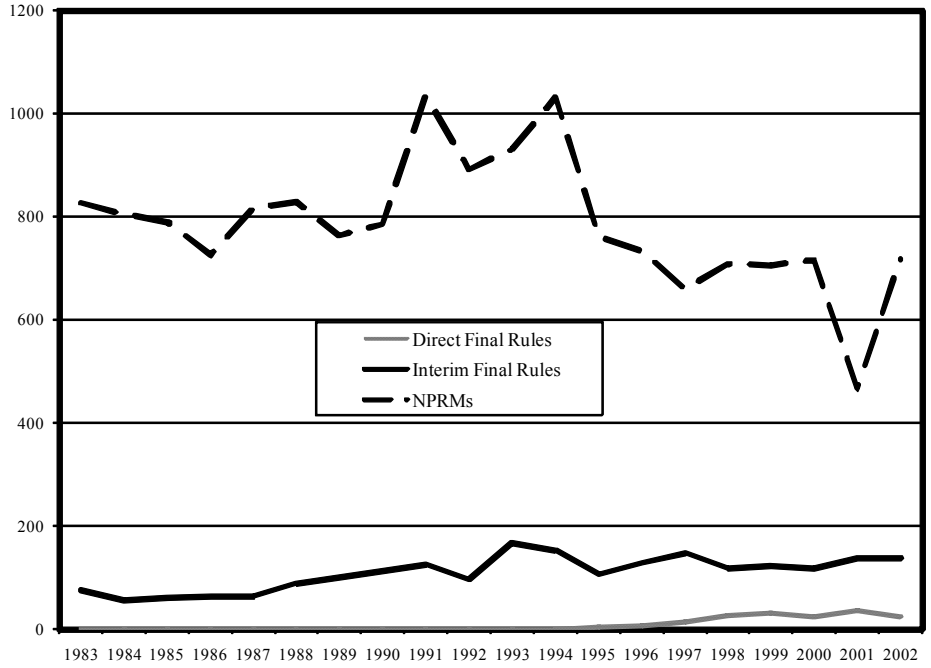
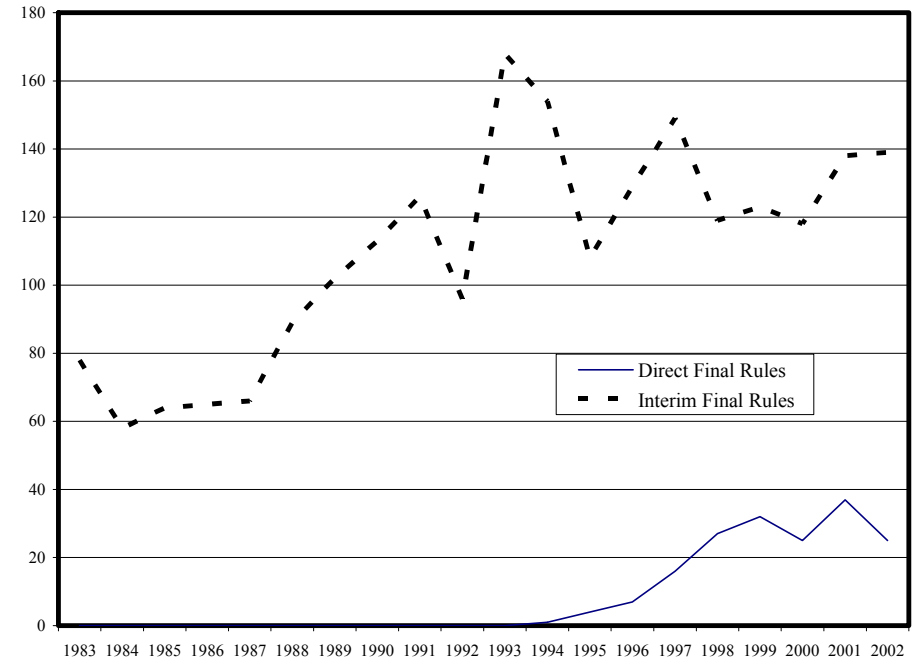


Chart 2: Direct and Interim Rulemaking, 1983-2002



Source for Charts 1 and 2: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers with an NPRM, Direct Final Rule, or Interim Final Rule action listed with an actual date between 1983 and 2002.

These simple counts shed some light on the "Ossification", "Deference", "Direct Final Rules", and "Interim Final Rules" Hypotheses. First, on the "Ossification" Hypothesis, Chart 1 suggests that the procedural costs to rulemaking are not so high as to prohibit considerable rulemaking activity by agencies. The administrative state, at least on a macro level, does not seem be substantially ossified. To be sure, these counts do not tell us what the optimal level of rulemaking or what the content of the rules should be. Perhaps, from a social welfare or democracy perspective, there should be more rulemaking of a particular kind, or less.[111] But the counts do show that agencies issue from several hundred to over a thousand NPRMs per year and a generally increasing number of direct and interim final rules per year.[112] Second, on the "Deference" Hypothesis, Chart 1 provides some support that agency use of notice and comment rulemaking increased after the Supreme Court's 2001 decision in *United States v. Mead Corporation*. 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. The data thus do not disprove the "Deference" Hypothesis.[113]

Finally, Chart 2 and the underlying data give some backing to the "Direct and Interim Final Rules" Hypotheses, which predict that less controversial and more technical agencies are more likely to use direct final rulemaking than other agencies because they expect fewer adverse comments and 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.

The most frequent users of direct final rulemaking, between 1983 and 2002, are, in decreasing order: the EPA (100 direct final rules), NRC (26), Department of Transportation (DOT) (25), and Department of Agriculture (USDA) (20). As a percentage of an agency's rulemaking activities, the most frequent users are, in decreasing order: the EPA (5.7%), NRC (5.2%), Small Business Administration (SBA) (2.2%), and DOT (1.2%).[114] To the extent that independent agencies are less controversial and more technical than executive agencies, the NRC's choices seem to comport with the "Direct Final Rules" Hypothesis, but the choices of the EPA, DOT, and USDA do not. But, overall, independent agencies are not the most frequent users of direct final rulemaking. Instead, controversial agencies appear to use direct final rulemaking to avoid scrutiny even though such rulemaking is intended for non-controversial rules. Such choices are understandable as a strategic matter.

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[111] *See* Bressman, *supra* note 49, at 544 (calling for notice and comment rulemaking to decrease arbitrary agency action).

[112] The length of the rulemaking process is also important for assessing the ossification debate. *See* Section III.D, *infra*. 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. How many NPRMs fail to produce final rules?

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

[114] The percentages are low because agencies did not engage in direct final rulemaking for the first half of the period being studied.

The most frequent users of interim final rulemaking, between 1983 and 2002, are, in decreasing order: the USDA (312 interim final rules), Department of Commerce (DOC) (212), DOJ (209), and Department of Defense (DOD) (206). As a percentage of an agency's rulemaking activities, the most frequent users are: the Department of State (State) (57.6%), Department of Homeland Security (DHS) (47.3%), NASA (40.2%), and DOJ (35.2%). Eleven additional agencies devote more than 10 percent of their rulemaking activities to interim final rules: the DOD, Department of Housing and Urban Development (HUD), Federal Emergency Management Administration (FEMA), USDA, DOL, SBA, DOC, Treasury, Office of Federal Housing Enterprise Oversight (OFHEO), Department of Energy (DOE), and Department of Health and Human Services (HHS). Chart 3 displays the number of interim rules by the most frequent users of the procedure (USDA, DOC, DOJ, and DOD) 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 and DOD promulgated significantly more interim rules than during other presidential terms, including President Clinton's second.[115] That pattern does not hold for the DOC and DOJ.[116]

Much of this interim final rulemaking may be explained in non-political terms. 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 heavily rely on emergency rationales for their interim rulemaking. NASA does relatively little rulemaking of any kind. Interestingly, the EPA devotes a below average percentage of its rulemaking to interim final rulemaking, perhaps because it anticipates that such rulemaking would lead to procedural challenges in the courts. But many politically charged agencies, 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, it therefore appears that more controversial agencies, likely 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, confirming the "Interim Final Rules" Hypothesis.[117]

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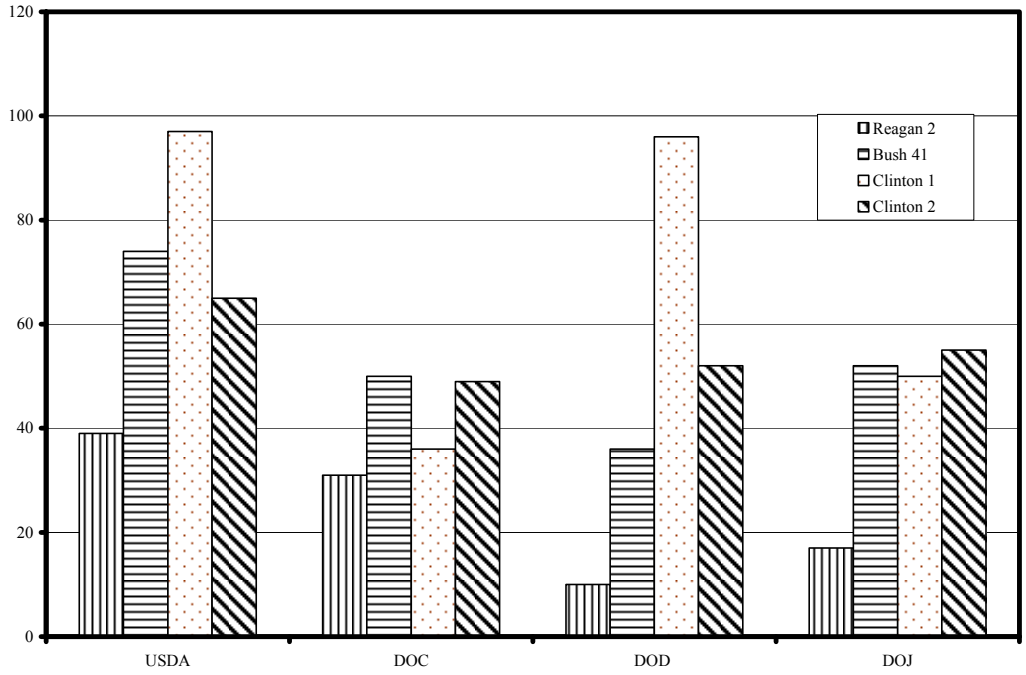
[115] The USDA was reorganized in 1994; among other items, the reorganization separated food safety and marketing issues and closed almost one-third of the department's field offices. Ronald Smothers, *U.S. Shutting 1,274 Farm Field Offices*, N.Y. TIMES, Dec. 7, 1994, at A16; *A Conflict of Interest?*, FOOD & DRUG PACKAGING, Jan. 1995.

[116] 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 USDA and DOD. The Chi-Square results for each agency are listed as follows (Agency (χ^2 value, degrees of freedom, significance level)): USDA (6.924, 2, 0.031); DOC (2.711, 2, 0.258); DOD (31.478, 2, 0.000); DOJ (0.242, 2, 0.886).

[117] Further research should examine which agencies (or parts of agencies) use direct or interim final rules for major/significant rules and how often. In addition, if an agency receives adverse comments to a direct final rule, the agency is supposed to go through traditional commenting procedures. Interim rules

Chart 3: Interim Rulemaking, by Presidential Term, 1985-2000



Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers 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 notice and comment rulemaking, intimating that the traditional rulemaking process may not be significantly ossified. That finding has one major limitation. Rulemaking without prior comment has increased across a wide range of agencies, which suggests that notice and comment rulemaking has significant costs that agencies want to avoid. This trend may continue even though the Supreme Court's 2001 decision in *United States v. Mead Corporation* makes notice and comment rulemaking more attractive. 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.

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*.[118] This public decision to commence

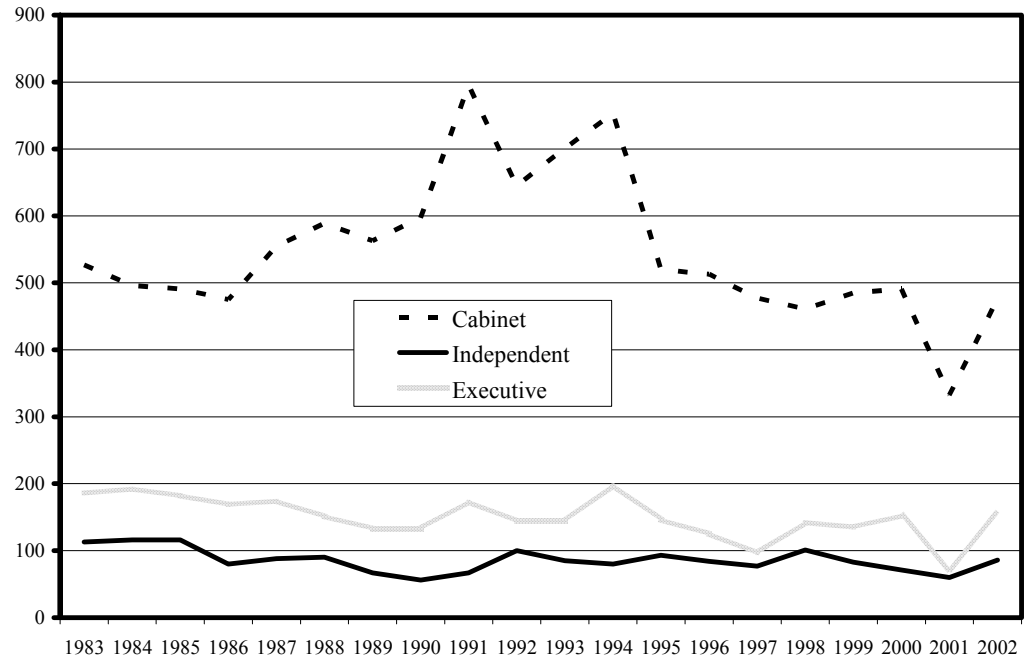
technically are supposed to be temporary. The database can be used to investigate how often direct final and interim final rulemaking turns into traditional notice and comment rulemaking.

[118] Cabinet departments and executive agencies must get OMB approval before publishing an NPRM. *See supra* note 28 and accompanying text. An agency may have also issued an Advanced Notice of Proposed

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 appears relatively stable. Chart 4 shows the trends in NPRMs for cabinet departments, executive agencies, and independent agencies listed in note 98.[119] There is no overall increase or decrease in rulemaking proposals in this time period.

Generally, the three categories of agencies experience the same direction of change (increasing or decreasing) from the preceding year, especially cabinet departments and executive agencies. In the mid-1990s, independent agencies' proposals of rulemaking seem to display conflicting directional change from non-independent agencies. In the cabinet departments, there are increases in NPRMs at the end of President George H.W. Bush's Administration and in the first two years of President Clinton's Administration, but proposals of rulemaking come close to settling at earlier levels after the 1994 mid-term congressional elections. Independent and executive agencies seem to have 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 drop for all agencies.

Chart 4: NPRMs, 1983-2002



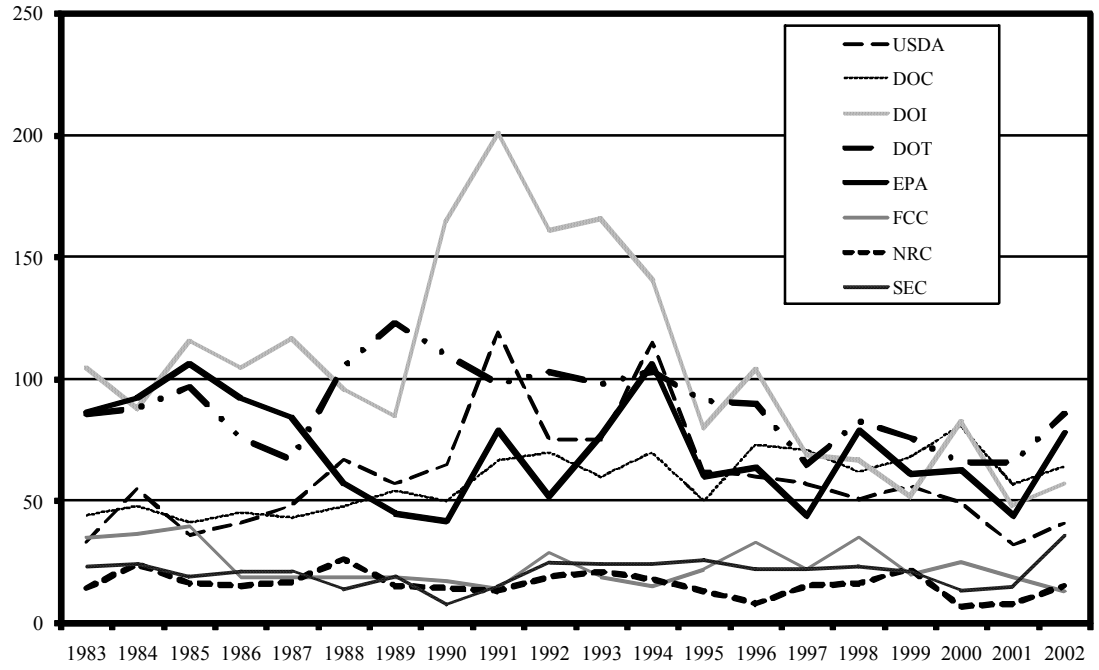
Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for agencies listed in note 98 with an NPRM with an actual date between 1983 and 2002. Agencies are categorized as described in notes 98 and the Data Appendix. NPRMs are defined in the Data Appendix.

Rulemaking (ANPRM) or engaged in negotiated rulemaking, 5 U.S.C. §§ 561-70, before publishing an NPRM.

[119] *See* Data Appendix, *infra*.

Chart 5 shows trends in NPRMs for the agencies with the most rulemaking activity in this period for their type of agency (cabinet, executive, independent).[120] Proposals of rulemaking from independent agencies, the FCC, NRC, and SEC, appear relatively constant. For a series of years in the 1980s, the EPA proposes fewer and fewer rules.[121] The DOI shows the largest rise (in absolute terms) in the early 1990s in proposed rulemaking, but the number of its proposals generally declines throughout the Clinton Administration.

Chart 5: NPRMs, 1983-2002



Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for USDA, DOC, DOI, DOT, EPA, FCC, NRC, and SEC with an NPRM with an actual date between 1983 and 2002.

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[120] This Section focuses on all NPRMs, significant and nonsignificant. Since the mid-1990s, 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 7. Looking at significant NPRMs with an actual date in the 1983-2003 *Unified Agendas*, the cabinet departments with the most activity are: the DOT (241 significant NPRMs), USDA (238), HHS (229), DOI (132), HUD (103), DOL (82). The non-cabinet executive agencies with the most activity are: the EPA (264 significant NPRMs), SBMA (59), IRS (18). The independent agencies with the most activity are: the FCC (82 significant NPRMs), SEC (23), NRC (12). Summing up significant NPRMs across all agencies listed in note 98, the trends across time are unclear. For each year from 1994 to 2002, there are 178, 188, 165, 143, 195, 224, 159, 121, and 189 significant NPRMS, respectively. As with all NPRMs, there is a drop in significant NPRMs in President George W. Bush's first year of office.

[121] The 1990 Amendments to the Clean Air Act required 452 separate actions by the EPA. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, CLEAN AIR ACT: EPA HAS COMPLETED MOST OF THE ACTIONS REQUIRED BY THE 1990 AMENDMENTS, BUT MANY WERE COMPLETED LATE, GAO-05-613 (May 2005), at 3.

Regression analysis permits examination of multiple factors on the initiation of notice and comment rulemaking by the eight agencies in Chart 5. Regulatory activity is observed across multiple agencies (*i.e.*, cross-sectional) and across nearly two decades (*i.e.*, time series); in other words, cross-sectional time series data. I focus on the cross-sectional (across agencies) variation.[122] To do this, I use a fixed effects regression model, a type of regression model that controls for omitted explanatory variables that may differ among agencies but remain constant 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.

The dependent variable is the number of NPRMs, *i.e.*, a *count* of regulatory activity. The counts likely are not independent; one rulemaking likely contributes to another rulemaking. To capture this feature of the dependent variable, I use a special form of the fixed effects model, a negative binomial fixed effects regression model.[123] Table 1 reports regression results of various political factors on the initiation of notice and comment rulemaking.[124]

[122] I ran some preliminary regressions with lags of the dependent variable (*i.e.*, values of the dependent variable in the preceding year); the results did change significantly. Nevertheless, the time series nature of the data could be more systemically examined.

[123] Technically, the negative binomial fixed effects model in Stata is not a true fixed effects model in that the fixed effects center on the dispersion parameter, not on the agencies; in other words, it does not control for all the stable covariates. *See* Paul D. Allison & Richard Waterman, *Fixed-Effects Negative Binomial Regression Models*, 32 SOCIOLOGICAL METHODOLOGY 247 (2002). I get similar results using a negative binomial model with agency dummy variables, which does control for the agencies. *See infra* note 124.

[124] 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.* Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, at 39 (working paper 2007) (finding that deadlines decrease the duration of rulemaking). When the regression in Table 1 is run as a standard negative binomial regression with dummy variables for the agencies (instead of the fixed effects model), dropping the EPA, all of the agency variables are significant. The DOI and DOT are associated with more rulemaking activity; the USDA, DOC, FCC, NRC, and SEC are linked to less rulemaking activity. The other statistically significant relationships—first year of President's term, Congress's party control, the interaction of Congress's party with agency independence, and the interaction of the President's party with agency independence—remain.

Table 1: Notices of Proposed Rulemaking by 8 Agencies, 1983-2002

Variable	*Coefficient (Standard Error)*
President's Party (R)	-0.050 (.055)
Congress's Party (R)	-0.165 (.064)**
President's First Year	-0.168 (.069)*
President's Last Year	-0.019 (.066)
Indep.*Congress's Party	0.240 (.070)**
Indep.*President's Party	0.119 (.059)*
Independent	0.146 (.446)
United Government	0.170 (.147)
Change in Congress	0.116 (.063)
Constant	2.969 (.187)**

n=160
Wald $X^2(9)=42.69$ (test of covariates as a group having no effect)
Prob > $X^2=0.00$
* p < .05, ** p < .01
Note: Stata's fixed-effects negative binomial model; 8 groups (USDA, DOC, DOI, DOT, EPA, FCC, NRC, SEC).

Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for the USDA, DOC, DOI, DOT, EPA, FCC, NRC, and SEC with an NPRM with an actual date between 1983 and 2002.[125]

The Executive Branch, along with agency characteristics, appears to influence the initiation of rulemaking activities, providing mixed support for the "Presidential Control—Ideology" and "Presidential Control—Crack-of-Dawn Action" Hypotheses. The party of the President is not statistically related to the initiation of rulemaking as a general matter, contrary to the "Ideology" Hypothesis, which predicts less rulemaking under Republican Presidents than under Democratic Presidents.[126] But the interaction of a Republican President and agency independence is positively correlated with the commencement of rulemakings; likewise, the interaction of a Democratic President and agency independence is negatively correlated with the number of NPRMs. In other words, independent agencies under President Clinton commenced significantly fewer notice and comment rulemakings; these agencies started more rulemakings under Republican Presidents. Independent agencies therefore seem to counterbalance commonly perceived regulatory biases of the President.

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

[125] For explanation for how the variables are coded, see Data Appendix, *infra*.
[126] *Cf.* Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197 (1982) (regulatory behavior of the NLRB, FTC, and SEC "varies systematically with presidential partisanship"); Cochran, *supra* note 9, at 13 (no relationship between party control of the White House and the number of *Federal Register* pages); Valentin Estevez, Liberals, Conservatives and Your Tax Return, at 1 (Nov. 30, 2004) (unpublished manuscript on file with author) (IRS audits individual returns less frequently and business returns more frequently when the President is a Democrat); *see also supra* note 67.

more, rulemaking proceedings. There is a significant start-up period for each President: 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, etc.[127] Presidents often impose moratoriums on rulemaking "to assert control over the rulemaking process" when they take office.[128] Presidents do not seem to start more rulemakings in the final year.[129]

Party control of Congress also shapes agency rulemaking in certain respects, generally supporting the "Congressional Control—Ideology" and "Congressional Control—Crack-of-Dawn Action" Hypotheses. As predicted by the "Ideology" Hypothesis, Republican control of both chambers of Congress is connected to significantly fewer NPRMs, and Democratic control of both chambers is connected to significantly more NPRMs.[130] 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 positively correlated with the commencement of rulemakings; likewise the interaction of a Democratic Congress and agency independence is negatively correlated with the number of NPRMs. In other words, independent agencies start more rulemakings when Republicans control Congress. Independent agencies seem to counterbalance commonly perceived regulatory biases of both of their major overseers, the President and Congress.

The regression results do not strongly support the "Divided Government" Hypothesis, which predicts less rulemaking under divided government. The United Government variable is in the expected direction (*i.e.*, positive coefficient between united government and NPRMs) but is not significant in this specification; it is significant and in the expected direction in other model specifications.[131]

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[127] 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 10, at 1262. Since 1963, Congress has given funding to the incoming President "to establish a transition team and to bring potential appointees to Washington for interviews and general vetting." *Id.* at 1264.

[128] CURTIS W. COPELAND, CONGRESSIONAL RESEARCH SERVICE REPORT 32356, FEDERAL REGULATORY REFORM: AN OVERVIEW, at 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 90-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 9, 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. The Senate, under pressure from the Clinton Administration and Democrats, did not act. *See* SKRZYCKI, *supra* note 9, at 153-55; Sunstein, *supra* note 70, at 273.

[129] *But see* Table 2, Charts 6-7, *infra*.

[130] *Cf*. Cochran, *supra* note 9, at 13 (finding no relationship between party control of Congress and the number of *Federal Register* pages).

[131] 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 instead of those two variables, United Government becomes significant in the expected direction (*i.e.*, united government is correlated with more NPRMs). The other two statistically significant effects remain: the first year of a President's term is negatively related to the commencement of rulemaking and the interaction between a Republican Congress and

In sum, the first part of this Section yields two important findings. First, independent agencies seem to work against regulatory biases of the President and Congress, starting more rulemakings when there is a Republican President or Republican Congress. Second, rather than capitalizing quickly on their electoral mandates, Presidents generally start fewer, not more, rules in the first year of their terms than in later years. This empirical work thus marks an important first step in analyzing notice and comment rulemaking.[132]

Some attention should also be devoted to the commencement of rulemaking activity after an election changes power in Congress or White House but before control actually shifts—the period between November and January in an election year.[133] The next Sections investigate the completion of regulatory activity in that period and the withdrawal of proposed but not finalized regulations after that period. This Section concludes by looking at midnight commencements of rulemaking. 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 where power shifted, either in Congress or in the White House.[134] Charts 6 and 7 graphically display the results of Table 2 for a subset of the agencies with the most midnight NPRM activity.

Through Chi-Square tests, which analyze differences among observed frequencies of particular events, the null hypothesis that there are equal numbers of

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agency independence is positively related to the start of rulemaking. None of the Presidential dummy variables is significant.

[132] Additional research should examine these hypotheses with different measures of rulemaking activity—for instance, its content (regulatory or deregulatory), and its length. The analysis here does not distinguish rulemakings rescinding previous regulations from rulemakings establishing new regulatory or deregulatory programs. 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 also focuses only on the start of the rulemaking process. How does the number of comment periods (*i.e.*, 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 (*i.e.*, independence from President) and perceived ideological preferences of the agency correlate with particular attributes of the rulemaking process? I have begun some of this research. *See* Gersen & O'Connell, *supra* note 124. In this other work I have shifted the level of observation from yearly counts of categories of rulemaking activities (*e.g.*, 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 (*e.g.*, shifts in Presidential Administrations), but also individual attributes of a particular rulemaking activity (*e.g.*, source and age of legal authority, existence of statutory or judicial deadlines, expected effect on the economy, expected effect on levels of government, etc.). *Cf.* Shapiro, *Two Months*, *supra* note 9, at 15 (reporting descriptive information on the length of the rulemaking process for rules promulgated in November and December 2003); Shapiro, Presidents and Process, *supra* note 9, at 18 (same for November/December 1999 and 2003).

[133] Election Day is the first Tuesday of November. Presidents are inaugurated on January 20th. Members of Congress take office on January 3rd. Thus, the lag is slightly shorter for changes in Congress than for changes in the White House. U.S. CONST. amend. 20; *see also* Beermann & Marshall, *supra* note 10, at 1260.

[134] Technically, the counts should be from Election Day to the date of the political transition. *See supra* note 133. These results presented, however, would not change in any meaningful way.

NPRMs across elections is rejected with statistical significance at or over 99 percent for the following agencies from Charts 6 and 7: the USDA, DOI, DOT, EPA, and IRS.[135]

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, DOT, and IRS issued more NPRMs than in any other political transition period. This pattern has an intuitive explanation. President Bush presumably hoped and indeed 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, though they could have been deregulatory in nature.[136] Also telling are the midnight NPRMs by the EPA after the 1994 mid-term elections. The EPA may have begun those rulemakings to gain some power against the new Republican congressional majorities.

[135] The Chi-Square results for each agency are listed as follows (Agency (χ^2 value, degrees of freedom, significance level)): USDA (23.297, 4, 0.000); DOC (2.732, 4, 0.604); DOD (7.630, 4, 0.106); HHS (8.366, 4, 0.079); DOI (56.741, 4, 0.000); Treasury (8.744, 4, 0.068); DOT (21.789, 4, 0.000); EPA (14.957, 4, 0.005); FCC (2.478, 4, 0.649); IRS (13.265, 4, 0.010).

[136] *See supra* note 128.

Table 2: "Midnight" Notices of Proposed Rulemaking by Agencies after 1986, 1988, 1993, 1994, and 2000 Elections

Agency	1986	1988	1992	1994	2000
USDA	9	18	29 (2)	13 (8)	5 (2)
DOC	11	13	18	12	17 (1)
DOD	7	5	3	10	2
Education	1	10	3	2	0
DOE	2	6	1	4 (2)	2
HHS	12	22	23 (2)	10 (2)	15 (7)
DHS					8 (4)
HUD	2	8	3	2 (1)	3 (2)
DOI	19	18	62	18 (4)	18 (7)
DOJ	3	4	4	4 (2)	8 (1)
DOL	5	11	5	8 (2)	2 (1)
State	0	0	1	0	2
DOT	13	21	42 (3)	19 (3)	19 (2)
Treasury	4	4	12	13	10
VA	3	8	5 (3)	1	3 (1)
EPA	13	17	14 (1)	33(14)	15 (3)
FEMA	1	3	0	2	1
IRS	21	15	33 (2)	28 (2)	39
NASA	0	4	1	2	1
SBA	0	2	1	2 (2)	2
CPSC	0	5	0	1	1
FCC	9	8	11 (3)	6 (1)	12 (2)
FERC	0	0	2	4	3
FTC	0	0	0	0	0
NRC	2	6	5	4	1
PBGC	1	0	2	0	2
SEC	7	2	7	5	1
SSA	1	1	2	1	3 (3)

Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers with any NPRM (significant NPRMs are in parentheses) with an actual date between November 1, 1986 and January 20, 1987 (Senate change), November 1, 1988 and January 20, 1989 (White House change), November 1, 1992 and January 20, 1993 (White House change), November 1, 1994 and January 20, 1995 (House and Senate changes), and November 1, 2000 and January 20, 2001 (White House change).

Chart 6: NPRMs Issued After Election (1986, 1988, 1992, 1994, 2000)

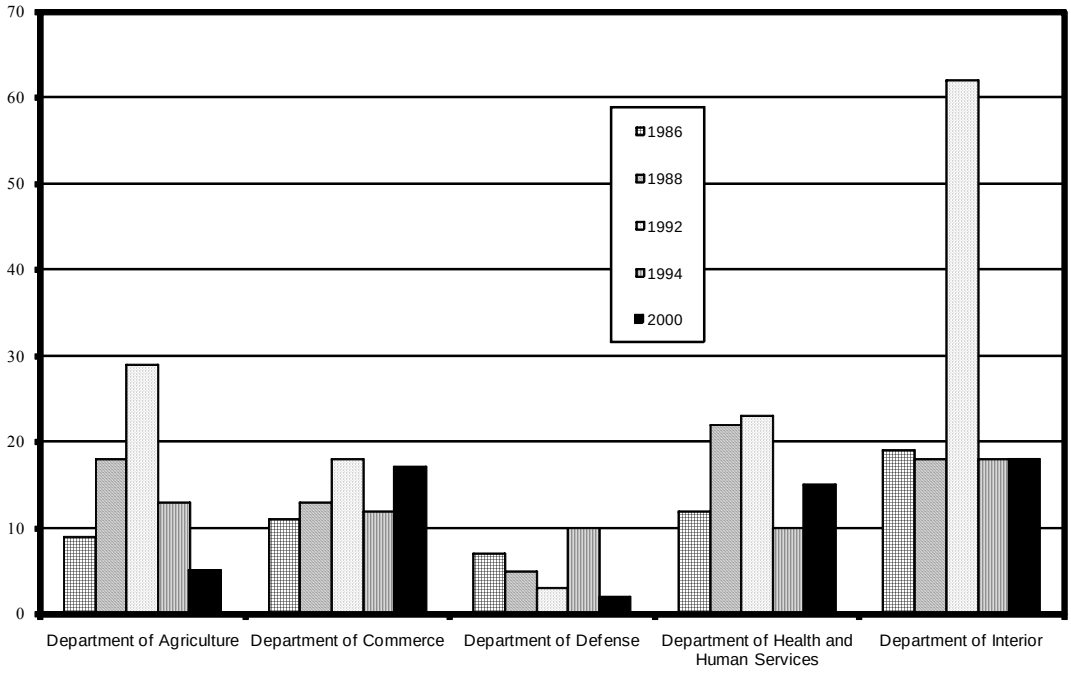
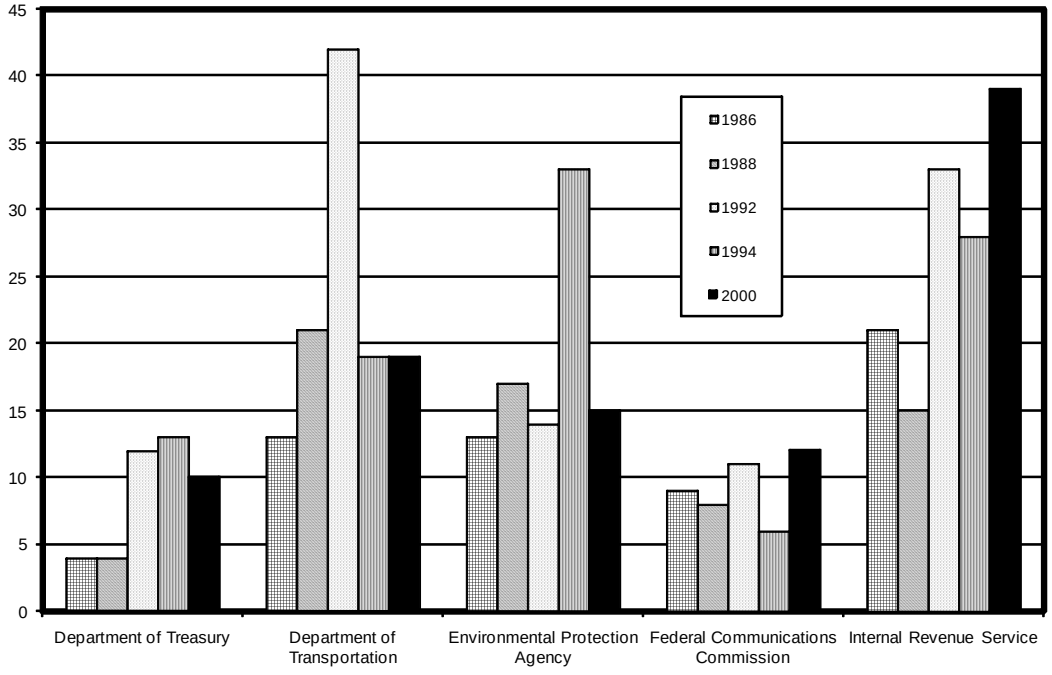


Chart 7: NPRMs Issued After Election (1986, 1988, 1992, 1994, 2000)



Source for Charts 6 and Chart 7: Same as for Table 2.

These results lend some support to the "Presidential Control—Midnight Action" Hypothesis, which predicts that outgoing Presidents try to complete rulemakings before they leave office. In order to complete regulatory action, agencies have to start such action.[137] The main finding of the final part of this Section, however, says more about individual Presidents. Democrats may not be the biggest midnight regulators. From Table 2, President George H.W. Bush started over one-third more midnight rulemakings in the final quarter of his term than did President Clinton or 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 strength of various political pressures and institutional structures on agency action.

Chart 8 shows the trends in the completion of regulatory activity for cabinet departments, executive agencies, and independent agencies in the final quarter of each year from 1983 to 2002.[138] Cabinet departments finish the most regulatory actions in the final year of the Administrations of the two Republican Presidents in the data (as compared to completions in other years of the same Administrations).[139] Commentators argued that President Clinton engaged in considerable midnight regulatory activity.[140] But his cabinet departments finished more regulatory activity after the Republicans won the 1994 mid-term elections (but before the Republicans gained control of Congress in January 1995) than in any other final quarter of his Administration, including before President George W. Bush takes office.[141]

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[137] This summary of midnight NPRMs raises issues to be examined in more detail in future research. The final quarters in election years should be compared with the final quarters of non-election years. Regression analysis, in particular, would permit exploration of multiple factors possibly connected to final-quarter NPRMs.

[138] For the analysis in this Section, the final quarter is defined as November 1 of a Presidential election year to January 20 of the following year. Technically, the counts should be from Election Day to the date of inauguration. These results presented, however, would not change in any meaningful way. *See supra* notes 133, 134. Completions consist of direct final rulemaking, promulgation of rules after notice and comment rulemaking, and other "final action" (a category in the *Unified Agenda*). *See* Data Appendix, *infra*.

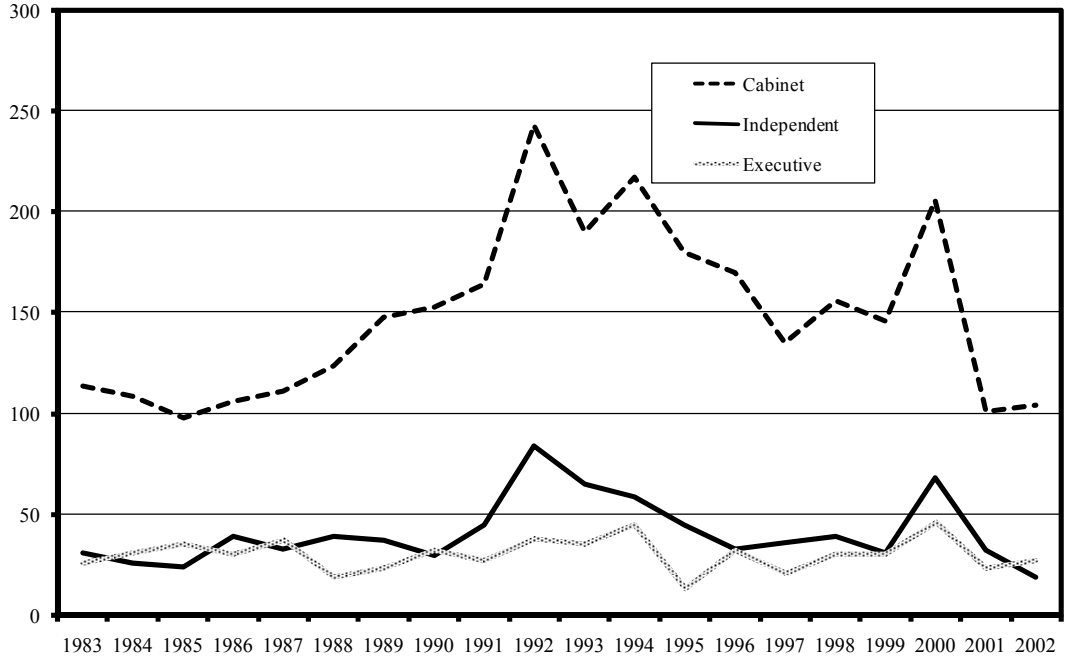
[139] President Reagan's midnight activities are particularly interesting because party control of the White House did not change when he left office. Commentators have remarked that the Reagan Administration "scrambl[ed] to put on the books regulations that were too hot to handle during the campaign,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

[140] *See* Beermann, *supra* note 10; Mendelson, *supra* note 10; Cochran, *supra* note 9.

[141] President Clinton's end-of term national monument designations under the Antiquities Act of 1906 do, however, appear unique. *See* National Park Service, 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 June 30, 2007) (and individual monument web sites linked within) (collected data available from author); *see also* Beermann, *supra* note 10, at 973-77; Eric Pianin, *White House Won't Fight Monument Designations*, WASH. POST, Feb. 21, 2001, at A7.

Interestingly, independent agencies seem to complete more regulatory activity in the final quarter of a President's Administration than in preceding years.[142] Perhaps, some commissioners plan on leaving their posts when the Administration ends. 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.

Chart 8: Fourth Quarter Completions, 1983-2002



Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for agencies listed in note 98 with a completed regulatory action with an actual date between 1983 and 2002. Agencies are categorized as described in notes 98 and the Data Appendix. Completed actions are defined in the Data Appendix.

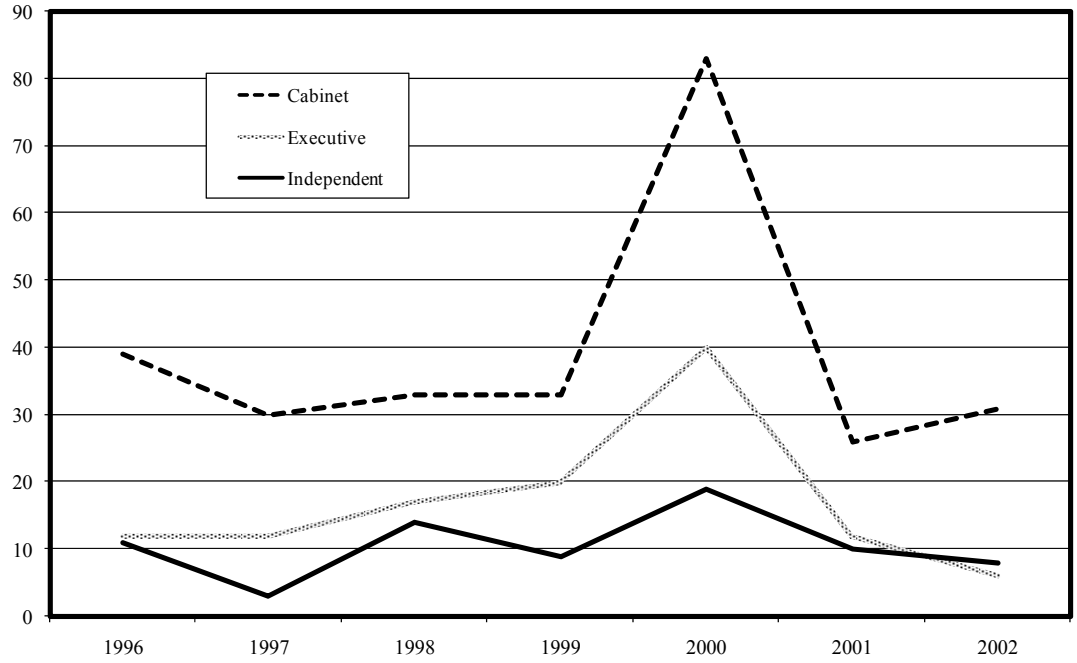
Since the mid-1990s, the *Unified Agenda* has collected consistent data on the significance of reported regulatory actions. By law, significant or major actions are those that are likely to have an effect of at least $100 million on the economy or have other considerable effects.[143] Because data on the significance of regulatory actions start in the mid-1990s, they cover only President Clinton's last term and the start of President George W. Bush's first term.

Chart 9 displays the trends in the completion of significant regulatory activity in the last quarter of each year (November to January), from 1996 to 2002. Cabinet departments, executive agencies, and independent agencies complete more significant regulations in the final three months of President Clinton's Administration than in any other last quarter in the data. When the data are broken down for the same agencies in

[142] *But cf.* Table 3, *infra*.
[143] *See supra* note 7.

Chart 5, the USDA, DOI, and EPA finish more significant actions at the very end of 2000 than in other time periods. In late 2000, the DOT has a relative increase from the year before, but churns out more significant actions in other years. The DOC, FCC, NRC, and SEC do not complete more major actions at the end of 2000 than in the previous year.

Chart 9: Fourth Quarter Significant Completions, 1996-2002



Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for agencies listed in note 98 with a significant completed regulatory action with an actual date between 1996 and 2002. Agencies are categorized as described in notes 98 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 multiple factors on the completion of regulatory actions by the eight agencies in Chart 6. Table 3 reports regression results for regulatory completions (significant and non-significant) in the final quarter of each year (November to January), between 1983 and 2002.[144]

[144] When the regression in Table 3 is run as a standard negative binomial regression with dummy variables for the agencies (instead of the fixed effects model), dropping the EPA, many of the agency variables are significant. The DOC and DOT are associated with more completions in the final quarter; the FCC, NRC, and SEC are linked to fewer completions. The other statistically significant variables—President's party and last year of President's term—remain. When the number of an agency's NPRMs in the previous year is included, the same results are obtained (except that the President's party is no longer significant, which is also true in the fixed effects model with a lagged NPRM variable), and the lagged variable is significant. *Cf. infra* note 152.

Table 3: Completion of Regulatory Activity in the Fourth Quarter by 8 Agencies, 1983-2002

Variable	*Coefficient (Standard Error)*
President's Party (R)	-0.172 (0.087)*
Congress's Party (R)	-0.135 (0.106)
President's Last Year	0.255 (0.105)*
Indep.*Congress's Party	-0.010 (0.115)
Indep.*President's Party	-0.028 (0.100)
Independent	0.254 (1.327)
United Government	-0.057 (0.255)
Midnight Congress (1994)	0.250 (0.174)
Midnight Senate (1986, 2000)	0.055 (0.124)
Constant	2.559 (0.255)**

n=160
Wald $X^2(9)=39.89$
Prob > $X^2=0.00$
* $p < .05$, ** $p < .01$
Note: Stata's fixed-effects negative binomial model; 8 groups (USDA, DOC, DOI, DOT, EPA, FCC, NRC, SEC).

Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for USDA, DOC, DOI, DOT, EPA, FCC, NRC, and SEC with a completed regulatory action with an actual date between 1983 and 2002.[145]

As with the commencement of rulemaking, aspects of political control seem to influence the completion of regulatory activity. The party of the President is statistically related to regulatory completions in the final quarter of each year, as predicted by the "Presidential Control—Ideology" Hypothesis. President Clinton completes more rulemakings than Republican presidents.[146] 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. More rulemaking actions are completed in the final year of a President's Administration.

Party control of Congress, however, is not statistically related to the completion of rulemaking as a general matter, which goes 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

[145] *See* Data Appendix, *infra*.
[146] 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 instead of those two variables, the last year of a President's Administration remains significant. No other variable in Table 3 becomes significant. Dropping President Reagan, the dummy variable for President George H.W. Bush is positive and significant; the dummy variables for Presidents Clinton and George W. Bush are also positive but not significant.

rulemaking, the interaction of party control of the White House or Congress and the independence of an agency is not significant.[147]

In sum, the first part of this Section produces two main findings, both of which accord with commonly held intuition. First, agencies generally complete more rules in the final quarter of each Presidential Administration. But some agencies also rush to finish regulations before party control in Congress shifts. Second, independent agencies do not seem to work against the regulatory biases of the President and Congress in completing regulatory actions. Perhaps independent agencies face considerably less pressure from political overseers when they commence rulemakings, but not at later stages, when the consequences are much greater.[148]

Some attention should also be paid to the duration of the rulemaking process. The average duration of completed rulemakings for the eight agencies in Table 3, significant and routine, ranges from 215.26 days for the DOC to 881.65 days for the FCC.[149] All agencies but the FCC complete a rulemaking 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, Jacob Gersen and I have analyzed some of these factors. We found that

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[147] One variable missing from this regression model is the amount of rulemaking that had previously commenced. Presumably, an agency will complete more actions if it has previously started more actions. There are some 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 3, it is positively related to completions in the subsequent year (p value < .01); the coefficient on the President's Party variable remains negative but it is no longer significant.

[148] Further research should examine different measures of rulemaking activity—for instance, its content, its length, and its durability. The analysis here does not separate completed regulatory actions that overturn previous regulatory policies from actions that establish new regulatory or deregulatory programs. Do 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. Do regulatory actions that get 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. How does the length of the rulemaking process (from start to finish) vary? The analysis here also does not consider the durability of these actions. 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?

[149] For this analysis, I looked only at reports to the *Unified Agenda* from April 1995 to October 2003 and kept RINs only if they had a NPRM with an actual date reported. A completed rulemaking was defined as a final rule, final action, interim final rule, or direct final rule. *Cf.* Data Appendix, *infra.* To deal with duplicate entries, the most recent entry for an RIN was kept; others were deleted. The average duration for the USDA was 420.80 days (95 percent confidence interval: 378.07 to 463.52 days). The average duration for the DOC was 215.26 days (95 percent confidence interval: 180.62 to 249.89 days). The average duration for the DOI was 534 days (95 percent confidence interval: 493.42 to 574.58 days). The average duration for the DOT was 578.01 days (95 percent confidence interval: 520.84 to 635.18 days). The average duration for the EPA was 598.57 (95 percent confidence interval: 539.33 to 657.81 days). The average duration for the FCC was 881.65 days (95 percent confidence interval: 695.53 to 1067.78 days). The average duration for the NRC was 534.53 days (95 percent confidence interval: 288.14 to 780.92 days). The average duration for the SEC was 358.96 days (95 percent confidence interval: 302.04 to 415.88 days).

deadlines appear to shorten the rulemaking process. Changes in the White House or Congress after the NPRM is issued make the regulatory process longer. There seems to be no significant relationship, however, between the duration of the regulatory process and whether the NPRM was issued during united or divided government. Rulemakings commenced under President Carter and President George H.W. Bush seem to consume more time than rules started under President Clinton; rulemakings commenced under President George W. Bush seem to consume less time than those started under President Clinton. Finally, significant rulemakings take longer.[150]

These results on the length of the rulemaking process provide additional evidence on the "Ossification" Hypothesis. Along with the quantity of rulemaking activities, the duration of these activities suggests that the administrative state is not significantly ossified. The next Section considers the interruption of the rulemaking process, during and outside political transitions.

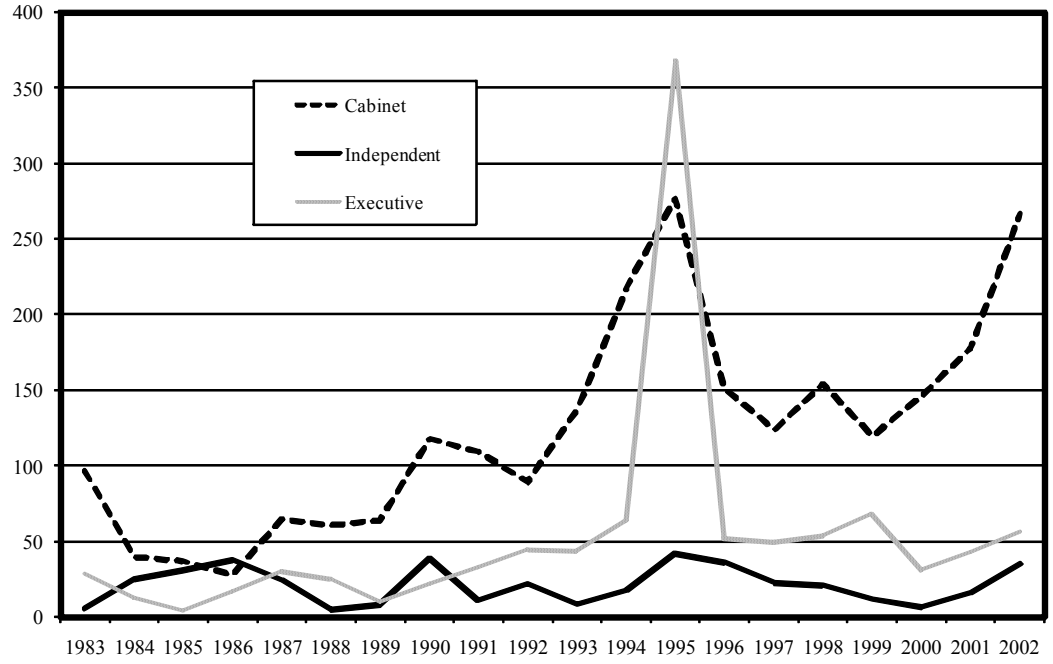
E. Withdrawals of Rulemakings

A proposed but unfinished rule usually can be withdrawn for any reason, without an opportunity for comment on the withdrawal. By contrast, a completed rule typically can be rescinded only after notice and comment.[151] Withdrawals of uncompleted rules thus create another area for investigation of the role of political transitions, in particular, on agency action.

Chart 10 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 and in 2001. There is also a large increase in withdrawals by executive agencies 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 incoming officials withdraw uncompleted rulemakings started under outgoing officials' watch. Party control shifted from the Democrats to the Republicans in Congress in 1995 and in the White House in 2001.

[150] Gersen & O'Connell, *supra* note 124, at 39-40.
[151] *See supra* notes 50-53 and accompanying text.

Chart 10: Withdrawals, 1983-2002



Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for agencies listed in note 98 with a withdrawal action with an actual date between 1983 and 2002. Agencies are categorized as described in notes 98 and the Data Appendix. Withdrawals are defined in the Data Appendix.

Withdrawal data at the individual agency level are quite noisy. Among the eight agencies in Chart 5, the EPA withdraws the highest number of its regulatory actions in 1995; the DOI terminates the greatest number of regulations in 2001. Regression analysis is, however, needed to consider multiple potential explanations for withdrawals of rules. Table 5 reports regression results for the withdrawal of regulatory activities (significant and non-significant) between 1983 and 2002 for these 8 agencies.[152]

[152] When the regression in Table 5 is run as a standard negative binomial regression with dummy variables for the agencies (instead of the fixed effects model), dropping the EPA, some of the agency variables are significant. The DOI is associated with more withdrawals; the FCC, NRC, and SEC are linked to fewer withdrawals. The statistically significant relationship between withdrawals and the interaction variable between President's Party and Agency Independence remains, but the relationship between withdrawals and the President's Party does not (though it has the same sign).

Table 5: Withdrawal of Regulations by 8 Agencies, 1983-2002

Variable	*Coefficient (Standard Error)*
President's Party (R)	-0.335 (0.150)*
Congress's Party (R)	-0.062 (0.184)
President's First Year	0.148 (0.191)
President's Last Year	-0.141 (0.183)
Indep.*Congress's Party	0.363 (0.223)
Indep.*President's Party	0.428 (0.187)*
Independent	-0.761 (0.298)*
United Government	-0.091 (0.399)
Change in Congress	0.197 (0.174)
Constant	0.842 (0.167)**

n=160
Wald $X^2(9)=36.61$
Prob > $X^2=0.00$
* p < .05, ** p < .01
Note: Stata's fixed-effects negative binomial model; 8 groups (USDA, DOC, DOI, DOT, EPA, FCC, NRC, SEC).

Source: Unified Agenda (April 1983-October 2003). Counts of unique Regulatory Identification Numbers for the USDA, DOC, DOI, DOT, EPA, FCC, NRC, and SEC with a withdrawn regulatory action with an actual date between 1983 and 2002.[153]

The regression results, based on eight agencies, are in some tension with the overall trends for all agencies in the database displayed in Chart 10. In the regression model, Republican Presidents withdraw fewer rulemakings; Democratic Presidents (Clinton) pull more rulemakings. This result is also largely consistent in this data (excluding President George W. Bush) with a President withdrawing more rulemakings if the previous Administration was controlled by the opposite party. In Chart 10, however, President George W. Bush interrupts more regulations than any other President. In addition, timing within a Presidential Administration has the expected sign in the regression model (*i.e.*, the first year has more withdrawals) but is not statistically significant. The same is true for Congress (*i.e.*, the first year after party control has shifted in at least one chamber has a positive coefficient but is not significant). Chart 10 shows a big jump in withdrawals after the 1994 mid-term elections. The eight agencies used in the regression model may not be representative of the administrative state. In any event, the support for the "Presidential Control—Crack-of-Dawn" and "Congressional Control—Crack-of Dawn" Hypotheses may not be as strong as first appeared.

Agency structure also interacts in interesting ways with withdrawals of rulemakings. The interaction of a Republican President and agency independence is positively correlated with the withdrawal of rulemakings; thus, the interaction of a Democratic President and agency independence is negatively correlated with rulemaking withdrawals. In other words, independent agencies under President Clinton

[153] *See* Data Appendix, *infra*.

withdraw significantly fewer rulemakings. This result also is largely consistent with independent agencies undertaking fewer regulatory changes after the 1994 mid-term election. The parallel interaction variable for Congress has a similar sign, but barely misses the measure for significance. In addition, the independence of an agency on its own is negatively correlated with the number of withdrawn rulemakings.

In sum, this Section yields two interesting findings. First, many agencies do withdraw uncompleted regulations after major political transitions. Certain agencies withdraw more proposed rules after a political transition in Congress than after a new President takes office. Second, independent agencies use withdrawals less than non-independent agencies. Independent agencies therefore seem to face less political pressure and undergo less change under political transitions.[154]

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

IV. 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 II.C, focuses on 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 significantly ossified. It also lays out some of the strategic considerations of an agency that wants its rulemaking to endure.

Section B, which tackles the political control and political transition debates from Section II.C, concentrates on external pressures on agencies from the White House and Congress. It examines what qualifies as a political transition, urging legal scholars and the courts to pay more heed to congressional transitions, as well as presidential transitions. 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 non-delegation 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. But this Article has concentrated instead on a rule's costs and benefits to the regulating agency. The costs are central to discussions over the

[154] 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. Are withdrawals after political transitions more likely to be of significant or non-significant 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?

regulatory ossification of the administrative state.[155] The benefits are central to discussions over judicial deference to agency action.[156]

The costs to rulemaking may not be as high as feared. From 1983 to 2002, federal agencies commence and complete substantial rulemaking.[157] Much of this rulemaking follows traditional notice and comment procedures.[158] Since the mid-1990s, federal agencies almost always issue more than 600 official NPRMs each year, including over 120 significant ones.[159] The average duration of completed rulemakings for seven of the eight agencies used in the regression analyses in the Article is under two years.[160] These empirical findings strongly suggest that the administrative state is not significantly ossified. These findings do not, however, intimate that agencies face no significant costs when they engage in rulemaking. Indeed, if agencies faced less scrutiny by the courts or by the OMB, they would presumably undertake more rulemaking.

Agency decisions to turn to rulemaking procedures without prior public comment in recent years indicate that there are real costs to traditional notice and comment rulemaking. Agencies have increasingly used direct and interim final rulemaking, which allow the promulgation of legally binding rules without prior public comment in particular circumstances.[161] Direct final rules, which are supposed to expedite the promulgation of non-controversial regulations, become effective a certain time after publication in the *Federal Register* unless adverse comments are received. Interim final rules, which are intended to be used when the agency has good cause to enact rules immediately, take effect upon publication or shortly thereafter, with the opportunity to comment provided after publication. The empirical findings suggest that some agencies may use these abbreviated procedures not as they were designed but instead to avoid scrutiny of controversial actions.[162]

After the Court's 2001 decision in *United States v. Mead Corporation*, the benefits to agencies of engaging in traditional notice and comment rulemaking may be significantly higher. The empirical results are consistent with agencies issuing more

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[155] *See supra* notes 57-59 and accompanying text.
[156] *See supra* notes 60-64 and accompanying text.
[157] *See* Charts 1, 8, *supra*; *supra* note 120.
[158] *See* Chart 1, *supra*.
[159] *See id*.; *supra* note 120.
[160] *See supra* notes 149-150 and accompanying text. *See also* U.S. GEN. ACCOUNTING OFFICE, AVIATION RULEMAKING: FURTHER REFORM IS NEEDED TO ADDRESS LONG-STANDING PROBLEMS, GAO-01-821 (July 2001), at 45 (examining average duration of significant rulemaking from FY 1995 through FY 2000 by 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."); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1283-84 (1994) (noting that the EPA rules studied, some of which were preceded by negotiated rulemaking, took approximately 3 years to complete); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 134 (1992) (finding average duration for rules completed by the EPA between 1986 and 1989 to be 523 days).
[161] *See* Chart 2, *supra*.
[162] *See supra* notes 33-35 and accompanying text.

NPRMs in the aftermath of *Mead*, but more research needs to be done to assess the implications of *Mead* for agency rulemaking.

This inquiry into the costs and benefits of rulemaking also raises wider strategic considerations for federal agencies. Agencies presumably want at least some of their rules to "stick"—*i.e.*, not be withdrawn before promulgation, not be rescinded after promulgation, not face hostile OMB or congressional oversight, not be struck down by the courts, etc. 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? This inquiry is not merely academic; it has real effects for regulatory durability.

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 shift rulemaking practices, political actors and the courts presumably will respond to those changes. But static views of the administrative state could provide much needed information for current discussions concerning regulatory ossification, judicial deference, and political control.

B. Political Transitions

Agency rulemaking occurs in a complex political environment, created, in large part, by the separation of powers. Agencies face oversight from multiple sources: the White House, Congress, courts, interest groups, the media, and others.[163] Legal scholars have recently concentrated almost exclusively on the President's role in shaping the administrative state.[164] This Article has investigated pressures from the President and Congress, and their interaction, on agency rulemaking. These pressures are core elements of discussions concerning political control and political transitions.

1. The Missing Branch of Government

Political transitions consist not only of changes in the White House but Congress as well.[165] After all, elections can shift power in both branches of government.[166] 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 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

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[163] *See supra* notes 65-69 and accompanying text.
[164] *See supra* note 70.
[165] 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 Shankar & Mark Mazzetti, *New Defense Chief Eases Relations Rumsfeld Bruised*, N.Y. TIMES, March 12, 2007, at A6.
[166] 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).

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 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.[167] 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 from a particular party who wield that legislative power.

When examining regulatory activities during political transitions, legal scholars uniformly consider only changes in the White House. Jack Beermann's thoughtful examination of the "legality of . . . administrative action in periods of transition" is limited to presidential transitions.[168] Other examples abound. Nina Mendelson investigates attempts by outgoing Administrations to embed particular policies or people in the administrative state.[169] Others evaluate efforts by new Administrations to withdraw or suspend regulatory actions promulgated by the outgoing Administration.[170] 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.[171]

This focus on presidential transitions complements the heavy emphasis in the legal literature over the past several decades concerning the President's involvement in the administrative state more generally.[172] Deservedly classic, widely cited articles by Elena Kagan, Lawrence Lessig, and Cass Sunstein emphasize the relationship between the President and agencies.[173] For these scholars, the President is and should be a major player in the administrative state; Congress is often pushed to the side.[174] Recent empirical legal scholarship on agency action also takes up the President's role.[175] To be

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[167] In May 2001, Vermont Senator Jeffords announced he would caucus with the Democrats, instead of with the Republicans, moving power in the Senate. John Lancaster & Helen Dewar, *Jeffords Tips Senate Power*, WASH. POST, May 25, 2001, at A1.

[168] Beermann, *supra* note 10, at 950.

[169] Mendelson, *supra* note 10; Morriss et al., *supra* note 10; Rossi, *supra* note 10.

[170] Jack, *supra* note 10; Loring & Roth, *supra* note 8; Sanford, *supra* note 10.

[171] *But cf.* Loring & Roth, *supra* note 8 (empirical study).

[172] *See supra* note 70 and accompanying text; *see also* Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 179 (1997) (criticizing "cult of the Chief Executive" in administrative law); Sargentich, *supra* note 14, at 3 ("Over the past two decades, much constitutional and administrative law discourse has emphasized the President as an actor whose oversight can legitimate the existence of far-reaching agency authority.").

[173] Kagan, *supra* note 67; Lessig & Sunstein, *supra* note 70. These are just a few examples of important work on the President's role in the administrative state.

[174] Some scholars explicitly dismiss that Congress plays an important role. *See, e.g.*, Kagan, *supra* note 67, at 2259; Mendelson, *supra* note 10, at 570-72; Rodriguez, *supra* note 70, at 1184-89.

[175] *See* Bressman & Vandenbergh, *supra* note 8; Croley, *supra* note 8. These important pieces do not discuss in any depth the role of Congress in the periods they are studying. *Cf.* Croley, *supra* note 8, at

certain, some legal scholars seriously engage with Congress's capacities.[176] But, overall, administrative law scholarship currently seems to pay considerably more attention to the White House than to Congress.

Part III's empirical investigation suggests that administrative law needs to pay significant attention to Congress and, in particular, to congressional transitions. Agency regulatory agendas shifted in marked ways around the 1994 election. First, certain (Executive Branch) agencies withdrew more proposed rules after the 1994 election than after a new President took office.[177] Second, agencies generally complete more rules in the final quarter of each Presidential Administration. Cabinet departments (as a group), however, finished more actions after the 1994 election than in President Clinton's last quarter. [178] The most recent congressional election provides 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?

By widening the scope of political transitions to include changes in Congress, legal scholars do not need, however, to take a position in debates in the political science literature as to whether the President or Congress is the primary overseer of administrative agencies.[179] Rather, they need only acknowledge that multiple institutions can significantly influence agencies.[180] Political transitions in both branches of government may have important ramifications for how we think about administrative actions descriptively, doctrinally, and normatively.

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

From Part III, many agencies appear to shift their regulatory activities in the period immediately preceding and following a political transition.[181] 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

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849, 851 (no discussion of 1994 election despite empirical observations concerning increased changes by OMB starting in 1995 and decrease in significant rules being submitted to OMB in 1995).

[176] *See, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Neal E. Devins, *Regulation of Government Agencies through Limitation Riders*, 1987 DUKE L.J. 456; J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005); Richard 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); Thomas O. McGarity, *Presidential Control of Regulatory Decision-Making*, 36 AM. U. L. REV. 454 (1986); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbroad*, 20 CARDOZO L. REV. 775 (1999); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

[177] *See* Chart 10, *supra*.

[178] *See* Chart 8, *supra*.

[179] *See supra* notes 65, 67.

[180] *See, e.g.*, B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY (TRANSFORMING AMERICAN POLITICS) (2004).

[181] Part III examines some of that activity but does not distinguish among the possible reasons behind it. *See* Beermann, *supra* note 10, at 956 (explaining three reasons: "hurrying, waiting, and delay").

party, typically question the legitimacy of midnight regulatory actions. Likewise, incoming officials, in the White House or the legislature, exert authority in the initial days of a transition.[182] Agencies seem to take some time to start notice and comment rulemaking after most political transitions.[183] But they often quickly freeze or suspend the effective dates of many rules promulgated before a transition[184] or withdraw unfinished rules.[185]

The desirability of midnight and crack-of-dawn regulations is mixed, on grounds of efficiency and democratic legitimacy.[186] 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 reform is clear as a normative matter, it may be politically infeasible to implement.[187]

Consider, first, potential reform of the regulatory process at the agency level for midnight regulations. The APA could be amended to make it impossible or much harder for agencies to promulgate regulations before a political transition.[188] 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. Or the APA could establish a minimum comment period (for example, 120 days) for non-emergency regulations that would make it impossible for an agency to propose and promulgate a regulation between an election and a change in political control.[189] Consider, next, potential reform of the regulatory process for crack-of-dawn regulations. 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 forgo notice and comment procedures when rescinding a

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[182] *See* PAUL C. LIGHT, THE PRESIDENT'S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CLINTON 43 (3d ed. 1999); Beermann & Marshall, *supra* note 10, at 1255; *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. Neudstadt, *The Contemporary Presidency: The Presidential "Hundred Days"*, 31 PRES. STUD. Q. 121 (2001); Mark Leibovich, *The 110th Congress; Among His Official Duties, Keeping On Top of the 100-Hour Clock*, N.Y. TIMES, Jan. 10, 2007, at A18; Robin Toner, *G.O.P. Blitz of First 100 Days Now Brings Pivotal Second 100*, N.Y. TIMES, Apr. 9, 2007, at A1.

[183] *See* Section III.C, *supra*; COPELAND, *supra* note 128, at 22-23.

[184] *See* Memorandum of January 29, 1981: Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981); Card Memorandum, *supra* note 2. 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. Although President Clinton implemented a moratorium on new regulation (unless a Clinton appointee approved), he did not suspend he 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).

[185] *See* Section III.E, *supra*.

[186] *See supra* notes 72-83 and accompanying text.

[187] *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).

[188] *See* Beermann, *supra* note 10, at 1004-05; Morriss et al., *supra* note 10, at 597.

[189] In several states, 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, 389-90 (2004).

regulation enacted immediately before a political transition.[190] Or agencies could have to meet 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. The APA could also be amended to make it explicit that agencies typically must (or need not) provide notice and the opportunity to comment when suspending the effective date of a regulation.

Reform could also target the judicial review stage. The APA could be amended to raise the standard for judicial review of agency action undertaken right before a political transition.[191] For example, agencies could have to show that they acted as most reasonable persons would have acted. Or agencies could have to demonstrate that no reasonable person would have acted differently. Similarly, the APA could be amended to make judicial review harder (or more lenient) for agencies to undo or change existing regulations 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).

The desirability of any of these proposals is not immediately clear, 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. If the reforms apply to congressional as well as presidential transitions, agencies would have little time to act with fewer restraints. In addition, even assuming that these proposals are beneficial as a policy matter, they may not achieve their intended effect. Agencies and political actors would presumably react strategically to these changes. Indeed, what counts as "midnight" may just be pushed back to right before an election, creating the same problems as before. Or agencies may try to promulgate policies through informal adjudications, guidance, or policy statements.[192] If rescission of regulations were procedurally harder, agencies might decide not to enforce regulations, instead of trying to change them.[193]

Finally, even assuming that these proposals are beneficial and effective, they may not be politically feasible to implement. To the extent that agency rulemaking is more likely to regulate than deregulate, most of the proposals in this Section have a deregulatory bias, making them unattractive to members of Congress who support government regulation in particular areas. The proposals also tie the hands of current politicians, making them unattractive unless officials think they will be better off if everyone's hands are tied in the future.

C. Wider Implications for Administrative Law Doctrine

This final Section suggests some far-reaching normative and doctrinal implications of the empirical work in Part III for legislative delegation to agencies and judicial deference to agencies on statutory interpretation questions. In particular, it argues that congressional pressure on agencies may alleviate some concerns underlying

[190] Beermann, *supra* note 10, at 1007; Morriss et al., *supra* note 10, at 597.
[191] *See* Beermann, *supra* note 10, at 1004-05.
[192] *Cf*. SEC. v. Chenery Corp., 332 U.S. 194 (1947); Magill, *supra* note 109, at 1438-39.
[193] *See* Beermann, *supra* note 10, at 975.

the non-delegation doctrine. It also posits, more ambitiously, that judicial theories of deference could be revised to better comport with how agencies actually function.

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,[194] but the desirability of such delegation is still contested.[195] Although typically discussed for the doctrinal point, *Whitman v. American Trucking Associations* provides a helpful perspective on this normative debate.[196]

The core 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.[197] The secondary ruling from the case barred agencies from limiting their statutory discretion to cure any delegation problem from Congress.[198] The empirical work in Part III suggests a normative take on this secondary issue. Could Congress, after *Immigration & Naturalization Service v. Chadha*,[199] limit problematic delegations of legislative authority to agencies through procedural deadlines at the front end or through oversight, procedural or substantive, at the back end?[200] On functional terms, if Congress shapes regulatory agendas *ex post*, the delegation of authority to agencies seems more limited.[201] Congress, too, may have important "completion power."[202]

The timing of congressional control may be determinative. The Congress that delegates authority is rarely the same Congress that oversees the delegation.[203]

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[194] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001); *cf*. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

[195] *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).

[196] Before the Supreme Court's decision in *American Trucking,* Bressman argued that the D.C. Circuit's ruling in that case (that agencies may be able to provide sufficient limits on legislative delegation) "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, Schecter 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.

[197] American Trucking, 531 U.S., at 473-76.

[198] American Trucking, 531 U.S., at 472. Judge Leventhal's procedural defense of agency action in *Amalgamated Meat Cutters* is thus no longer viable.

[199] 462 U.S. 919 (1983).

[200] *Cf*. Bressman, *supra* note 49, at 519-22 (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 studies for constraints on how, not who, control over agencies should be conducted); Kagan, *supra* note 67, at 2270 (arguing that courts have refused, "in the face of broad delegations, to ratify alternative mechanisms of legislative control over agency decisionmaking").

[201] Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, COLUM. L. REV. (forthcoming), at 50; Sargentich, *supra* note 14, at 27, 30.

[202] *Cf*. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006).

[203] 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 (1989); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J. L. ECON. & ORG. 111 (1992). *See*

Deadlines imposed at the time of delegation, therefore, do not create the same problem of legislative drift as oversight hearings in a new Congress.[204] *Ex ante* actions therefore may be more transparent than *ex post* actions. 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.[205]

Nevertheless, 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 lack needed complexity.[206] Despite being a multi-member body with higher transaction costs for acting than the President,[207] Congress may be better suited, in particular circumstances, to promote certain values underlying the non-delegation doctrine. Kevin Stack discusses three main non-delegation values: democratic accountability, non-arbitrariness, and judicial manageability.[208] 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.[209] If Congress improves the articulation of agency rationales for decisions, courts will have an easier time reviewing agency action. It seems, however, likely that Congress may have mixed effects on these values. After all, the congressional committee structure encourages overlapping jurisdictions, which may produce conflicting and changing directions to agencies.[210] 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).[211]

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 deference to give agency exercise of that authority in interpreting ambiguous statutes. Courts and commentators typically rely on one of two primary theories of agencies to defend considerable deference to agency decisions. First, under a political accountability theory of agencies, courts defer to agency interpretations of ambiguous statutes because agencies are more accountable (to the national electorate, through the

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also J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1496-97 (2003).

[204] *Cf*. Gersen & O'Connell, *supra* note 124, at 33.

[205] To be certain, many scholars have written about Congress's role in agency oversight. *See supra* note 176.

[206] *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1221-22 (2006); Sargentich, *supra* note 14, at 27, 30.

[207] *See* Nzelibe, *supra* note 206, at 1246-47.

[208] 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.

[209] *Cf. id*. at 996.

[210] O'Connell, *supra* note 187, at 1694.

[211] Nzelibe argues that Congress does a better job than the President at disseminating information. Nzelibe, *supra* note 206, at 1259.

President) than courts.[212] Second, under an expertise theory of agencies, courts defer to agency interpretations because agencies have more expertise than courts.[213]

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 acted with force of law, courts will uphold the agency's interpretation so long as it is reasonable.[214] 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 to develop policy that incorporate feedback from voters.

The harder categories—no explicit delegation of authority and agency interpretation through informal adjudication or interpretative 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 courts should give more (*Chevron*) or less (*Skidmore*) deference to agency interpretations in these harder categories:

> 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 lens through which to view the legality of the Agency's interpretation here at issue.[215]

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

Empirical work on agency regulatory activities, including from Part III, may provide needed complexity to these theories of deference. Some agencies' regulatory agendas are shaped considerably by political actors. Other agencies' agendas seem far less affected.[216] The political accountability theory appears more applicable to the first group; the expertise theory appears more relevant to the second group. Perhaps courts should focus less on the type of agency action (*e.g.*, notice and comment rulemaking, informal adjudication, guidance documents) and more on the type of agency, an agency's track record, and the level of presidential and congressional control, in

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[212] *See* Chevron, 467 U.S. at 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."); *cf.* Nzelibe, *supra* note 206, at 1266.

[213] *See* Skidmore, 323 U.S. at 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.").

[214] *See* United States v. Mead Corp., 533 U.S. 218 (2001).

[215] Barnhart v. Walton, 535 U.S. 212, 222 (2002).

[216] Agency rulemaking activity may, however, exhibit little change as political actors shift but still may be immensely politically responsive.

assessing how much deference to give to an agency's interpretation of an ambiguous statute.[217] This distinction may track the formal independence of the agency or it may not.[218] It may also shift depending on control of the White House and Congress.

In other words, if an agency faces considerable oversight from Congress and the White House, courts should defer to that agency's reasonable decisions, no matter how they are reached (*i.e.*, with or without particular procedures). If an agency confronts little such oversight and does not possess special expertise, courts should scrutinize that agency's decisions more carefully. Finally, if an agency receives minimal political scrutiny but has extensive expertise, courts should also defer to that agency's actions. These ideas need further exploration, but they suggest some wider issues to consider.

V. 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 I constructed from twenty years' of reports in the *Unified Agenda* and by presenting preliminary results, has helped to change that situation. The Article has provided the first comprehensive empirical examination of agency rulemaking, with and without prior comment, from President Ronald Reagan to President George W. Bush, during and outside political transitions. 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 public comments, 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 regulations after transitions. The Article also has examined several normative and doctrinal implications of this empirical work, contributing to and often challenging conventional wisdom in debates on regulatory ossification, judicial deference, political control, and political transitions.

The research here has consequences for political science and legal scholarship. First, political scientists should, drawing from the legal literature, consider more nuanced agency actions than just the general category of agency rulemaking through notice and comment procedures. Such rulemaking can encompass new regulations or the rescission or modification of existing regulations. Also, agencies can enact rules without notice and comment and increasingly have done so. Agencies can also withdraw rules from the notice and comment process without providing any justification. Studying only one form of regulatory action may not give an accurate perspective on agency actions during or outside transitions.

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[217] *Cf.* Kagan, *supra* note 67, at 2377-80 (suggesting that courts should often give more deference to actions with more presidential involvement).

[218] *Cf.* Bressman, *supra* note 201, at 47 (suggesting *Chevron*'s equal application 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); Kagan, *supra* note 67, at 2376-77 (arguing that courts should not give *Chevron* deference to independent agencies); Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429 (2006) (same).

Second, legal scholars should not limit their attention to midnight regulatory actions and attempts by the next 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.

The research also may help us predict changes in the administrative state in the shadow of the 2008 election. What shifts in rulemaking should we expect to see under a Clinton/Obama Administration? A Giuliani/Romney Administration? What happens if Congress remains in the hands of the Democrats? Or if the Republicans recapture control?

There is still, of course, much we do not know about agency rulemaking. To encourage more study of the administrative state, the rulemaking database I created will be made freely available to other scholars. From this and future empirical work, we can reassess core administrative law doctrines. Do data support various theories? Should doctrines change? Also, we can think in a more complex manner about institutional reforms—of Congress, of the White House, and of agencies. It all comes back to the same ultimate inquiry: how we can produce more effective and more legitimate regulatory activity in a highly partisan system.

Data Appendix

I. Description of *Unified Agenda* Data

For a particular Regulatory 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, Agency Relations, 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 and dates), Federal Register Citation, Initial Public Cost, Base Year, Recurring Public Costs, Costs and Benefits (text), Risks (text), Statement of Need (text), NAICs, contact information, and a few other housekeeping fields.

II. Coding Assumptions

A. Years

Years run from January 21 to January 20. Thus, a regulatory action that occurred on January 5, 2001 is counted as a 2000 action.

B. Types of Actions

Actions are counted only if they had an actual date reported. 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 330=Final Rule, 325=Direct Final Rule, or 600=Final Action. Thus, completed actions do not include interim final rules (on the idea that interim final rules are supposed to be followed by final rules). 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. Most critical, some regulatory actions described above are listed under 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=10 (Economically Significant) or 20 (Other Significant) or if Major=Yes.

D. Types of Agencies

Data for the cabinet departments include information from the VA before it became a cabinet department in 1989. Data for the executive agencies include the EPA, NASA, FEMA (before it joined DHS), SBA, and IRS. 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. Data for the independent agencies include the CPSC, FCC, FERC, FTC, NRC, OFHEO, PBGC, SEC, and SSA. The agencies are led by appointees who served fixed-terms and typically can be removed by the President only for cause. The SSA became an independent agency in 1994. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (codified as amended at 42 U.S.C. § 904 (2000)).

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's the President's first year, and 0 otherwise. The variable for President's Last Year takes on a value of 1 if it's 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 Congressional Change takes a positive value (1) if Republicans gain control of at least one chamber from the previous year, negative value (-1) if Democrats gain control of at least one chamber from the previous year, and a zero value if there is no change in party control of both chambers from the previous year. 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 kept for each RIN. Thus, if an agency reported an NPRM under a particular RIN in three *Unified Agendas*, only the most recent entry was kept. This also means if there were two different dates given for an NPRM under the same RIN, one reported in October 2001 and one reported in April 2002, only the April 2002 entry's date appears in the data. Agencies often seem to correct some of the action dates in later editions. I used the latest entry on a particular action on the assumption that it was the most reliable.