2009

Hiding in Plain Sight? Timing and Transparency in the Administrative State

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JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 505
(2D SERIES)

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

December 2009

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Anecdotal evidence of agencies burying bad news is rife in law and politics. The bureaucracy regularly is accused of announcing controversial policies on holidays and weekends when public attention is elsewhere. We show that this conventional wisdom is wrong, or at least significantly incomplete. The conventional wisdom is riddled with theoretical holes, and there is little systematic empirical evidence to support it. After critiquing the conventional account of agencies hiding bad news, we articulate and defend a revised theory of strategic timing in administrative law. We argue that timing decisions rarely affect the visibility of decisions but can drive up the costs of monitoring and responding for interest groups and legislative coalitions. Agency discretion to choose when to announce policy decisions can even allow agencies to influence which interest groups monitor the regulatory process and therefore whose preferences must be taken into account. We evaluate both the conventional wisdom and our revised theory using twenty-five years of empirical evidence. We then develop the implications for administrative law doctrine and institutional design of the bureaucracy.

INTRODUCTION

Burying bad news is one of the oldest tricks in politics.[1] As David Gergen, then an adviser to President Ronald Reagan, quipped in 1984,

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Very useful comments were provided by Ken Bamberger, Eric Biber, Tino Cuéllar, Dan Farber, Jesse Shapiro, Matthew Stephenson, Adrian Vermeule, and John Yoo. Financial support has been provided by the Hellman Family Faculty Fund, the Boalt Hall Fund, UC Berkeley's Committee on Research, and the Jerome Kutak Fund at The University of Chicago Law School. Thanks to Tess Hand-Bender, Roman Giverts, Monica Groat, Edna Lewis, Harry Moren, Stacey Nathan, and John Yow for research assistance. An earlier version of this Article was presented at the 2008 annual meeting of the American Law and Economics Association and in the UC Berkeley's Center for the Study of Law and Society's Speaker Series.

1 The evidence of controversial policy announcements being made just before weekends and holidays is largely anecdotal. One rigorous empirical study concluded that the president is less likely to sign noncontroversial executive orders or legislation containing *good* news on Fridays. See Stefano DellaVigna and Joshua Pollet, *Strategic Release of Information on Friday: Evidence from Earnings Announcements* *25–27, 48 (unpublished manuscript 2005). The string of executive orders issued on Fridays or immediately before holiday weekends is striking. For example, the executive order interpreting Common Article 3 of the Geneva Conventions as not applying to enemy combatants was issued on a Friday, July 20, 2007. Executive Order 13440, 3 CFR § 229. This Friday phenomenon for executive orders is not a recent innovation in politics. President Richard Nixon's order granting broad authority to investigate Americans suspected of being threats to national security also was issued on a Friday, July 2, 1971. Executive Order 11605 3 CFR § 176 (1972). To be certain, not all potentially controversial executive orders are issued on

"It was one of the first rules I learned when I arrived in Washington. If you've got some news that you don't want to get noticed, put it out Friday afternoon at 4 p.m."[2] More recently, a spate of controversial agency policies were buried in the holiday or weekend news cycle. In a letter sent to state health officials one Friday evening during a congressional recess in August 2007, the director of the federal Center for Medicaid and State Operations announced new standards that make it much harder for states to cover more children under the Children's Health Insurance Program, angering officials in New York, New Jersey, California, and other states.[3] In the afternoon of Friday, December 22, 2006, the Securities and Exchange Commission (SEC) released a "technical perfecting amendment" to its rules concerning executive compensation that permits companies to report a lower amount for overall payment to top officials than under previous rules.[4] Six days later, during Christmas week, the Food and Drug Administration (FDA) issued a notice seeking comments on its findings that cloned animal milk and meat pose no dangers to consumers.[5]

Agencies also appear to hide cancellations of proposed policies, especially those of earlier administrations. On December 31, 2003, the Occupational Safety and Health Administration cancelled proposed rules that would have required hospitals, prisons, and homeless shelters to test their employees for tuberculosis, distribute facemasks, and quarantine infected workers, stating that voluntary standards were sufficient to protect public health.[6] No major newspaper reported the can-

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Fridays. President John F. Kennedy's order to end racial discrimination in subsidized housing was issued on a Tuesday, Nov 20, 1962. Executive Order 11063, 3 CFR § 261 (1963). President Harry Truman's order to racially integrate the military was issued on a Monday, July 26, 1948. Executive Order 9981, 13 Fed Reg 4313 (1948). In the last two examples, the presidents likely wanted to maximize media attention.

2 Stephen Engelberg, *The Bad News Hour: 4 P.M. Friday*, NY Times A20 (Apr 6, 1984) (quoting Gergen). President Reagan made the following announcements on Fridays: the formal end to the international peacekeeping force in Lebanon, the release of a commission report criticizing the administration's arms control policies, the controversial settlement of a big antitrust case against AT&T and IBM, the restoration of tax breaks to schools that discriminate on race, and the imposition of lifetime nondisclosure mandates on more than 100,000 federal officials. Id.

3 See Robert Pear, *Rules May Limit Health Program Aiding Children*, NY Times A1 (Aug 21, 2007).

4 Cindy Skrzycki, *New Rules Delivered Just in Time for Holidays*, Wash Post D1 (Jan 9, 2007). The SEC contended that the timing of the "noncontroversial" policy announcement resulted from when the Office of Management and Budget (OMB) approved the rule for promulgation. Id.

5 Id (reporting that although the FDA released the announcement regarding cloned milk on December 28, it nonetheless received plenty of attention because many groups were interested in the topic).

6 Amy Goldstein and Sarah Cohen, *Bush Forces a Shift in Regulatory Thrust; OSHA Made More Business-friendly*, Wash Post A1 (Aug 15, 2004).

cellation of the uncompleted rules, which had been years in the making under President Bill Clinton's administration.[7] Senators James Jeffords and Patrick Leahy formally complained about holiday announcements of significant regulatory policy changes by President George W. Bush's administration, but according to President Clinton's spokesperson for the Office of Management and Budget (OMB), all administrations "consider the timing of a controversial regulatory announcement."[8]

At first glance, these political anecdotes seem to mimic stories from the corporate world, where companies sometimes report unexpected poor earnings results on Fridays or after market trading has closed for the weekend. Comparing Friday-night disclosures across public and private spheres is, on one hand, quite natural, and, on the other hand, quite challenging. One can track the timing of announcements in both contexts by drawing up lists of regulatory decisions and earnings disclosures with relative ease. The content and consequences of these announcements, however, are far easier to measure in the business context—primarily by looking to forecasted versus actual earnings and subsequent market prices in the short and long term—than policy announcements in the political environment.

Compelling anecdotes tend to attract rigorous analysis, and indeed, in the business context, the economics literature has long grappled with precisely how and why the timing of information release affects market response.[9] The legal literature, however, has been com-

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7 Id.

8 Skrzycki, *New Rules Delivered Just in Time for Holidays*, Wash Post at D1 (cited in note 4) (reporting statements of Larry Haas, the OMB spokesman for the Clinton administration). See also Seth Borenstein, *Bush's Environmental Policies Have Been a Matter of Detail; Wrought Quietly, Big Changes Have Set Critics Howling*, Milwaukee J Sentinel A19 (Jan 26, 2003) (listing a series of environmental policy announcements made by the recent Bush administration on Fridays).

9 The corporate literature has fleshed out several theories to explain the timing of business announcements. The most intuitive theory posits that companies want to minimize or postpone public and market scrutiny of bad news. See Mark Bagnoli, William Kross, and Susan G. Watts, *The Information in Management's Expected Earnings Report Date: A Day Late, a Penny Short*, 40 J Acct Rsrch 1275, 1279–80 (2002) (listing reasons managers might delay earnings reports); Aswath Damodaran, *The Weekend Effect in Information Releases: A Study of Earnings and Dividend Announcements*, 2 Rev Fin Stud 607, 608–09 (1989) (finding that firms are more likely to report bad news on Fridays and after markets close); Stephen H. Penman, *The Distribution of Earnings News over Time and Seasonalities in Aggregate Stock Returns*, 18 J Fin Econ 199, 203 (1987) (demonstrating that earnings reports published later in the calendar quarter are more likely to convey bad news); Anne E. Chambers and Stephen H. Penman, *Timeliness of Reporting and the Stock Price Reaction to Earnings Announcements*, 22 J Acct Rsrch 21, 22 (1984) (finding that delayed earnings reports are associated with negative returns, which suggests that they contain bad news); James M. Patell and Mark A. Wolfson, *Good News, Bad News, and the Intraday Timing of Corporate Disclosures*, 57 Acct Rev 509, 525 (1982) (concluding that the likelihood of companies releasing bad news increases after the close of trading). A related theory hypothesizes that although businesses cannot hide poor results with a now twenty-four-hour news cycle, weekends and holidays can "distract" investors temporarily. See DellaVigna and Pollet, *Strategic*

paratively devoid of either theoretical or empirical analysis of timing in the policy context.[10] Despite constant attention to the structures and

Release of Information on Friday at *1 (cited in note 1). See also Mark Bagnoli, Michael Clement, and Susan G. Watts, *Around-the-Clock Media Coverage and the Timing of Earnings Announcements* *22–23 (McCombs Research Paper Series No ACC-02-06, Dec 2005), online at http://ssrn.com/abstract=570247 (visited Sept 1, 2009) (concluding that although continuous media coverage has decreased the opportunities for after-trading announcements, negative earnings news is released disproportionately on Fridays). Another theory, at odds with the first two, suggests that companies instead announce bad news earlier (and perhaps loudly) to manage analyst expectations. See Carl R. Chen and Nancy J. Mohan, *Timing the Disclosure of Information: Management's View of Earnings Announcements*, 23 Fin Mgmt 3, 63, 65 (1994) (quoting CEO survey responses suggesting that they often release lower-than-expected earnings earlier). Compare Jeffrey T. Doyle and Matthew Magilke, *The Timing of Earnings Announcements: An Examination of the Strategic Disclosure Hypothesis* *2–3 (Mar 2008), online at http://ssrn.com/abstract=995580 (visited Sept 1, 2009) (disputing the conventional view that managers engage in opportunistic release of information).

10 But see J.R. DeShazo and Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U Pa L Rev 1499, 1533–38 (2007) (discussing the variables impacting the timing of federal regulatory action regarding climate change pollutants). See also Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Va L Rev 889, 943–51 (2008) (examining early and late rulemaking activities within presidential administrations); Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U Pa L Rev 923, 971–77 (2008) (examining the role of statutory and judicial deadlines in changing agency behavior); Jacob E. Gersen and Eric A. Posner, *Timing Rules and Legal Institutions*, 121 Harv L Rev 543, 545–46 (2007) (analyzing timing rules imposed on legislative and regulatory activity). The political science literature contains some studies that implicate timing issues, but none, as far as we are aware, emphasizes the strategic issuance of *agency* decisions. Consider generally Alan M. Jacobs, *The Politics of When: Redistribution, Investment, and Policy Making for the Long Term*, 38 Brit J Polit Sci 193 (2008) (examining pension reform in Britain and the United States to develop an intertemporal understanding of the policy choices of political actors); Daniel Béland and Patrik Marier, *Protest Avoidance: Labor Mobilization and Social Policy Reform in France*, 11 Mobilization 377 (2006) (arguing that by launching controversial reforms at the start of the summer holiday season, the French government reduced the scope of mobilization in opposition to the reforms); Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton 2004); Tajuana D. Massie, Thomas G. Hansford, and Donald R. Songer, *The Timing of Presidential Nominations to the Lower Federal Courts*, 57 Polit Rsrch Q 145 (2004) (developing a strategic explanation that the timing of presidential appointments is a function of politics and institutional constraints); Daniel P. Carpenter, *Groups, the Media, Agency Waiting Costs, and FDA Drug Approval*, 46 Am J Polit Sci 490 (2002) (exploring what variables impact the time variance for FDA approval of different drugs); Janet M. Box-Steffensmeier, Laura W. Arnold, and Christopher J.W. Zorn, *The Strategic Timing of Position Taking in Congress: A Study of the North American Free Trade Agreement*, 91 Am Polit Sci Rev 324 (1997) (developing a dynamic model of strategic position announcements to help explain why congressional actors vote when they do); Amihai Glazer, et al, *Strategic Vote Delay in the U.S. House of Representatives*, 20 Legis Stud Q 37 (1995) (finding that representatives who are voting against their party delay their votes). There is also literature on bureaucratic delay. See, for example, Lea-Rachel D. Kosnik, *Sources of Bureaucratic Delay: A Case Study of FERC Dam Relicensing*, 22 J L, Econ, & Org 258 (2006) (examining the heterogeneity of regulation process times and explaining how interest groups, the legislature, and bureaucratic discretion impact the timing of regulatory decisions); Mary K. Olson, *Managing Delegation in the FDA: Reducing Delay in New Drug Review*, 29 J Health Polit, Policy, & L 397 (2004) (finding that user-fee reform decreased FDA drug review times by 34 percent); Daniel P. Carpenter, *Why Do Bureaucrats Delay? Lessons from a Stochastic Optimal Stopping Model of Agency Timing, with Applications to the FDA*, in George A. Krause and Kenneth J. Meier, eds, *Politics, Policy, and Organizations:*

procedures that regulate agency decisions[11]—be they statutory,[12] common law,[13] or constitutional[14]—the questionable status of administrative agencies in the constitutional order,[15] and recurrent cries of agency malfeasance and nonfeasance,[16] few scholars have sought a theoretical account of *when* agencies act, as opposed to *how* agencies act (what procedures are used) or *what* agencies say (what substance is promulgated). This Article seeks to remedy this oversight by constructing a theoretical and empirical analysis of the timing of agency action.

Our thesis is straightforward. We suggest that the conventional anecdotal wisdom about the bureaucracy burying bad news is wrong or incomplete, at least in its most typical form. Our critical claim is part conceptual and part empirical. Conceptually, we note that administrative agencies in the United States are some of the most extensively monitored government actors in the world. Almost all policy decisions an

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Frontiers in the Scientific Study of Bureaucracy (Michigan 2003); Hilary Sigman, *The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence*, 44 J L & Econ 315 (2001) (demonstrating that the time taken to clean up superfund sites can be explained by the influence of concentrated private interests); Amy Whritenour Ando, *Waiting to Be Protected under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J L & Econ 29 (1999) (finding that public support or opposition can significantly affect the timing of decisions to add species to the endangered species list).

11 See generally Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum L Rev 1749 (2007).

12 See generally Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L, Econ, & Org 243 (1987) (discussing how political actors design legislative constraints on agency actions to minimize information inequalities and to increase political control over the bureaucracy).

13 See generally Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin L Rev 917 (2006) (examining the concept of "administrative common law" and its strengths and weaknesses for harnessing agencies' power to make the law say what they want it to say); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex L Rev 113 (1998).

14 See Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum L Rev 2071, 2111–14 (1990).

15 See generally, for example, Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1 (1995); Geoffrey P. Miller, *Independent Agencies*, 1986 S Ct Rev 41 (analyzing the constitutional parameters of agency independence by focusing on the scope of the removal power of the president); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum L Rev 573 (1984). Compare Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541 (1994) (arguing that the Constitution allocates the power of law execution and administration to the executive alone); Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv L Rev 1153 (1992) (supporting the unitary theorist argument that all federal officers exercising executive power must be subject to the direct control of the president), with Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1 (1994) (using an originalist analysis to argue that the Framers envisioned a large degree of congressional power to structure and limit the administration as Congress thought appropriate). See also generally *Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies*, 36 Am U L Rev 277 (1986).

16 See, for example, Richard J. Pierce, Jr, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin L Rev 59, 65 n 44 (1995).

agency makes must be published in the Federal Register for all to see.[17] Even informal policies that are not legally binding are publicly available.[18] Most legally binding agency rules require notice and an opportunity for public comment by any affected interests—comments to which the agency must adequately respond.[19] With some notable exceptions,[20] final policy decisions by federal agencies in the United States are stunningly visible, even if the internal decisionmaking process of agencies is not entirely transparent. The idea of agencies hiding controversial policy actions by announcing them on Friday afternoons and running for the door is about as silly as Gulliver hiding among the Lilliputians by covering his eyes. The actions may not produce leading newspaper headlines by the time Monday rolls around, but that does not mean there is no one watching. The simple conventional account simply does not fit with the legal constraints imposed on agencies by statutes like the Administrative Procedure Act (APA).[21]

We also provide an empirical critique of the conventional wisdom by analyzing a dataset of agency rulemaking actions over twenty-five years. The data evidence little timing manipulation. Although important agency rulemaking decisions are slightly more likely to be issued on Fridays or weekends, this form of strategic timing manipulation is not correlated with political or institutional conditions commonly thought to drive agency desires to reduce the visibility of decisions. The manipulation of timing may be less tied to days of the week than times of the year, however. Rules producing an impact on state government, for example, appear more likely to be issued during a con-

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17 See 5 USC §§ 552(a)(1)(D), 553(b)–(d) (mandating that agencies publish substantive rules of general applicability, statements of general policy, and notices of proposed rulemaking in the Federal Register).

18 See 5 USC § 552(a)(1)(D).

19 See 5 USC § 553(b)–(d); *Weyerhaeuser Co v Costle*, 590 F2d 1011, 1027–28 (DC Cir 1978) (stressing the importance of procedural "openness, explanation, and participatory democracy" in agency regulation); *United States v Nova Scotia Food Products Corp*, 568 F2d 240, 252 (2d Cir 1977) (invalidating FDA regulation of the production of smoked whitefish because the agency failed to disclose the scientific formula it used to define "insanitary conditions"). There are some large exceptions to the general requirement of prior notice and comment. See, for example, 5 USC § 553(a) (excluding regulations that involve "a military or foreign affairs function of the United States" or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); 5 USC § 553(b)(3)(B) (permitting an agency to forego prior notice and opportunity for comment if such procedures are "impracticable, unnecessary, or contrary to the public interest"). See also O'Connell, 94 Va L Rev at 902 n 33, 929–36 (cited in note 10) (summarizing the literature on rulemaking without prior notice and comment and detailing agency use of direct and interim final rulemaking).

20 See, for example, James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, NY Times A1 (Dec 16, 2005) (breaking the story of warrantless wiretapping of Americans by the National Security Agency "to search for evidence of terrorist activity").

21 Administrative Procedure Act, Pub L No 89-554, 80 Stat 381 (1966), codified as amended at 5 USC § 551 et seq.

gressional recess than during other periods. In short, although we cannot conclusively reject the possibility that agencies use timing in the way the conventional account predicts, we find little evidence to support this possibility.

The constructive part of our thesis is that timing dynamics are more nuanced and limited than the traditional superficial account assumes. Although agencies cannot hide their decisions, timing can be used to change the cost structure of the public and private interest groups who are in the business of monitoring them. To be clear at the outset, we are not claiming that the timing of government action is irrelevant, but rather that manipulating timing produces selective monitoring by agency watchers or overseers in the political process. In other words, timing information release does not reduce the visibility of agency actions per se, but it does change the universe of actors—be they interest groups, politicians, or the media—who ultimately observe the given action. The former story corresponds to barring access to a public space, the latter to instituting a fee to gain entry. As discussed more extensively below, strategic timing can allow the monitored to choose the monitors. It stands to reason that the substance of agency decisions will change depending on which group of actors is monitoring their decision. At the extreme, agencies that can choose to exclude some interest groups from the monitoring process may be able to avoid public outcry or prevent more aggressive legislative oversight—ultimately shifting policy outcomes toward bureaucratic preferences.

Even in this more nuanced story, however, existing procedural restrictions in the law ensure that this strategy may be exceptional rather than typical. The promulgation of final rules, for example, is typically associated with a delay before implementation[22] and an extensive set of possible grounds for challenging the decision in court.[23] The delay rule facilitates monitoring and makes strategic timing a more difficult strategy to use effectively. Both Notices of Proposed Rulemakings (NPRMs) and Notices of Inquiries (NOIs)—typically mandatory before issuing new policy—explicitly are designed to generate public attention

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22 See 5 USC § 553(d) (providing for a thirty-day lag before a rule becomes effective); 5 USC § 801(a)(3) (providing for a sixty-day lag before a major rule becomes effective).

23 See, for example, 5 USC §§ 553, 706(2) (providing for the scope and process of judicial review of agency actions); *United States v Mead Corp*, 533 US 218, 224–25 (2001); *Chevron U.S.A. Inc v NRDC*, 467 US 837, 840 (1984); *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co*, 463 US 29, 41 (1983); *Sierra Club v Costle*, 657 F2d 298, 312 (DC Cir 1981); *Weyerhaeuser*, 590 F2d at 1024–25 (reviewing challenges based on the agency's statutory authority, procedural fairness, and abuse of discretion); *Nova Scotia Food Products*, 568 F2d at 249 (deciding whether promulgation of the agency rule was arbitrary, capricious, or an abuse of discretion).

and allow for interested parties to participate in the regulatory process.[24] Such decisions are "running public performances": they are on display for all to see, and while they often do not last forever, there is no meaningful sense in which the performance can be hidden from view.

All decisions, however, do not have such continuing public exposure. Instead, some decisions are immediate one-off events, with no or little opportunity to plan for the performance or to provide feedback afterward. For the subset of once-in-time decisions, timing could play a much greater role. This subset is small but important: mainly, the withdrawal of previously proposed rules (in other words, the abandonment of existing agency process). For reasons we discuss below, it is more difficult to challenge withdrawals in court. Immediate scrutiny and a nonjudicial political reaction will be more important. To foreshadow a bit, the manipulation of timing is rare for the issuance of final rules or the commencement of a rulemaking process but appears to be common for the withdrawal of proposed rules.

If our critique and reformulation of the timing of agency action is correct, more attention should be paid to rulemaking withdrawals as a class of administrative actions.[25] Although the rescissions of binding rules[26] and complete agency inaction[27] have long generated considerable analysis in the regulatory politics literature, withdrawals of uncompleted rulemakings are rarely a topic of discussion in the commentary.[28]

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24 See 5 USC § 553(b)–(c) (requiring that notice of a proposed rulemaking be published in the Federal Register and must include the time and location of the public rulemaking proceedings); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 Admin L Rev 411, 419–22 (2005) (describing the "limited right" of the public to participate in regulatory rulemaking).

25 We use the terms "rule withdrawal," "rulemaking withdrawal," "withdrawal of a proposed rule," and "withdrawal of an uncompleted rule" interchangeably. The terms refer to the abandonment or cancellation of a rulemaking that the agency had not yet completed. In other words, rule withdrawals are not rescissions of rules already in effect. Such rescissions typically require notice and comment or legislative repeal, whereas withdrawals do not. See 5 USC §§ 801–08 (establishing a fast-track legislative repeal process); *State Farm*, 463 US at 38 (providing an example of rescission through notice and comment); *Kennecott Utah Copper Corp v Department of Interior*, 88 F3d 1191, 1206 (DC Cir 1996) (allowing agencies to withdraw regulations "until virtually the last minute before public release").

26 See, for example, Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv L Rev 505, 508–09 (1985); Marianne Koral Smythe, *Judicial Review of Rule Rescissions*, 84 Colum L Rev 1928, 1929 (1984).

27 See, for example, Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 NYU L Rev 1657, 1659–61 (2004) (contending that current doctrine on inaction conflicts with the need to prevent agency arbitrariness); Richard J. Pierce, Jr, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 NYU L Rev 1239, 1243–44 (1989) (arguing that deferential judicial review does not undermine the political accountability of agencies); Cass R. Sunstein, *Reviewing Agency Inaction after* Heckler v. Chaney, 52 U Chi L Rev 653, 665 (1985) (supporting judicial review of agency inaction).

28 But see Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary-and-Capricious Review*, 119 Yale L J (forthcoming 2009) (noting, through examples, that political factors play a role in withdrawals and suggesting that withdrawals may be a particularly good area for courts to

Courts tend to treat withdrawals differently than other forms of agency decisions, though explicit discussion of such agency action is remarkably sparse. There is consensus that courts can review withdrawals if statutory schemes explicitly contemplate the abandonment of proposed action or if the agency faces a mandatory duty to regulate. Conflict currently exists among courts as to whether review of other withdrawals is permissible. Although there are good reasons for distinguishing withdrawals of unfinished rulemakings from the enactment of new rules and the rescission of old rules, the differential treatment in the law makes timing more important for withdrawals than for other agency decisions. Given the spike in rulemaking withdrawals after a presidential transition (typically the abandonment of rulemakings that were started but not completed under the previous administration),[29] rule withdrawals should occupy a more central role in administrative law scholarship. Yet, because withdrawals combine features of both agency inaction and agency policymaking, balancing the competing doctrinal imperatives to protect agency discretion and to keep agencies accountable presents serious challenges for administrative law.

The remainder of the Article proceeds in three parts. Part I provides an overview of how timing decisions fit in the broader literature on administrative agencies and institutional design. It describes the conventional account and explains why it is largely incorrect or at least incomplete. Part II offers a constructive theory of agency timing decisions and presents empirical evidence. Part III develops the legal and normative implications.

I. TIMING OF AGENCY POLICY

The extant literature on the administrative state has emphasized a series of critical questions about the balance of powers among the legislature, executive, courts, and agencies. How does Congress decide how to structure agencies?[30] Under what conditions does Congress

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start explicitly considering political factors as part of arbitrary-and-capricious review); O'Connell, 94 Va L Rev at 959–63 (cited in note 10) (finding that "after a political transition, agencies withdraw uncompleted rulemakings started under a previous administration"); Robert Shull and Genevieve Smith, *The Bush Regulatory Record: A Pattern of Failure*, 11–15 (OMB Watch Sept 2004), online at https://www.policyarchive.org/handle/10207/5083 (visited Sept 1, 2009) (lamenting the withdrawal of many public health, safety, and environmental proposals during the George W. Bush administration); Raymond Murphy, Note, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 Geo Wash L Rev 86, 88 (1985) (sketching out the scope of judicial review of rule withdrawals based on then-recent court decisions).

29 See O'Connell, 94 Va L Rev at 959–63 (cited in note 10).

30 See, for example, David E. Lewis, *Presidents and the Politics of Agency Design* 39–69 (Stanford 2003) (analyzing how certain variables, such as divided government or the durability of a president, impact the extent to which Congress chooses to insulate agencies from executive control). See also Jacob E. Gersen, *Designing Agencies: Public Choice and Public Law*, in Daniel A. Farber

delegate to agencies rather than produce policy directly through legislation?[31] To what extent can Congress constrain agencies by using structure and process restrictions at the front end,[32] or budgets and oversight at the back end?[33] Does the president exercise significant control over regulatory policy?[34] What role do courts have in shaping agency decisions?[35] Do agencies pursue largely private interest goals or public interest aspirations?[36] Although definitive answers to many of these questions have eluded scholars, the intellectual terrain is well trodden, and we will not revisit it here. In both law and political science, however, questions of the timing of agency decisions have been comparatively neglected.[37]

To the extent that timing has received any sustained treatment in administrative law, its treatment typically has been limited to two narrow areas. First, various commentators have analyzed the ways in which courts do and should review agencies' failures to act entirely[38] or

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and Anne Joseph O'Connell, eds, *Research Handbook in Public Law and Public Choice* *3 (Edward Elgar forthcoming 2009) (discussing the theoretical bases for the creation of administrative agencies and analyzing the "conceptual relationship between the design of agency decisionmaking structures and the extent of control by other political institutions like the legislature").

31 See generally, for example, David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge 1999).

32 See, for example, Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va L Rev 431, 432–33 (1989).

33 See, for example, Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am J Polit Sci 165, 171 (1984).

34 See, for example, Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2319 (2001) (arguing that concerns relating to the accountability and effectiveness of government action support a strong role for the president in setting administrative direction).

35 See, for example, Richard W. Waterman, Amelia A. Rouse, and Robert L. Wright, *Bureaucrats, Politics, and the Environment* 90–97 (Pittsburgh 2004) (finding that EPA administrators considered the federal courts to be the third most influential actor in exerting influence over the manner in which the EPA enforces the law); Peter H. Schuck and E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L J 984, 1054 (undertaking an extensive empirical analysis of how agency actions fare when subject to direct appellate review, and providing basic conclusions regarding the impact of judicial review on agency action); R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* 344–45 (Brookings 1983) (critiquing the impact of the courts on the regulatory implementation of the Clean Air Act).

36 See, for example, Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* 213–36 (Princeton 2008) (seeking to identify conditions under which socially beneficial regulation might be expected, even over the opposition of powerful interest groups).

37 But see note 10.

38 There is a fine difference between an agency deciding that it will not take a particular action and an agency not acting (often called agency inaction). The Supreme Court's recent decision in *Massachusetts v EPA*, 549 US 497, 509–12, 527–28 (2007) (reviewing the EPA's decision to deny a petition for rulemaking to regulate greenhouse gas emissions), is an example of the former; its decision in *Norton v Southern Utah Wilderness Alliance*, 542 US 55, 60–61 (2004) (dismissing a suit brought against the Bureau of Land Management for failure to take action to

their unreasonable delay in reaching decisions.[39] Second, and often related, timing rears its head in discussions of regulatory ossification as scholars debate whether the costs of procedural requirements for agency rulemaking lengthen the rulemaking process or discourage agencies from adopting socially beneficial rules altogether.[40] In both these areas, timing questions concern the duration of agency action or inaction; that is, how long does it take for an agency to formulate a

protect public lands from damage caused by off-road vehicles), is an example of the latter. We refer here to agency inaction.

39 See 5 USC § 706(1) (providing that a reviewing court shall compel an agency to take an action that it had "unreasonably delayed"); *Norton*, 542 US at 66–67 (deciding that the Bureau of Land Management was not legally required to take action, so its action could not be "unreasonably delayed"); *Forest Guardians v Babbitt*, 164 F3d 1261, 1272, 1274 (10th Cir 1998) (concluding that the Department of Interior unreasonably delayed in protecting the habitat of the silvery minnow because it did not meet a congressionally imposed deadline for agency action); *Oil, Chemical and Atomic Workers International Union v Zegeer*, 768 F2d 1480, 1488 (DC Cir 1985) (holding that the Mine Safety and Health Administration was proceeding on a reasonable schedule to regulate miners' radon exposure, so a court order was not warranted); *Telecommunications Research and Action Center v FCC*, 750 F2d 70, 79 (DC Cir 1984) (evaluating for reasonableness the FCC's five-year delay in its inquiry into AT&T's rate of return). See also generally Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 Va Envir L J 461 (2008) (arguing that ultimately judicial review of agency inaction is no different than judicial review of agency action); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin L Rev 1 (2008) (constructing a framework that allows courts to understand whether and how they should review agency inaction); DeShazo and Freeman, 155 U Pa L Rev 1499 (cited in note 10) (analyzing why the federal government delayed producing national standards for climate change pollutants); Jody Freeman and Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 S Ct Rev 51 (arguing that the Court is willing to carefully scrutinize agency discretion to "decide not to decide" because the Court currently is concerned with insulating expert agencies from political influence); Bressman, 79 NYU L Rev 1657 (cited in note 27) (arguing that courts should subject agency inaction to the same principles of judicial review that apply to agency action); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn L Rev 689 (1990) (asserting that courts should more overtly weigh pragmatic considerations when deciding whether a particular agency action should be deemed "unreviewable").

40 See, for example, Jason Webb Yackee and Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making Ossified?*, J Pub Admin Rsrch & Theory (forthcoming 2009); 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, 396 (2000) (finding that judicial review under the "hard look" standard did not significantly impede agencies' pursuit of their policy goals); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex L Rev 525, 557 (1997) (arguing that "hard look" judicial review can stymie the implementation of protective legislation); Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L J 1463, 1487–89 (1992) (discussing how judicial enforcement of various rulemaking procedures may incentivize agencies to release less information to the public during the rulemaking process); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L J 1385, 1410–36 (1992) (extensively reviewing the procedural, analytical, and substantive requirements that have ossified the rulemaking process); Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* 224–31 (Harvard 1990) (analyzing how the confluence of congressional and judicial influences on the administrative state can dramatically affect regulatory output).

policy decision or how long has the agency taken no action? These are important topics, but our focus is on timing in a simpler sense.[41] Once an agency has made a policy decision internally, when will that decision be announced to the public and why does it matter? Although we mainly emphasize the impact of timing decisions on the distribution of monitors of the agency action, we note in passing that timing may also substitute for content or process in regulations. An agency, for instance, could adopt a less controversial policy using abbreviated procedures but issue it during a period of high media and political visibility; by contrast, an agency could adopt a more controversial stance using more formal procedures but provide limited notice and hide the decision in the weekend news cycle.[42]

A. The Conventional Account

To the extent that there is conventional wisdom about the use of timing by agencies, it is that the visibility of agency actions can be reduced if actions are announced during a holiday or weekend news cycle. The microfoundation for this view is generally left unspecified and on close examination, it is somewhat inconsistent. Is it that the news media simply do not register government actions taken on Friday afternoons? Do interest groups with millions of dollars at stake in agency decisions head out early for their vacation homes and never bother to check what happened the week before? Are legislative staffs oblivious to this practice?

As we note below, both the conventional account and our modification emphasize the relationship between the timing of decisions and associated monitoring costs. In our view, the main mistake of the conventional account is its assumption that issuing policy during low-visibility time periods makes monitoring costs essentially so high that no one will observe the hidden policy, and it will be all but impossible to mobilize political opposition. A problem for this view has to do with short-term versus long-term equilibria. Even if this were a suc-

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41 This Article focuses on core timing decisions related to the monitoring costs theory. One of us has explored timing decisions related to political transitions elsewhere. See generally O'Connell, 94 Va L Rev 889 (cited in note 10) (examining whether agencies start more rulemakings in the first year of a presidential administration, whether agencies complete more rules in the final quarter of an administration or outgoing Congress, and whether agencies withdraw more rulemakings after a shift in the White House or Congress). We have also examined the duration of agency rulemaking in a separate article. See generally Gersen and O'Connell, 156 U Pa L Rev 923 (cited in note 10) (analyzing the effects of deadlines and other factors on the duration of agency rulemaking).

42 Consider Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 Harv L Rev 528, 530 (2006) (analyzing agency choices between substance and procedure).

cessful short-term strategy, it is difficult to construct a long-term equilibrium in which such behavior is rational. If the media and interest groups do not pay attention to agency decisions announced on Friday afternoons or holidays, then surely it is in an agency's interest to announce certain decisions at those times. But once interest groups or reporters get wind of the practice, they should pay extra-special attention to an agency's Friday and holiday announcements. And if the level of public attention is no less intense on those days, facilitated by a now twenty-four-hour news cycle, then it would no longer be the best response for the agency to announce controversial policies at such times. The conventional wisdom describes a set of strategies that is off the equilibrium path.

A second reason the conventional account falters is that most forms of agency action will be available for public review independent of timing. For example, an NPRM is typically open for at least sixty days so that comments can be taken.[43] A final rule generally does not go into effect for at least thirty days to allow for notice and legal challenges to take place prior to implementation.[44] A major rule, in particular, cannot take effect for at least sixty days after it is issued.[45] As a result, it is unlikely that announcing decisions on Friday afternoons will hide much of anything. Yet, the weekend media cycle may give less attention and coverage to these actions, and the natural monitors in Congress may be less able to mobilize quick opposition. But if agencies regularly engage in such behavior, interest groups and legislators should anticipate and adjust their own behavior accordingly. At best, hiding controversial decisions in this way would be a short-term political strategy, not the sort of generational political wisdom that can withstand the test of time and political dynamics.

Instead of using timing to hide decisions, we argue that agencies can make strategic timing decisions to affect the monitoring costs of Congress, the White House, interest groups, the media, and the general public. Again, this does not, as is commonly asserted, block the visibility

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43 See Executive Order 12866 § 6(a)(1), 58 Fed Reg 51735 (1993) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."); FDA, *Making Your Voice Heard at FDA: How to Comment on Proposed Regulations and Submit Petitions* (Feb 7, 2008), online at http://www.fda.gov/opacom/backgrounders/voice.html (visited Sept 1, 2009).

44 See 5 USC § 553(d).

45 See 5 USC § 801(a)(3). A major rule is any rule OMB finds will have or is likely to have "an annual effect on the economy of $100,000,000 or more," "a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions," or a "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 USC § 804.

of agency actions. Rather, it drives a shift in the population of potential monitors for any given agency action. We begin therefore by developing an informal theory of timing decisions that captures the intuition underlying the conventional wisdom about burying bad news in the weekend news cycle. The Article's theoretical innovation is to emphasize the relationship between timing, monitoring costs, and selective participation[46] by interest groups in agency policymaking processes.[47]

B. Selective Monitoring of Agencies

To help motivate the analysis, note that most policy in the United States is implemented by the bureaucracy, and agency problems are attendant in any such congressional delegation of government authority.[48] Administrative law seeks to manage the risk that agency behavior will diverge from the preferences of the public or other political institutions. Effectively monitoring agency behavior is usually a necessary condition for minimizing agency drift.

The average agency is monitored by a diverse mix of public actors and private interest groups. Some of this monitoring is formal. The White House, for example, reviews agency rules before they are issued.[49] Congress creates and funds agencies, prescribes specific responsibilities, and often supervises their work using information requests, committee hearings, and other oversight tools.[50] Courts review the procedure and substance of agency actions, relying on an extensive body of statutory and doctrinal tools.[51] Less formally, interest groups

46 See generally Christopher R. Berry, *Imperfect Union: Representation and Taxation in Multi-level Governments* (Cambridge forthcoming 2009) (developing the idea of selective participation in other political contexts).

47 The conventional account for Friday night earnings announcements in the business context—solidified in the 1980s—also recently has come under scrutiny. See Doyle and Magilke, *Timing of Earnings Announcements* at *4 (cited in note 9) (finding support for the "benign" hypothesis that managers release worse earnings news when the market is closed in order to disseminate the information more broadly); Chen and Mohan, 23 Fin Mgmt at 63, 65 (cited in note 9) (arguing that companies affirmatively try not to hide poor earnings announcements to manage the evaluations of analysts). Our critique of the conventional wisdom in the public sector also has some applicability to the corporate sector. After all, businesses cannot hide their earnings statements when the market reopens on Monday morning.

48 For overviews of the delegation literature, see Epstein and O'Halloran, *Delegating Powers* at 14–29 (cited in note 31) (exploring the history and theory of delegation and delegation mechanisms); D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* 4–12 (Chicago 1991) (same).

49 See Executive Order 12866, 58 Fed Reg 51735 (1993), 3 CFR § 191.

50 See generally Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members* (CQ Press 10th ed 2005). See also Lewis, *Presidents* at 44–48 (cited in note 30); Epstein and O'Halloran, *Delegating Powers* 18–29 (cited in note 31). See also generally Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Brookings 1990); McCubbins, Noll, and Weingast, 3 J L, Econ, & Org 243 (cited in note 12).

51 See note 23.

and members of the public often track agency actions and may petition other political actors in addition to the agencies to shift regulatory outcomes.[52] The media bring agency deeds and misdeeds to light, too.[53]

Each potential monitor naturally has preferences about the substance of agency policy, usually preferring that an agency's final decisions be as close to the monitor's preferences as possible. Monitoring the bureaucracy, however, is not costless. Interest groups monitoring agency action must balance the benefits of monitoring agency behavior with its costs.[54] As a result, it is generally only groups with something at stake that are willing to bear the costs of monitoring. Suppose that each of these interest groups has a different expected benefit from monitoring agency decisions, perhaps because they have different concerns or because they have different abilities to respond to decisions. If so, there will always be some group for whom the existing marginal cost of monitoring is nearly equal to the marginal return from monitoring. Any factor that increases the costs of participation will make the expected returns from monitoring negative. These interest groups, for whom it was just barely worth participating given the existing costs and benefits, will cease to participate when monitoring costs increase.

When monitoring costs increase, the groups with the most at stake will continue to monitor because the marginal cost is still much less than the marginal benefit. The composition of interest groups monitoring agency decisions is now different, however. Because the remaining groups have preferences different from the exiting group, the response to agency action taken on a low-visibility day may be different than the response the agency would have received had the policy been announced on a high-visibility day. It is not that no one is paying attention or that the agency has succeeded in hiding its actions. Rather, the pool of actors who are paying attention has changed. Given that the

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52 See Daniel P. Carpenter, *Protection without Capture: Product Approval by a Politically Responsive, Learning Regulator*, 98 Am Polit Sci Rev 613, 621 (2004) (demonstrating that the political organization of consumers can influence FDA regulatory outcomes); Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 Admin & Socy 325, 333–38 (1997); Jason Webb Yackee and Susan Webb Yackee, *A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J Polit 128, 135 (2006) (finding that business commenters, but not other commenters, exert strong influence over the content of final rules). See generally Susan Webb Yackee, *Assessing Inter-institutional Attention to and Influence on Government Regulations*, 36 Brit J Polit Sci 723 (2006).

53 See, for example, Goldstein and Cohen, *Bush Forces a Shift in Regulatory Thrust*, Wash Post at A1 (cited in note 6) (discussing President Bush's withdrawal of many rules proposed but not formally promulgated during the Clinton administration). See also generally Cary Coglianese and Margaret Howard, *Getting the Message out: Regulatory Policy and the Press*, 3 Intl J Press/Polit 39 (June 1998).

54 See David Epstein and Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J L, Econ, & Org 227, 228 (1995).

agency itself decided when to announce its decision, it stands to good reason that the new group of monitoring interest groups will produce a public reaction more in keeping with the agency's underlying preferences.

To get some sense of the benefits and costs of monitoring, which can range from relatively trivial to significant, consider two classic forms of congressional oversight of agencies: "police patrols" and "fire alarms."[55] According to Mathew McCubbins and Thomas Schwartz, "Instead of sniffing for fires, Congress places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm."[56] Most oversight of agency action occurs through threats by interest groups to sound a fire alarm to Congress because such oversight is cheaper than direct police patrolling, such as regular hearings and investigations by congressional members.[57] Although police patrols and fire alarms were defined to describe categories of congressional oversight, they also help illuminate monitoring efforts by the other branches of government, interest groups, the general public, and the media. The White House is much like Congress—able to engage in police patrols but often reliant on fire alarms. The courts, by contrast, cannot do their own patrolling and must wait for an alarm to be pulled. Interest groups, the general public, and the media are the ones who generally pull such alarms, often after engaging in police patrols of their own.

McCubbins and Schwartz focus on the benefits and costs to Congress for monitoring agencies. Extending their framework allows for consideration of the monitoring calculus for other agency watchers. The benefits of monitoring can vary across these third parties. For example, police-patrol monitoring mechanisms likely provide more information about agency behavior than a single intervention during a crisis. Different monitors can also claim credit for their vigilance in different ways and in varying degrees. The credit might come in the form of a political chit, an increase in newspaper sales, or a boost in electability or approval. Sounding or responding to a four-alarm fire when an agency acts badly presumably yields more credit than more mundane monitoring of less chaotic events. Perhaps most importantly, it is not clear which form of oversight will, on average, produce greater shifts of policy toward monitor preferences. Both regular supervision

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55 McCubbins and Schwartz, 28 Am J Polit Sci at 166 (cited in note 33) (explaining that police-patrol oversight is more centralized and direct, whereas fire-alarm oversight consists of a decentralized system, relying on the public to alert Congress to agency actions that are incongruent with congressional policies).

56 Id.

57 Id at 166–69.

of agency actions and a vocal response to a one-off crisis could yield public policy that is more in keeping with the monitors' preferences.

These monitoring mechanisms also generate variable costs for different agency watchers. Police-patrol oversight requires, more or less, constant attention to an agency docket, some or most of which may be irrelevant to a monitor's interests. Fire-alarm oversight—for the monitor—is less costly than police-patrol oversight, but even fire-alarm oversight consumes time that could be devoted to some other task. Additionally, agency observers may, at times, incur blame for their actions. Voters might punish monitors they perceive as unduly interfering with the administrative process. The likelihood of blame, however, arguably depends more upon the structure and content of agency action than the form of oversight.

C. Timing and Monitoring Costs

Everything we have said thus far applies generically to agencies and monitoring costs. What remains is to locate the timing of agency decisions within the selective monitoring framework. Part I.C's modest claim is that monitoring costs are a partial function of the timing of agency decisions. In many cases, timing will be a trivial share of overall monitoring costs, and for some interest groups the change in cost structure will be unimportant—that is, it will result in no observable behavioral change. However, so long as there is some actor who was just willing to pay the monitoring costs before an increase, there will be some actor who will cease to do so when monitoring costs increase at all.

The conventional account suggests that policies announced on a Friday afternoon are forever lost in the news cycle. It is as though these policies subsequently are implemented behind closed doors, forever locked away. More plausible is simply to say that announcing policies on Christmas Eve or when Congress is out of session forces monitors to exert more effort to observe the policy decisions. It requires business associations or nonprofits to pay someone to be on call or in the office. Moreover, and likely more importantly, it also increases the costs of publicizing the objectionable action and mobilizing a political response. Almost no monitor is able simply to stop the agency from moving forward alone. Changing the policy requires notifying and organizing other actors in the political process. Simplistically, but accurately, the costs of doing so increase after hours, on weekends, on major holidays, or when Congress is out of session. Put in the colloquial language of political science, the timing of agency action affects the costs of both police patrols and fire alarms.

Importantly, the effectiveness of this strategy will vary depending on the type of underlying action. It may work sometimes for final rules, but it should work much more effectively for a subset of less prominent agency actions. Where delay, transparency, and judicial scrutiny are not built into the administrative process, the prospect of strategically manipulating the timing of decisions is more sensible. Part of what makes the conventional timing story less than wholly compelling is that new rules are usually proposed, considered for many months with extensive public comments, announced, and then implemented only after affected parties have considered whether to challenge the decision at the agency or in court, assuming ripeness and other jurisdictional mandates. In other settings, however, agencies make policy decisions without prior notice and comment, using such devices as interim final rules, direct final rules, ostensibly nonbinding policy statements, and so on.[58] Some of those decisions do not take effect immediately.[59] Additionally, especially after shifts in administration, many of the most controversial agency decisions will be whether to finish or withdraw rulemakings started by prior administrations.[60] Rule withdrawals occur without prior notice and comment or an ex post lag. Rule withdrawals are sometimes challenged in court, but the burden of doing so successfully is typically much higher.[61] The returns from strategically manipulating timing should be greater for this class of actions than either the commencement of traditional rulemaking (through NPRMs) or the implementation of final rules. Although it would not be surprising to see little evidence of timing manipulation anywhere, if robust timing effects exist anywhere, it should be for this limited subset of decisions.

The ability of agencies to use timing to raise monitoring costs will also vary according to the type of monitor: members of Congress and the general public may fare worse than the White House, which has other ways to monitor likely agency policy before it is issued. This ability may also differ by the type of monitoring the agency watchers use: "fires" become harder to see, raising the costs for those who look for or respond to them; by contrast, frequent police patrols should catch strategically timed actions. Finally, this ability to manipulate timing may depend on agency choices on other dimensions, including regulatory substance and procedure.[62] Given certain procedures and

58 See Jacob E. Gersen, *Legislative Rules Revisited*, 74 U Chi L Rev 1705, 1709–13 (2007); Lars Noah, *Doubts about Direct Final Rulemaking*, 51 Admin L Rev 401, 403 (1999); Michael Asimow, *Interim-final Rules: Making Haste Slowly*, 51 Admin L Rev 703, 704 (1999); Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo Wash L Rev 1, 1–3 (1995).

59 Direct final rules, for example, do not take effect until thirty or sixty days have passed, assuming no adverse comments are submitted in that period. Levin, 64 Geo Wash L Rev at 1 (cited in note 58).

60 See, for example, Shull and Smith, *The Bush Regulatory Record* at 11–15 (cited in note 28).

61 See Part III.A.

62 See generally Stephenson, 120 Harv L Rev 528 (cited in note 42).

substance of an agency decision, timing that is less visible naturally imposes more costs on monitors than more visible timing. But less visible timing may trade off against more visible procedures or more palatable substance, leaving the cost-benefit calculation unchanged. For instance, an agency could announce uncontroversial regulations on Fridays, perhaps making monitoring at those times less attractive for interest groups; by contrast, an agency could issue contentious decisions on Fridays, likely making monitoring even more attractive or necessary for interest groups.[63] Timing decisions are then best understood as strategic decisions by agencies that can make it more difficult, other factors being equal, for watchers to interfere with their policy implementation. The timing of action makes effective monitoring of agency action more costly, which in turn should change the universe of interests participating in the agency process.

II. EMPIRICAL EVIDENCE

Another reason the conventional account of strategic timing is unsatisfying is that it is insufficiently attentive to the reality of regulatory politics. The strategic use of timing requires both desire and opportunity on the part of agencies. If the agency either does not care or is not engaged in controversial action, then there is no reason to try to reduce the visibility of decisions. Alternatively, the opportunity to use timing effectively may not be present, even if the desire on the part of agencies exists.

Suppose an agency wants to avoid public controversy. When an agency takes an action that upsets interests groups, these groups have two main options. One is turning to the courts and challenging the legal validity of the decision. The other is running to Congress and generating political opposition to the agency's proposal. The right locale for analysis then is whether and to what extent changing the timing of decisions can affect the costs of reacting to agency action. First consider the relationship between bureaucratic timing and judicial review. For most types of agency actions, the timing of a decision does not meaningfully affect the costs of judicial response. Because delay and visibility are explicitly built into most administrative processes, interest group challenges will be no more difficult for policies announced on Fridays than policies announced on Tuesdays. Timing may play a more plausible role with respect to types of agency actions that are more difficult to challenge in litigation. Because legal challenge is more dif-

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63 Similarly, given some set substance, both an agency that foregoes public comment and an agency that announces a policy decision on a holiday or weekend raise monitoring costs, but an agency that engages in particularly open proceedings (for instance, hearings and long comment periods) may offset the higher monitoring costs of a weekend announcement.

ficult, upset interest groups will have to generate a response in either the media or the legislature. If there is any weekend-news effect, strategic timing of announcements could generate less controversy for this subset of actions.

The most prominent examples of agency actions that are hard to challenge in courts are the withdrawal of proposed rules and the issuance of informal policies, including informal adjudicative statements, interpretative rules, guidance, or other nonbinding statements of agency policy. Although we are unable to analyze informal guidance documents because of data limitations, we are able to analyze rule withdrawals. A tentative hypothesis is that agencies will not release controversial policies on Fridays more often than on other days of the week, except for actions like rule withdrawals or perhaps interim final rules (which lack prior notice and comment as well as ex post delay before enacting binding obligations).

Judicial review of course is costly, and it relies on judges, who may agree either with the agency's view or the opposing perspective of an interest group. Therefore, in many cases, the fire alarm will be sounded first in the legislature or media. The legislature is more likely to respond to a media firestorm, and a media firestorm could be less likely if bad news is released late on a Friday afternoon. However, a simpler way for the agency to increase alarm costs is to issue decisions when Congress is out of session. For interest groups seeking to generate political opposition to an agency's discrete action, it will almost always be more difficult to do so when legislators are out of town. Whether agencies do so, of course, is ultimately an empirical question, but this seems a superior timing-related strategy to weekend announcements. Again, visibility in the ordinary language sense of the word is not reduced, but the costs of generating opposition are increased, and therefore the probability of opposition being generated is decreased as well.

All together these distinctions allow for a somewhat more fine-grained empirical evaluation of the theory. If the naïve conventional view is right and if most agency decisions face opposition, there should be clusters of decisions on low-visibility days or during low-visibility time periods. If the revised view is correct, several alterative predictions follow. First, there should be greater evidence of clustering on low-visibility days for rule withdrawals or informal policy statements than for the issuance of final rules (or, for that matter, NPRMs or NOIs). Second, while there should be little evidence of Friday effects for final rules, there should be evidence of recess effects for final rules. And, there should be recess effects not just for final actions but also rule withdrawals and the like. Together, these hypotheses should be taken as preliminary, intended to sketch an initial empirical account of the timing of agency actions. Rather than offering definitive proof that agencies do or do not use timing in the ways we suggest, this Article offers a series of data points that are generally consistent with the theoretical account offered in Part I.

A. Measuring Timing

Conceptual quibbles aside, it would be surprising if generations of political anecdotes were completely off base. This practice of manipulating the news cycle may be effectively utilized by agencies and other government organizations. Officials in multiple administrations and members of different political parties all seem to insist that timing does reduce visibility. The analysis relies on a large database of agency rulemaking actions constructed from twenty-five years (1983–2008) of federal agency semiannual reports in the Unified Agenda of Federal Regulatory and Deregulatory Actions ("Unified Agenda").[64] The database contains considerable information on the rulemaking process, including, if applicable, the date of the NPRM, the date(s) of the comment period(s), the date when the final rule was promulgated (if the process was completed), the date the rulemaking process was withdrawn (if the process was not completed), and particular characteristics of the rulemaking. The database has information on the rulemaking activities of all fifteen cabinet departments as well as thirty-two executive and independent agencies.

At this point, a bit more precision is warranted about what it means for there to be "some timing effects" or "no timing effects." Ideally, it would be possible to identify a set of agency decisions for which timing could feasibly be manipulated, observe whether timing was manipulated, and also measure the effects (for instance, on the nature of interest group monitoring and subsequent response by Congress or the courts). Unfortunately, this is not possible, and therefore the analysis pursues a series of second-best approaches.

A first question is whether agencies do in fact manipulate the timing of decisions. Without the ability to peer inside the heads of administrators (or to survey agency decisionmakers), answering this question requires a descriptive baseline. That is, what would the distribution of policy announcements look like if there were no manipulation of timing, and how serious a deviation from that distribution would justify a conclusion that strategic timing decisions are being made? Because there is virtually no rigorous empirical work on this

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64 The Unified Agenda is published twice a year in the Federal Register. For a detailed description of the data and their advantages and limitations, see O'Connell, 94 Va L Rev at 924–29 (cited in note 10).

question,[65] we start with a parsimonious assumption, positing that the "no manipulation of timing" regime would produce a roughly uniform distribution of agency actions—essentially equal probability of occurrence at each possible point in the distribution. If agencies are only open for business during the week, one would expect approximately 20 percent of all agency actions to be taken (announced) on each day of the work week. If a given agency seems to cluster announcements disproportionately (much more than 20 percent) on Fridays, this might be suggestive evidence that timing dynamics are in play. Far from clustering final actions on Friday afternoons, however, the distribution of policy announcements by agencies is nearly exactly uniform.[66] No weekday produces less than 17 percent of final actions announced, and agencies announce just less than 22 percent of final actions on Friday. Although we do not make too much of this evidence, there is nothing in it to support the idea that agencies prefer to hide final actions in the weekend news cycle. The distribution of rulemaking starts (NPRMs) is almost identical, with little to no meaningful day-to-day variation.

The aggregate data could easily mask either the presence or absence of real underlying timing trends. For example, even if each day of the week has equal mass, it could be that the 20 percent announced on Tuesdays are relatively uncontroversial policies, whereas the 20 percent announced on Fridays are extremely controversial. Without a way of measuring how controversial different decisions are, this possibility cannot be eliminated, but controlling for rule characteristics does partially mitigate this issue.[67] There are certain exceptions, of course. Most importantly, if we look only at significant final actions, agencies issued 31.9 percent of such actions on Fridays. Although this undermines the earlier point about uniform distribution, it still demonstrates that most significant actions are not issued on Fridays. Also, withdrawals of proposed rulemakings seemed to be timed differently than final actions. Overall, 29.9 percent of withdrawals are announced on Fridays; of significant withdrawals, 30.9 percent are done on Fridays.

Given the obvious deficiencies of the aggregate descriptive data, a second empirical strategy is called for. Recall that timing manipulation should be a joint function of the desire to reduce political response to controversial policies and the ability to do so. As an empirical matter then, political and institutional conditions that would affect either the desire of agencies to reduce the political response or the ability to do so should be correlated with the timing of agency action.

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65 But consider DellaVigna and Pollet, *Strategic Release of Information on Friday* at *25–27 (cited in note 1) (analyzing the timing of executive orders).

66 Coding and results for all the data analysis are available from the authors.

67 See note 73 for additional information on this issue.

The exogenous institutional conditions should be statistically associated with the probability that a given action is announced on a Friday or, alternatively, when Congress is out of session. This idea is straightforward, but also a bit sloppy in that it conflates the desire to avoid negative political response with the ability to do so; nonetheless, as a first approximation it is arguably defensible.

To illustrate, suppose a Republican president favors deregulation of air pollutants and a Democrat-majority Congress opposes deregulation. If the president exerts effective control over the EPA, the agency will propose increasing the permissible level of the relevant pollutant in the air or, alternatively, abandon a rulemaking that a prior pro-regulation president and EPA commenced. The former action will be hard to hide, and it would be surprising if the agency used a Friday announcement to hide the decision. In that context, there should be little or no statistical association between conditions of divided government and the probability of a Friday afternoon release. There should, however, be a positive association between conditions of divided government and the probability of announcing when Congress is out of session. The presence of divided government makes it likely that there will be divergence between agency preferences and congressional preferences (which would provide an otherwise welcoming ear to interest group complaints). If the goal is to make it more costly for monitors to sound congressional fire alarms, then the partisan makeup of Congress would matter, and divided government (in combination with other conditions) could make the strategic use of timing more likely.

Or, suppose an agency has preferences that diverge from those of the president.[68] Given extensive presidential oversight over nonindependent agencies instantiated in review by the OMB's Office of Information and Regulatory Affairs (OIRA),[69] it seems unlikely that an

68 Arguably, this was the case for (some) staff of the EPA and President George W. Bush. See Janet Wilson, *EPA Chief Is Said to Have Ignored Staff*, LA Times A30 (Dec 21, 2007) (reporting that the head of the EPA directly contradicted the written recommendations of the staff). In addition, the Office of Information and Regulatory Affairs (OIRA), which arguably shared President Bush's preferences, also rejected the National Oceanic and Atmospheric Administration's proposed rule to cut down on the fishing of krill, a marine species and important food source for whales and other animals in the Pacific Ocean. See *Fisheries off West Coast States; Coastal Pelagic Species Fishery; Amendment 12 to the Coastal Pelagic Species Fishery Management Plan*, 72 Fed Reg 8335 (2007). OIRA returned the proposed rule for reconsideration eight months later. Letter from Susan E. Dudley, Administrator, OIRA, to John J. Sullivan, General Counsel, Department of Commerce (Oct 30, 2007), online at http://www.reginfo.gov/public/return/return_doc_20071030.pdf (visited Sept 1, 2009). After revision, OIRA accepted the proposed rule. See *Fisheries Off West Coast States; Coastal Pelagic Species Fishery; Amendment 12 to the Coastal Pelagic Species Fishery Management Plan*, 73 Fed Reg 29104 (2008).

69 See Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum L Rev 1260, 1278–79 (2006); Robert W. Hahn and Robert E. Litan, *Counting*

executive agency could successfully use timing to raise presidential monitoring costs. An independent agency, however, might be able to manipulate timing. But an independent agency would do so only if presidential oversight affected its decisions.[70] Scholars have long theorized that independent agencies are more susceptible to congressional pressure precisely because of the lack of explicit presidential control.[71] If these assumptions about political control of independent agencies are correct, then this institutional feature—agency independence—should have virtually no impact on the probability that an action is announced on a Friday, but quite a large impact on whether an action is announced when Congress is out of session.

In short, strategic timing decisions are more likely to manifest in the context of congressional recesses than Friday afternoons, and political and institutional conditions that would drive timing decisions will be more robust predictors of actions like rule withdrawals and interim rules than actions like final rules characterized by extraordinary visibility. To shed some empirical light on this murky topic, several very simple regression models of agency timing decisions are estimated.

B. Discussion

Table 1 contains the results from four main probit regression models. Each model is estimated twice, once on a longer panel with less substantive information and once with a shorter panel for which we have more complete information. We estimate models for two types of agency decisions, final actions and rule withdrawals, and investigate two types of timing effects, the announcement of decisions on a Friday (or weekend) and the announcement of a decision when

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Regulatory Benefits and Costs: Lessons for the US and Europe, 8 J Intl Econ L 473, 476 (2005); Robert W. Hahn and Mary Beth Muething, *The Grand Experiment in Regulatory Reporting*, 55 Admin L Rev 607, 613–26 (2003) (analyzing the effectiveness of the OMB's efforts to tally the costs and benefits of the regulations issued by several different federal agencies); Kagan, 114 Harv L Rev at 2290–99 (cited in note 34).

70 Consider Lewis, *Presidents* at 39–69 (cited in note 30) (analyzing the degree to which Congress can insulate agencies from the influence of the executive); Kagan, 114 Harv L Rev at 2376–77 (cited in note 34) (explaining the factors that contribute to the extent of presidential control over an independent agency's actions).

71 Consider Bressman, 107 Colum L Rev at 1807 (cited in note 11) (arguing that *Chevron*'s equal applicability to independent and nonindependent agencies is not puzzling because Congress "fill[s] the gaps" for the former and the president does so for the latter); Strauss, 84 Colum L Rev at 592 (cited in note 15) ("[A]s a former FTC Chairman recently remarked, the independent agencies 'have no lifeline to the White House. [They] are naked before Congress, without protection there,' because of the president's choice not to risk the political cost that assertion of his interest would entail."). But see generally Neal Devins and David E. Lewis, *Not-so Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 BU L Rev 459 (2008) (arguing that presidents have more power than ever before over independent-agency policymaking).

Congress is out of session.[72] Rather than estimate overly complicated models that make heroic demands on the underlying data, the analysis tends heavily toward parsimony, particularly given the preliminary nature of these findings. The coefficients presented in Table 1 are marginal effects; they can be interpreted as the marginal change in the probability that the given agency policy is announced, for example, on a Friday, as the covariate or independent variable changes. To illustrate, in a model of Friday policy announcements, a marginal coefficient of -0.20 on agency independence would indicate that independent agencies are 20 percent less likely to announce decisions on Fridays than nonindependent agencies.

The models rely on two main sets of covariates or explanatory variables. The first is a set of variables indicating political and institutional conditions. These variables include whether the action was taken during a period of divided government, whether the year in which the action was announced was an election year or the year preceding a presidential election, whether control of Congress had just shifted, and whether the issuing agency was independent or a cabinet agency. The second set emphasizes features of the regulatory action itself, including whether the action was economically or otherwise significant and whether it implicated state government interests. We also controlled for whether the action was issued by the IRS, which had a very large number of withdrawals during the period. These action characteristics are an attempt to control for the baseline level of importance or controversy. Given the sheer size of regulatory actions in the database, coding a direct measure of potential controversy for each action is not feasible. Thus, in the analysis presented, we have to rely on the second set of proxies. To be certain, these measures are crude, but they are suggestive.[73] Each of the four models is estimated twice. Four columns

72 Throughout the Article, we use the House recess schedules as an indicator of legislative recess. The House and Senate recesses overlap extensively, but not perfectly so. Congress spends a significant portion of the year in recess; the amount does vary, mainly by whether it is an election year (and then whether it is a presidential election or midterm election year). For example, in 2008, the House spent 170 calendar days in recess; in 2007, it was in recess for 114 calendar days.

73 We also considered other ways to get at whether agencies were announcing "bad" or "good" news. We might expect rulemaking announcements by conservative agencies (such as the Department of Defense) under President Clinton and liberal agencies (such as EPA or the US Agency for International Development) under Republican presidents to be more controversial than the reverse. For example, the "don't ask, don't tell" policy for gays in the military under President Clinton and the refusal to regulate greenhouse gases under President George W. Bush generated considerable opposition. See Paul Quinn-Judge, *Military Policy on Gays Detailed; Conduct Is Target, Not One's Orientation*, Boston Globe Metro 3 (Dec 23, 1993); *Massachusetts v EPA*, 549 US 497, 509–12 (2007). We were able to code thirty-seven of the forty-seven agencies in our database as liberal, neutral, or conservative using Professors Joshua Clinton and David Lewis's typology of agencies. See Joshua D. Clinton and David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 Polit Analysis 3, 17–19 (2008). We then examined

contain more observations than the others as they include data from 1983–2008. However, one important substantive variable—whether the agency action qualifies as a "significant" action—is not reliably coded until after 1995. The other columns thus are reestimations of the original four models on this later subset of the data. In most cases, coefficients have the same sign and roughly the same magnitude; however, because there is no good methodological reason for favoring one set of estimates over the other, we present both sets of results.

First, consider Columns (1) and (2).[74] There are no independent variables that are either statistically or significantly associated with the probability that a final rule is issued on a Friday or weekend, with one exception. In Column (2) (covering from 1995–2008), significant final actions are more likely to be announced on Fridays. This lends at least some credence to the anecdotal evidence about Friday announcements of controversial decisions. The effect is not huge, but it does seem to be genuine. Significant rules are about 3 percent more likely to be announced on Fridays than nonsignificant rules. Friday announcements are no more likely in presidential election years or the year immediately after an election year. Friday announcements are no more likely when government is united or divided. No other measured characteristic of the agency action itself—for example, whether the action impacts state government interests or whether the agency is a cabinet department—is associated with Friday actions either. Indeed, the overarching conclusion from the analysis of Friday policy announcements is that virtually none of the institutional, political, or agency characteristics that the conventional account might expect to be associated with the strategic use of timing are associated with Friday actions at all. This should give adherents to the conventional view at least some pause.

Still, there could be no identifiable associations in the data, even if the conventional account is correct, so long as agencies seek to hide a sufficiently small number of decisions. The aggregate data could mask real, though rare, associations. This possibility cannot be eliminated with our existing methods, but note that if it is true, the timing problem is less significant—not more—for it would mean that the manipulation of timing is so infrequent as to be unidentifiable except

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whether announcements from agencies not perceived to be ideologically close with the president were announced in low-visibility settings, but found that not to be the case. Generally, there was no significant correlation, except that withdrawals by ideologically close agencies were positively correlated with congressional recesses. Coding, correlations, and regression results are available from the authors.

74 Model 1 is uninformative. The Likelihood Ratio for the Chi-Square test indicates that the model is not significant compared to a model with no explanatory variables. In other words, we cannot conclude that at least one of the coefficients of the explanatory variables is not equal to zero.

by anecdote. In essence, the data might not be fine-grained enough or there might be too much noise in the data to find meaningful relationships. By the same token, the fact that the data do reveal a relationship between rule significance and Friday actions suggests otherwise. Similarly, if this aggregate masking problem is real, it also implies that no other timing effects should be identifiable in the data. As it turns out, however, there are identifiable timing effects.

Columns (3) and (4) of Table 1 summarize the probability that a final agency action will be announced during a congressional recess. If Congress is out of session, all else equal, the costs of mobilizing a political response to an unpopular policy should rise. We hesitate to place too much emphasis on the magnitude of coefficients and instead focus mainly on the direction and robustness of effects. All coefficients that are significant in one model are also statistically significant in the other, and all but one have the same sign. Rules producing an impact on state government are more likely to be issued during a congressional recess. In the year after a presidential election, final actions are somewhat less likely to be issued when Congress is out of session;[75] rules issued during periods of divided government are less likely to be issued during a recess; and actions announced immediately after control of both chambers of Congress shifts (for example in 2007) are less likely to be announced when Congress is out of session. Although speculative, it may be that congressional attention is particularly acute during these time periods, and thus the marginal benefit of raising response costs is not justified. The results raise many interesting questions, and many of these associations cry out for greater analysis and theorizing. For example, agencies issue slightly more actions in December than in any other month. Congress is also often in recess during much of December. It would be important to separate out recess effects from general end-of-year effects. For the moment, however, we note only the basic empirical associations.

The conceptual discussion in Part I also suggests that it may be more effective to use timing to affect monitoring costs with regard to actions that are harder to challenge ex post, like rule withdrawals. Columns (5) through (8) examine this possibility. First, note that a shift in congressional control increases the probability of action on Fridays (Columns (6) and (7)) and seems to increase the probability that the rule will be withdrawn during a recess as well (Column (8)). That said, the opposite sign on the covariate in the model that does

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75 Consider Douglas Kriner and Liam Schwartz, *Divided Government and Congressional Investigations*, 23 Legis Stud Q 295, 309 (2008) (finding that Congress conducts less oversight in election years, controlling for divided government and other factors).

not control for rule significance (Column (7)) suggests caution about any strong conclusions. If these effects are genuine, then timing dynamics for withdrawals differ somewhat from the dynamics for final actions. This should not be altogether surprising. Whereas final rules will be hard to hide from Congress anyway, withdrawn rules, as a category, often generate less attention. The temptation to increase monitoring costs for rule withdrawals may be especially strong.

The effect of divided government on the timing of withdrawals is also consistent across models, but differs for Friday timing and recess timing. Whether on the full time series or a subset of the data, rules are more likely to be withdrawn during congressional recesses in divided government (Columns (7) and (8)), but less likely to be withdrawn on Fridays in such periods (Columns (5) and (6)). This result also suggests that timing dynamics are nuanced; the same concerns that drive Friday announcements may not drive recess announcements. Although caution is warranted in general, unlike the release of final rules which are largely unaffected by background political conditions, such factors do seem to affect the timing of withdrawals. This finding is consistent with the theoretical argument. Unlike final rules, which will almost inevitably receive ex post scrutiny and likely have already received a good deal of ex ante scrutiny as well, rule withdrawals are more difficult to challenge in court and contain no inherent delay that would otherwise facilitate mobilizing congressional response.

Lastly, note that while the post–election year variable is not always significant in the models, when it is statistically significant it is always negative. In the year after a presidential election, agency actions are less likely to be announced on Fridays or when Congress is in recess. This might be surprising at first glance. Proposed rules that are being withdrawn when a president first takes office typically will have been started by previous administrations. Abandoning these proposals would seem to be precisely the sort of controversial decisions that new administrations would want to hide. There are two plausible explanations for the results. First, rule withdrawals are being announced by the very same agency that started the rulemaking process. While the new political appointees obviously prefer the rulemaking to be abandoned, the career civil servants may not. Career staff may actually prefer to facilitate public and congressional response, instead of making reactions more costly. To the extent that career civil servants rather than political appointees can control policy announcements, the findings could be evidence of further agency problems within the bureaucracy. Second, if the decisions to withdraw incomplete rulemakings are being driven by political considerations, withdrawals may be just the sort of agency action the new administration wants to trumpet. Withdrawals are quick, cheap, and as we emphasize, difficult to challenge. Thus, for a new administration, rule withdrawals may be the easiest path to quick political capital among its supporters.

Unlike the effect on final actions, controlling for other factors, significant rules are less likely to be withdrawn on Fridays, though the effect is small. Significant proposed rules have already received a great deal of attention because of their large economic or other major impact. The prospects of hiding these withdrawals are dim. Agencies are more likely to withdraw significant rules during a congressional recess, and without any controls, agencies withdraw more significant proposed rules on Fridays than on any other day. The basic point is that the variables one would expect to drive strategic timing decisions—if such decisions were being made by agencies—are in fact sometimes associated with the timing of withdrawals but are not associated with the issuance of final rules.

* * *

Our view is not that timing is unimportant but that timing influences regulatory politics in a somewhat different way from common intuition. While agencies may prefer to reduce the visibility of their actions, agencies will often be unable to do so. Empirically, the dynamics of final actions differ from rule withdrawals. Although significant rules are more likely to be announced on Fridays and during congressional recesses, other political or institutional variables that one might expect to be associated with the timing of such announcements are not. Political conditions seem to matter more for rule withdrawals, a subset of agency actions less subject to ex ante viewing or ex post challenge. Because rule withdrawals are more difficult to challenge in court, it is one of the few types of agency policies for which announcing in a lower-visibility environment does in fact raise monitoring costs substantially. The availability of judicial review partially constrains an agency's strategic use of timing as to the weekend news cycle effect. But an agency can still use timing to drive up other monitoring costs: mainly, the costs of assembling a legislative coalition to respond to the agency's decision. When Congress is the likely responder to fire alarms, timing can drive up these costs.

This analysis merely skims the surface of how agency timing decisions may affect the rulemaking process. Many questions remain. Political control of institutions could be treated in a more refined manner.[76] The possibility that Congress may prefer low-visibility regulatory

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76 See Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 Am Pol Sci Rev 467, 470 (2004) (noting that a regression of a particular regulatory output on political variables, such as divided government, over time may

actions in certain contexts should be explored. Variation within a type of agency (for instance, cabinet departments) could be analyzed. Interest group configurations (for example, one-sided, contrasting, and so on) may also be important to agency timing. Future research might examine how agencies balance the timing and procedural aspects of rulemaking. More specifically, do agencies issue guidance or interim final rules, which generally lack prior public comment and ex post delay in implementation, in low-visibility settings, compounding accountability concerns? For the time being, however, we hope to have shown that the conventional account of timing in politics is substantially less complete than generally assumed.

III. INSTITUTIONAL IMPLICATIONS

This Part turns to the broader legal and institutional implications of our analysis. First, if the role of timing is most pronounced with respect to the withdrawal of uncompleted regulatory actions, our work suggests a renewed emphasis on the administrative law of withdrawals. Second, although the administrative law of withdrawals strikes us as a more intriguing set of legal problems, we also briefly discuss what might be called the new administrative law of timing. Agency timing decisions can be productively analyzed in the context of several standard administrative law doctrines. In these settings, attempts to manipulate timing are signals about agency views of the regulatory process. Lastly, while the strategic use of timing has long been thought a staple of politics, if strategic timing is a real phenomenon with potentially negative implications for the administrative state, it is also a relatively straightforward problem to resolve with any one of a series of legal rules. We sketch and analyze these implications below.

A. Abandoning Action

Despite its prevalence, the abandonment of proposed rulemakings is largely an absent category in administrative law.[77] Withdrawals,

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mask interesting connections because particular political configurations may be working in different directions).

77 But consider Watts, 119 Yale L J (forthcoming 2009) (cited in note 28) (describing some withdrawals and suggesting that agencies articulate political reasons for withdrawals in judicial review); O'Connell, 94 Va L Rev at 959–63 (cited in note 10) (tracking withdrawals from 1983 to 2002); Biber, 60 Admin L Rev at 29–30 (cited in note 39) (arguing that resource allocation concerns are mitigated by judicial review of agency withdrawals of partially completed rulemakings); Jason M. Loring and 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, 1453–59 (2005) (studying empirically the response of new presidential administrations to midnight regulations); Shull and Smith, *The Bush Regulatory Record* at 11–15 (cited in note 28) (analyzing withdrawals by the FDA and EPA from 2001 to 2004 and finding that they withdrew

if they are discussed at all as distinct agency decisions, are relegated to short notes in administrative law casebooks.[78] Current administrative law scholarship is focused almost exclusively on either final agency policy decisions or agency decisions not to act at all.[79] In the agency action context, the rulemaking process draws nearly all of the attention,[80] though agencies can also enact binding policies through adjudication.[81] The standard account is one of notice-and-comment rulemaking, where displeased parties might challenge the process or the outcome.[82] Less standard, but increasingly common in practice, are rulemakings without prior notice and comment, such as direct or interim final rulemaking.[83] Here, too, parties can contest either the means by which the agency decision was reached or the ultimate substance of the policy.[84] In either case, the agency decision might be a new regulatory initiative or might rescind a former policy that was already in effect. But regardless, if the parties have standing, it is relatively easy to get into court.[85] Agencies,

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60 and 52 percent of actions, respectively, carried over from the previous administration). There is much more discussion in the mainstream press, though overall this coverage is quite limited. See, for example, R. Jeffrey Smith, *Under Bush, OSHA Mired in Inaction*, Wash Post A1 (Dec 29, 2008) (reporting that "Bush appointees ordered the withdrawal of dozens of workplace health regulations" in response to industry pressure); Sarah Cohen and Laura Stanton, *Comparing Presidential Action on Regulations*, Wash Post A14 (Aug 15, 2004); Goldstein and Cohen, *Bush Forces a Shift in Regulatory Thrust*, Wash Post at A1 (cited in note 6).

78 See, for example, Ronald A. Cass, Colin S. Diver, and Jack M. Beermann, *Administrative Law: Cases and Materials* 798 (Aspen 5th ed 2006); William F. Funk, Sidney A. Shapiro, and Russell L. Weaver, *Administrative Procedure and Practice: Problems and Cases* 68–69 (Thomson West 3d ed 2006); Jerry L. Mashaw, et al, *Administrative Law: The American Public Law System* 895–97 (4th ed 1998).

79 See generally, for example, DeShazo and Freeman, 155 U Pa L Rev 1499 (cited in note 10) (analyzing what factors influenced the implementation of federal regulatory action regarding climate change pollutants).

80 See Bressman, 107 Colum L Rev at 1761–63 (cited in note 11).

81 See *SEC v Chenery Corp*, 332 US 194, 202 (1947) ("In performing its important functions ... an administrative agency must be equipped to act either by general rule or by individual order."); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L J 952, 1000–01 (2007).

82 See, for example, *New York v EPA*, 413 F3d 3, 10 (DC Cir 2005).

83 See *Administrative Conference of the United States, Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed Reg 43108, 43110–13 (1995) (recommending these forms of rulemaking for urgent or noncontroversial rules); Asimow, 51 Admin L Rev at 712–15 (cited in note 58); Noah, 51 Admin L Rev at 401–02 (cited in note 58); Office of the Vice President, *Improving Regulatory Systems: Accompanying Report of the National Performance Review Recommendation* 5 (1993), online at http://govinfo.library.unt.edu/npr/library/reports/reg.html (visited Sept 1, 2009); Levin, 64 Geo Wash L Rev at 1 (cited in note 58).

84 See, for example, *NRDC v Abraham*, 355 F3d 179, 184, 205–06 (2d Cir 2004) (holding that Department of Energy (DOE) withdrawal of air conditioner efficiency standards was improper based on its interpretation of the statute and its manner of promulgating delays); *Methodist Hospital of Sacramento v Shalala*, 38 F3d 1225, 1236–38 (DC Cir 1994) (upholding a policy of the Secretary of Health and Human Services to revise Medicare reimbursement rates, though it did not include notice-and-comment procedures).

85 See, for example, *Abraham*, 355 F3d at 191–94 (confirming subject matter jurisdiction over petitioner's challenge to the DOE's amendments).

of course, sometimes fail to act. Although agency inaction is sometimes grounds for legal challenge, in practice it is extremely difficult to drag an agency into court to defend its policymaking reticence.[86] In these inaction cases, the agency has not started the rulemaking process, but many commentators conflate the absence of an outcome with the absence of any rulemaking process and thus have not discussed rulemaking withdrawals in any depth.[87]

Rule withdrawals sit uneasily between these two ideal types, agency action and inaction.[88] When an agency withdraws a proposed rule, it has started a rulemaking process but has decided not to complete it. Commentators have generally ignored the issue of whether withdrawals are more like agency action or agency inaction,[89] and to the extent that the courts have considered it, they are not in agreement, as will be discussed in more depth below. But the answer to that classification question—as a positive and normative matter—actually constrains the ability of agencies to strategically time rulemaking withdrawals. If withdrawals are more like agency action, with traditional access to judicial review, agencies will have less incentive to manipulate the timing of withdrawals because interest groups will not find it harder to challenge those withdrawals in court if they are issued on a Friday rather than on a Tuesday. By contrast, if withdrawals are more like agency inaction, with less access to judicial review, agencies will have more incentive to manipulate timing. If legal challenges are less plausible, interest groups will have to use the media or Congress to advance their policy preferences; those tools are harder to use on weekends and when Congress is not in session.[90] While there is considerable confusion in the courts as to the reviewability of withdrawals, there is also some agreement.

We start first with the two accepted doctrines governing withdrawals. First, if the relevant statutory scheme expressly contemplates the withdrawal of a proposed regulatory action in particular circumstances, courts will typically review the withdrawal. The Endangered

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86 See, for example, *Norton v Southern Utah Wilderness Alliance*, 542 US 55, 60–61 (2004).

87 But see Biber, 60 Admin L Rev at 30 (cited in note 39).

88 Rejections of petitions to the agency for rulemaking also sit between agency action and inaction. The agency must consider the petition, often engaging in notice and comment, before rejecting it. Withdrawals are somewhat different than rejections of such petitions because they involve rulemakings started by the agency.

89 But see Biber, 60 Admin L Rev at 53 (cited in note 39) (labeling withdrawals as agency action); Murphy, Note, 53 Geo Wash L Rev at 88 (cited in note 28) (exploring judicial review of agency withdrawals).

90 We assume here that the agency does not quickly follow a withdrawal with a final rule. Consider *Texas v Lyng*, 868 F2d 795, 797 (5th Cir 1989) (finding that the agency did not violate the APA's notice-and-comment rulemaking requirements in adopting a final rule without allowing additional time for comment after withdrawing its proposal).

Species Act (ESA) is a prime example. Pursuant to the ESA, if the agency proposes to list a species (a process involving notice and an opportunity for public comment), it must within one year conclude that the species is endangered and list the species, conclude that the species is not endangered and withdraw the proposed listing, or conclude that there is scientific disagreement about whether the species is endangered and extend the decision period by six months.[91] When the agency determines that a proposed listing is not justified (that is, that the proposed species is not endangered) and withdraws the listing proposal, that action can be reviewed by the courts so long as the parties have standing.[92]

The Clean Air Act (CAA) is another example. The administrator of EPA must propose a rule establishing an emission standard for any hazardous pollutant, hold a public hearing, and then enact the standard or issue a finding that the agent is not a hazardous pollutant.[93] Withdrawals of proposed rules are reviewed as decisions not to implement proposed emission standards.[94] Under both the ESA and CAA, the agency must justify the withdrawal, providing a record on which the courts can review the agency action. But these statutes are the exception rather than the rule:[95] most statutes do not explicitly contemplate the abandonment of proposed rulemakings.[96]

Second, even if the statutory scheme does not explicitly contemplate the withdrawal of proposed regulations, courts will often review agency decisions to abandon proposed action if the applicable statute imposes mandatory obligations on the agency to act. In *Farmworker Justice Fund v Brock*,[97] the DC Circuit reversed the Secretary of Labor's decision "not to promulgate a proposed occupational safety or health standard he finds to be necessary to fulfill the purposes of the [Occupational Safety and Health Act] solely in the hope that state governments will provide equivalent protection in the next two

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91 See 16 USC § 1533(b)(6).

92 See, for example, *Federation of Fly Fishers v Daley*, 131 F Supp 2d 1158, 1169 (ND Cal 2000); *Save Our Springs v Babbitt*, 27 F Supp 2d 739, 748 (WD Tex 1997).

93 42 USC § 7412(b)(2)–(3).

94 See, for example, *NRDC v EPA*, 824 F2d 1146, 1149 (DC Cir 1987) (reviewing EPA's decision to withdraw a proposal for stricter vinyl chloride emissions as a decision not to implement).

95 Similarly, under the Mine Safety and Health Act, the Secretary of Labor may abandon a proposed "health or safety standard" as long as he timely "publish[es] his reasons for his determination" to withdraw it. 30 USC § 811(a)(4)(C). This is an explicit exception to the secretary's "affirmative duty to complete" a rule once he has identified the need for it. *United Mine Workers v Department of Labor*, 358 F3d 40, 43 (DC Cir 2004) (holding that the affirmative duty to complete a rule does not preclude the secretary from withdrawing a proposed rule).

96 See, for example, the Energy Policy and Conservation Act, Pub L No 94-163, 89 Stat 871 (1975), codified at 42 USC § 6201 et seq (lacking explicit discussion of abandonment or withdrawal of proposed rulemakings).

97 811 F2d 613 (DC Cir 1987), vacd as moot, 817 F2d 890 (DC Cir 1987).

years."[98] The court explained, "Whatever the extent of a particular agency's discretion under a particular statute, it does not encompass the authority to contravene statutory commands."[99]

Similarly, in *Environmental Defense Fund v EPA*,[100] the DC Circuit concluded that EPA had acted arbitrarily and capriciously by withdrawing its proposed reinterpretation of the mining waste exclusion to the Resource Conservation and Recovery Act.[101] Reviewability was in some sense overdetermined. The agency conceded the court's jurisdiction, and the court cited the DC Circuit's holding in *Montana v Clark*,[102] discussed below, which seemingly permits (at least in the DC Circuit) review of any withdrawal after notice and comment of proposed amendments to longstanding rules, if the longstanding rules are kept in effect.[103] But the statutory provision at issue also imposed a set of mandatory obligations on the agency.[104] This second uncontested doctrine on withdrawals comports with the rule announced in *Norton v Southern Utah Wilderness Alliance*,[105] which permits review of complete agency inaction "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."[106]

Outside of these two doctrines, however, there is far less consensus concerning the reviewability of withdrawals, particularly those of proposed rulemakings that are not mandated by statute. This conflict, which is sometimes explicit but often implicit, has generated remarkably little discussion in the case law. The Supreme Court has not directly addressed withdrawals.[107] The debate over reviewability, such as it currently stands, largely pits the DC Circuit against the Ninth Circuit. In examining discretionary withdrawals, the DC Circuit continues to rely on case law that precedes the Supreme Court's ruling in *Heckler v Chaney*,[108] which barred judicial review of FDA's decision not to take

98 811 F2d at 623 (requiring the secretary to issue the rule within thirty days of the holding).

99 Id at 622.

100 852 F2d 1316 (DC Cir 1988).

101 Id at 1318, 1329–30 (finding that EPA's decision to withdraw was contrary to congressional intent and that the agency's reasoning only supported refining the proposal, not withdrawing it altogether).

102 749 F2d 740 (DC Cir 1984).

103 *Environmental Defense Fund*, 852 F2d at 1324, citing *Clark*, 749 F2d at 744.

104 *Environmental Defense Fund*, 852 F2d at 1320 (referencing the statutory language, which imposed an affirmative obligation upon EPA to determine whether a regulation was or was not necessary, and publish a determination and the rationale for the determination in the Federal Register).

105 542 US 55 (2004).

106 Id at 64.

107 Compare *Massachusetts v EPA*, 549 US 497, 527–28 (2007) (noting that rejections of rulemaking petitions "are thus susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential'") (citation omitted).

108 470 US 821 (1985).

particular enforcement actions.[109] By contrast, the Ninth Circuit has refused to adopt a similar stance by vacating en banc a panel decision in line with the DC Circuit.[110]

The DC Circuit has reviewed agency withdrawals of a narrow category of proposed discretionary rules for decades.[111] Panels in that circuit typically just quote a line from *Clark*, a 1984 case: "The law in this circuit is clear that an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action."[112] By its terms, the line appears to cover withdrawals of uncompleted rulemakings. The agency in *Clark*, however, had issued a final rule, which did not include the proposed amendments but instead kept the previous rules in effect.[113] The line also overstates the clarity of the DC Circuit's law on withdrawals. The previous law in the DC Circuit is sparse. Some analysis appears in *Center for Auto Safety v National Highway Traffic Safety Administration*.[114] After finding that the withdrawal of an Advanced NPRM was a "rule" under the APA,[115] the DC Circuit then analyzed whether the withdrawal was ripe for judicial review. Specifically, the court determined in a "pragmatic way" that because the withdrawal of proposed changes was a final decision to maintain the status quo (so far as those changes applied to cars built in 1985), it was reviewable.[116]

The most extensive discussion appears in *NRDC v SEC*,[117] in which the DC Circuit explicitly considered the advantages and disadvantages of allowing judicial review of an agency's decision not to fi-

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109 Id at 834.

110 *Animal Legal Defense Fund v Veneman*, 469 F3d 826 (9th Cir 2006), vacd en banc, 490 F3d 725 (9th Cir 2007).

111 See, for example, *Environmental Defense Fund*, 852 F2d at 1318 (condemning EPA's decision to remove certain mining wastes from a hazardous waste list as "arbitrary and capricious"). But consider *Kennecott Utah Copper Corp v Department of the Interior*, 88 F3d 1191, 1207 (DC Cir 1996) ("Because [the agency's] decision to withdraw the [proposed rulemaking] did not alter substantive legal obligations under previously published regulations, the agency's decision to withdraw the document did not constitute a 'regulation' within the meaning of [the relevant act].").

112 749 F2d at 744.

113 Id.

114 710 F2d 842 (DC Cir 1983).

115 Id at 846.

116 Id at 846–47. The court explained:

> Thus, to the extent that NHTSA's public statements withdrawing its January Notice represent a binding decision not to adopt or enforce improved fuel efficiency standards for particular years in the future, but rather represent a decision to maintain the 27.5 mpg standard provided for by Congress, they logically should be ripe for review.

Id at 847. The court determined, however, that the agency's decision to abandon the rulemaking as it applied to post-1985 models was not final, and thus was not ripe for review. Id at 848–49.

117 606 F2d 1031 (DC Cir 1979).

nalize a proposed rule.[118] The court, on balance, favored review in particular circumstances:

> [I]n a context like the present one, in which the agency has in fact held extensive rulemaking proceedings narrowly focused on the particular rules at issue, and has explained in detail its reasons for not adopting those rules, we believe that the questions posed will be amenable to at least a minimal level of judicial scrutiny.[119]

Not only is review predicated on the scope of agency proceedings prior to the withdrawal and on the nature of the agency's explanation, it also is quite deferential.[120] In short, review of withdrawals outside explicit statutory provisions and mandatory duties in the DC Circuit appears considerably narrower in practice than may first appear.[121]

The Ninth Circuit adopted the DC Circuit's case law from the 1980s in *Animal Legal Defense Fund v Veneman*,[122] but later vacated its ruling.[123] Although no longer binding, the ruling provides the most recent comprehensive discussion of whether courts should review agency withdrawals of proposed policies. The majority concluded that the abandonment of a "proposed interpretative rule" was a final agency action within the meaning of § 704 of the APA and thus was reviewable by the court.[124] The majority engaged in a two-part inquiry: "First, did the abandonment of a Draft Policy have legal consequences or determine rights or obligations? Second, does it make a difference that the [agency]

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118 Id at 1047.

119 Id. The court refused to adopt a per se rule of reviewability, noting "the interests of the plaintiffs are usually not compelling, there is a possibility of some minor interference with effective agency performance, and the issues will often be poorly suited for judicial resolution." Id.

120 Indeed, in *NRDC v SEC*, the court affirmed the agency's decision. Id at 1062. See also *Consumer Federation of America v Consumer Product Safety Commission*, 990 F2d 1298, 1305 (DC Cir 1993) (holding that the Commission's decision not to pursue a regulation for all-terrain vehicles was entitled to a substantial degree of deference on review); *NRDC v EPA*, 824 F2d at 1159 (declining to limit the discretion of the agency in determining appropriate regulations under the Clean Air Act); *Professional Drivers Council v Bureau of Motor Carrier Safety*, 706 F2d 1216, 1221 (DC Cir 1983) ("The agency must be accorded considerable deference in evaluating information presented and reaching decisions based upon its expertise."). But consider *Competitive Enterprise Institute v National Highway Traffic Safety Administration*, 956 F2d 321, 323 (DC Cir 1992) ("We cannot defer to mere decisional evasion."); *Williams Natural Gas v Federal Energy Regulatory Commission*, 872 F2d 438, 450 (DC Cir 1989) ("conclud[ing] that the Commission has failed to provide a satisfactory explanation for its termination of [the proposed rulemaking]").

121 See, for example, *Center for Auto Safety*, 710 F2d at 847–49 (holding that a challenge to a withdrawal of an advanced NPRM was not ripe).

122 469 F3d 826 (9th Cir 2006), vacd en banc, 490 F3d 725 (9th Cir 2007).

123 490 F3d at 726.

124 *Animal Legal Defense Fund*, 469 F3d at 839–40, 844 (permitting a challenge to the US Department of Agriculture's decision not to adopt a draft policy protecting the psychological well-being of primates in zoos and research facilities).

had no legal obligation to propose or adopt the Draft Policy in the first place?"[125] It answered the first affirmatively and the second negatively.

The majority recognized that "[j]udicial second-guessing of such decisions triggers concerns of over-reaching, particularly when the agency has already deemed the regulation unworthy of adoption."[126] Despite these concerns, the majority relied on three DC Circuit cases[127] to determine that courts may be able to review, at least minimally, the withdrawal of proposed discretionary agency action where the agency has met the two-part test in *NRDC v SEC*.[128] It concluded that the draft policy at issue met both criteria.[129]

The panel was not unanimous. Judge Alex Kozinski, in dissent, began: "In holding that we can review withdrawal of proposed regulations an agency had no duty to adopt, my colleagues overlook the sea-change in administrative law wrought by *Heckler v. Chaney*, which held that we have no authority to review an agency's discretionary decision *not* to act."[130] He stressed that "adoption and nonadoption of regulations are asymmetrical events": the former "change[s] the law, and thus can sharply affect the legal interests of private parties"; the latter "leaves rights and responsibilities unchanged."[131] He also speculated on the implications of the majority's holding on agency decisions, arguing that "it discourages agencies from proposing discretionary regulations, lest they be stuck with them if they cannot convince a federal court that the record supports abandonment."[132] Judge Kozinski, although in the minority on the panel, likely would have been in the majority in the Ninth Circuit, which voted to vacate the panel's decision and to rehear the case en banc.[133] But before the Ninth Circuit could rehear the case, the parties settled and agreed to dismiss the

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125 Id at 840.

126 Id at 841–42.

127 See *United Mine Workers*, 358 F3d at 43–44 (demonstrating that once an agency has embarked on a course of rulemaking, a court can review the agency's decision to abandon the proposed rulemaking); *Center for Auto Safety*, 710 F2d at 847–49; *Professional Drivers Council*, 706 F2d at 1220–22 (upholding the Secretary of Transportation's decision not to amend regulations governing hours of service for truck drivers).

128 *Animal Legal Defense Fund*, 469 F3d at 843 (finding that the agency must have "held a rulemaking proceeding" and "compiled a record narrowly focused on the particular rules suggested but not adopted"), quoting *NRDC v SEC*, 606 F2d at 1047.

129 *Animal Legal Defense Fund*, 469 F3d at 844.

130 Id (Kozinski dissenting) (citations omitted). Judge Kozinski argued that two of the three cases relied on by the majority pre-dated *Chaney*, and that the third did not involve a "discretionary course of action." Id at 850 n 9 (Kozinski dissenting).

131 Id at 847.

132 Id at 850.

133 See *Animal Legal Defense Fund v Veneman*, 482 F3d 1156, 1156 (9th Cir 2007).

case with prejudice "provided that the panel's opinion and judgment are vacated," which they were.[134]

The dissension in the vacated Ninth Circuit opinion highlights several significant but seemingly unresolved questions about agency withdrawals of proposed rules, especially in light of recent case law on finality, agency discretion, and agency inaction. First, when is a withdrawal of a proposed rulemaking a final agency action under § 704 of the APA? Second, when is such a withdrawal an action committed to agency discretion and hence unreviewable under § 706(1) of the APA? Third, what sort of record does the agency need to have for the withdrawal so that it can be reviewed under § 706(2) of the APA?

Under the APA, courts can review only final actions.[135] As the Supreme Court explained in *Bennett v Spear*:[136]

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."[137]

An agency's announcement of a withdrawal of an uncompleted rulemaking is published in the Federal Register and reported to the Unified Agenda of Federal Regulatory and Deregulatory Actions.[138] It appears to end the agency's decisionmaking process.[139] But an agency may withdraw a rulemaking because it is contemplating other options in a particular area. The withdrawal therefore may end one option but not the overall process.[140] Assuming a withdrawal does mark the consummation of the agency's decisionmaking process, it may not create legal consequences. A withdrawal, by definition, stops a rulemaking that would have imposed legal rights or obligations. If "maintaining the status quo has legal consequences" as well,[141] a withdrawal could be considered a final action. At best, only some withdrawals constitute final agency action.

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134 See *Animal Legal Defense Fund*, 490 F3d at 725.

135 5 USC § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

136 520 US 154 (1997).

137 Id at 177–78 (citations omitted).

138 See Curtis W. Copeland, *Midnight Rulemaking: Considerations for Congress and a New Administration* 10 n 35 (Congressional Research Service, Nov 24, 2008), online at http://www.fas.org/sgp/crs/misc/RL34747.pdf (visited Sept 1, 2009).

139 See, for example, *AARP v EEOC*, 823 F2d 600, 604 (DC Cir 1987).

140 See *Animal Legal Defense Fund*, 469 F3d at 852 (Kozinski dissenting).

141 Id at 840.

The APA also bars judicial review of actions committed to agency discretion.[142] In *Chaney*, the Court listed four reasons that justify the presumption of nonreviewability: that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities"; that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect"; that "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner"; and that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict."[143]

Although the Court noted that the case "does not involve the question of agency discretion not to invoke rulemaking proceedings,"[144] at least some of these justifications are applicable to withdrawals of uncompleted rulemakings. The plausibility of these justifications for withdrawals of rulemakings seems to parallel their order, with the initial reasons appearing the most relevant. Although the Supreme Court has not directly applied these justifications to withdrawals, Justice Thurgood Marshall, who concurred in the judgment of *Chaney*, believed the majority's reasoning was in conflict with the DC Circuit's decisions to review withdrawals of discretionary rules.[145] In *Animal Legal Defense Fund*, Judge Kozinski agreed. But the question still remains open. After all, when an agency withdraws a rulemaking proceeding, it often has already invested resources and created a record, lessening two concerns.[146]

This creation of a record plays critically in the final question as to how detailed the record must be. The APA presumes that courts will review agency action on some kind of record.[147] The DC Circuit's case law ties reviewability of withdrawals of discretionary rules to the existence of a record for review. The more detailed the record, all else being equal, the more likely the DC Circuit will review a regulatory withdrawal. On one hand, the connection is compelling, at least to the courts. Courts need something to review. On the other hand, the con-

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142 5 USC § 701(a)(2) (precluding judicial review of agency action that "is committed to agency discretion by law").

143 470 US at 831–32.

144 Id at 825 n 2.

145 See id at 850 n 7 (Marshall concurring).

146 See Biber, 60 Admin L Rev at 30 n 95 (cited in note 39) (explaining that different levels of agency action should warrant varying levels of deference by the courts).

147 See 5 USC § 706; *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 419–20 (1971) (remanding a case because the lower court failed to review the full administrative record).

nection creates problematic incentives for agencies. Why start the rulemaking process if there is uncertainty about whether it will be finished? Indeed, the more consideration the agency gives to a proposed rulemaking, the more likely it will face judicial scrutiny.

These three questions deserve attention on their own merits, but they also have implications for standard administrative doctrines for more conventional agency action and inaction. They do not, however, address the elephant in the room when it comes to agency withdrawals: political transitions. Agencies tend to withdraw uncompleted rulemakings that were started under the previous administration. In *NRDC v EPA*,[148] President Reagan's EPA had withdrawn a proposed emission standard from President Jimmy Carter's administration.[149] Similarly, in *Farmworker Justice Fund*, President Reagan's Secretary of Labor pulled a field sanitation standard proposed under President Carter.[150] In *Animal Legal Defense Fund*, President George W. Bush's Agriculture Department withdrew a draft policy announced under President Clinton.[151]

Withdrawals occur even if the transition involves the same party. In *Competitive Enterprise Institute v National Highway Traffic Safety Administration*,[152] President George H.W. Bush's administration cancelled a rulemaking begun under President Reagan.[153] In *United Mine Workers v Department of Labor*,[154] the Mine Safety and Health Administration under President George W. Bush pulled a proposed rulemaking announced under his father.[155]

This political dimension thus informs our preliminary normative stance on the administrative law of withdrawals. Agency abandonment of proposed rulemakings differs in fundamental ways from affirmative agency policymaking. Simply put, the agency has not promulgated a final rule; it has satisfied some of the requirements of notice-and-comment rulemaking but not others. But such withdrawals also differ in primary ways from complete inaction, which courts are increasingly hesitant to touch. After all, the agency has decided to invest resources in a particular rulemaking by proposing it. The agency also often has

148 824 F2d 1146 (DC Cir 1987).

149 See id at 1149.

150 811 F2d at 617 (holding that the withdrawal of the rule was contrary to law and mandating the agency to promulgate the proposed regulation within thirty days).

151 469 F3d at 830–31.

152 956 F2d 321 (DC Cir 1992).

153 See id at 323 (reviewing the decision of the National Highway Traffic Safety Administration to terminate proceedings to modify miles per gallon standards).

154 358 F3d 40 (DC Cir 2004).

155 See id at 42 (reviewing the withdrawal of a rule governing hazardous substances, which was proposed in 1989 and ultimately withdrawn in 2002).

compiled a record from the rulemaking process. Thus, judicial review should be easier for agency withdrawals than for complete agency inaction but not as easy as for agency final policy decisions.

Although this area of administrative law is ripe for more extensive analysis, we suggest that the ultimate outcome should hinge on two factors. First, to the extent that judicial review of withdrawals will ossify the rulemaking process further and to the extent that ossification is undesirable, review should be less likely or more deferential. Second, to the extent that withdrawals are the result of political transitions, review should be more likely or less deferential if we care more about expertise justifications of the administrative state, and just the opposite if we emphasize a political accountability rationale for the bureaucracy.[156] Cast in this light, it should be clear that the judicial treatment of agency withdrawals implicates core features of the administrative state. Because withdrawals are much more likely to be the locus of strategic timing decisions, administrative law's treatment of withdrawals is all the more important to get right.

B. Timing in Administrative Law

The discussion in Part III.A examined the underdeveloped administrative law on the judicial review of agency withdrawals, a category of agency action that the empirical analysis suggests was more open to manipulation on timing grounds. This Part briefly considers how timing decisions might be seen as part of broader administrative law principles. Rather than advocate new doctrinal schemes for timing rules,[157] we try to locate timing questions within standard administrative law doctrines. To be certain, it is rare for parties, courts, or commentators to raise these sorts of timing claims in any of the contexts we discuss.[158] Nevertheless, these standard doctrines may be able to accommodate such claims. These suggestions are clearly something of a stretch on existing law. As such, they should be taken as tentative ideas about where timing concerns might begin to fit into existing doctrine, rather than as statements that such claims constitute anything approaching viable litigation strategies.

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156 Consider Smythe, 84 Colum L Rev at 1949–50 (cited in note 26) (contending that courts should be more skeptical of rescissions of recently promulgated rules after political transitions).

157 For example, the courts could develop a new doctrine for agency actions during congressional recesses that draws on case law involving recess appointments. To be sure, there are critical differences, including the lack of explicit constitutional and statutory provisions for nonappointment recess actions. Consider generally Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L Rev 1487 (2005).

158 But consider *Bonnichsen v United States*, 217 F Supp 2d 1116, 1125 (D Or 2002) (noting that the Army Corps of Engineers had "[t]ak[en] advantage of a brief congressional recess" to announce the challenged decision, but not relying on the timing in reviewing the action).

1. *Chevron*.

To start with, consider the familiar framework from *Chevron U.S.A. Inc v NRDC*[159] that requires courts to engage in a two-part inquiry in examining an agency interpretation of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[160]

The mechanics of *Chevron* Step One and Step Two have been exhaustively analyzed elsewhere.[161] A more recent legal innovation arises from *United States v Mead Corp*.[162] *Mead* solidifies a critical distinction between interpretations that qualify for *Chevron* deference and interpretations that should be upheld only to the extent the agency's interpretation has "power to persuade," also known as *Skidmore* deference.[163] In recent years, administrative lawyers of all stripes have struggled to understand precisely what sorts of agency actions warrant which sort of deference from which courts in which circumstances.[164]

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159 467 US 837 (1984).

160 Id at 842–43 (citations omitted).

161 See generally, for example, Matthew C. Stephenson and Adrian Vermeule, Chevron *Has Only One Step*, 95 Va L Rev 597 (2009) (arguing that administrative law should jettison the two-step framework and ask the single question whether the agency's interpretation is permissible as a matter of statutory construction); Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 Georgetown L J 833 (2001) (asking to what sorts of statutes and to what types of agency interpretations the mandatory deference doctrine of *Chevron* should apply); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi Kent L Rev 1253 (1997) (exploring the meaning and role of the second step in the *Chevron* formula); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex L Rev 83 (1994) (arguing that the *Chevron* model fails to accord with public policy and should be modified accordingly).

162 533 US 218 (2001).

163 See id at 229. See also *Skidmore v Swift & Co*, 323 US 134, 140 (1944) (requiring courts to assess multiple factors and decide on a case-by-case basis what level of deference to afford agency interpretations).

164 See *Barnhart v Walton*, 535 US 212, 222 (2002); *Mead*, 533 US at 226–27. *Christensen v Harris County*, 529 US 576, 586–88 (2000) (holding that interpretations contained in opinion letters do not merit *Chevron* deference). See also Kristin E. Hickman and Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum L Rev 1235, 1238–39 (2007); Lisa

Mead and related cases emphasize that judicial deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[165] Under this view, the degree of deference courts owe to an agency's statutory interpretation is therefore a partial function of the procedures used to generate an agency decision.[166]

There is, however, much disagreement about precisely which procedures qualify an agency interpretation for greater deference. Some contend that formal procedures—for example, the use of notice and comment, formal rulemaking, or formal adjudication—are necessary and sufficient for *Chevron* deference.[167] Others argue that such formality is neither necessary nor sufficient for *Chevron* deference.[168] Some courts rely on a varying combination of factors in determining how much deference to provide.[169] For example, in *Barnhart v Walton*,[170] the Court listed "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" as providing, on balance, the justification for using *Chevron* deference in reviewing the Social Security Administration's interpretation at issue in the case.[171] *Chevron* Step Zero[172] occupies an increasingly central spot in administrative law.[173] The core inquiry is whether Congress would

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Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 Vand L Rev 1443, 1486 (2005) (arguing for a more formalistic analysis of agency actions that have taken the place of traditional legislative processes); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo Wash L Rev 347, 355–58 (2003) (assessing the increasing complexity of the *Mead* legal regime, and the burden it is imposing on the lower courts).

165 See 533 US at 226–27.

166 See generally Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187 (2006) ("The Court is apparently seeking to allow *Chevron* deference only, or mostly, when agency decisions have followed procedures that guarantee deliberation and reflectiveness."); Bressman, 58 Vand L Rev 1443 (cited in note 164); Vermeule, 71 Geo Wash L Rev 347 (cited in note 164).

167 See, for example, *Mead*, 533 US at 245–46 (Scalia dissenting).

168 See, for example, *Edelman v Lynchburg College*, 535 US 106, 114 (2002) (implying that deference could be accorded to actions that did not fall within notice-and-comment rulemaking power).

169 See *Barnhart,* 535 US at 220–21. Justice Breyer also has stated that procedural formality is not a sufficient condition for *Chevron* deference. See *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 1003–05 (2005) (Breyer concurring).

170 535 US 212 (2002).

171 Id at 222. The Court subsequently held that "inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *National Cable & Telecommunications Association*, 545 US at 981.

172 See generally Sunstein, 92 Va L Rev 187 (cited in note 166) (examining the legal developments behind Step Zero, the threshold question of when a *Chevron* analysis is warranted). The phrase is originally from Merrill and Hickman, 89 Georgetown L J at 873 (cited in note 161).

173 See Jacob E. Gersen and Adrian Vermeule, Chevron *as a Voting Rule*, 116 Yale L J 676, 688–90 (2007).

want courts to defer to the agency on this sort of decision issued in this sort of way. The near exclusive emphasis on procedural formality as the determinant of *Chevron* deference, however, may be premature. Professor Lisa Bressman has recently argued that instead of relying exclusively on procedural choices, courts should "truly gauge the existence of agency delegation"—by assessing the substance (and surrounding political realities) of the delegated authority.[174]

Just as the procedures used to formulate policy (and perhaps the substance of delegated authority as well) are a natural input for the Step Zero inquiry, so too is the timing of agency decision.[175] Rules intentionally issued or abandoned in low-visibility environments undermine both the political accountability and expertise rationales for giving agencies deference.[176] If we are correct that agencies use timing to make it harder for public and private parties—including Congress itself—to monitor and respond to agency decisions, then low-visibility actions seem precisely the sort of agency action to which Congress would not want courts to apply great deference. If a rational reconstruction of congressional intent is the key factor for Step Zero, it would be entirely sensible for courts to review low-visibility agency action less deferentially.[177] It would also be relatively straightforward for courts to do so. By contrast, assessing the substance of agency authority to see if Congress has delegated interpretative power is "complicated—multifactored and context dependent."[178] In sum, *Chevron* Step Zero could provide a natural way for courts to police strategic manipulation of monitoring costs by administrative agencies.

In addition to playing into the specific mechanics of *Chevron*, agency timing decisions also are relevant to broader concerns about responsiveness and competence, two cornerstones of deference doctrines. Cast in its best light, notice-and-comment rulemaking takes advantage of public input and agency knowledge to produce policy that reflects agency expertise and democratic legitimacy.[179] Strategic timing decisions undermine this process, reducing the opportunities

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174 Lisa Schultz Bressman, Chevron*'s Mistake*, 58 Duke L J 549, 554 (2009).

175 Consider O'Connell, 94 Va L Rev at 943–51 (cited in note 10); Gersen and O'Connell, 156 U Pa L Rev at 929 (cited in note 10).

176 See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 NYU L Rev 461 (2003) (arguing for a more direct focus on agency arbitrariness in analyzing the legitimacy of agency actions).

177 At least one court arguably has adopted this reasoning, in part. See *In re Vioxx Products Liability Litigation*, 501 F Supp 2d 776, 788 (ED La 2007) (finding that the preamble to a final rule "lack[ed] the 'power to persuade'" in part because the preamble was "inserted at the eleventh hour").

178 Bressman, 58 Duke L J at 604 (cited in note 174).

179 See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv L Rev 1511, 1542 (1992) (commending the ability of a special commission to make necessary military base closings when Congress had been unable to act due to political pressures).

for public participation and argument while simultaneously creating an appearance that motivations other than expertise are driving policy. Less deferential judicial review could help compensate.[180]

2. Arbitrary and capricious review.

Arbitrary and capricious review of agency policy decisions, commonly referred to as "hard look" review, also provides a straightforward venue for incorporating the timing of agency action.[181] Under § 706(2)(A) of the APA, a court reviewing an agency's factual and policy determinations "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[182] Hard look review has two dominant variants in modern administrative law. Procedural hard look requires that courts engage in a searching inquiry, including whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[183] On this front, dubious timing decisions may raise the specter that an agency has acted improperly, and thus timing actions that raise monitoring costs might result in a higher probability of finding the substantive policy decision arbitrary and capricious.[184] Much like an agency decision to forego particular procedures to rush out a nonemergency decision, these other timing practices would be a cue to the courts that something else may be awry.

Alternatively, the timing of agency action might itself be arbitrary and capricious, violating the second variant of hard look review: the substantive hard look doctrine.[185] If an agency's only reason for finalizing a rule during a congressional recess is to make it more difficult for

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180 Consider Stephenson, 120 Harv L Rev at 530 (cited in note 42) (examining how agencies often trade off substantive accuracy and procedural depth).

181 For an overview of hard look review, see Seidenfeld, 73 Tex L Rev at 128–29 (cited in note 161).

182 5 USC § 706(2)(A).

183 See *Motor Vehicle Manufacturers Association v State Farm Mutual Auto Insurance Co*, 463 US 29, 43 (1983) (citations omitted). For an overview of procedural hard look, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U Chi L Rev 1383, 1429 (2004) (discussing the depth and rigor with which courts choose to review the record supporting the agency's actions). See also *Association of Data Processing Service Organizations, Inc v Board of Governors of the Federal Reserve System*, 745 F2d 677, 696–97 (DC Cir 1984).

184 Consider *Bonnichsen*, 217 F Supp 2d at 1125 (noting initially an agency's decision to take "advantage of a brief congressional recess," and finding, without connecting the timing element, the policy outcomes arbitrary and capricious); *California Department of Health Services v Babbitt*, 46 F Supp 2d 13, 15 (DDC 1999) (noting the issuance of agency policy in the "waning hours of the [George H.W.] Bush Administration").

185 See Magill, 71 U Chi L Rev at 1428–29 (cited in note 183).

Congress or affected private parties to observe and react to the decision, the timing decision itself might fail a court's hard look. To be sure, this suggestion too would face considerable obstacles.[186] After all, although an agency's procedural choices may affect how its substantive choices are judged,[187] courts rarely second guess the procedural decisions themselves.[188] But the idea is not quite as far-fetched as it first might seem. Agency delay is regularly challenged on the ground that the delay itself is arbitrary and capricious.[189] Courts frequently hesitate to accept such challenges on the ground that delay most commonly results from agency judgments about how best to allocate scarce internal resources.[190] This resource constraint concern, however, is notably absent with respect to agency actions on low-visibility days. Thus, the case for active, or at least existent, judicial review of the timing of action is even stronger here than in most delay cases.

C. Regulating Strategic Timing

On either the conventional account, which we hope by now to have partially rebutted, or a revised theory of bureaucratic timing based on monitoring costs, unfettered agency discretion as to when to announce policy decisions generates problems for good regulatory governance. These problems are unlikely to bring the administrative state to its knees, but if there is a deficiency, it is also relatively simple to remedy. This Part sketches several alternative timing regimes that might reduce the ability of agencies to increase the costs of generating political responses to agency actions. Because the legitimacy of agency

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186 Courts cannot impose additional procedural requirements on agencies beyond those mandated by statute or the Constitution. See *Vermont Yankee Nuclear Power Corp v NRDC*, 435 US 519, 543–48 (1978) (holding that the Court cannot overturn a rulemaking proceeding on the basis of the procedural devices used so long as the agency employed the statutorily mandated *minimal* procedures).

187 See Magill, 71 U Chi L Rev at 1431 (cited in note 183) ("[*Mead*] structures scope-of-review doctrine systematically by telling all agencies that there is a link between the policymaking form chosen and the standard of review applied.").

188 See *SEC v Chenery Corp*, 332 US 194, 202 (1947) ("In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order."); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L J 952, 1000–01 (2007) (explaining that an agency generally has broad power to decide by which procedural format it will choose to implement a statutory grant of power).

189 See, for example, *Massachusetts v EPA*, 549 US 497, 534–35 (2007); *Telecommunications Research and Action Center v FCC*, 750 F2d 70, 79–80 (DC Cir 1989); *Forest Guardians v Babbitt*, 164 F3d 1261, 1274 (10th Cir 1998); *Oil, Chemical and Atomic Workers International Union v Zegeer*, 768 F2d 1480, 1481 (DC Cir 1985).

190 See Richard J. Pierce, Jr, *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 Admin L Rev 61, 90, 93 (1997) (arguing that courts should not excuse agency delays based on scarce resources—rather such a problem requires a legislative solution, as it is a legislatively generated problem).

decisions grows from the twin anchors of expertise and accountability, enhancing public monitoring of agency action should result in more legitimate public policy. This Part discusses several timing regimes that seemingly would restrict agency discretion in sensible ways: (1) Coordination Rules, (2) Random Issuance, (3) Reverse Delegation, (4) Veil Rules, and (5) Plural Release. None of these alternatives is uniquely applicable to the timing problem, nor is any a panacea. Each does, however, provide a partial fix to the timing problem. Each could be applied to all regulatory actions or to particular subsets, such as significant rulemakings.[191]

The wrinkle here is that administrative law scholarship is replete with fights about the nature and extent of discretion that agencies should have generally, but especially with respect to the allocation of internal resources. Scholars who are generally in favor of agency latitude would no doubt also argue that agencies should be given wide authority to make timing decisions. After all, timing decisions implicate the internal allocation of agency resources,[192] a trope that has been used for decades to encourage courts to avoid intervention.[193] Even assuming that agencies know better than courts or Congress how to best allocate their internal resources, if timing is left to agency discretion, the attractiveness of using timing strategically will only be exacerbated. In fact, Congress regularly restricts agency authority by imposing procedural restrictions and substantive constraints on agency action. Many of the proposed timing regimes discussed below would be less intrusive into internal agency resource allocation than these other requirements. All of these regimes presume that more transparency and cheaper monitoring are desirable. It is possible, of course, that as a normative matter, less visibility could be preferred in particular circumstances (for instance, when monitoring would yield a regulatory outcome costly to social welfare).

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191 For example, "major" rulemakings are those with more than a $100 million impact on the economy or other similar adverse effects. See 5 USC § 804. Rulemakings may also be labeled as significant actions in the Unified Agenda without qualifying as major rules. See Data Appendix.

192 See Biber, 60 Admin L Rev at 16–30 (cited in note 39); Cass R. Sunstein, *Reviewing Agency Inaction after* Heckler v. Chaney, 52 U Chi L Rev at 682 (cited in note 27). See also Pierce, 49 Admin L Rev at 72–75 (cited in note 190) (discussing how diminished agency resources impact the timeliness of administrative decisions); Gregory L. Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U Dayton L Rev 71, 73–74 (1979) (examining requirements for timely action in administrative law, and the various procedural mechanisms that affect the timeliness of agency actions).

193 See generally Biber, 60 Admin L Rev 1 (cited in note 39).

1. Coordination rules.

If agencies issue important rulemaking actions (such as NPRMs, final rules, or withdrawals) on Fridays, weekends, or holidays, a simple coordination rule could help remedy the problem. If, for whatever reason, releasing information about regulations on Wednesdays reduces monitoring costs, perhaps all new regulatory actions should be issued on Wednesdays. This is a simple idea, but most readers will recognize it as self-defeating. If Wednesday is the day for issuing all new agency regulatory actions, the per-regulation media coverage or attention from legislators or interest groups will naturally be less in this regime than in an unregulated regime. If third parties, including the media, can distinguish high-importance rulemakings from low-importance rulemakings, media coverage and monitoring will be appropriately matched. But the aggregate media coverage for all new rulemaking actions could easily decline in this regime. If the media would have given coverage to actions issued on other days, the coordinated regime reduces aggregate monitoring of regulatory activity. Moreover, the coordinated release regime does not remedy the underlying monitoring costs problem. It may be more costly for third parties to monitor a given agency action issued on a low-visibility day than a high-visibility day, but swamping monitors with too much information is costly as well. Unpopular rulemaking actions can be effectively neutralized either by issuing them alone late on a Friday afternoon or by issuing them in a sea of other more innocuous decisions.

An alternative coordinated timing regime would solve some, but not all, of these problems. Rather than coordinating the release of all rulemaking actions on a given day of the week or month, a preclusive coordination rule would forbid regulatory announcements on Fridays, weekends, or holidays (or during a congressional recess) but allow the agency to choose any other time for issuance. The preclusive coordination regime avoids issuance on the allegedly "least monitored" days, but still allows for dispersion across other days. The regime would avoid worst-case timing scenarios, but by increasing the number of rulemaking decisions released during other time periods, it could still reduce aggregate monitoring of agency actions. The desirability of the rule would depend on how these opposing effects net out in practice.

2. Random issuance.

All the variants of coordination rules suffer from at least one weakness: they produce an increase in clustering or congestion, which may increase aggregate monitoring costs even while reducing the per-action monitoring costs for some decisions. A random issuance regime solves the clustering problem, although it also introduces new difficulties. Suppose that prior to finalizing or abandoning a proposed rule, agencies were required to submit decisions to a centralized repository. The administrator of the repository would then randomly issue a certain number of agency decisions each day. This rule eliminates agency discretion about when to release decisions and prevents agencies from using timing to affect monitoring costs.

The random issuance rule not only reduces clustering vis-à-vis coordination timing rules, but also vis-à-vis the current legal status quo. The empirical analysis shows that some agency decisions not only cluster on certain days of the week, but also at certain times of the year when Congress is not in session. The random issuance rule would reduce clustering of both sorts and thereby mitigate monitoring costs problems. The downside of the randomness rule is that it may generate artificial delay in the regulatory process.[194] For example, if final rules are ready to be released, but not actually announced until randomly selected, private actors affected by the new regulation will not benefit (or be hurt) in the interim. Given the extensive complaints about there being too much delay in the administrative state,[195] a rule that introduces even more delay might not be especially attractive.[196] In addition, agencies may try to game the system by finalizing or sending particular decisions at certain times, such as close to a congressional recess. And once again, the effect on aggregate visibility and monitoring of agency actions is ambiguous. What is clear is that the random issuance regime should eliminate agency use of timing decisions intentionally to affect monitoring costs.

3. Reverse delegation.

It is intuitive, but wrong, to say that all rulemaking actions issued in high-monitoring-cost environments should be given more exposure. Some regulations are more important than others. An optimal exposure regime would not require equal monitoring for all regulatory decisions; rather it would calibrate the extent of monitoring to the regulation's importance. Recall that the dynamics of regulatory politics should generally ensure that this is the case. Interest groups with a great deal at stake in a particular regulation will monitor more care-

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194 Agencies, however, also create delay when they wait to release a decision. Imagine an agency makes a decision on Monday. Now, the agency could wait until Friday or longer to release it. If the agency provides the decision to the repository on Monday, it could be released randomly on Tuesday.

195 See Pierce, 47 Admin L Rev at 72–75 (cited in note 190).

196 But see Gersen and O'Connell, 156 U Pa L Rev at 971–77 (cited in note 10) (discussing whether judicial and congressional remedies for administrative delay may produce negative side effects on administrative law).

fully. If many interest groups have much to gain or lose there will be more aggregate monitoring of the more important agency decisions. The core problem with strategic timing in our framework is that it drives some interest groups out of the universe of monitors, thereby not only reducing the aggregate amount of monitoring, but also shifting the median preferences of the monitors. In essence, strategic timing is a form of subterfuge that reduces the otherwise existing forces that calibrate the extent of monitoring to the importance of the decision. If so, simply taking the timing decision away from the agency could resolve many timing dilemmas. The random issuance regime accomplishes this only by giving the timing decision to another agency, which might also use timing strategically for political ends.

Another alternative would be a reverse delegation or a partial delegation rule. Under this rule, the agency would make the substantive decision, subject to existing statutory constraints. Congress (or another institution), however, would then decide when to release the rulemaking action (perhaps subject to other statutory constraints like any time within the next thirty days). In the reverse delegation regime, the agency decides policy but another institution decides timing. Unfortunately, while this rule eliminates agency use of timing to affect third party monitoring, it does so only by creating a risk that Congress or another institution will do so. The rule prevents agency manipulation of fire-alarm costs, but it still allows another political institution to raise monitoring costs for private actors.[197]

4. Veil rules.

The main drawback of the reverse delegation regime is that it merely substitutes one risk of bias for another. The reverse delegation scheme minimizes agency bias on timing but maximizes congressional bias. Because one of the major problems with agency timing is the ability to increase fire-alarm costs and therefore the probability of congressional reaction, this strikes us as a marked improvement. It does, however, generate a new timing problem that could be as serious as the old one. If the goal is to minimize the strategic manipulation of monitoring costs by public and private actors, other alternatives, such as veil rules, exist.[198]

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197 OIRA review has a similar effect. By requiring approval before an agency can issue a NPRM or final rule, OIRA review creates a risk that an institution other than the agency will manipulate timing to serve its own ends—here, the president's.

198 Consider Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L J 399, 425 (2001).

In the veil regime, an agency would be forced to select a time to announce a policy decision before the agency selects the substance or content of the rule. The veil idea is to force decisions before actors know about the position they will occupy in the real world. In this context, the veil rule forces a decision about timing before agencies know whether it is likely to offend specific monitors. The NPRM or NOI could contain a timing commitment, for example, promising that the agency will issue either a subsequent withdrawal or a final rule on a given day of the week. This would make it marginally more difficult to make a timing decision that raises monitoring costs in an undesirable way.

The weakness of a veil rule in the regulatory timing context is that agencies often have a good sense of what the final rule will be at the time the rulemaking is initiated. Indeed, the agency must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved" in an NPRM.[199] Initiating a new pollution control rule that increases burdens on the utility industry will have a predictable response, even if the exact magnitude or nature of those burdens is not known ex ante. Thus, the veil rule is unlikely to be especially effective in this context. In essence, there is not enough uncertainty behind the veil to prevent the decisionmaker from understanding the individual effects on the choice.

5. Plural release.

A plural release regime is another simple design option to address the problem of regulation timing. This regime might require that agency actions issued on low-visibility days be reissued on a high-visibility day. For instance, if the initial agency decision was issued late on a Friday afternoon, the plural release rule would require that it be issued again the following Tuesday. Or if the initial action was released during a congressional recess, the plural release regime would require that it be reissued when Congress is back in session. The effective date could be tied to the reissuance date. The reissuance rule does not eliminate the timing problem because the action may no longer be hot news when it is reissued later on. However, the aggregate exposure would certainly be higher than the status quo, and the rule would reduce the monitoring costs borne by third parties for observing agency decisions. The plural release regime draws partially from legislative practice. Multiple reading rules are a standard facet of legislative pro-

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199 5 USC § 553(b)(3).

cedure,[200] introducing delay into deliberations while also ensuring that parties are given an opportunity to consider the proposal.

The objection to this rule is that it entails almost pure costs. An already enormously extensive docket of agency actions for private parties to keep track of will expand even further. That said, in equilibrium, it could be the case that no rules would be issued on low-visibility days because two periods of attention are worse for the agency than a single one. The double-action costs, on this view, are theoretically real, but unlikely to be actualized in practice. The monitoring costs problem would be greatly reduced and the hypothetical costs would mostly never be realized.

* * *

The above proposed timing reforms are merely illustrative. If the timing of agency action were acknowledged to be a genuine problem for regulatory policy, no doubt more serious institutional reform proposals could be devised. But even these simple regimes provide a partial remedy. Thus, regulating the timing of agency action does not present particularly intractable problems of institutional design.

CONCLUSION

Politicians and journalists often swap anecdotes of administrative agencies using timing to avoid public scrutiny. Much of this anecdotal behavior, if systemic, would seem puzzling as a theoretical matter and insensitive to the reality of regulatory politics. This Article seeks to bring conceptual clarity and empirical rigor to this traditional account. The conventional wisdom is that agencies simply bury bad news. Our analysis, however, suggests that this type of behavior is the exception rather than the rule. Often agencies will have no incentive to reduce visibility. More often, they will be unable to do so, at least in the way that the conventional wisdom suggests.

Instead, we argue that few forms of agency action are susceptible to hiding. For most actions, strategic timing does not prevent visibility but simply increases the difficulty of generating political opposition in Congress. The analysis finds evidence of timing effects on withdrawals of uncompleted rulemakings, which are much harder to challenge in court, and also some release of agency decisions while Congress is out of session. In our view, strategic timing is a rich and real phenomenon, but the conventional account emphasizes the wrong locus of agency action.

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200 See Gersen and Posner, 121 Harv L Rev at 554 (cited in note 10) (examining how timing rules can increase the costs of secret or manipulative legislative action).

Given that the administrative state implements an enormous volume of policy in the United States, the interaction among agencies, interest groups, Congress, and the president is obviously of central importance. To this point, the timing of agency action has played a bit part in the study of administrative law: it should have a larger presence. Our aspiration is that our conceptual, empirical, and doctrinal work provides an analytic framework for courts and commentators to pursue questions of timing in administrative law. The analysis also emphasizes the importance of the abandonment of rulemaking proceedings. There is administrative law doctrine on such withdrawals, but it remains underdeveloped. While we have sketched some preliminaries on this front, there is much work to be done.

TABLE 1
MARGINAL EFFECTS FROM PROBIT MODELS

	(1) Friday Final Action	(2) Friday Final Action	(3) Recess Final Action	(4) Recess Final Action	(5) Friday Withdrawal	(6) Friday Withdrawal	(7) Recess Withdrawal	(8) Recess Withdrawal
Independent	-0.006 (0.010)	0.015 (0.015)	0.004 (0.011)	0.021 (0.017)	-0.030 (0.020)	0.035 (0.029)	0.030 (0.023)	0.050 (0.032)
Cabinet	0.010 (0.008)	0.013 (0.011)	-0.005 (0.009)	0.015 (0.013)	-0.022 (0.015)	0.010 (0.018)	0.056*** (0.015)	0.036* (0.021)
State Impact	0.003 (0.009)	-0.001 (0.012)	0.030*** (0.010)	0.029** (0.014)	0.025 (0.018)	0.042** (0.020)	-0.012 (0.018)	0.002 (0.022)
Election Year	-0.011 (0.006)	-0.000 (0.009)	0.024*** (0.008)	-0.037*** (0.010)	-0.008 (0.014)	-0.001 (0.016)	-0.003 (0.014)	-0.028 (0.018)
Post–election Year	-0.002 (0.007)	0.004 (0.010)	-0.035*** (0.008)	-0.050*** (0.012)	-0.042*** (0.014)	-0.034** (0.017)	-0.006 (0.014)	-0.028 (0.019)
Congress Shift	-0.010 (0.010)	-0.008 (0.012)	-0.114*** (0.011)	-0.146*** (0.013)	0.288*** (0.019)	0.091*** (0.026)	-0.096*** (0.017)	0.083*** (0.028)
Divided Government	0.000 (0.006)	-0.012 (0.009)	-0.046*** (0.008)	-0.030*** (0.010)	-0.038*** (0.013)	-0.038** (0.015)	0.062*** (0.013)	0.058*** (0.017)
IRS	-0.013 (0.013)	0.010 (0.019)	0.033** (0.015)	0.057*** (0.022)	0.129*** (0.030)	-0.106*** (0.029)	-0.184*** (0.023)	-0.045 (0.041)
Significant Rule	--	0.031*** (0.009)	--	0.038*** (0.010)	--	-0.028* (0.014)	--	0.044*** (0.017)
Observations	25487	13022	25487	13022	7850	4474	7850	4474
Likelihood Ratio	11.81	18.75	220.33	182.67	424.46	46.58	170.69	52.14

Note: Standard errors are in parentheses
*** p<0.01, ** p<0.05, * p<0.1

DATA APPENDIX

The information on regulatory actions in this Article comes from a new database of agency rulemaking constructed from federal agency semiannual reports in the Unified Agenda.[201] These reports, published in the Federal Register, list many important features of the rulemaking process. For notice-and-comment rulemaking, they provide the date on which the notice of proposed rulemaking, or NPRM, was issued, the date(s) of the comment period(s), the date when the final rule was promulgated (if the process was completed), and the date the regulatory action was withdrawn (if the process was not completed). For rulemaking without prior opportunity for public comment, the reports give the dates of direct and interim final rules.

Because each Unified Agenda publication contains several thousand entries, coding from the hard copies of the Federal Register or even from an electronic version on Westlaw or LexisNexis would be extraordinarily time consuming. The General Services Administration's Regulatory Information Service Center provided XML files of agency reports in the Unified Agenda from the fall of 1983 to the fall of 2008. The XML files, which use a markup language that combines text and structure in a manner that facilitates data sharing, made the database construction feasible.

The database contains information for all unique Regulation Identifier Numbers, or RINs, in the agenda reports for fifteen cabinet departments, ten executive agencies, and twenty-two independent agencies. The cabinet departments include the following: Department of Agriculture (not including the Federal Crop Insurance Corporation); Department of Commerce; Department of Defense; Department of Education; Department of Energy (not including the Federal Energy Regulatory Commission); Department of Health and Human Services (not including the Social Security Administration); Depart-

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201 As explained in note 64, the Unified Agenda is a primary source of rulemaking activity. The GAO keeps a similar database on completed rules under the Congressional Review Act using information reported by agencies. See 5 USC § 801(a). The Regulatory Information Service Center also compiles counts of agency rules. Counts of rulemaking activity differ by government source. See Croley, *Regulation and Public Interests* at 102–17 (cited in note 36) (explaining that there is no single source collecting comprehensive data on rulemaking and that each source defines and classifies rules in different ways). Although the primary source of information on agency rules, the Unified Agenda data have some disadvantages, including that individual agencies submit the data on their activities and that the reports miss many complexities of rulemaking (for instance, it is not possible to tell easily whether a rule is regulatory or deregulatory in nature). See O'Connell, 94 Va L Rev at 927–29 (cited in note 10) (discussing the limitations of this database but maintaining that it still provides an important big-picture perspective on rulemaking activities).

ment of Homeland Security (not including the Federal Emergency Management Agency); Department of Housing and Urban Development (not including the Office of Federal Housing Enterprise Oversight); Department of Interior; Department of Justice; Department of Labor (not including the Pension Benefit Guaranty Corporation); Department of State; Department of Transportation (not including the Surface Transportation Board and Saint Lawrence Seaway Development Corporation); Department of Treasury (not including the Internal Revenue Service); and Department of Veterans Affairs (and Veterans Administration before it became a department).

The executive agencies include the following: Environmental Protection Agency; Federal Emergency Management Agency; General Services Administration; Internal Revenue Service; National Aeronautics and Space Administration; National Archives and Records Administration; Office of Management and Budget; Office of Personnel Management; Small Business Administration; and US Agency for International Development.[202]

The independent agencies include the following: the Commodity Futures Trading Commission; Consumer Product Safety Commission; Equal Employment Opportunity Commission; Farm Credit Administration; Federal Communications Commission; Federal Crop Insurance Corporation; Federal Deposit Insurance Corporation; Federal Energy Regulatory Commission; Federal Home Loan Bank Board; Federal Housing Finance Board; Federal Maritime Commission; Federal Reserve Board; Federal Trade Commission; Interstate Commerce Commission; National Credit Union Administration; Nuclear Regulatory Commission; Office of Federal Housing Enterprise Oversight; Pension Benefit Guaranty Corporation; Saint Lawrence Seaway Development Corporation; Securities and Exchange Commission; Social Security Administration; and the Surface Transportation Board.[203]

The database includes, if applicable, relevant dates of traditional notice-and-comment rulemaking as well as binding rulemaking without prior opportunity for public comment (direct and interim final rules). It notes particular characteristics of rulemaking actions, includ-

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202 Each of these agencies is headed by a Senate-confirmed appointee. O'Connell, 94 Va L Rev at 984 (cited in note 10). Except for the IRS after 1998, the appointee serves at the will of the president and can be fired for any reason. Id. 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. Id. The IRS is coded 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.

203 All of these agencies are led by appointees who serve fixed terms and typically can be removed by the president only for cause. Id. The Social Security Administration became an independent agency under the Social Security Independence and Program Improvements Act of 1994. Id at 984–95 (cited in note 10).

ing their significance and the existence of legal and statutory deadlines. The database also removes duplicate entries from the Unified Agenda reports.

The database incorporates the following additional coding assumptions:

Years and quarters. Years run from January 20 to January 19 of the following year. Thus, an NPRM issued on January 5, 2001 is counted as a 2000 NPRM.

Types of actions. Actions are counted as completed regulatory actions if the rulemaking action listed in the timetable field was a final rule or final action. Actions are counted as withdrawals if the rulemaking action listed in the timetable field was stated as a withdrawal or as deleted at agency request. Withdrawals are almost entirely of uncompleted regulatory actions, but some are of direct and interim final rules. Most critically, some regulatory actions that should have been listed as final actions, particularly before 2003, are listed in the timetable field as 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. If an RIN had multiple dates for the same type of action, only one date was selected. For final actions and withdrawals, the latest date was used.

Significance of actions. Actions are deemed significant if the Priority Code field was listed as economically significant or otherwise significant or if the major field was coded as "yes."

Divided government. Years were counted as divided government if at least one chamber of Congress was controlled by the opposing party to the president. The Senate was treated as controlled by Democrats from 2001 to 2003, because Senator Jeffords, an independent, caucused with the Democrats to give them committee control, a key factor in agency oversight.