

AGENCY RULEMAKING AND POLITICAL TRANSITIONS

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INTRODUCTION

Even before President Obama took to the dance floor on the night of his inauguration, his then-Chief of Staff, Rahm Emanuel, had already fired

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off a memorandum to the heads of federal agencies instructing them not to start or finish any regulations without approval of the new Administration.¹ Emanuel also requested that agency leaders “[c]onsider extending for 60 days the effective date of regulations that have been published in the *Federal Register* but not yet taken effect.”² In short, the memorandum was an immediate and powerful assertion of control over regulatory policy by the new Administration.

In the weeks before the inauguration, while Democratic Party organizers prepared to celebrate President Obama and his team, agencies under President George W. Bush rolled out “midnight” regulations. The Bureau of Land Management, for instance, finalized a rule that it had proposed just four months earlier to permit drilling for oil shale on federal land in western states.³ The Environmental Protection Agency (EPA) issued a regulation, initiated the previous year, to expand how much hazardous waste could be burned outside of incineration limits.⁴ These and dozens of other midnight regulations were unveiled despite an express command in May 2008 from Chief of Staff Joshua Bolten that directed executive agencies to finish regulations by November 1 of that year unless there were “extraordinary circumstances.”⁵

¹ Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, the White House, to Heads of Executive Departments and Agencies (Jan. 20, 2009) [hereinafter Emanuel Memo], in 74 Fed. Reg. 4435 (Jan. 26, 2009). The memorandum provided exceptions approved by the Director of the Office of Management and Budget “for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or other national security matters,” or other urgent matters. *Id.* The action was one of the first of the new Administration. President Obama had not yet signed a single executive order or held a press conference. See Jeff Zeleny, *A Busy Night on the Town, Then a Busier Day at the Office*, N.Y. TIMES, Jan. 22, 2009, at A20.

² Emanuel Memo, *supra* note 1, at 4435.

³ Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,414 (Nov. 18, 2008) (to be codified at 43 C.F.R. pts. 3900, 3910, 3920, 3930); David A. Fahrenthold, *Bush Administration Pushes Their Final Environment and Energy Policies*, WASH. POST (Dec. 19, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/19/AR2008121902898.html>.

⁴ Expansion of RCRA Comparable Fuel Exclusion, 73 Fed. Reg. 77,953, 77,953 (Dec. 19, 2008) (to be codified at 40 C.F.R. pt. 261); R. Jeffrey Smith, *EPA Issues Exemptions for Hazardous Waste, Factory Farms*, WASH. POST, Dec. 13, 2008, at A4.

⁵ Memorandum from Joshua B. Bolten, Chief of Staff, the White House, to Heads of Executive Departments and Agencies (May 9, 2008) [hereinafter Bolten Memo], available at <http://graphics8.nytimes.com/packages/pdf/washington/COS%20Memo%205.9.08.pdf>. Although the memorandum did not establish any procedures to demonstrate extraordinary circumstances, agencies still needed to get final regulations approved by the Office of Information and Regulatory Affairs in the Office of Management and Budget under Executive Orders 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2006), and 13,422, 3 C.F.R. 191 (2008), repealed by Exec. Order No. 13,497, 3 C.F.R. 218 (2010). To the extent that agencies complied with the memorandum, there were fewer classic midnight regulations (i.e., rules issued after the election); compliance also ensured that regulations had taken effect before the new Administration took over, making it harder to reverse those regulatory (or deregulatory) actions. See Charlie Savage & Robert Pear, *Administration Moves to Avert Late Rules Rush*, N.Y. TIMES, May 31, 2008, at A1; *infra* notes 117–18 and accompanying text.

This regulatory pattern—crack-of-dawn response to midnight regulation—has played out in all recent White House transitions, including those in which the incoming and departing presidents hailed from the same political party. In its closing weeks, President Clinton’s Administration engaged in a flurry of regulatory activity, including the establishment of energy efficiency standards for washing machines and significant workplace ergonomic requirements.⁶ Overall, agencies completed about twice as many major regulations (those generally having more than a \$100 million annual effect on the economy) in President Clinton’s final year than in any preceding year for which such information on regulatory impact was regularly collected.⁷

On President George W. Bush’s first day in office, Chief of Staff Andrew Card also had immediate instructions for federal agencies. Like Emanuel’s memorandum, Card’s directive barred agencies from sending regulatory notices to the *Federal Register* without approval by a Bush appointee. It also called for agencies to withdraw regulations that had been sent to the *Federal Register* but had not yet been published. More significantly, it told agencies to suspend the effective dates of rules that had been published but had not yet gone into effect.⁸ By the end of the first year of the Administration, hundreds of regulations started but not yet completed before Bush took office were formally withdrawn.⁹ And so the regulatory cycle goes.

This crack-of-dawn response to midnight regulation manifests itself in congressional transitions as well. Although the rulemaking pattern is often not as pronounced or as frequent, due in part to the fact that two-chamber shifts in congressional control have been rarer than changes in the White House in recent decades, congressional transitions also can alter agency decisionmaking by creating similar midnight and crack-of-dawn regulatory

⁶ President George W. Bush kept the first. Matthew L. Wald, *Administration Keeps 2 Rules on Efficiency of Appliances*, N.Y. TIMES, Apr. 13, 2001, at A14. Congress killed the second under the authority provided by the Congressional Review Act. Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001); see Congressional Review Act, 5 U.S.C. §§ 801–808 (2006).

⁷ See *infra* Figure 8.

⁸ Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, the White House, to Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001) [hereinafter Card Memo], in 66 Fed. Reg. 7702 (Jan. 24, 2001). The May 2008 Bolten Memo mostly took the last option off the table for the incoming Obama Administration because completing regulations by mid-November ensured that they would be in effect before Obama’s inauguration. See Bolten Memo, *supra* note 5. Presidents Reagan and George W. Bush also suspended the effective dates of regulations from executive agencies (but not independent regulatory commissions) that had been completed at the end of Presidents Carter’s and Clinton’s Administrations, respectively, but had not gone into effect. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34747, MIDNIGHT RULEMAKING: CONSIDERATIONS FOR CONGRESS AND A NEW ADMINISTRATION 7–9 (2008). By contrast, the Emanuel Memo requested that all agencies “consider” similar suspensions of regulations promulgated at the end of President George W. Bush’s Administration. Emanuel Memo, *supra* note 1.

⁹ See *infra* Figure 10.

opportunities—specifically, by fast-tracking regulations before control shifts or withdrawing uncompleted regulations afterward. In November 1994, the midterm elections switched control of both the House and the Senate from the Democrats to the Republicans; the reverse occurred in November 2006. The 1994 election accompanied a noticeable jump in regulatory completions before the new Republican majorities took control and a marked increase in withdrawals of uncompleted regulations after the transition, but the 2006 election was not accompanied by similar spikes in regulatory activity.¹⁰ In the 2010 election, Republicans promised to cut back regulation by President Obama’s agencies.¹¹ Although not as predictable as shifts in White House control, these congressional transitions are also critical components of regulatory policy.

The third branch of our federal government also undergoes transitions. Here, though, the change of personnel does not have as immediate an effect on agency decisionmaking. Rather, court decisions can influence the regulatory process by altering the incentives for agencies to engage in certain types of regulation, such as more or less informal rulemaking, and greater explanation of agency decisions so as to avoid having a regulation overturned later on. For example, in 2001, the Supreme Court decided *United States v. Mead Corp.*, which provides, in most circumstances, more deference to notice-and-comment rulemaking than to less formal agency actions.¹² There was no “midnight” as with political transitions, but the ruling, like other important administrative law decisions, created a new dawn for future regulatory policies.

These three types of transitions—presidential, congressional, and judicial—all have the power to shape, in major and minor ways, agency rulemaking and thus, in turn, a wide range of public policy. In sheer numbers, agency rulemaking dominates legislation. In 2009, Congress passed 119

¹⁰ See *infra* Figures 6, 8, 10.

¹¹ David M. Herszenhorn, *Legislative Plan Direct from G.O.P. Mainstream*, N.Y. TIMES, Sept. 24, 2010, at A17 (“The Republicans also promised to ‘rein in the red tape factory in Washington’ by making it harder for federal agencies to impose new regulations.”); Robert Pear, *Short of Repeal, G.O.P. Will Chip Away at Health Care*, N.Y. TIMES, Sept. 21, 2010, at A1 (“Republicans say [in the 2010 election season that if elected] they will try to withhold money that federal officials need to administer and enforce the [new health care] law. They know that even if they managed to pass a wholesale repeal, Mr. Obama would veto it.”). Some agencies waited until after the election to not have regulations be made an election issue. Gabriel Nelson, *EPA Delays Release of Final Ozone Standards*, N.Y. TIMES (Aug. 23, 2010), <http://www.nytimes.com/gwire/2010/08/23/23greenwire-epa-delays-release-of-final-ozone-standards-75285.html> (“The current political climate would make it ‘convenient’ for EPA to release the standards after November’s midterm election, said Howard Feldman, director of regulatory and scientific affairs at the American Petroleum Institute. Frank O’Donnell, president of advocacy group Clean Air Watch, agreed. The decision to delay the final rule could reflect intense political pressure on the agency, he wrote in an e-mail . . .”).

¹² 533 U.S. 218, 226–27 (2001).

public laws.¹³ During the same period, agencies issued approximately 3500 rules.¹⁴ To be certain, many of these rules are routine or have minimal consequences. But many are important, including 84 “major” regulations, classified in that way because they have an annual economic effect of at least \$100 million or other significant effect.¹⁵ These regulations involve many policy areas, including the environment, finance, national security, public health, and science and technology, to name just a few.

This Article examines agency rulemaking during the periods surrounding political transitions. Using a new comprehensive database on agency rules that covers the period from 1983 to 2010, a longer time frame than existing studies cover, it describes key stages of the rulemaking process over time. In addition, it analyzes the connection between political transitions, both presidential and congressional, and of one major judicial transition, and the duration of completed rulemakings. Not all rulemakings are completed, however, so this Article also examines the relationship between transitions and whether proposed rulemakings are withdrawn.

Part I briefly summarizes the rulemaking process and the major types of relevant transitions, considering how they are viewed by a federal agency. Part II describes the database on agency rulemaking used in the Article and discusses its strengths and weaknesses; it also situates this study

¹³ Interim Résumé of Congressional Activity: First Session of the One Hundred Eleventh Congress, 156 CONG. REC. D3 (corrected daily ed. Jan. 5, 2010). In 2008, Congress passed 278 public laws. Interim Résumé of Congressional Activity: Second Session of the One Hundred Tenth Congress, 154 CONG. REC. D1336 (daily ed. Jan. 2, 2009).

¹⁴ See *GAO Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressact/fedrule.html> (search Agency: All, Rule Type: All, Priority Type: All, Date Published in the Federal Register: January 2009 to December 2009) (last visited Aug. 20, 2011). In 2008, agencies published 3117 rules. See *GAO Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressact/fedrule.html> (search Agency: All, Rule Type: All, Priority Type: All, Date Published in the Federal Register: January 2008 to December 2008) (last visited Aug. 20, 2011).

¹⁵ See *GAO Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressact/fedrule.html> (search Agency: All, Rule Type: Major, Priority Type: All, Date Published in the Federal Register: January 2009 to December 2009) (last visited Aug. 20, 2011). In 2008, agencies published 95 major rules. *GAO Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressact/fedrule.html> (search Agency: All, Rule Type: Major, Priority Type: All, Date Published in the Federal Register: January 2008 to December 2008) (last visited Aug. 20, 2011). The law defines “significant” or “major” rules as those that have at least an annual \$100 million, or otherwise “material[ly]” adverse, effect on the economy. Exec. Order No. 12,866, *supra* note 5, § 3(f); see 5 U.S.C. § 804(2) (2006) (“The term ‘major rule’ means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) 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.”). The empirical work in this Article uses a slightly wider definition of significance to include other, noneconomically significant regulations.

among both empirical and nonempirical research on agency rulemaking and political transitions. Part III contains the major descriptive work, which tracks the number of rules that were initiated, completed, and withdrawn over approximately twenty-five years. Part IV analyzes systematically the duration of the rulemaking process for rules that are completed and focuses on political and judicial transitions. Part V then examines the connection between political and judicial transitions (as well as other factors, such as agency deadlines) and the decision to withdraw a proposed rule. The Article concludes by considering wider implications of the rulemaking process and political transitions for administrative law and new administrations.

I. THE RULEMAKING PROCESS AND TYPES OF TRANSITIONS

Before examining rulemaking transitions more systematically, it seems wise to provide some brief background on both components: the rulemaking process and the kinds of transitions that can shape it. This Part also specifically considers the agency's perspective on each of these components.

A. *The Rulemaking Process*

There are two versions of the rulemaking process: what textbooks describe (and what scholars typically study) and what happens in practice. In the former, regulations (or rules)¹⁶ are enacted through relatively simple notice-and-comment procedures. After internal agency planning and subsequent review by the Office of Information and Regulatory Affairs (OIRA), a unit of the Office of Management and Budget, an executive agency formally starts the public rulemaking process by publishing a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* and by providing a public docket of supporting materials. The NPRM commences a public comment period, usually sixty days but sometimes shorter, during which time interested persons can submit their reactions in written form to the agency. The agency examines the comments and evaluates what changes to make to the proposed regulation. The final rule, which is also reviewed by OIRA and then published in the *Federal Register*, must be a "logical outgrowth" of the proposed rule.¹⁷ In most cases, the final rule does not take effect for thirty days—or for sixty days, if the rule is classified as major.¹⁸

¹⁶ I use the terms "rule" and "regulation" interchangeably. If no other information is provided, the terms refer to a regulation or rule produced by the notice-and-comment procedures prescribed by the Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2006).

¹⁷ O'CONNELL, *supra* note *, at 900–02 & n.26. Independent regulatory commissions, such as the Federal Communications Commission, do not need to seek OIRA review before publishing an NPRM or final rule. Exec. Order No. 12,866, *supra* note 5, § 3(b) ("'Agency,' unless otherwise indicated, means any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).").

¹⁸ See Congressional Review Act, 5 U.S.C. § 801 (2006).

The textbook version differs from what happens in actual rulemakings in several important ways. To start, the textbook version assumes that the rulemaking process has three discrete stages that occur in a specified order: notice, opportunity for comment, and the final rule. Many agencies, however, issue binding rules without prior opportunity for comment. For example, an agency can issue a “direct final rule,” which takes effect a certain period after publication unless adverse comments are received. An agency can also issue an “interim final rule,” which can take effect upon publication, and subsequently take comments on the rule if for some important reason it needs to forego prior notice and opportunity for comment.¹⁹ Neither of these approaches is mentioned explicitly in the Administrative Procedure Act (APA). However, the APA does provide for the waiver of prior notice and comment (but without the requirement of post-rule comments) where the agency has “good cause” to forego these procedures if they “are impracticable, unnecessary, or contrary to the public interest.”²⁰

In addition, in the textbook version, an agency goes through the steps once; there is one NPRM, one comment period, and one final rule. In practice, however, an agency can issue an “Advance NPRM,” or a second or third NPRM. A single proposed rule can have multiple comment periods. And an agency can issue an interim rule followed by a final rule. Those choices can be driven, in part, by statutory deadlines. For example, the Family and Medical Leave Act (FMLA),²¹ which President Clinton signed into law on February 5, 1993, mandated that the Department of Labor (DOL) enact regulations to implement key parts of the FMLA within 120 days, to take effect one month later, on August 5. The DOL published its NPRM on March 10 and asked for comments until the end of that month. On June 4, the DOL promulgated an interim final rule, which took effect on August 5 and which asked for further comments. The DOL published final regulations seventeen months later, on January 6, 1995, which it amended twice before the final rules went into effect on April 6, 1995.²²

Finally, the textbook version presumes that the agency issues a final rule after the comment period ends. But an agency may decide, after receiving comments or during the OIRA review process, not to enact a final rule at all. Unlike a completed rule, which the agency can rescind typically only through the notice-and-comment process, a “withdrawn rule” functions as the unilateral abdication of a proposed regulation without a similar formal process.²³ Some withdrawals of proposed rules are explicitly contem-

¹⁹ O’CONNELL, *supra* note *, at 903.

²⁰ 5 U.S.C. § 553(b)(3)(B) (2006).

²¹ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

²² Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,934–35 (Nov. 17, 2008).

²³ See Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1174, 1188 (2009). Courts are more likely to review withdrawn rules if “the relevant statutory scheme expressly contemplates the withdrawal of a pro-

plated by statute. Under the Endangered Species Act,²⁴ for example, after the Department of the Interior proposes to list a species (and invites comment), the agency has one year to find that the species is endangered and thereby list it, find that the species is not endangered and thereby withdraw the proposed listing, or find that there is sufficient disagreement to extend its decisionmaking period for another six months.²⁵

Other withdrawals follow changes in political control.²⁶ At the end of August 2009, the Obama Department of Labor announced it was withdrawing a rulemaking process started one year earlier, under President George W. Bush's Administration. The proposed rule would have required DOL agencies to issue an advanced NPRM any time they wanted to "develop[] a health standard that would regulate workplace exposure to toxic substances or hazardous chemicals."²⁷ Still other withdrawals reflect nonpolitical justifications, such as intervening economic events or additional information.

These differences between casebook description and practice have implications for the empirical study of the rulemaking process. To be certain, simplifications are needed to gain traction for any sort of analysis, whether it is theoretical, empirical, or normative. Nevertheless, two elements of the practice of rulemaking seem important to at least acknowledge explicitly in, if not also incorporate into, an empirical study of rulemaking. First, the multiple stages of rulemaking make defining the start and end of the regulatory process more complex. The NPRM and final rule are often easiest to identify, but data based on these dates may understate or overstate the amount of time for binding regulations to be enacted. If an agency works on a rulemaking for a long time before issuing an NPRM, the duration between the NPRM and final rule will be too short of a measure of the regulatory process. On the other hand, in the FMLA example, the duration from the NPRM to the final rule was twenty-two months, but the interim rule was promulgated less than three months after the NPRM. Second, proposed rules that are not finished are part of the rulemaking process as well. Un-

posed regulatory action" or "the applicable statute imposes mandatory obligations on the agency to act." *Id.* at 1188–89.

²⁴ 16 U.S.C. § 1533(b)(6) (2006).

²⁵ Gersen & O'Connell, *supra* note 23, at 1188–89.

²⁶ *Id.* at 1196 (providing several examples where agencies "withdr[ew] uncompleted rulemakings that were started under the previous administration"); O'CONNELL, *supra* note *, at 959–63 (documenting spikes in withdrawals after political transitions). Courts sometimes note the timing of a withdrawal but do not consider the political transition in assessing the withdrawal's legality. *See, e.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1149 (D.C. Cir. 1987) (regulation proposed in 1977, withdrawn in 1985); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 615–16 (D.C. Cir. 1987) (standard proposed in 1976, not pursued in 1977), *vacated*, 817 F.2d 890, 890 (D.C. Cir. 1987).

²⁷ Requirements for DOL Agencies' Assessment of Occupational Health Risks, 74 Fed. Reg. 44,795, 44,795 (Aug. 31, 2009) (to be codified at 29 C.F.R. pt. 2). The Obama Administration also withdrew proposed quarantine regulations that had been announced in 2005 "amid fears of avian flu." Alison Young, *White House Kills Proposal for Quarantines*, USA TODAY, Apr. 2, 2010, at 5A.

like proposed legislation that is unwieldy to track and may be introduced for a wide variety of reasons, proposed regulations are serious agency actions, and when they are withdrawn, that decision may signal important information about agency decisionmaking.

B. Types of Transitions

All three branches of government periodically experience transitions. Most attention focuses on the White House; that attention, however, often simplifies presidential transitions. When the media and scholars discuss presidential transitions in the rulemaking context, they typically consider a transition from a two-term, lame-duck president of one party to a president of the other party.²⁸ This is understandable, as the last two presidential transitions, Clinton to George W. Bush and Bush to Obama, fit this pattern.

There are, however, other possibilities. First, the presidential transition may not involve a change in party control. For instance, in 1989, control of the White House shifted from President Reagan to President George H.W. Bush, who had been Reagan's Vice President for the preceding eight years. Granted, this type of transition is rare in recent times; excluding atypical transitions such as those due to assassination or forced resignation, the last one before 1989 was in 1945. When party control does not change, the midnight of the outgoing administration likely feels less pressing to the White House. Nevertheless, agencies in the Reagan Administration apparently "scrambl[ed] to put on the books regulations that were too hot to handle during the campaign, hoping to minimize the divisive controversy George Bush might otherwise face as he launch[ed] his vision of a 'kinder, gentler' nation on January 20."²⁹ In other words, some of the midnight regulations under President Reagan enacted policies that the new Administration favored but that were likely to generate public controversy. In addition, even with a same-party transition, policy and style differences exist. In the campaign, Bush promised "wholesale change" if elected and indicated that "he would rather bring in an outsider for any given job than keep a Reagan appointee who had already served if both were equally quali-

²⁸ E.g., Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 948–49 (2003); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1262–67 (2006); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 559–67 (2003); Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 553 (2003); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1039–43 (2001); William M. Jack, Comment, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1479–84 (2002); B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782, 782–84 (2003).

²⁹ Ronald A. Taylor et al., *Here Come Ronald Reagan's 'Midnight' Regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11.

fied.”³⁰ He carried through on that promise, removing a significant number of Reagan appointees in the federal bureaucracy.³¹

Second, the presidential transition may be from a one-term president who was not reelected to a new president. In the past five transitions, from 1981 to 2009, two departing presidents, Presidents Jimmy Carter and George H.W. Bush, left office after failing to be reelected. These transitions after one term share certain characteristics with other transitions, particularly because of the change in party control.³² But they also have unique features. Most notably, outgoing one-term presidents have had far less time to establish and complete regulatory objectives. It takes close to a year to get top-level agency personnel in place, often foreclosing much of that time from regulatory work.³³ Then, agency administrators must set regulatory objectives and executive agencies must seek OIRA approval before commencing a rulemaking. Once proposed, a regulation undergoing traditional notice and comment will not go into effect, on average, for 1.3 years.³⁴ In short, one-term presidents generally manage only one major regulatory cycle.

White House transitions are not the only political transitions affecting agency rulemaking. Congress also undergoes political shifts. Because elections for the entire House of Representatives and for one-third of the Senate are held every two years, such shifts can be more frequent. The closest parallel to the paradigmatic White House transition—from a two-term president of one party to a new president of another party—would be a shift in party control of both congressional chambers. For example, the 1994 and 2006 elections prompted major congressional transitions.³⁵ Such

³⁰ David Hoffman & Ann Devroy, *Bush Pledges to Work with Congress: President-Elect Prepares to Put Own Team in Place Swiftly*, WASH. POST, Nov. 8, 1988, at A1; see Gerald F. Seib, *The Next President: No Ideologue, Bush Is Likely to Be Pragmatic, Work with Congress*, WALL ST. J., Nov. 10, 1988, at A1 (quoting President H.W. Bush as saying he would “for the most part bring in a brand-new team of people from around the country”).

³¹ See ROBERT MARANTO, *BEYOND A GOVERNMENT OF STRANGERS: HOW CAREER EXECUTIVES AND POLITICAL APPOINTEES CAN TURN CONFLICT TO COOPERATION* 58 (2005); see also Steven V. Roberts, *Bush Personnel Team Aims for Stiff Scrutiny*, N.Y. TIMES, Nov. 12, 1988, at A9 (describing the “wave of jitters” from the post-election announcement “that all Presidential appointees would be asked for their resignations”).

³² See Jason M. Loring & Liam R. Roth, Empirical Study, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1444–45 (2005).

³³ Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 955–63 (2009).

³⁴ See *infra* paragraph accompanying notes 133–34 (analyzing duration of recent rulemakings).

³⁵ See Richard L. Berke, *G.O.P. Wins Control of Senate and Makes Big Gains in House; Pataki Denies Cuomo 4th Term*, N.Y. TIMES, Nov. 9, 1994, at A1; Adam Nagourney, *12-Year Run Over, Balance May Rest on Virginia Race*, N.Y. TIMES, Nov. 8, 2006, at A1; see also Jeff Zeleny, *As Guard Changes in Congress, Lobbyists Scramble to Get in Step*, N.Y. TIMES, Nov. 15, 2006, at A1 (“Republicans do not cede control of Congress for nearly two months, but money, power and influence are already

transitions typically precipitate considerable shifts in regulatory policy, at least for Congress. In 1994, the Republicans' "Contract with America" was devoted, in part, to rolling back government regulations.³⁶ By contrast, in 2006, the Democrats promised tougher regulation, at least in areas related to public safety.³⁷

Although much of the focus has been on these more dramatic congressional transitions, a more moderate transition occurs when control of one chamber (typically the House) does not shift, but control of the other chamber (the Senate) does. After the 1980, 1986, 2002, and arguably 2000 elections, control of the Senate shifted from one party to the other.³⁸ Legal scholars generally focus on these transitions only to the extent that they affect the confirmation process for federal judges, a subject of great interest because of the direct connection to legal doctrine, and they do not consider implications for regulatory policy.³⁹ Finally, as with White House control, a shift in personnel, even without any change in party control, can still result in a change in regulatory priorities.⁴⁰

Transitions also occur within the unelected branch of government—the judiciary. To be certain, the most direct analogy to the White House or congressional transition stories would be to changes in membership of the Supreme Court or the lower federal courts. The retirement of Justice Sandra Day O'Connor and the confirmation of Justice Samuel Alito, for example, shifted the balance of the Supreme Court to the right.⁴¹ Unlike with the other two branches, however, personnel changes on the Supreme Court do not have immediate consequences for agency decisionmaking. Rather, im-

beginning to change hands. The political economy, at least here in the capital, is humming for Democrats.”).

³⁶ See CONTRACT WITH AMERICA 125 (Ed Gillespie & Bob Schellhas eds., 1994).

³⁷ See Robert Pear, *Drug Industry Is on Defensive as Power Shifts*, N.Y. TIMES, Nov. 24, 2006, at A1.

³⁸ In May 2001, Senator Jeffords of Vermont declared that he would caucus with the Democrats, instead of with the Republicans, leaving fifty Democrats, forty-nine Republicans, and Jeffords. This decision by Jeffords allowed the Democrats to control committee leadership (as the Vice President had sided with the Republicans previously to break the tie in the Republicans' favor). See John Lancaster & Helen Dewar, *Jeffords Tips Senate Power*, WASH. POST, May 25, 2001, at A1. In 2002, the Republicans won a majority of seats in the Senate.

³⁹ See, e.g., Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 531 (1998) (explaining that judicial selection “has been politicized since the country's founding” but that “significant numbers of vacancies, which remained unfilled for protracted periods, only became a serious problem after the mid-twentieth century”).

⁴⁰ In recent decades, political parties have become more polarized, making Democratic control of Congress now quite different from Democratic control during President Carter's Administration. See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 24 (2006); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* 3–4 (2008).

⁴¹ Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

portant Supreme Court decisions in administrative law affecting agency procedural or substantive decisions serve a similar but not identical “transition” role in agency rulemaking. These decisions raise the costs or benefits of certain procedures and policy decisions to an agency, thereby shaping regulatory activity. In recent decades, these transitional cases arguably include *FCC v. Fox Television Stations Inc.*,⁴² *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,⁴³ *United States v. Mead Corp.*,⁴⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁵ *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,⁴⁶ and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁴⁷ These decisions address if and how agencies can reverse themselves, if and how courts should defer to agency interpretations of statutes and other decisions, and if and how courts can impose procedural requirements on agency decisionmaking.

To be sure, the transition analogy is stretched here. Judicial decisions are likely not as fundamental as elections for the substance of regulatory policy. In addition, I do not want to characterize the enactment of the APA as a congressional transition or OIRA regulatory review by executive order as a presidential transition. Nevertheless, these important administrative law cases come closest to transitions in the third branch of our government and potentially affect the regulatory process in substantial ways.

C. The Agency’s Perspective

Federal agencies generally have significant discretion in their rulemaking activities. Procedurally, they can often decide whether and when to start the regulatory process, whether and when to finish or stop the process, and whether and when to use a particular kind of process. Substantively, they usually have considerable flexibility in the content of the policy they adopt. For example, an agency created by statute might be tasked with pro-

⁴² 129 S. Ct. 1800, 1810 (2009) (holding a change in agency policy to the same standard of review as the initial policy).

⁴³ 545 U.S. 967, 980–86 (2005) (applying traditional *Chevron* deference to an agency interpretation of an ambiguous statute even if a court had previously settled on another interpretation).

⁴⁴ 533 U.S. 218, 226–31 (2001) (limiting *Chevron* deference to interpretations where Congress has delegated to the agency the authority to act with the force of law and where the agency has acted with that authority).

⁴⁵ 467 U.S. 837, 842–43 (1984) (establishing the two-part framework for assessing agency interpretations of statutes: (1) “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.”; (2) “[I]f 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.”).

⁴⁶ 463 U.S. 29, 43 (1983) (establishing “hard look” review of agency actions under the APA’s “arbitrary and capricious” clause).

⁴⁷ 435 U.S. 519, 543–49 (1978) (barring courts from imposing additional procedural requirements on agencies unless compelled by statute or by the Constitution).

protecting the public health with regard to food and afforded rulemaking and adjudicatory power to meet that objective. The statute may permit, but not compel, the agency to enact a policy—for example, addressing food labeling. If the agency does decide to pursue a particular labeling policy, it may choose when to do so and by what process, such as rulemaking or adjudication. Furthermore, the agency typically has a range of choices in the policy area of food labeling that it can implement.

Some constraints, of course, explicitly restrict this procedural and substantive discretion in setting regulatory policy. Statutory or judicial deadlines may restrict when rulemakings begin and end.⁴⁸ Statutes, executive orders, and case law may govern what process must be used.⁴⁹ Statutes and executive orders may determine which or what kind of agency has substantive policymaking authority as well as impose limits on that policymaking discretion.⁵⁰

There are many other constraints on agency rulemaking. The transitions in all three branches of government described above provide one way of classifying most of these influences. From a nonindependent agency's perspective (a cabinet department or a free-standing executive agency such as the EPA), the Executive Branch likely wields more control over the rulemaking process than the other branches.⁵¹ A presidential transition disrupts many of these levers of control. The creation of an agency or the

⁴⁸ See, e.g., 29 U.S.C. § 2654 (2006); *Nw. Envtl. Advocates v. EPA*, No. C 03-05760 SI, 2006 WL 2669042, at *12 (N.D. Cal. Sept. 18, 2006); see generally Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 171–73 (1987) (arguing that “reliance on deadlines may be counterproductive”); Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467, 467–86 (1987) (using eleven case studies “more fully exploring” his previous argument); Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 939–43 (2008) (empirically examining the use of deadlines from 1983 to 2003); Gregory L. Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAYTON. L. REV. 71, 73–77 (1979) (contending that deadlines are often necessary to get needed agency action); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 77–84 (1997) (noting that most agencies fail to meet statutory deadlines and analyzing actual and potential judicial responses).

⁴⁹ See, e.g., 5 U.S.C. § 553(b)–(d) (2006); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); Exec. Order No. 12,866, *supra* note 5.

⁵⁰ See, e.g., Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; Exec. Order No. 13,228, 3 C.F.R. 796 (2002).

⁵¹ See Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 297 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010); see also David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1095–97 (2008) (noting extensive presidential involvement in agency decisions but also claiming that agencies themselves are politicized through staffing decisions); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–319 (2001) (demonstrating the considerable control of the White House over agency decisions and providing a legal and normative defense for that control). There is considerable debate in the political science literature as to whether Congress or the President is the dominant overseer of federal agencies. See O’CONNELL, *supra* note *, at 910–11 nn.68, 70 (gathering citations).

delegation of new authority to an existing agency can be achieved typically only by statute, the enactment of which of course requires the president's agreement (or a difficult-to-obtain two-thirds majority of each chamber to override his veto). More important, however, for immediate regulatory policy, the agency knows that its top leadership team is beholden to the White House, which is responsible for appointing the officials, usually with the advice and consent of the Senate and sometimes pursuant to particular statutory mandates. These leaders also generally want to hold onto their jobs. The White House can also fire almost all executive agency officials for any reason, including a policy disagreement. There are some fixed-term positions in nonindependent agencies, such as the Administrator of the Federal Aviation Administration, and the Commissioner of Internal Revenue in the Treasury Department, whose inhabitants are protected from firing except for cause. However, such top-level political positions are rare outside of independent regulatory commissions and boards. In addition to worrying about their job security and their budgets, agency leaders receive formal directives as well as more informal pressure from the White House concerning regulatory (or deregulatory) priorities. Finally, agencies must report their regulatory plans to OIRA and receive OIRA approval before issuing proposed and final regulations.⁵²

An independent agency (an independent regulatory commission or board) is less beholden to the White House. Typically, all of its leaders are protected from firing except for cause, though chairpersons typically can be demoted to ordinary commissioners at will. In addition, such agencies do not need to secure OIRA approval before issuing regulations. The other mechanisms of control still apply, however. A presidential transition thus shifts policy priorities, to a lesser or greater extent, potentially influencing the structure and staffing of all agencies, the scope of delegation to those agencies, and the oversight of the rulemaking process.

Most critically, to every agency—whether a cabinet department, free-standing executive agency, or independent agency—a presidential transition almost always changes agency leadership, the very people carrying out the rulemaking process. Early presidents did not get to appoint leaders to nearly as many bureaucratic positions because officials did not traditionally resign at the end of each administration.⁵³ But now, except for fixed-term positions, the president (through the White House personnel office) staffs all top agency positions, including approximately 700 Senate-confirmed

⁵² O'CONNELL, *supra* note *, at 900 & n.26, 918; Stephenson, *supra* note 51, at 297–300.

⁵³ See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1311 (2006). President Jackson established rotation in offices, arguing that the spoils system was prodemocratic compared to the earlier traditions that treated those positions as property rights. Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1577–78, 1613–14 (2008).

slots in executive agencies.⁵⁴ Even in independent agencies, the president can generally choose the chairperson. In light of these changes, an outgoing president and outgoing agency leaders want to complete rulemakings before leaving office. An incoming president and incoming agency leaders aim to stop rulemakings commenced but not finished by the previous administration and to establish and carry out their own regulatory agenda, including the reversal of certain completed regulations. All else being equal, the executive transition presumably shapes rulemaking activities by agencies under the direct control of the president—cabinet departments, free-standing executive agencies, and the like—more than regulatory actions by independent regulatory commissions and boards.⁵⁵

As with a White House transition, a congressional transition also moves policy priorities, thereby shaping the structure of agencies, the scope of delegation to those agencies, and oversight of the rulemaking process. From an agency's perspective, Congress exerts significant authority over agency rulemaking. That authority does not vary substantially by the structural independence (or lack thereof) of an agency. Independence has much more to do with the White House's influence than Congress's. An agency's creation and day-to-day life is structured by Congress. At the start, Congress often designs the agency and imposes decisionmaking structures, though some agencies are first established by the White House. Once the agency is running, the Senate confirms all top agency leaders and some lower-level officials. These officials need the Senate to sign off on their nominations before they join the agency's ranks, but after that, Congress plays no formal role in their removal. Most critically, an agency depends on Congress for delegations of authority and for funding to carry out this delegated authority. In short, Congress establishes the statutory framework in which agencies operate.⁵⁶ With the statutory framework and agency in place, the agency still answers to Congress. The agency can be the subject of an investigation, its leaders can be called to testify, and it can face a range of pressures from members and committees.⁵⁷ For instance, although neither chamber of Congress plays a formal role in officials' removal, Congress can place informal yet substantial pressure on the White House or on leaders themselves for a leader to resign.⁵⁸

Most importantly, a congressional transition changes the political environment in which agency rulemaking occurs. At the extreme, after a transition, the agency can face an appropriations rider that prevents it from using

⁵⁴ See O'Connell, *supra* note 33, at 927–28.

⁵⁵ See O'CONNELL, *supra* note *, at 919–20.

⁵⁶ See Stephenson, *supra* note 51, at 285.

⁵⁷ O'CONNELL, *supra* note *, at 920; Stephenson, *supra* note 51, at 285–97.

⁵⁸ Anne M. Joseph, Called to Testify: Congressional Oversight of Presidential Appointees and the Administrative State (Feb. 7, 2003) (unpublished manuscript) (on file with author).

its budget to work on a particular rulemaking.⁵⁹ In a less extreme approach, agency officials may also be required to explain and justify particular rulemaking decisions, whether through formal committee hearings or individual letters and phone calls from members of Congress.⁶⁰ In addition, the appointments calculus may change. A midterm election cannot formally affect the tenure of agency officials already in their jobs, but it can affect appointments to vacant positions. Because appointee tenure is short—around two years in nonfixed term positions—Senate transitions that do not coincide with shifts in White House control still shape an agency's top rung of officials.⁶¹

In the face of these constraints, agencies may rush to complete rulemakings before a congressional transition in order to avoid facing external pressure (or internal pressure through new staffing selections) to postpone or reverse rulemakings after a transition. Congressional transitions may shape the rulemaking activities of independent agencies more than those of agencies under the direct control of the President because the White House presumably offers the latter stronger support against Congress than the former.⁶²

Agencies do not confront the White House or Congress in isolation. The interaction between the President and Congress also shapes the rulemaking process. For instance, all agencies likely find it more difficult to enact rules in periods of divided government.⁶³ If different parties control the White House and Congress, there will probably be more disparate policy preferences in a regulatory area than if the same party were in charge. Thus, divided government likely makes it harder for the agency to craft a regulation that pleases both branches.

Finally, courts constrain the rulemaking process. Presidential and congressional influence on the rulemaking process “presume[s] a background of judicial enforcement of legal constraints on both the agencies and the political branches.”⁶⁴ To be certain, politics also may shape judicial enforcement.⁶⁵ From the perspective of an agency, the possibility of judicial

⁵⁹ CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34354, CONGRESSIONAL INFLUENCES ON RULEMAKING THROUGH APPROPRIATIONS PROVISIONS (2008); see also Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 456 (detailing use of appropriations riders and arguing that they are “not the proper vehicle for substantive policymaking”).

⁶⁰ See JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 130–44 (1990).

⁶¹ See O’Connell, *supra* note 33, at 919 & n.23.

⁶² See O’CONNELL, *supra* note *, at 920–21.

⁶³ See *id.* at 921.

⁶⁴ Stephenson, *supra* note 51, at 306.

⁶⁵ See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 842 (2006); see generally Tonja Jacobi, *The Judiciary*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 51, at 234, 239–45 (examining strategic behavior in judicial decisionmaking); Stephenson, *supra* note 51, at 306–15 (summarizing how law and politics shape judicial review of agency statutory interpretations).

enforcement restricts the process and substance of its rulemaking. Important court decisions can make certain procedures and policy decisions more costly or more beneficial to an agency. Because these decisions take effect immediately, agencies feel only one set of effects from these judicial “transitions.” Agencies cannot rush to finish rulemakings before such decisions as they do not know what those decisions will be; rather they can react only after such decisions are announced. Because the Supreme Court has not differentiated its mandates by agency type, independent and nonindependent agencies should react similarly to changes in administrative law doctrine, all else being constant.

In sum, in examining rulemaking and transitions in all three branches of government from the agency’s perspective, it may be most helpful to consider how the agency analyzes the costs and benefits of rulemaking. This cost–benefit calculation is quite different than the one typically discussed in administrative law—whether a particular regulation has net benefits to society.⁶⁶ Instead, the calculation considers the net benefits of a rulemaking, both in terms of substance and process, to an agency in light of the particular costs to the agency. On the benefit side, the agency may care about the regulatory outcome; budgetary, political, and status rewards; and judicial deference. On the cost side, the agency may worry about regulatory outcome; budgetary, political, and status fallout; and reversal by the courts. The rulemaking process also consumes agency resources that could be devoted to other tasks. Any particular transition therefore potentially changes this calculation.

II. RULEMAKING STUDIES AND DATA

Until now, this Article has relied on theory and anecdote in discussing agency rulemaking and political and judicial transitions. The next sections undertake a more systematic empirical investigation. Despite its importance, there has been little rigorous examination of agency rulemaking that explores variation across a wide range of agencies and over several decades.⁶⁷ To be sure, there are some useful aggregate counts and connected

⁶⁶ See, e.g., Exec. Order No. 12,866, *supra* note 5.

⁶⁷ Some research on rulemaking across agencies and over time, of course, does exist. E.g., Gersen & O’Connell, *supra* note 48, at 979–90 (examining rulemaking deadlines); Gersen & O’Connell, *supra* note 23, at 1210–13 (examining timing of rulemaking decisions); O’CONNELL, *supra* note *, at 922–63, 983–86 (analyzing initiations, completions, and withdrawals of rulemaking, with a focus on political transitions); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making “Ossified”?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2009) [hereinafter Yackee & Yackee, *Ossified*] (analyzing constraints on the duration of the rulemaking process); Jason Webb Yackee & Susan Webb Yackee, *Divided Government and U.S. Federal Rulemaking*, 3 REGULATION & GOVERNANCE 128 (2009) [hereinafter Yackee & Yackee, *Divided*] (analyzing the effect of divided government on the rulemaking process).

analyses across a number of years.⁶⁸ There are also some detailed studies on a small set of agencies or on more agencies over a short period of time.⁶⁹

⁶⁸ E.g., CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 7–21 (3d ed. 2003) (noting macro trends in rulemaking actions); Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 166–69, 183–87 (2009) (analyzing variation in *Federal Register* pages during political transitions); William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 539–43 (2005) (analyzing changes in *Federal Register* pages, among other items, over time, with attention to presidential transitions). There has also been some work by journalists and think tanks. E.g., Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-election Quarters 2*, 10–14 (Mar. 8, 2001) (unpublished manuscript), <http://mercatus.org/publication/cinderella-constraint-why-regulations-increase-significantly-during-post-election-quarte?id=17546> (examining variation in *Federal Register* pages during political transitions); CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS, AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 13–29 (2010) (summarizing counts of *Federal Register* pages and rulemaking entries in the Unified Agenda of Federal Regulatory and Deregulatory Actions); James L. Gattuso, *Reining in the Regulators: How Does President Bush Measure Up?*, BACKGROUNDER (Heritage Found., Washington, D.C.), Sept. 28, 2004, at 5–10 (summarizing counts of *Federal Register* pages, *Code of Federal Regulations* pages, and major rules in the Government Accountability Office’s database); Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time* 7–23 (Mercatus Ctr., Working Paper No. 08-40, 2008), http://mercatus.org/sites/default/files/publication/WPPDF_Empirical_Tests_for_Midnight_Regulations.pdf (analyzing relationship between midnight regulations and OIRA review time).

⁶⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (2009) (examining timelines for sixteen rulemakings); Scott R. Furlong, *The 1992 Regulatory Moratorium: Did It Make a Difference?*, 55 PUB. ADMIN. REV. 254, 257–60 (1995) (describing rulemaking trends in President George H.W. Bush’s Administration); Gregory H. Gaertner et al., *Federal Agencies in the Context of Transition: A Contrast Between Democratic and Organizational Theories*, 43 PUB. ADMIN. REV. 421 (1983) (examining effects of the 1980–1981 presidential transition on two federal agencies); Stephen M. Johnson, *Ossification’s Demise? An Empirical Examination of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008) (examining counts and duration of rulemakings at the EPA during the first term of President George W. Bush); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 122–30 (1992) (investigating constraints on the duration of the rulemaking process at the EPA); Loring & Roth, *supra* note 32, at 1450–59 (examining midnight rulemaking in three agencies under Presidents George H.W. Bush and Clinton); Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 399–417 (2007) [hereinafter Shapiro, *Presidents*] (comparing rulemaking in November and December 1999 with rulemaking in November and December 2003); Stuart Shapiro, *Two Months in the Life of the Regulatory State*, 30 ADMIN. & REG. L. NEWS 12 (2005) [hereinafter Shapiro, *Two Months*] (describing rulemaking in November and December 2003); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131–37 (2006) [hereinafter Yackee & Yackee, *Bias*] (examining the effect of interest group comments on forty rulemakings); Susan Webb Yackee, *Assessing Inter-institutional Attention to and Influence on Government Regulations*, 36 BRIT. J. POL. SCI. 723, 731–41 (2006) (analyzing the effect of comments and political institutions on forty rulemakings); Stuart Shapiro, *Explaining Ossification: An Examination of the Time to Finish Rulemakings* (Aug. 11, 2009) [hereinafter Shapiro, *Ossification*], available at <http://papers.ssrn.com/abstracts=1447337> (using ordinary least squares regression models to examine the duration of 435 rulemakings); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990* (Nov. 30, 2010) [hereinafter Yackee & Yackee, *Testing*], available at <http://papers.ssrn.com/abstracts=1699878>.

And there are some explorations of political transitions.⁷⁰ Of the more sophisticated work, almost all of it comes from scholars who typically sit in political science departments or public policy schools and do not write for law reviews.⁷¹ Even there, as well as in less sophisticated work, many studies use page counts in the *Federal Register* as a proxy for rulemaking activity instead of the rules themselves.⁷²

The most interesting and thorough research to date, in my view, is the result of work by Susan Webb Yackee and Jason Webb Yackee.⁷³ In one article, they examine whether procedural constraints imposed by Congress, the White House, or the courts, slow the rulemaking process.⁷⁴ They argue against the ossification thesis—that procedural requirements imposed mainly by the courts discourage agencies from engaging in notice-and-comment rulemaking.⁷⁵ They conclude that “[a]gencies appear readily able to issue a sizeable number of rules and to do so relatively quickly.”⁷⁶ They also posit that “procedural constraints may actually speed up the promulgation of rules, though [their] model suggests that this positive effect may decline, or even reverse, as proposed rules age.”⁷⁷ In another study, they

⁷⁰ See Brito & de Rugy, *supra* note 68; Gaertner et al., *supra* note 69; Gersen & O’Connell, *supra* note 48; Gersen & O’Connell, *supra* note 23; Howell & Mayer, *supra* note 68; Loring & Roth, *supra* note 32; O’CONNELL, *supra* note *; Shapiro, *Presidents*, *supra* note 69; Yackee & Yackee, *Divided*, *supra* note 67; Cochran, *supra* note 68; McLaughlin, *supra* note 68.

⁷¹ But see Gersen & O’Connell, *supra* note 48; Gersen & O’Connell, *supra* note 23; Loring & Roth, *supra* note 32; O’CONNELL, *supra* note *; Yackee & Yackee, *Testing*, *supra* note 69.

⁷² See, e.g., Brito & de Rugy, *supra* note 68; Howell & Mayer, *supra* note 68; Cochran, *supra* note 68.

⁷³ The Yackees and I work with databases independently created from the Unified Agenda of Federal Regulatory and Deregulatory Actions. See O’CONNELL, *supra* note *, at 924 n.103 (summarizing studies using the Unified Agenda).

⁷⁴ Yackee & Yackee, *Ossified*, *supra* note 67.

⁷⁵ See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 49 (1993); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225–54 (1990); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 530 (1997) (arguing against Professor Seidenfeld’s suggestion that “judicial contribution to the ossification problem can be successfully brought under control”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (examining existing evidence and causes of ossification as well as avoidance devices). Yackee and Yackee are not the first to challenge the ossification thesis. See, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466 (1992) (exploring issues of rulemaking by considering the importance of the “traditions of holding government accountable to the law it creates for itself”).

⁷⁶ Yackee & Yackee, *Ossified*, *supra* note 67, at 261.

⁷⁷ *Id.* Yackee and Yackee have recently completed another study on ossification—focusing on the Department of the Interior—that spans a more relevant period for assessing ossification, from 1950 to 1990. Yackee & Yackee, *Testing*, *supra* note 69. This second study yields similar results, finding “mixed and relatively weak evidence of ossification.” *Id.* at 1. Specifically, they find that the Department of the Interior continues to “promulgate large volumes of regulations” but that those regulations, on average, “take somewhat longer to complete in the ossified era than before.” *Id.*

consider whether divided government hinders rulemaking activity.⁷⁸ They find that “during periods of divided government, agencies issue fewer rules and fewer substantively significant rules than they do during periods of unified government.”⁷⁹ They examine political and judicial transitions but focus only on completed rulemakings.

This Article expands and builds on their and my prior research by considering transitions and all aspects of the rulemaking process—initiations, completions, and withdrawals—across dozens of agencies and over twenty-five years. Comprehensive and easily analyzable information on agency rulemaking is surprisingly difficult to find. Some scholars still tally the pages in the *Federal Register*,⁸⁰ but volume in the *Federal Register* is at best a rough proxy for rulemaking activity. Specifically, page counts may be a misleading indicator of regulatory activity in that explanatory materials that appear in the *Federal Register* may not be correlated with actual regulatory changes.

Moreover, the federal government keeps different tallies of rulemaking activity by agencies depending on how a rule is defined. Since 1996, under the Congressional Review Act, the Government Accountability Office (GAO), formerly known as the General Accounting Office, has tracked agency rules, reporting “major” rules to Congress.⁸¹ The GAO’s Federal Rules Database relies on information submitted to it by agencies. It contains detailed information on these major rules and (at least in the public version) only cursory information on the remaining reported rules. The Regulatory Information Service Center (RISC) also keeps count of agency rules by assessing all agency rule submissions to the *Federal Register*. Its counts are the most inclusive of all sources of regulatory activity, as RISC includes all rules the APA and the Freedom of Information Act require to be published.⁸² These counts also go back nearly three decades. They are not regularly posted, however, and they are aggregate counts with no information linked to particular rulemakings.

In an ideal world, empirical studies of rulemaking would use individual agency rule submissions to the *Federal Register*. Since virtually all rules

⁷⁸ Yackee & Yackee, *Divided*, *supra* note 67. This work was conducted independently and published shortly after my research on divided government and rulemaking in O’CONNELL, *supra* note *.

⁷⁹ Yackee & Yackee, *Divided*, *supra* note 67, at 128.

⁸⁰ See Brito & de Rugy, *supra* note 68; Howell & Mayer, *supra* note 68; Cochran, *supra* note 68.

⁸¹ Under the Act, “[t]he term ‘major rule’ means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) 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 U.S.C. § 804(2) (2006).

⁸² STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 103 (2008).

are published in the *Federal Register*,⁸³ there would be no selection issues as to what rules were included. These submissions also contain individual-level information about a rulemaking—when it commenced, when the public period opened, how many comments were received, when the final rule was issued, what the rule is about, whether the rule is significant, and so forth. The problem is that gathering that information for many agencies over any serious length of time is prohibitively time-consuming as there is no database of *Federal Register* entries with rulemaking attributes coded in separate fields; instead, researchers would have to search electronically through the text of the *Federal Register* and then code various characteristics of each relevant entry. Understandably, scholars who use individual entries in the *Federal Register* (as opposed to page counts) to study rulemaking generally look at particular agencies or at short periods of time.⁸⁴

This Article uses a database constructed from the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is published twice a year in the *Federal Register*.⁸⁵ The Unified Agenda collects agency reports on rulemaking activity. Although these reports do not contain all the information present in the *Federal Register* notices of rulemakings (for instance, the number of comments received in a notice of final rulemaking), they do contain many important components of the rulemaking. Most critically, they provide dates of important actions in the rulemaking process: when any NPRMs were issued, when any comment periods opened, when any comment periods closed, when any final rule was issued, when any NPRM was withdrawn (i.e., not completed), when any interim rule was issued, when any statutory or judicial deadlines expire, and similar dates. They also note certain characteristics of the substance of the rulemaking: the abstract of the rule; the effects of the rule on state, local, or tribal interests; the significance or mundaneness of the rule; the priority of the rule; and the designation of the rule as “major” under the Congressional Review Act, if applicable.

The Unified Agenda’s scope of rules is comparable to the GAO’s Federal Rules Database, though they are not identical. In addition, the Unified Agenda contains most but not all rules published in the *Federal Register*.

⁸³ See 5 U.S.C. § 552(a)(1) (2006) (“Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the foregoing.”).

⁸⁴ See Loring & Roth, *supra* note 32, at 1450–51 (restricting analysis to three agencies over two presidential transitions); Shapiro, *Presidents*, *supra* note 69, at 400 (limiting analysis to two two-month periods, one in 1999 and one in 2003); Yackee & Yackee, *Testing*, *supra* note 69, at 31–33 (looking at forty years of entries for the Department of the Interior).

⁸⁵ I am making this compiled database available to interested scholars. Please email aoconnell@law.berkeley.edu. See also *Data Sets for Northwestern University Law Review* 105:2, NW. U. L. REV. (Oct. 1, 2011), <http://www.law.northwestern.edu/lawreview/issues/105.2/data.html>. Recent editions of the Unified Agenda are available at <http://www.reginfo.gov/public/do/eAgendaMain>.

The difference appears to be that agencies do not report all routine rulemaking actions that get labeled as rules in the *Federal Register* to the Unified Agenda. Despite the slight cost in scope (as compared to the *Federal Register*), the Unified Agenda is provided in .xml format to the public, making database construction of individual features of rulemakings feasible for a large number of agencies over a long period of time.⁸⁶

I am not the first to use the Unified Agenda to study agency rulemaking.⁸⁷ But the database I have constructed spans, as far as I can tell, the longest period of time, from the fall of 1983 to the spring of 2010. It contains information for all unique Regulation Identifier Numbers (RINs) for fifteen cabinet departments, eight executive agencies, and twenty-four independent agencies (of which two were executive agencies for some of the period).⁸⁸ Of the 48,091 RINs in the database, 22,294 report at least one

⁸⁶ There are some complexities involved in using the Unified Agenda reports. Most important, an individual rulemaking may appear in successive versions of the Agenda. Some scholars do not filter out these duplicative entries, leading to overcounting of rulemaking activity. See O'CONNELL, *supra* note *, at 925 n.104. I used the most recent Agenda report for a particular rulemaking. This means that if an earlier entry for a rulemaking contained certain information that a later entry did not, the earlier information would not be included in the database. To that extent, the database undercounts particular regulatory actions. I used the latest entry on the assumption that it was the most reliable.

⁸⁷ See *supra* note 73 and accompanying text.

⁸⁸ 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); Department 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 the 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 the Treasury (not including Internal Revenue Service); and the 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 (before 1999); National Aeronautics and Space Administration; National Archives and Records Administration; Office of Management and Budget; Office of Personnel Management; Small Business Administration; Social Security Administration (before 1995); and Agency for International Development. The independent agencies include the following: 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; Internal Revenue Service (after 1998); 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 (after 1994); and the Surface Transportation Board. The IRS Restructuring and Reform Act of 1998 established a five-year term of office for the IRS Commissioner, which applied to the current leader at the time of enactment. The SSA became independent under the Social Security Independence and Program Improvements Act of 1994.

NPRM, 27,048 report at least one final action, 3346 report at least one interim final rulemaking, and 8292 report at least one withdrawal or deletion of action, all with an actual date.⁸⁹ Of the close to 22,000 RINs that report an NPRM, 19,113 ended with a final rule or action or with the NPRM being withdrawn. Approximately 10% (1861 RINs) ended with a withdrawal. Most of the remaining approximately 3000 RINs with NPRMs that did not end with a final action or withdrawal appear either to still be in process or to have had some other action taken (such as an interim rule).

III. RULEMAKING TRENDS AND POLITICAL TRANSITIONS

Agencies do not engage in a constant stream of rulemaking activities. Although scholars have discussed the rush to complete rulemakings prior to a presidential transition, other aspects of the rulemaking process—initiation and withdrawals of proposed rules—also go through cycles.⁹⁰ In addition, changes in the White House are not the only transitions shaping agency decisionmaking. As discussed previously, congressional and judicial transitions are also important events to study.⁹¹

Building on earlier research, this Part uses approximately twenty-five years of regulatory data, from 1983 to 2010, to track initiations, completions, and withdrawals of rulemakings in recent decades.⁹² I suggest potential explanations for apparent variations in these stages of the regulatory process, some of which are explored more systematically in Parts IV and V.

A. Initiations of Rulemaking

The actual initiation of rulemaking is poorly understood as an empirical matter. Before an agency publicly issues an NPRM, much internal deliberation and even White House review (if the agency is not an independent regulatory commission) occurs. Because the timing of agency deliberation prior to White House review is not publicly visible, though,

⁸⁹ Agencies can also list actions they intend to undertake with predicted dates (which are marked with “00” in the day field). I excluded those intended actions. Because I used the latest entry on a rulemaking, many of these intended dates became actual dates and were therefore included.

⁹⁰ See O’CONNELL, *supra* note *, at 937–52, 959–63.

⁹¹ See *id.* at 967–71; *supra* Part I.B–C.

⁹² An action is counted as an “initiated regulatory action” if the rulemaking action listed in the timetable field was an NPRM. An action is counted as a “completed regulatory action” if the rulemaking action listed in the timetable field was a final rule or final action. An action is counted as a “withdrawal” 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 initiations, the earliest date was used; for final actions and withdrawals, the latest date was used.

almost all empirical work on the rulemaking process measures the start from the publication of the NPRM.⁹³

This Article is no different in that regard. Figure 1 displays the number of NPRMs by cabinet departments, executive agencies, and independent agencies from 1983 to 2009.⁹⁴ To look within each of these categories, I chose four agencies with healthy rulemaking activity—two cabinet departments with different constituencies, one executive agency with overlapping constituencies with one of the cabinet departments, and one independent regulatory commission with overlapping constituencies with the other cabinet department. Figure 2 charts NPRMs for these agencies: the Department of Commerce, the Department of the Interior, the Environmental Protection Agency (EPA), and the Federal Communications Commission (FCC). Figure 3 shows counts of significant NPRMs for the three major types of agencies; because the significance of rulemakings was reliably reported to the Unified Agenda only starting in 1995, the counts run from 1995 to 2009.⁹⁵

⁹³ See Gersen & O'Connell, *supra* note 48, at 988–89 (measuring duration of the rulemaking process from the issuance of the NPRM); Gersen & O'Connell, *supra* note 23, at 1178 (looking at the timing of NPRMs by day of week and whether Congress was in recess); O'CONNELL, *supra* note *, at 937–52 (analyzing NPRMs as the start of the rulemaking process); Shapiro, *Presidents*, *supra* note 69, at 412–17 (calculating duration of rulemaking process from the NPRM); Yackee & Yackee, *Ossified*, *supra* note 67, at 271 (analyzing “months elapsed between publication of an NPRM and its associated final rule”); Yackee & Yackee, *Divided*, *supra* note 67, at 135 (using counts of NPRMs as a measure of the initiation of rulemaking). But see U.S. GEN. ACCOUNTING OFFICE, GAO-01-821, AVIATION RULEMAKING: FURTHER REFORM IS NEEDED TO ADDRESS LONG-STANDING PROBLEMS 8–9 (2001) (examining delay between statutory delegation and issuance of NPRMs in one area of regulation); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 69, at 18 (examining true start of rulemaking process and measuring duration from that until publication of the proposed rule); Kerwin & Furlong, *supra* note 69, at 120–22 (using data from the EPA to examine time before the NPRM, time between NPRM and final rule, and time between the pre-NPRM start of the process and final rule for one agency). In some cases, agencies do publish Advance NPRMs, but because they are not consistently issued, the commencement of rulemaking is still generally connected to the NPRM. In significant rulemakings reviewed by OIRA, there are measures of the time OIRA took to review an NPRM before it was published. The length of that process varies. See McLaughlin, *supra* note 68, at 28. Despite seeming variation in the length of that process, researchers have not used the date of submission to OIRA as the start of the rulemaking process.

⁹⁴ Years run from January 20 of one year to January 19 of the following year. Thus, an NPRM issued on January 5, 2001 is counted as a 2000 NPRM. Because I have only partial data on 2010—from the spring edition but not the fall edition, of the Unified Agenda—I do not include 2010 in the figures in this Part.

⁹⁵ Actions are deemed “significant” if the priority code field is listed as economically significant or otherwise significant or if the major field was coded as “yes.” See *supra* text accompanying note 15.

FIGURE 1: NPRMs BY TYPE OF AGENCY

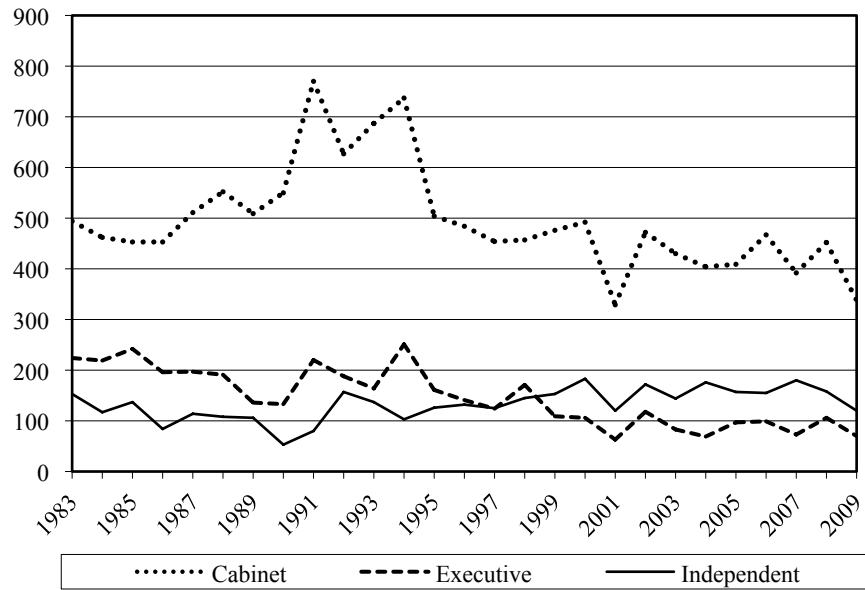


FIGURE 2: NPRMs BY FOUR AGENCIES

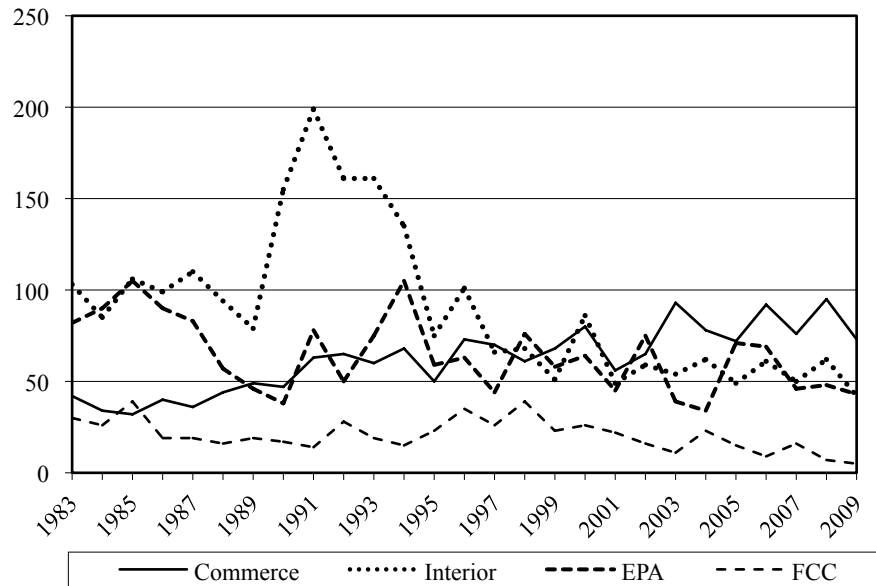
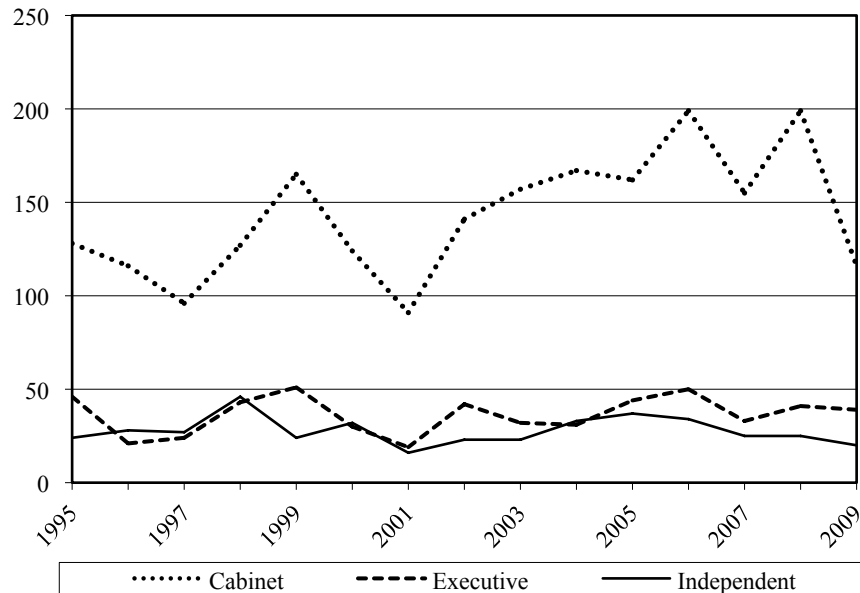


FIGURE 3: SIGNIFICANT NPRMS BY TYPE OF AGENCY



These figures suggest two possible patterns. First, many agencies are slow to initiate rulemakings in the first year of an administration. Cabinet departments and executive agencies—institutions presumably under more presidential control than independent regulatory commissions—generally issue fewer NPRMs in a president's first year than in other (though not all) years.⁹⁶ To be certain, there are exceptions. The Department of the Interior published more NPRMs in 1993 (161) than in any other year of the Clinton Administration.⁹⁷ Although Figure 3 covers only one start of a full administration, the observation also holds for significant rulemakings under President George W. Bush.

Several stories could explain this slow start. Most straightforwardly, starting a rulemaking takes time. Before an NPRM is issued, the agency has to determine that it wants to regulate (or deregulate) in a particular area, has to figure out the contours of what it wants to do, and, if the agency is a cabinet department or executive agency, has to seek White House approval of the actual NPRM. In a good number of cases, especially involving significant regulations, the agency is working with the White House (often

⁹⁶ The overall decline in executive agency NPRMs after 1998 is driven by the IRS switching from an executive agency to an independent agency in the coding. *See supra* note 88 and accompanying text.

⁹⁷ That was a decline from most of the years in the preceding Administration.

staff but, in rare cases, the president) before formally submitting the NPRM for OIRA approval.⁹⁸

It also takes presidents months to fill key leadership positions in agencies. Presidents Clinton and George W. Bush waited over six months, on average, for Senate-confirmed appointees to take their places in cabinet departments and executive agencies; part of that wait was due to the delay in nominating appointees and part was the delay in confirming appointees once nominated.⁹⁹ Although cabinet secretaries are generally in place quite quickly, heads and deputy heads of executive agencies, deputy secretaries, assistant secretaries, and other key positions take much longer to staff.¹⁰⁰ Agencies typically hold off starting at least some if not most rulemakings until top officials are in place.¹⁰¹ In addition, new administrations may focus their immediate regulatory attention on reviewing and undoing rulemakings of the previous administration, which may prevent agencies from launching new regulatory (or deregulatory) initiatives. This motivation to review and undo regulations is driven by a change in policy preferences from the outgoing to incoming president. It also underlies the unwillingness of agencies, in some contexts, to formally start regulations in which the preceding administration had completed the preliminary work without reviewing that work carefully.

Finally, when presidents take office, they may look for quicker mechanisms than notice-and-comment rulemaking to influence policy. Executive orders might be one alternative.¹⁰² Presidents Clinton and George W. Bush promulgated more executive orders in their first years than in all other years.¹⁰³ Emergency or interim rules are another alternative, as they take less time to issue because there are no prior notice-and-comment procedural requirements. Figure 4 displays the number of interim rules for cabinet departments, executive agencies, and independent agencies from 1983 to

⁹⁸ See Kagan, *supra* note 51, at 2283–84.

⁹⁹ O’Connell, *supra* note 33, at 956 & n.214.

¹⁰⁰ *Id.* at 957.

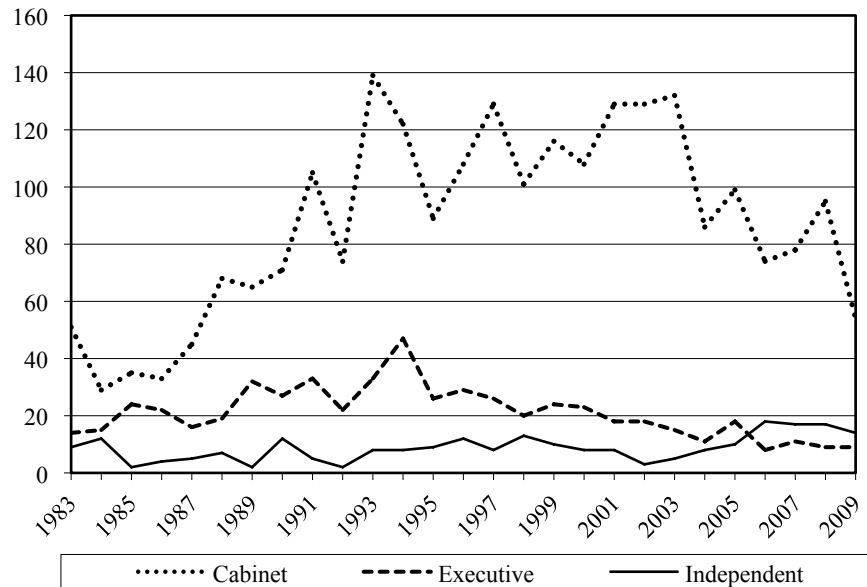
¹⁰¹ See ANNE JOSEPH O’CONNELL, WAITING FOR LEADERSHIP: PRESIDENT OBAMA’S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 11–12 (2010).

¹⁰² See KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 3–33 (2001).

¹⁰³ *Administration of William J. Clinton (1993–2001): Disposition of Executive Orders Signed by President William J. Clinton*, THE NAT’L ARCHIVES, <http://www.archives.gov/federal-register/executive-orders/clinton.html> (last visited Aug. 20, 2011); *Administration of George W. Bush (2001–2009): Disposition of Executive Orders Signed by President George W. Bush*, THE NAT’L ARCHIVES, <http://www.archives.gov/federal-register/executive-orders/wbush.html> (last visited Aug. 20, 2011). More attention has been paid instead to the spike in executive orders at the end of an administration. See L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL 34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 10–13 (2008) (showing spike in executive orders at the end of the past five Administrations); Beermann, *supra* note 28, at 970 (showing increase in executive orders at the end of the Clinton Administration); Howell & Mayer, *supra* note 68, at 538–39 (showing uptick in executive orders in a president’s final months).

2009. There was a jump in interim rules by cabinet departments in the first year of the Clinton and George W. Bush Administrations. Indeed, these departments issued more interim rules (139) in the first year of the Clinton Administration than in any other year of his presidency. There was also a noticeable increase in interim rules by executive agencies in the first year of the Clinton Administration from the preceding year.

FIGURE 4: INTERIM RULES BY TYPE OF AGENCY



While the first pattern focuses on the period after a presidential transition, the second potential pattern targets the period before a shift in political control. Usually, commentators remark upon midnight *completions* of rules in the closing months of a presidential administration.¹⁰⁴ However, there are also midnight *initiations* of rules before control of the White House shifts. According to the extended database constructed for this Article, President George H.W. Bush's cabinet issued over 140% more NPRMs during the final three months in office (November–January, 218 NPRMs) than did President George W. Bush's cabinet (90 NPRMs), over 75% more NPRMs than did President Clinton's cabinet (124 NPRMs), and almost 30% more than did President Reagan's cabinet (169 NPRMs). The most plausible explanation seems to be that President George H.W. Bush expected a second term; when he was not re-elected, he appears to have tried to push his de-regulatory agenda before President Clinton took office. Interestingly, cabi-

¹⁰⁴ See, e.g., Fahrenthold, *supra* note 3; Smith, *supra* note 4; *infra* text accompanying note 179.

net departments issued more NPRMs during the third quarter of President George W. Bush's final year than in any other quarter during his Administration.¹⁰⁵

Presidential transitions are not the only form of political transition. Control of Congress is an important factor in agency decisionmaking. In Figure 1, there is a spike in NPRMs from cabinet departments and executive agencies in 1994, before Congress shifted from Democratic to Republican control, as well as a jump in 2006, before Congress changed from Republican to Democratic control. For a specific example, the EPA started more rulemakings in the final quarter of 1994 (November–January, 36 NPRMs) than in any other quarter of the Clinton Administration. Figure 3 does not capture the 1994 transition but does display an increase in significant NPRMs by cabinet departments and executive agencies before the Democrats took control of Congress in 2007.

One of the biggest criticisms of aggregate counts, including those used in this study, is that they do not distinguish between regulatory and deregulatory rulemakings.¹⁰⁶ Such a distinction, however, would require either automating the coding of the Unified Agenda's rule summaries or coding each rule by hand. Neither option seemed feasible: it is not clear that automated coding of the abstracts is possible, and hand-coding would be extraordinarily labor-intensive. These counts can be analyzed by agency mission, which might approximate regulatory or deregulatory preferences. Joshua Clinton and David Lewis have developed a typology of agency ideology from expert surveys; this typology provides an ideological measure on a conservative to liberal scale of an agency, irrespective of time period. Using this typology, thirty-seven of the forty-seven agencies in the Unified Agenda database can be coded as liberal, neutral, or conservative, assuming that liberal agencies tend to be pro-regulation, conservative agencies tend to be pro-deregulation, and neutral agencies demonstrate no such tendency.¹⁰⁷ For example, the Departments of Commerce and the Interior are classified

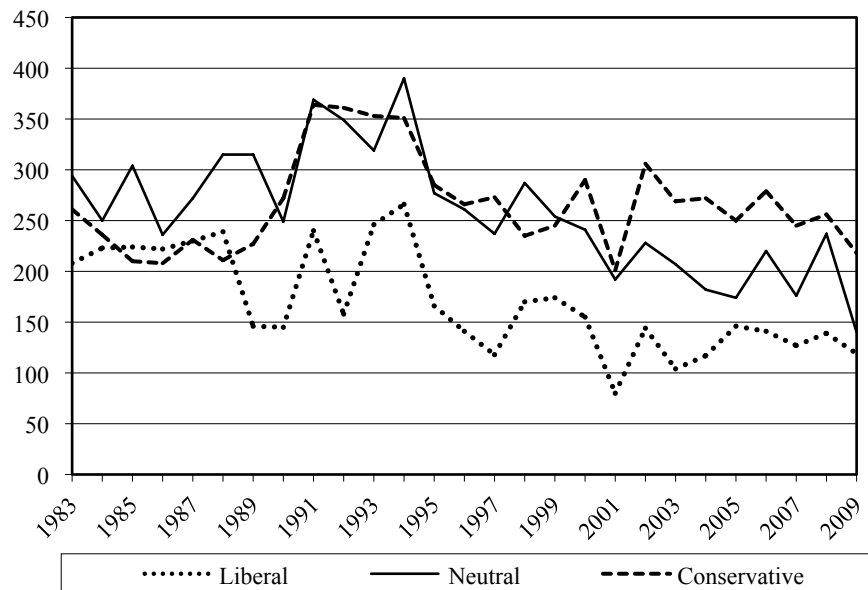
¹⁰⁵ The first quarter includes actions from February, March, and April. The second quarter includes actions from May, June, and July. The third quarter includes actions from August, September, and October. The fourth quarter includes actions from November, December, and January of the subsequent year. The fourth quarter matches, albeit imperfectly, the period between a November election and presidential inauguration (when those occur). These agencies had been directed by the Chief of Staff to issue any NPRMs by June 1, 2008. Bolten Memo, *supra* note 5. Because June falls in the second quarter, not the third, it appears a large number of NPRMs missed that deadline.

¹⁰⁶ See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. & CONTEMP. PROBS. 185, 198 n.41 (1994).

¹⁰⁷ Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 17–19 (2008). If the confidence interval of the agency's score included 0, the agency was coded as neutral. This typology has weaknesses. Most troubling is that ideology, derived from expert surveys, does not vary by party or administration. In other words, an agency has the same ideological label regardless of whether members of the Republican or Democratic Party currently staff its top ranks.

as conservative, the EPA is marked as liberal, and the FCC is categorized as neutral. Figure 5 tracks the number of NPRMs by agency ideology.

FIGURE 5: NPRMS BY AGENCY IDEOLOGY



From Figure 5, it appears that initiations of rulemakings by ideologically divergent agencies share some trends; when NPRMs from liberal agencies jump from one year to another, often so do NPRMs from conservative agencies. One potentially notable discrepancy occurs before the 1995 and 2007 congressional transitions. In 1994, before the Democrats turned over power in Congress to the Republicans, liberal and neutral agencies had the highest number of NPRMs, whereas NPRMs by conservative agencies did not rise that year from the previous year. One explanation is that liberal agencies wanted to start rulemakings before Republicans took control of Congress so that it would be harder to prevent those initiatives from being suspended—it is harder to kill a regulatory process that has formally started than one that has not started at all. In 2006, before the Republicans handed over control of Congress to the Democrats, conservative and neutral agencies increased their NPRMs from the preceding year. The converse of the preceding explanation could hold true for conservative agencies before Democrats took charge of both chambers of Congress. Although Figure 5 is consistent with this explanation, it does not actually test the validity of that explanation.

Parts IV and V provide more systematic explorations of rulemaking completions and withdrawals but not of initiations of the rulemaking proc-

ess. Other research has provided some of this needed rigorous analysis. For instance, using a Poisson model of counts of NPRMs for ten agencies (with fixed effects for the potential lack of independence among observations for a particular agency) on an earlier version of the database examined here, I find that the first year of an administration is associated (in a statistically significant manner) with fewer rulemakings; that the last year has no significant effect; that the significant interaction of a Republican president (and, separately, Congress) with agency independence may suggest that independent agencies engage in more rulemakings under a Republican president or Congress; and that divided government does not seem to be linked either way to more or fewer NPRMs being issued.¹⁰⁸ In work published soon thereafter (from research conducted independently from mine on a larger set of agencies), Yackee and Yackee find a statistically significant negative relationship between divided government and the issuance of NPRMs.¹⁰⁹ More work, of course, remains to be done on the initiation of rulemaking as defined by the issuance of NPRMs, including examination of the interaction between agency missions or ideology and political transitions.

B. Completions of Rulemaking

Unlike the amorphous commencement of the rulemaking process, at least in its nonpublic form, the enactment of a rule is easier to identify. Each agency publishes its final rules or actions in the *Federal Register* to take effect usually thirty or sixty days later and reports those dates in the Unified Agenda.¹¹⁰ Figure 6 charts final actions by cabinet departments, executive agencies, and independent agencies from 1983 to 2009. Figure 7 displays the number of such actions for the Department of Commerce, Department of the Interior, EPA, and FCC.

¹⁰⁸ O'Connell, *supra* note 33, at 942–46.

¹⁰⁹ Yackee & Yackee, *Divided*, *supra* note 67, at 134. When they look at cabinet departments and other agencies separately, the result holds only for the former category; they find no significant relationship between divided government and the issuance of NPRMs by noncabinet departments. *Id.* at 138. Moreover, they find no significant relationship between divided government and the issuance of significant NPRMs. *Id.*

¹¹⁰ See *infra* notes 190–91 and accompanying text.

FIGURE 6: FINAL ACTIONS BY TYPE OF AGENCY

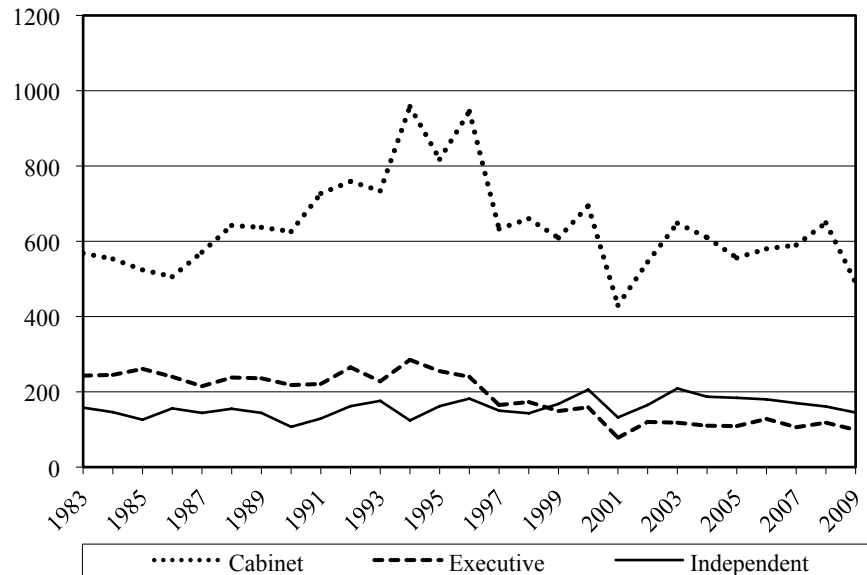
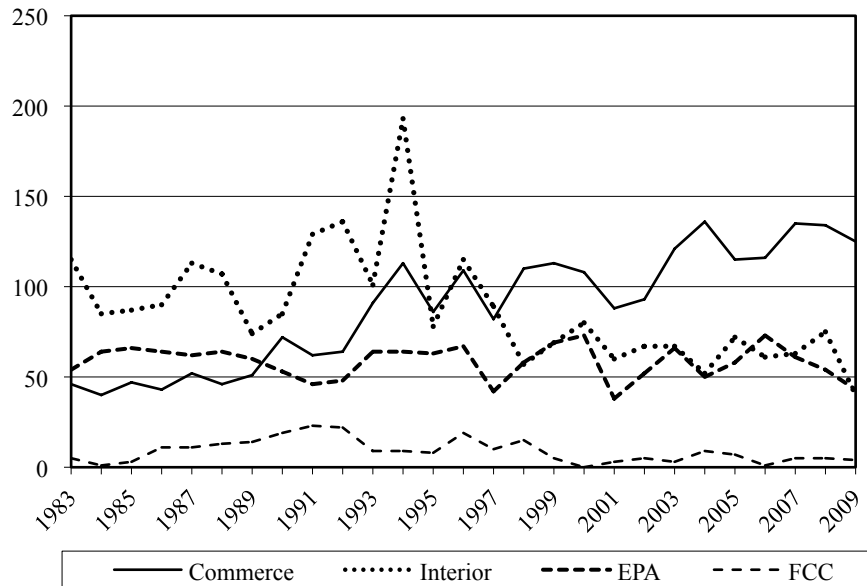


FIGURE 7: FINAL ACTIONS BY FOUR AGENCIES



As with initiations of the rulemaking process, as marked by the issuance of an NPRM, agencies do not churn out final actions at a steady rate.

There seem to be fewer completions in the first year of an administration, compared to other years of that administration, for all types of agencies. For instance, there were 430 final actions by cabinet departments in 2001; the next lowest number of completions for the George W. Bush Administration was 545 in 2002. By contrast, there seem to be more completions by cabinet departments in the final year of that Administration, at least compared to previous years. For example, there were 649 final actions in 2008, beating (barely in some cases) every other year; the next highest was 648 completions in 2003.

These yearly counts comport with two stories about midnight regulations. The first is the conventional account, which posits that, in the face of a presidential transition, outgoing presidents try to extend their policy preferences into the next administration and beyond. For instance, presidents “burrow” political appointees into the career civil service,¹¹¹ assign land for national monuments,¹¹² and grant presidential pardons.¹¹³ Furthermore, relevant to this Article, their agencies enact midnight regulations.¹¹⁴ Cabinet departments under President Reagan and President George W. Bush and all types of agencies under President George H.W. Bush completed more rulemakings in the final year than in any previous year of those Administrations. President Clinton’s cabinet departments, executive agencies, and independent agencies, and President Reagan’s executive and independent agencies, all as groups, also increased their final actions in the final year from the preceding year. As with initiations, these are comparisons among groups of agencies (sorted by structure). For many possible reasons, individual agencies within a particular group do not necessarily follow the pattern for their type of agency. For example, the Department of Commerce issued just barely more final actions in 2004 (136 actions) than in 2008 (134 actions).

The figures also suggest another account of midnight regulations that is far less commonly recognized by scholars and commentators: a rush to complete rules before a change in control of Congress. President Clinton’s cabinet departments, as a group, completed considerably more regulatory actions in 1994, before Republicans took over in Congress, than in his final year. Figure 7 shows that the pattern holds for the individual Departments of Commerce and the Interior. Executive agencies, as a group, also completed more actions in 1994 than in the preceding year, though the EPA did not. Independent agencies, as a group, produced fewer final actions in 1994 than in 1993. The contrast for cabinet departments was not as sharp in

¹¹¹ See Mendelson, *supra* note 28, at 563–64.

¹¹² See Howell & Mayer, *supra* note 68, at 546–47.

¹¹³ See P.S. Ruckman, Jr., “Last-Minute” Pardon Scandals: Fact and Fiction (Apr. 15, 2004) (unpublished manuscript), available at <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf>.

¹¹⁴ See generally Beermann, *supra* note 28 (describing phenomenon of midnight regulations); Mendelson, *supra* note 28, at 561–63 (same).

2006. Under President George W. Bush, cabinet departments slightly increased their output in 2006 from the preceding year, but the difference was much smaller than it was during the 1994 congressional transition. The Department of Commerce's output jumped by only one action (from 115 to 116), and the Department of the Interior's completions actually dropped. The EPA, however, finished more rules in 2006 than it did in 2005.

Because of the paucity of two-chamber shifts in congressional control from 1983 to 2009, it is difficult to draw inferences about the role of congressional transitions in regulatory decisions. Nevertheless, the two transitions do provide some interesting changes in the regulatory environment that could be explored further. It could be that changes to the rulemaking process depend on the direction of the shift; the move from a more regulatory to a more deregulatory Congress may produce more rulemaking than a shift from a more deregulatory to a more regulatory Congress in the closing months of a congressional regime.

These presidential and congressional transition stories are also plausible for completions of significant rulemakings.¹¹⁵ Figure 8 shows significant regulatory actions for the three major types of agencies by quarter year from 1995 to 2009.¹¹⁶ In terms of presidential transitions, cabinet departments finished more important actions in the last quarter of President Clinton's Administration (83 actions) than in any other quarter in the data for that presidency (the next highest was the second quarter of 1996 with 55 actions). Similarly, cabinet departments and executive agencies promulgated more final actions (95 and 22 actions, respectively) in the final quarter of President George W. Bush's Administration than in any other quarter of his presidency (the next highest were 72 and 20 actions in the third quarter of the final year for cabinet departments and executive agencies, respectively). President George W. Bush took unprecedented steps to make the rules issued in his final year harder to overturn. In May 2008, Chief of Staff Joshua Bolten directed the cabinet and executive agencies to propose any new rules by June 1 and to finish any rules by November 1 except in "extraordinary circumstances."¹¹⁷ No other president covered by the database has issued such deadlines to agencies in the final year. If agencies had fully complied with the memorandum, which they did to some degree both for NPRMs¹¹⁸ and for completions, rules would have taken effect before President Bush left the White House. This would have prevented the new president from suspending future effective dates of rules, which President Bush himself had done after President Clinton stepped down.

¹¹⁵ See *supra* note 15 and accompanying text.

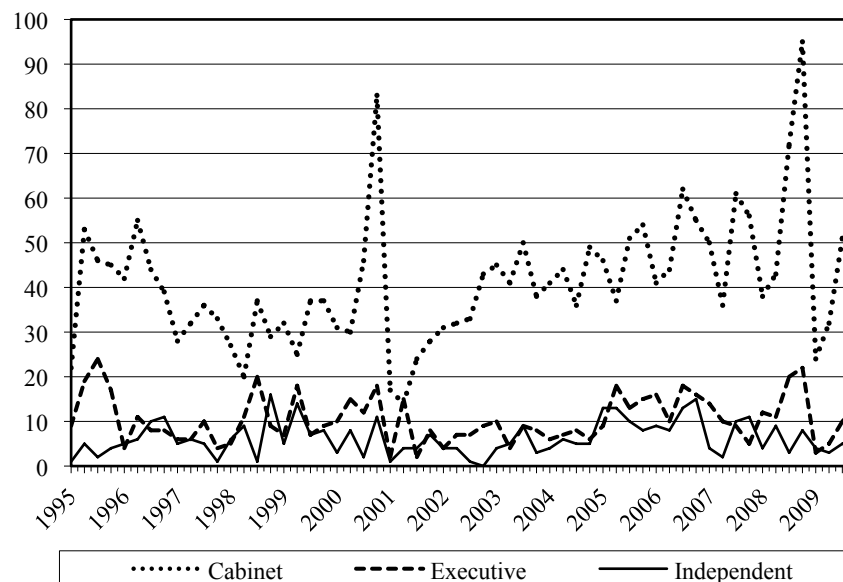
¹¹⁶ See *supra* note 105.

¹¹⁷ See Bolten Memo, *supra* note 5.

¹¹⁸ See *supra* note 105 and accompanying text.

In terms of congressional transitions, the reliable reporting of significant actions began after the 1994 election.¹¹⁹ There was a jump in completions in 2006, but it began in the third quarter (before the election). In that quarter, cabinet departments finished 62 significant actions, more than in any previous quarter (the next highest was 54 actions in the final quarter of 2005). Executive agencies and independent agencies also pushed through as many or more important actions than in each of the preceding quarters. The volume of such final actions was largely sustained in the final quarter. For instance, cabinet departments completed 55 actions in the final three months of the Administration. Perhaps agencies expected control of Congress to shift before the election and rushed rulemakings in anticipation of a change from Republican to Democratic control.

FIGURE 8: SIGNIFICANT FINAL ACTIONS BY TYPE OF AGENCY



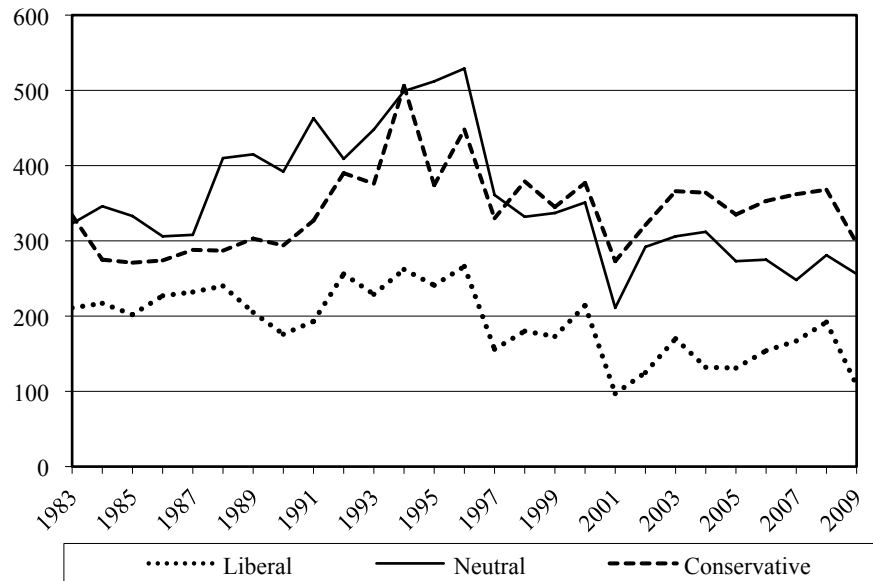
To try to distinguish among final actions, Figure 9 breaks down completions by agency ideology. As with NPRMs, final actions by ideologically divergent agencies often rise and fall together. In 1988, 2000, and 2008, all final years of presidential administrations, completions rose from the preceding year for all three categories, except that conservative agencies stayed essentially flat in 1988. But in 1992, although there was a jump in final rules by liberal and conservative agencies, final actions by neutral agencies fell from 463 to 409. The two congressional transitions show some similarities and some differences. In 1994 and 2006, years before a

¹¹⁹ O'CONNELL, *supra* note *, at 937 n.139.

two-chamber shift, final actions for all three groups jumped from the previous year. In 1995, after control had shifted, there was a decrease in liberal and conservative final actions and an increase in final actions by neutral agencies. By contrast, in 2007, there was an increase in liberal and conservative final actions but a drop in final rules by neutral agencies.

One possible explanation is that because Republicans favor fewer regulations, they were able to pressure many agencies to issue fewer regulations. Indeed, there was a downward trend in final actions, starting in 1995. By contrast, in this story, because Democrats support more regulations, they were able to get many agencies to increase their regulatory output, though there does not seem to be an upward trend starting in 2007. There may be too few years of post-2006 data, however, to determine if regulatory output has had a sustained increase.

FIGURE 9: FINAL ACTIONS BY AGENCY IDEOLOGY



As with initiations, these data concerning completed regulatory actions are meant to generate potential explanations of various trends. The proposed explanations concerning the pressure to finish rules before presidential and congressional transitions need to be tested more systematically. Some research has taken up this challenge. Specifically, as with initiations, I have analyzed a Poisson model of counts of final actions for ten agencies (with fixed effects for the potential lack of independence among observations for a particular agency) on an earlier version of the database used here. That examination, which compared final actions in the fourth quarter of

each year, produced several findings—that agencies finished fewer fourth-quarter actions under Republican presidents than under President Clinton; that agencies completed more fourth-quarter actions in the final year of an administration; and that neither party’s control of Congress, nor divided government, has a statistically significant relationship with fourth-quarter final actions.¹²⁰ Similar to their results on NPRMs, Yackee and Yackee found a significant relationship between divided government and final actions in their aggregated data and between divided government and significant final actions, but they did not find a significant relationship for noncabinet agencies.¹²¹

Because my earlier analysis focused just on the fourth-quarter counts of each year, it may have missed important changes that would have been captured by looking at a greater universe of final actions. Part IV expands this work by using a statistical model to examine connections between transitions and the duration of the rulemaking process for all regulatory actions that started with an NPRM and ended with a final action between 1983 and 2009.

C. Withdrawals of Rulemaking

In most studies of rulemaking, analysts look only at completed rulemakings. Some examine the time it takes from the initiation to completion.¹²² Others consider what changes are made between the start and end of the process.¹²³ But agencies start some rulemakings that they decide later not to complete.¹²⁴ Such withdrawals are supposed to be reported to the Unified Agenda as part of an agency’s annual regulatory plan.¹²⁵ Figure 10 displays the number of withdrawals by cabinet departments, executive agencies, and independent agencies from 1983 to 2009. Figure 11 charts such actions for the Department of Commerce, Department of the Interior, EPA, and FCC.

¹²⁰ *Id.* at 956–57. This work used a wider definition of final action to include interim and direct final rules.

¹²¹ Yackee & Yackee, *Divided*, *supra* note 67, at 134, 138.

¹²² *See, e.g.*, Yackee & Yackee, *Ossified*, *supra* note 67, at 267–68.

¹²³ *See, e.g.*, Yackee & Yackee, *Bias*, *supra* note 69, at 131–32; Yackee, *supra* note 69, at 730.

¹²⁴ In almost all cases, unfinished rules can be withdrawn without prior notice and opportunity for comment. Nevertheless, the decision to withdraw a proposed rule may face judicial scrutiny. *See* Gersen & O’Connell, *supra* note 23, at 1186–97. The withdrawal of a proposed rule differs from a rule rescission, which is the reversal, typically through notice and comment, of a completed rule.

¹²⁵ *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., R40713, THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 7–8 (2009). Withdrawals do appear to be regularly reported. *See infra* note 152.

FIGURE 10: WITHDRAWALS BY TYPE OF AGENCY

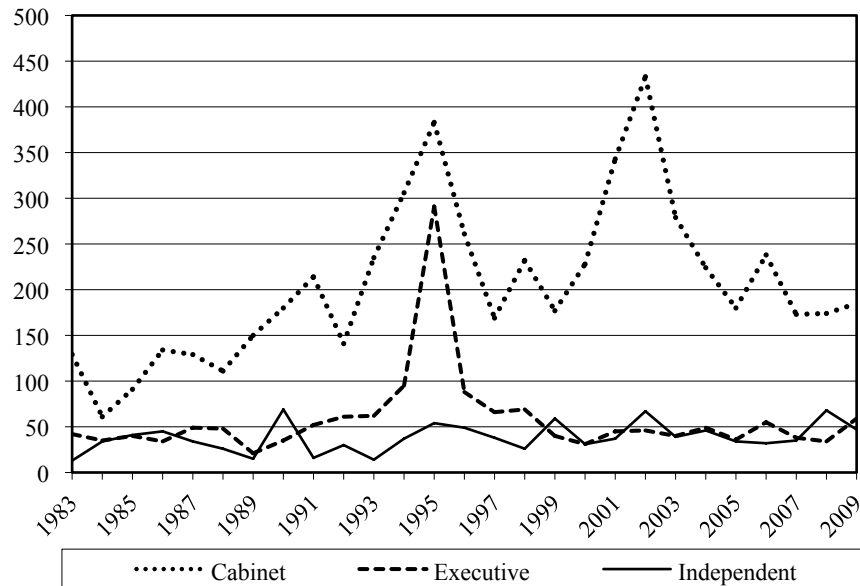
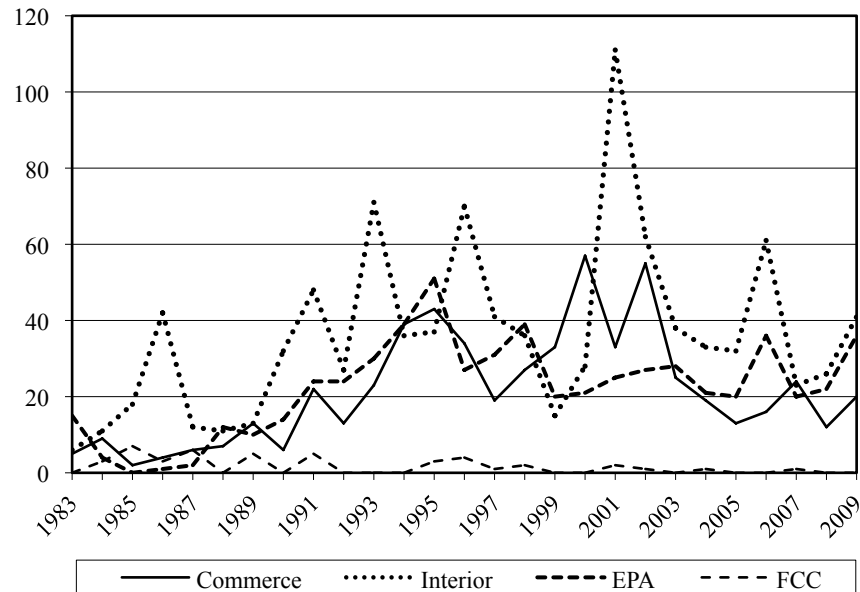


FIGURE 11: WITHDRAWALS BY FOUR AGENCIES



These figures examine this stage of the rulemaking process—essentially, the interruption of traditional rulemaking—in isolation. But just

as completions depend on initiations (and withdrawals), withdrawals rely on initiations (and the lack of completions).¹²⁶ As with NPRMs and final actions, agencies do not stop rulemakings at an unwavering pace. Rather, there are particular spikes in withdrawal activity. For executive agencies, the largest shift in initiations, final actions, and withdrawals is a considerable increase in withdrawals in 1995 (from 94 in 1994 to 291 in 1995). More examination reveals that almost all of the increase is due to reported withdrawals by the IRS. There is also a particularly steep increase for the Department of the Interior (from 28 in 2000 to 111 in 2001).

Most notably, Figures 10 and 11 suggest that withdrawals may follow significant political transitions. The parallel of midnight regulations before presidential transitions are the crack-of-dawn actions by new administrations. In recent times, new presidents have barred agencies from sending rulemaking actions to the *Federal Register* without approval.¹²⁷ They also have directed agencies to suspend or consider suspending the effective dates of regulations that were finalized in the closing days of the previous administration but have not yet taken effect.¹²⁸

In addition, new administrations have withdrawn at least some proposed rules that were started but not completed under a previous president. For the two-term presidencies completely captured by the data, (those of Clinton and George W. Bush), cabinet departments withdrew significantly more regulations in the first term than in the second term. The high was reached in Clinton's third year (383 withdrawals) and in Bush's second year (433 withdrawals). In the first year of every new administration in the data, withdrawals by both cabinet departments and executive agencies increased at least slightly from the last year of the outgoing president.

In these abandoned regulatory actions, we see a second, much-less-talked-about aspect of political transitions. Just as some agencies rush to finish rulemakings before congressional control shifts, they also withdraw a considerable number of proposed rulemakings following a congressional transition. Cabinet departments withdrew the second highest number of regulatory actions in 1995, just after the Republicans seized control of both houses of Congress in 1994. Additionally, executive agencies, led by the IRS, cancelled more regulatory processes in 1995 than in any other year. Similarly, the EPA also withdrew more rulemakings in 1995 than in any other year in the database. On the other hand, there seemed to be no increase in withdrawals in 2007 following Democrats' seizure of both houses of Congress. Given that there are only two major shifts in control of Congress (affecting both chambers) in the period examined here, perhaps little weight should be placed on a congressional transition story with respect to

¹²⁶ I have done some limited work considering these connections. See O'CONNELL, *supra* note *, at 957 n.177.

¹²⁷ Emanuel Memo, *supra* note 1, at 4435; Jack, *supra* note 28, at 1482.

¹²⁸ See *supra* notes 1–2, 8 and accompanying text.

withdrawals. On the other hand, perhaps there is something important about shifts in congressional control from the Democrats to the Republicans. One could imagine that if rules were more regulatory than deregulatory, Republicans would want fewer of them;¹²⁹ the converse would be true for Democrats.

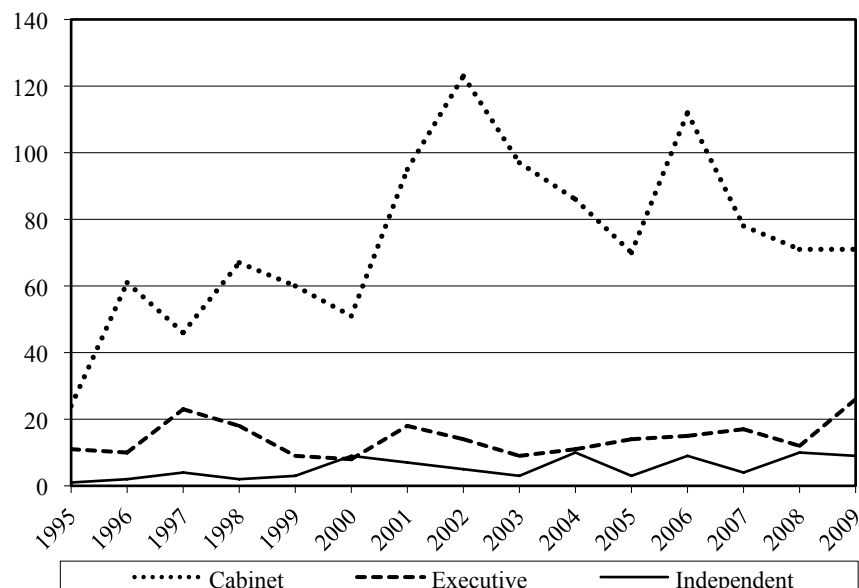
These stories seem less plausible for the subset of withdrawals involving significant rulemakings. Figure 12 charts significant withdrawals for the three major types of agencies from 1995 to 2009.¹³⁰ Because significance was only reliably reported starting with the 1995 Unified Agenda,¹³¹ withdrawals of regulations that had been proposed before such reporting may not be properly identified in the Unified Agenda. In addition, the time period essentially captures the start of only one Administration, that of President George W. Bush. There seems to be an upward trend in the abandonment of significant proposed regulations over time for cabinet departments but not for executive and independent agencies. There was a spike in significant withdrawals by cabinet departments in 2001 and 2002, potentially corresponding to the presidential transition. There was also an increase in 2006 before the congressional election. Perhaps cabinet departments anticipated that Democratic majorities in Congress would pressure the agencies to complete particular regulations, so the agencies formally abandoned those rulemakings before the Democrats took control. Or perhaps these agencies expected that the Democrats would not like the proposed rules and withdrew them before having to face congressional oversight. Alternatively, it could be that there is no meaningful connection between significant withdrawals and congressional transitions.

¹²⁹ Cf. Eric Lipton, *With Obama, Regulations Are Back in Fashion*, N.Y. TIMES, May 13, 2010, at A15 (“The push for some of the [regulatory] measures began at the end of the Bush administration, a tacit acknowledgement that its deregulatory agenda had gone too far.”).

¹³⁰ See *supra* note 15 and accompanying text.

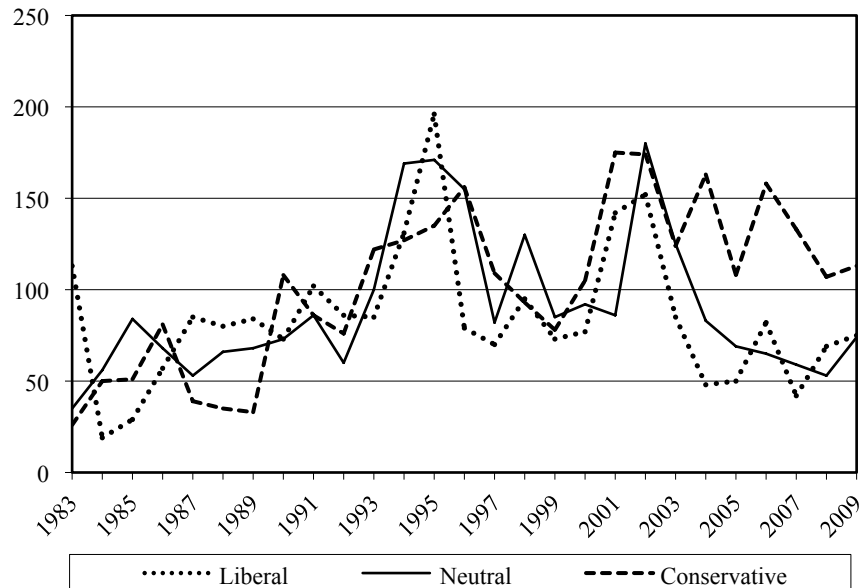
¹³¹ O’CONNELL, *supra* note *, at 937 n.139.

FIGURE 12: SIGNIFICANT WITHDRAWALS BY TYPE OF AGENCY



As with NPRMs and final actions, in an effort to differentiate among withdrawals, Figure 13 classifies withdrawals by agency ideology. The IRS, which drove much of the spike in executive agency withdrawals in 1995, was not separately categorized by Clinton and Lewis and hence has been dropped from this study's ideological breakdown. As with NPRMs and final actions, withdrawals of the three categories often rise and fall roughly together. There are some differences, however. Withdrawals by liberal and neutral agencies do seem to outnumber, at least slightly, withdrawals by conservative agencies during President Clinton's Administration. Predictably, the opposite was true during President George W. Bush's Administration, when withdrawals by conservative and neutral agencies were greater than withdrawals by liberal agencies. One possible explanation is that new administrations pull proposed regulations they do not like. To the extent that policy divergence is widest when Republicans control liberal agencies (or Democrats control conservative agencies), a president of one party would be most concerned with addressing that divergence in agencies identified with the president's ideology.

FIGURE 13: WITHDRAWALS BY AGENCY IDEOLOGY



To be sure, these figures do not indicate when the rulemaking process began. Withdrawals of rulemakings commenced under the same administration arguably differ from those commenced under a different administration. The previous discussion largely relies on the assumption (untested here) that most withdrawals are of rulemakings begun under a different administration. Part V addresses withdrawals in more detail. More generally, these figures are presented to suggest potential explanations of various trends. As with initiations and completions of regulations, proposed explanations concerning the incentive to pull rulemakings after presidential and congressional transitions need more systematic testing.

Some work has already been conducted. As with each of the other two categories of regulatory actions (NPRMs and final actions), I have analyzed a Poisson model of counts of withdrawn actions for ten agencies (with fixed effects for the potential lack of independence among observations for a particular agency) on an earlier version of the database used here. In that model, there is a statistically significant positive relationship between withdrawals and the 1994 election (the year after) as well as between withdrawals and Republican control of Congress.¹³² Part V provides another test of the relationship between withdrawals and all types of transitions.

¹³² *Id.* at 962–63.

IV. DURATION OF RULEMAKING

The figures in the previous Part provide information on major components of the rulemaking process over time. While the figures suggest explanations for changes in a type of regulatory action, they do not systematically explore these explanations. In addition, the figures look at stages of the rulemaking process in isolation; they do not consider how the stages fit together or how long it takes an agency to move from one stage to another. This Part tries to look more rigorously at the rulemaking process by examining its duration.

Using the complete database (compiled from Unified Agendas from fall 1983 to spring 2010), I begin with some summary measures of the duration of rulemakings. Specifically, these measures, unless otherwise noted, come from rulemakings that started with an NPRM between the start of President Reagan's Administration and the end of President George W. Bush's Administration and ended with a final rule or action.¹³³ These 16,826 rulemakings took, on average, 462.79 days, or nearly 1.3 years, to complete. Breaking them down by type of agency, on average, cabinet departments spent 456.54 days, executive agencies took 531.75 days, and independent agencies used 409.79 days. There is considerable variation within each group. Of the four agencies discussed in the previous Part, the Department of Commerce spent the fewest days, 223.71, on average, and the FCC took the longest, 857.27 days. The Department of the Interior used 467.45 days, and the EPA spent 602.34 days.¹³⁴

Agency ideology, as classified by Clinton and Lewis,¹³⁵ seems to show little variation in the counts displayed by the preceding figures. Although the counts from ideologically disparate agencies largely move together over time, the duration of rulemakings differs by these ideological categories. To complete a rulemaking, on average, liberal agencies took 577.57 days, whereas conservative agencies took 377.4 days. Neutral agencies were in the middle, using, on average, 451.63 days to complete a rulemaking from the date of the NPRM. It could be that rulemakings by liberal agencies, such as the EPA, are more contested. For example, the EPA is often challenged by business and environmental groups. It also turns out that signifi-

¹³³ I chose the start of this subset to avoid the selective inclusion of President Carter's rulemakings in the Unified Agenda, and I chose the end to exclude rulemakings that had been started and completed under President Obama. Because the end date of the available Unified Agendas at the time of writing is 2010, these later rulemakings are forced to have short durations. I also eliminated observations with zero or negative duration; such observations exist because of some of the automated coding of regulatory actions of the Unified Agenda. In the analysis presented here, the final action or rule is not necessarily the last action of the rulemaking process. Instead, the date of the final action or rule is the latest date of such an action for a particular RIN.

¹³⁴ Because there is variation among the agencies in what they report to the Unified Agenda, it is important to look at an agency over time and to control, at least to some extent, for specific agencies.

¹³⁵ See *supra* note 107 and accompanying text.

cant rulemakings are approximately twice as likely to be conducted by liberal agencies as conservative agencies (in the database used here).¹³⁶

There are different types of rulemakings. On the one hand, deadlines seem to shorten the rulemaking process, at least to some degree.¹³⁷ Here, I look at those 13,665 completed rulemakings that were started between Presidents Reagan and George W. Bush and reported in the fall 1988 or later edition of the Agenda when deadlines were more reliably reported. On average, the duration of rulemakings with a deadline was 441.93 days; by contrast, the duration of rulemakings without a deadline was 496.3 days, a difference of about two months.

On the other hand, significant rulemakings take longer. For this, I look at those finished rulemakings that were commenced between Presidents Reagan and George W. Bush and reported in the fall 1995 or later edition of the Agenda when significance was more systematically recorded. Of the 8737 rulemakings, significant rulemakings took 596 days to complete, on average, whereas nonsignificant rulemakings took 482.6 days, on average, a difference of close to four months.

As for political transitions, rulemakings during which a presidential transition occurred after the NPRM was issued took, on average, nearly three times as long to complete as those rulemakings that started and ended during a single administration (989.31 versus 355.43 days). Similarly, rulemakings that had a major shift in Congress after the NPRM took about two and a half times as long to finish (1021.58 versus 403.14 days) as rulemakings that were completed during a period in which no major shift in congressional control occurred. These comparisons are, however, problematic. The longer a rulemaking takes to complete, the more likely it is to have undergone a political transition, just in terms of the passage of time. Thus, it is unclear whether the two factors—duration of a rulemaking and the occurrence of a political transition—can be analyzed independently of one another.

The best way to analyze the duration of the rulemaking process is likely some form of duration model (the specific form depending on assumptions about the dependent and explanatory variables), where transitions can be treated as time-varying covariates as needed.¹³⁸ Most other

¹³⁶ This Article does not explore in any depth the plausibility of various explanations for this interesting difference.

¹³⁷ Gersen & O'Connell, *supra* note 48, at 945, 988.

¹³⁸ An earlier article on the duration of rulemaking made several contestable modeling assumptions. See Gersen & O'Connell, *supra* note 48, at 945–49. First, to analyze rulemaking duration, the article used a Cox proportional hazards model, which assumes that the proportionality of hazards does not vary over time. That assumption, however, does not hold for many of the explanatory variables. Second, the article treated political transitions in a simple manner. To start, the transitions were used as explanatory variables in the model about duration (roughly, thinking about transitions influencing duration), but the relationship also works in the other direction. In addition, political transitions were treated as time invariant. We might think that a person's risk of dying, given age and other invariant characteristics, is

work on rulemaking duration is descriptive (in other words, averages)¹³⁹ or relies on ordinary least squares regression.¹⁴⁰ The most sophisticated work on rulemaking duration is by Yackee and Yackee.¹⁴¹ This Part builds on that work by using more recent data and by focusing on transitions.

I estimate a Cox proportional hazards model for the approximately 12,225 completed rulemakings that were started between the Administrations of Presidents Reagan and George W. Bush and that were reported in the fall 1988 or later edition of the Unified Agenda when deadlines were more reliably recorded and that have information for the explanatory variables. Agendas do report earlier actions, so many rulemakings under President Reagan are included in the section of the database analyzed here. The Cox model is a type of duration or hazard model. As applied here, the larger class of duration models basically estimates the rate at which rulemaking ends after time t given that the rulemaking process has been in progress until time t .¹⁴² The main question then becomes whether a particular explanatory variable is linked to an increase in this rate (called the hazard rate), which is the same question as whether the variable is correlated with a shortening of the duration of the rulemaking process.¹⁴³

As applied here, the dependent variable in the primary Cox model is the time it takes rulemakings to yield a final rule or action from the issuance of the NPRM. Because uncompleted rulemakings could produce a final action or could end in a withdrawal, these censored observations (i.e., where

different before and after a transplant. Similarly, the pace of rulemaking may vary before and after a political transition. Finally, the earlier discussion of results suggested causal relationships for statistically significant variables. It is more precise to say these variables are linked or correlated in specific ways with the dependent variable. In this Article, I address these concerns in ways that seem more in keeping with the underlying data and restrictions on the statistical models used.

¹³⁹ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 69, at 17–19; Johnson, *supra* note 69, at 784.

¹⁴⁰ See, e.g., Shapiro, Ossification, *supra* note 69, at 18–21. Ordinary least squares regression allows the prediction of negative duration. See WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 937–38 (4th ed. 2000). By contrast, hazard models treat duration as a temporal dependent variable, which avoids such a problematic prediction and permits the inclusion of censored observations. *Id.*

¹⁴¹ Yackee & Yackee, *Ossified*, *supra* note 67.

¹⁴² See generally GREENE, *supra* note 140, at 937–51 (providing background on hazard models); Janet M. Box-Steffensmeier & Bradford S. Jones, *Time Is of the Essence: Event History Models in Political Science*, 41 AM. J. POL. SCI. 1414, 1417–21 (1997) (same); Bradley Efron, *Logistic Regression, Survival Analysis, and the Kaplan-Meier Curve*, 83 J. AM. STAT. ASS'N 414 (1988) (same).

¹⁴³ The Cox model is less restrictive than other hazard models, such as the exponential or Weibull models because it does not impose a specific functional form (for example, increasing) on the baseline hazard function. Box-Steffensmeier & Jones, *supra* note 142, at 1432–33. The Cox model does, however, assume that the proportionality of hazards—that the hazard functions of rulemakings with different explanatory or covariate values differ only by a proportional factor—is constant over time. *Id.* at 1433. This assumption can be tested for the explanatory variables used in the model and if violated largely corrected. See Janet M. Box-Steffensmeier & Christopher J.W. Zorn, *Duration Models and Proportional Hazards in Political Science*, 45 AM. J. POL. SCI. 972, 975–78 (2001); Yackee & Yackee, *Ossified*, *supra* note 67, at 274–75.

the final outcome is not recorded) are not included.¹⁴⁴ The model includes several categories of explanatory variables or, as they are called in hazard analysis, covariates.

Most relevant to this Article, the model includes covariates for two of the major transitions discussed in this Article: presidential and judicial transitions.¹⁴⁵ With respect to presidential transitions, the model includes a covariate for the time remaining in the president's term in which the NPRM was issued.¹⁴⁶ It also includes a time-varying discrete covariate to indicate the period of the rulemaking process that fell in the midnight quarter (November to January, roughly from the election that changes White House control to inauguration of the next president).¹⁴⁷ With respect to judicial transitions, the model includes a dummy covariate as to whether the NPRM was issued after the Supreme Court's *Mead* decision in 2001. The earlier Parts suggest that the midnight quarter should have a positive relationship with the hazard rate (and hence a negative relationship with duration) and that the *Mead* decision may have a negative relationship with the hazard rate (and hence a positive relationship with duration) because agency procedures arguably have become more important for judicial deference. The model also includes a covariate related to the political environment, a binary variable for whether there was divided government at the time the NPRM was issued.

Finally, the model includes covariates connected to the type of agency and type of rulemaking. There are binary variables for cabinet departments and executive agencies.¹⁴⁸ I also include the agency ideology variable (which takes a value of 1 if the agency is conservative, 0 if it is neutral, and -1 if it is liberal). There are also variables for whether there was a judicial or statutory deadline present in the rulemaking and whether the rulemaking affected the federal, state, local, or tribal governments.

¹⁴⁴ It would be possible to use the censored observations in a competing-risk Cox model where the outcome could be either a rule or a withdrawal.

¹⁴⁵ I also ran an alternative model with two-chamber congressional transitions instead of presidential transitions.

¹⁴⁶ Cf. Charles R. Shipan & Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 AM. J. POL. SCI. 654, 664 (2003) (including a variable for the time remaining in the congressional session in a hazard model of the time taken to confirm Supreme Court nominees). For an NPRM issued in the first term of a two-term presidency, this variable is the time between the end of the first term and the NPRM. The agency does not know in the first term whether the president will be reelected. Using the time to the end of the administration, as realized, does not change the results in any meaningful way.

¹⁴⁷ It could be argued that this variable is problematic in the same way that the time-invariant covariate for a presidential transition is problematic: in order to get to a midnight quarter, on average, the rulemaking process has to have gone on longer. But the time-varying covariate is trying to capture the effect on the hazard rate *in* that period.

¹⁴⁸ Independent agencies are the dropped-agency type to which the other variables should be compared.

Table 1 presents the main results from the model.¹⁴⁹ Positive coefficients indicate shorter duration, whereas negative coefficients indicate longer duration. I examined the model's Schoenfeld residuals (which can be plotted against time to test a key premise of the model) and determined that a number of covariates violated the model's proportionality assumption. Following others, I corrected for this violation by including interaction terms of the problematic variables with the natural logarithm of the time of analysis.¹⁵⁰ All of these interaction terms had negative coefficients and were statistically significant, indicating that the connections between the explanatory variables and durations are decreasing with time. Variables that were corrected in this way are marked by a # sign in the table.

TABLE 1: COX REGRESSION OF DURATION OF COMPLETED FINAL ACTIONS
NPRMs Issued Between January 20, 1981, and January 19, 2009

<i>Midnight Quarter</i>	0.307*** (0.047)
<i>Time Remaining in Term</i>	0.000*** (0.000)
<i>Mead Decision</i> #	4.048*** (1.014)
<i>Divided Government</i>	-0.201*** (0.030)
<i>Cabinet Department</i> #	15.291*** (4.183)
<i>Executive Agency</i>	0.100 (0.398)

¹⁴⁹ The analysis for any model presented or discussed in this and the subsequent section can be obtained from the author upon request.

¹⁵⁰ See *supra* note 143. I also divided the data into three sets—one for conservative agencies, one for liberal agencies, and one for neutral agencies—and ran the model on each set. All of the results are largely similar, except for the levels of government variables (which shift around in each set). In addition, for liberal agencies, executive agencies become significant and are linked to longer durations, and for conservative agencies, the deadline variable just loses significance. In addition, I also employed stratified estimation for several covariates—local government affected, federal government affected, and agency ideology—so that the baseline hazard functions of those variables are allowed to vary while the coefficients of the other variables are constrained to be equal across the strata. The results are mostly similar, in terms of sign and significance, including those variables and interaction terms of those variables with analysis time.

<i>Agency Ideology#</i>	0.241 (1.410)
<i>Deadline#</i>	2.638*** (0.623)
<i>Federal Government Affected#</i>	2.951*** (0.794)
<i>State Government Affected</i>	-0.005 (0.058)
<i>Local Government Affected#</i>	2.661*** (0.530)
<i>Tribal Government Affected</i>	-0.083 (0.056)
<i>Number of Observations</i>	12,227 (observations dropped if no agency ideology code available)
<p>*** $p < 0.01$, ** $p < 0.05$, * $p < 0.10$</p> <p>Robust Standard Errors: Clustering on agencies</p> <p>Pseudo Likelihood Ratio: -94215.712</p> <p>Wald: $\chi^2(18) = 2593.83^{***}$</p> <p>The following interaction terms were included, where T is analysis time: <i>Mead</i> Decision*ln(T), Cabinet Department*ln(T), Agency Ideology*ln(T), Deadline*ln(T), Federal Government Affected*ln(T), Local Government Affected*ln(T). Coefficients (which were all negative and, except for Agency Ideology*ln(T), significant) are not reported here.</p> <p>Coefficients are non-exponentiated coefficients.</p>	

As expected, the hazard rate increases in midnight quarters and in rulemakings with deadlines (thus, shortening durations) and decreases when the NPRM is issued during divided government (thereby lengthening durations). (Similar results obtain if midnight quarters before two-chamber congressional transitions are included instead of midnight quarters related to changes in the White House, except that divided government becomes linked to shorter durations.) Interestingly, the hazard rate also increases if the NPRM was issued after the *Mead* decision. It is unclear whether the story is more about the court decision or about the pace of rulemaking under President George W. Bush since the two are essentially equivalent in the data. There also appears to be a negative relationship between duration

and cabinet departments as well as between duration and rulemakings affecting federal and local governments. The *Mead* decision, agency structure, and government-level results are largely the same in a model with two-chamber congressional transitions instead of presidential transitions, except the federal government affected variable flips sign (and is significant).

I hesitate to draw broad conclusions from this hazard analysis. There are still problems with the proportionality assumption, even after including interaction terms with analysis time. Some of the results are unstable; relatively modest changes to the model can change them. One important variable suggested by the descriptive statistics at the start of Part IV that is missing is the significance of the rulemaking. When that variable is included in an analysis of a subset of the data used in Table 1 (as significance is not reliably recorded until the fall of 1995), and relevant interaction terms to correct for non-proportionality are included, divided government at the time of NRPM flips sign and is significant (so that rulemakings started in divided government are linked to shorter durations), the cabinet department variables loses significance, and the executive agency variable becomes significant (so that rulemakings by executive agencies are connected to shorter durations). There is, however, still a quickening in the rulemaking process in the midnight quarter.

Whereas others have examined the duration of rulemaking in the context of assessing the ossification of rulemaking,¹⁵¹ this Article has attempted to consider the duration of rulemaking in the context of transitions. It tangentially speaks to the ossification debate by showing that agencies do manage to engage in a considerable amount of rulemaking, but it does not genuinely consider how much more rulemaking agencies might be able to conduct with fewer procedural constraints except to consider the *Mead* decision. Unfortunately, the timing of the *Mead* decision in the first year of President George W. Bush's Administration presents considerable obstacles in drawing conclusions about that decision. Even with political transitions, the task is difficult because transitions are more likely with longer rulemaking.

V. RULEMAKING WITHDRAWALS

This Part systematically explores the connection between political transitions and withdrawals of proposed rules illustrated by Figures 10 to 12. To do so, it uses a parsimonious probit model, which is a common regression model to estimate a binary response by a maximum likelihood procedure, to analyze all rulemakings reported in the Unified Agenda between the fall 1988 and spring 2010 editions that started with an NPRM and that

¹⁵¹ Yackee & Yackee, *Ossified*, *supra* note 67.

ended either in a completed final action or withdrawal.¹⁵² The binary outcome—final action or withdrawal—is therefore the dependent variable in the model.

Out of 15,510 such rulemakings, 1603—more than 10%—ended in withdrawals. The model includes two primary explanatory variables to capture presidential and congressional transitions. The presidential change variable marks all rulemaking processes that started under one administration and resulted in a complete rule or withdrawal under a different administration.¹⁵³ The congressional change variable targets only the big (i.e., dual-chamber) congressional shifts, in 1995 and 2007, and captures regulatory actions that commenced before one of those shifts and that ended (one way or the other) afterward.¹⁵⁴ My hypothesis is that actions are more likely

¹⁵² Because deadlines, one of the explanatory variables analyzed in this Part, were not reliably reported until the fall 1988 Unified Agenda, a subset of the database is used for the regression model. Agendas do cover earlier actions, so many rulemakings under President Reagan are included in the section of the database analyzed here. From the fall 1988 to the spring 2010 Unified Agendas, there are 18,127 RINs that reported an NPRM with an actual date. Of those, 15,510 had a final action or withdrawal with an actual date also reported. Consequently, close to 2500 RINs are excluded from the analysis. If these RINs are correlated with particular variables, we should be worried about the validity of the results. Some of the excluded RINs are NPRMs from recent years. Because the rulemaking process takes considerable time to complete (or to lead to a withdrawal), the timing of those NPRMs explains why those RINs do not have a reported final action or withdrawal. Assuming that the explanatory variables are not correlated in different ways with the final expected outcome for recent NPRMs than for NPRMs in earlier periods, the exclusion of those RINs should not bias the results. Some of the excluded RINs are NPRMs that did come to resolution, but that resolution was not a final rule or withdrawal or was not coded as a final rule or withdrawal. As for the first, an RIN might have an NPRM but then end up being combined with another RIN. That action is coded in the Unified Agenda, but because it is not a final action or withdrawal, such an RIN would be dropped here. As for the second, some agencies have reported final actions (completions or withdrawals) in an “other” action category in the Unified Agenda; these outcomes if coded as “other” actions are not included here if reported in a 2003 or earlier edition of the Unified Agenda. See O’CONNELL, *supra* note *, at 984. More of these final actions are captured if reported in a 2004 or later edition of the Unified Agenda. To the extent that the miscoding affects final rules and withdrawn rules similarly, the analysis should not be undermined in any fundamental way, but more research needs to be done on these “other” actions. Finally, some of the excluded RINs are abandoned actions. In other words, they should be coded as withdrawals, but the agency never officially reported the suspension to the Agenda perhaps because the agency did not want to make the suspension permanent. This means that a higher percentage of actions started with an NPRM should be considered to have ended in withdrawal. So long as these are abandoned in practice (but not abandoned in the Unified Agenda and hence in the coded data), NPRMs are not too numerous or are not correlated in conflicting directions with reported withdrawals, the analysis here should only understate the correlation between certain explanatory variables and withdrawn regulations. Cf. Yackee & Yackee, Testing, *supra* note 69, at 142 (“[I]n many cases [interior] agencies fail to issue notice [in the *Federal Register*] that a rulemaking has been abandoned . . .”). Future research should employ a censored competing risk Cox proportional hazards model to deal with this missing information.

¹⁵³ I ran models with a presidential change variable that covered only a change of party (i.e., that excluded the transition from President Reagan to President George H.W. Bush). The coefficient on the presidential change increases slightly (making a withdrawal more likely), but the results do not change in any meaningful way.

¹⁵⁴ Because new Congresses start on January 3 (and not January 20, like new presidents), I used calendar years to calculate the congressional change variable.

to end in withdrawal if control of the White House or both houses of Congress changes after rulemaking has begun.

The model also includes several other explanatory variables. First, some regulatory actions face statutory or judicial deadlines for their commencement or completion.¹⁵⁵ The deadline variable indicates whether the rulemaking process had any kind of deadline imposed on it. A process with a deadline presumably is more likely to be completed than to be withdrawn as the deadline indicates that Congress or the courts care more about that regulatory process than one without a deadline, all else being equal.

Second, certain types of agencies may be more susceptible to political pressure. The independent agency variable marks all rulemakings by independent regulatory commissions and boards. As compared to cabinet departments and executive agencies, these agencies face less explicit oversight from the White House. Specifically, their leaders are appointed to fixed terms and thus can be fired only for cause by the President (unlike leaders of cabinet departments and executive agencies who generally serve at will and thus can be fired for any reason by the President).¹⁵⁶ In addition, only cabinet departments and executive agencies must get OIRA approval before publishing a proposed or final rule in the *Federal Register*.¹⁵⁷ Independent agencies are afforded greater latitude in rulemaking decisions and only have to submit their regulatory plans to OIRA on an annual basis; there is no requirement that they get prior approval before engaging in regulatory activity.¹⁵⁸

By contrast, independent agencies may confront more pressure from Congress than cabinet departments and executive agencies. Specifically, independent agencies have less protection from the White House in their interactions with Congress.¹⁵⁹ On the other hand, independent agencies are

¹⁵⁵ Gersen & O'Connell, *supra* note 48.

¹⁵⁶ Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1141–44 (2000) (discussing the scope of the removal power). Compare *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935), with *Myers v. United States*, 272 U.S. 52, 134 (1926).

¹⁵⁷ See *supra* note 17, at 900 n.26.

¹⁵⁸ Exec. Order No. 12,866, *supra* note 5, § 4(c) (defining “agency” to include independent regulatory commissions only for the regulatory plan mandate).

¹⁵⁹ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (“The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 592 (1984) (“[A]s a former FTC Chairman recently remarked, the independent agencies ‘have no lifeline to the White House. [They] are naked before Congress, without protection there,’ because of the President’s choice not to risk the political cost that assertion of his interest would entail.” (quoting Calvin Collier, Chairman, Fed. Trade Comm’n, Remarks to the Assembly of the Administrative Conference of the United States (Dec. 15, 1983))); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by*

designed to be more independent of all political influence than are cabinet departments and executive agencies.¹⁶⁰

Third, major judicial transitions may make it easier or harder for agencies to finish rulemakings if they impose additional procedural or substantive benefits or costs on agencies. The *Mead* variable indicates rulemakings that were started after the Supreme Court's decision in *United States v. Mead Corp.*¹⁶¹ That decision made notice-and-comment procedures more attractive compared to more informal agency decisions as rulemakings that employ such procedures are typically guaranteed to receive *Chevron* deference for ambiguous statutory interpretations, whereas rules issued more informally may only receive a lesser measure of *Skidmore* "respect" according to their persuasiveness.¹⁶² But such procedures are more costly than more informal decisionmaking. The *Mead* decision may initially have encouraged agencies to start notice-and-comment procedures but then agencies may also have later abandoned those procedures if the costs turned out to be larger than the expected benefits. Finally, because so many withdrawals in 1995 were made by the IRS, that agency was excluded from the analysis.¹⁶³

Table 2 presents the results from this model. The coefficients are reported as marginal effects. Standard errors are clustered at the individual

the Federal Trade Commission, 91 J. POL. ECON. 765, 792 (1983) ("[T]he FTC [an independent agency] is remarkably sensitive to changes in the composition of its oversight subcommittee and in its budget.").

¹⁶⁰ See Keith S. Brown & Adam Candeub, *Independent Agencies and the Unitary Executive: An Empirical Critique* 1 (Mich. State Univ. Coll. of Law, Legal Studies Research Paper No. 06-04, 2008), available at <http://ssrn.com/abstract=1100125> (concluding that FCC commissioners "pursue individual agenda[s], not the President's or Congress's as an institution"). But see David Hedge & Renee J. Johnson, *The Plot That Failed: The Republican Revolution and Congressional Control of the Bureaucracy*, 12 J. PUB. ADMIN. RES. & THEORY 333, 342-46 (2002) (showing that the EEOC and NRC reduced regulation immediately after the Republicans took control of Congress in 1995 but that regulatory actions increased several years later); Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 1 (Feb. 12, 2007), (unpublished manuscript), available at <http://dho.stanford.edu/research/partisan.pdf> (determining that congressional "partisan requirements [on the appointment of FCC commissioners] may have considerable effects on substantive policy outcomes").

¹⁶¹ 533 U.S. 218 (2001).

¹⁶² See O'CONNELL, *supra* note *, at 917-18; Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 529 (2006) ("[F]rom the perspective of an agency subject to judicial review, textual plausibility and procedural formality function as strategic substitutes: greater procedural formality will be associated with less textual plausibility, and vice versa.").

¹⁶³ An alternative would have been to include the IRS as a dummy variable. Doing so, however, would prevent clustering the standard errors on agencies, which is needed because observations from the same agency are not always independent. Thus, I chose to drop the IRS observations and use clustering to deal with nonindependence in the standard errors. The results are largely similar in a model including *only* rulemaking processes from the IRS except that the deadlines variable loses significance in the IRS-only model.

agency level in case observations for a particular agency are not independent.

TABLE 2: MARGINAL EFFECTS FROM PROBIT MODEL
Dependent Variable Is Final Outcome (1 for Withdrawal, 0 for Final Rule)

<i>Change in White House</i>	0.138*** (0.010)
<i>Change in Congress (both chambers)</i>	0.149*** (0.019)
<i>Deadline</i>	-0.039*** (0.005)
<i>Cabinet Department or Executive Agency</i>	0.004 (0.021)
<i>Mead Decision</i>	-0.019* (0.010)
<i>Number of Observations</i>	14468 (observations dropped if no agency ideology code available)
*** $p < 0.01$, ** $p < 0.05$, * $p < 0.10$, two-tailed tests used Robust standard errors: Clustering on agencies Pseudo Likelihood Ratio: -4183.7281 Predicted Withdrawals (variables held at their means) [Actual Withdrawals in data]: 8.03% [9.96%] Wald: $\chi^2(5) = 701.11$ ***	

Rulemakings that go through a presidential or congressional transition are 14% or 15%, respectively, more likely to end in withdrawal instead of completion. By contrast, rulemakings with a statutory or judicial deadline are 4% less likely to end in withdrawal. Rulemakings started after the *Mead* decision are 2% less likely to be withdrawn. There seems to be no relationship between the independence of the agency and the likelihood of a rulemaking not being completed.

These results suggest several conclusions. First, these are mostly small substantive effects, except for the political transitions. Statistical significance and substantive significance are two different metrics by which to consider regression results. To be certain, without statistical significance, coefficients are largely meaningless. On the other hand, statistically significant results are not necessarily substantively meaningful results. Even

assuming the deadline result is not an artifact of the large sample size, its magnitude is small. It may seem that the coefficients on the political transition variables are also quite small. Take the presidential change variable: the results indicate that if everything else is held constant but a rulemaking goes from being one without a presidential transition to one with a presidential transition, it is 14% more likely to end up being withdrawn. That is, however, arguably a meaningful result.

Second, this model is extremely parsimonious. It includes only major congressional transitions. I also ran models with a variable for one-chamber changes.¹⁶⁴ The results mostly remain unchanged.¹⁶⁵ It does not include interactions between the structural type of agency and the type of political transition. As suggested above, independent agencies might react more to congressional transitions than they do to presidential transitions. I ran models with these interaction variables. Those variables are not significant, and the results are not changed in any meaningful way. The model presented does not include time dummies, as several would be highly correlated with other variables. I did run models with a time trend for the year in which the NPRM was issued. The results change very little.¹⁶⁶

Finally, the model does not distinguish between significant and other rulemakings because the Unified Agenda did not start to reliably report the significance of rulemakings until the fall of 1995. I ran models on the 1995–2010 data and included a variable for significance. As with the interaction terms, that variable (for significance) is not statistically significant, and the other relationships are unchanged.¹⁶⁷ There are, of course, other things to test, for example, the interaction of the ideology of the agency and particular political transitions. In other words, do liberal agencies react differently than conservative agencies when power shifts from the left to the right, or in the other direction?

In sum, the model and alternative formulations discussed in the notes¹⁶⁸ provide support for all of the political transition stories pertaining to with-

¹⁶⁴ I ran the following alternative models: one including a variable for two-chamber changes and a variable for one-chamber changes (using 1981, 1987, and 2001), and one including a variable for two-chamber changes and a variable for one-chamber changes (using 1981 and 1987, but not 2001). In May 2001, Senator Jeffords, an Independent, decided to caucus with the Democrats; that action gave Democrats bare control of the chamber. *See supra* note 38.

¹⁶⁵ The addition of one-chamber changes as a variable in the model depresses the coefficient on the presidential change variable (understandably as two of the transitions, 1981 and 2001, are counted as presidential and congressional transitions in such a model) and increases slightly the coefficient on the two-chamber congressional transition variable. The addition changes the results in Table 2 in one other significant way. The coefficient for the *Mead* decision loses its significance when either one-chamber change variable (including or excluding 2001) is included.

¹⁶⁶ The coefficient for the *Mead* decision loses its significance when a variable marking the year of the NPRM is included.

¹⁶⁷ The level of significance of the *Mead* decision variable does improve so that the *p*-value is less than 0.05.

¹⁶⁸ *See supra* note 164.

drawals. A rule that is started but not finished before a change in control of the White House or Congress is more likely not to be completed after that change than if that change had not occurred. The *Mead* decision does not seem to have a stable correlation with final outcome. Such empirical realities pose potentially interesting questions for administrative law doctrine. Specifically, courts, which now generally ignore political transitions in reviewing withdrawals,¹⁶⁹ might want to consider them more explicitly in their review. These and other implications are taken up to varying degrees in the Conclusion.

IMPLICATIONS AND CONCLUSION

The primary aim of this Article is to describe major elements of the rulemaking process and to suggest potential consequences of presidential and congressional transitions for that process. The idea that political transitions shape the agency rulemaking process is not a new one. There has been, however, scant empirical evaluation of such transitions for the initiation and completion of rules, particularly across several administrations and broken down over a range of agencies. In addition, there has been almost no analysis of the withdrawal of proposed rules after political transitions and, other than my own previous work, no examination of withdrawals after congressional transitions. This Article helps to fill both those gaps.

Traditionally, after noting particular empirical realities, legal scholarship turns to considering the implications of these realities for doctrine and to suggesting proposals for reform. I largely abandon this traditional turn but for different reasons in each case. As for legal implications, prior work has already covered the most relevant possibilities. Two general points emerge from that work. First, current doctrine does not explicitly incorporate empirical realities about rulemaking and political transitions. Indeed, courts rarely acknowledge, except in passing, political transitions in reviewing agency action.¹⁷⁰ Relatedly, agencies generally do not discuss how political transitions shape their regulatory decisions.¹⁷¹

Second, although these empirical realities about rulemaking and transitions typically can fit—sometimes comfortably, sometimes more fitfully—

¹⁶⁹ See Gersen & O’Connell, *supra* note 23, at 1195–96 (noting that courts “do not . . . address the elephant in the room when it comes to agency withdrawals: political transitions”); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7 (2009) (“Judicial review of agency action is . . . technocratic in focus.”). But see, e.g., *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1125 (D. Or. 2002) (remarking, but not relying on, the fact that the Army Corps of Engineers “[t]ook advantage of a brief congressional recess” to announce its decision to bury a site with dirt and rubble where human remains had been discovered).

¹⁷⁰ See *supra* note 169.

¹⁷¹ See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1127, 1146–59 (2010) (“[P]residential supervision of agency rulemaking . . . appears to be both significant and opaque.”); Watts, *supra* note 169, at 14–29 (demonstrating agencies’ reluctance to discuss politics in explaining their decisions).

into conventional administrative law topics as a matter of theory, their inclusion does not seem imminent as a matter of practice. For example, congressional involvement in the rulemaking process through elections and deadlines could function as a substitute for limits on congressional delegation to agencies in the first place. Because the nondelegation doctrine has no real bite, this back-end control may help in making agency action appear more legitimate from a delegation perspective.¹⁷² More generally, the empirical work highlights the role of Congress, which is often the neglected branch in administrative law outside of delegation.¹⁷³

Additionally, political shifts in the rulemaking process could influence the level of deference courts accord agency actions. At the most general level, courts tend to use one of two theories of agencies to justify deference to agency decisions. The first theory is one of political accountability—in other words, courts defer because agencies are more accountable to the public than courts are.¹⁷⁴ The second theory is one of expertise—specifically, courts defer because agencies are more expert than courts are in most regulatory areas.¹⁷⁵ The empirical results support both theories to some degree. The connection between political transitions and rulemaking, particularly for nonindependent agencies, contributes to a political accountability theory of judicial deference. The relative stability of rulemaking activities by independent agencies (as compared to nonindependent agencies) augments the expertise theory.¹⁷⁶ More specifically, the timing of an agency decision—for instance, a completion of a regulation right before a president leaves office or a withdrawal of a proposed rule immediately after a new president comes into office—may suggest that the action is “arbitrary and

¹⁷² See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 145–48 (2006); O’CONNELL, *supra* note *, at 975–78.

¹⁷³ See O’CONNELL, *supra* note *, at 967–71. Some scholars, of course, have addressed the role of congressional influence on agency action. See Beermann, *supra* note 172, at 69–144; J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2241–43 (2005); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1466–87 (2003); Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 456–71; Gersen & O’Connell, *supra* note 48, at 937–49; Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205, 206–26 (1991).

¹⁷⁴ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

¹⁷⁵ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–38 (1944) (“Pursuit of [the agency official’s] duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution.”).

¹⁷⁶ Cf. O’CONNELL, *supra* note *, at 978–81 (suggesting that stability in rulemaking may suggest lack of political influence and dominance of technical expertise, which could justify deference under *Skidmore*’s reasoning).

capricious” under the APA.¹⁷⁷ Alternatively, the timing of the action—for example, to meet a deadline—may make it harder for a court to strike it down on such grounds.¹⁷⁸

In addition to detailing legal implications, traditional legal scholarship tends to propose reforms targeted at changing the discussed empirical claims. Such normative explorations, if worthwhile, need two components that are missing here. First, it needs to be clear that current practices must be changed. It is tempting to conclude that midnight and crack-of-dawn regulatory activity is untoward in some way.¹⁷⁹ But it is not clear, on efficiency or democratic legitimacy grounds, that curtailing the influence of political transitions on rulemaking is desirable.¹⁸⁰ Additionally, reforms create costs as well. For instance, to the extent that regulations are more pro-regulatory than deregulatory,¹⁸¹ a ban on midnight regulations likely would decrease the scope of federal controls over public health and the environment. That may strike some as a benefit, of course. Moreover, if agencies had to promulgate rules more than sixty days before inauguration, those rules would be much harder to undo since they would have all taken effect before the new president takes office.

Second, even assuming that change is needed, proposed reforms need to be feasible—as a matter of politics and practice. Presidents want neither to curtail their ability to regulate within their administrations nor to make it easier for their successors to undo their regulatory policies when they leave office. Specifically, many politicians and commentators advocate a ban on midnight regulations.¹⁸² These calls can come from either conservatives or

¹⁷⁷ See Gersen & O’Connell, *supra* note 23, at 1201–02.

¹⁷⁸ See Gersen & O’Connell, *supra* note 48, at 962.

¹⁷⁹ See, e.g., Jay Cochran, *Clinton’s ‘Cinderellas’ Face Regulatory Midnight*, USA TODAY, Dec. 13, 2000, at 17A (“Respect for the law erodes when it changes for no other apparent reason than the fact that an administration’s drop-dead date draws near.”); Al Kamen, *Placing Pryor Restraint on Republicans; Democratic Senator Warns Officials Against Transition Hanky-Panky*, WASH. POST, Nov. 5, 1992, at A21 (“Pryor said, ‘It would be unfortunate if the transition period is used to push through regulations which otherwise would not have been proposed or issued.’”); Murray Weidenbaum, *Hold Those Midnight Rules*, CHRISTIAN SCI. MONITOR, Jan. 17, 2001, at 11 (“[I]n the fine print we learn that steps were taken to ‘streamline’ and otherwise speed up the process by which these proposals are vetted by the various federal agencies and disputes between them resolved.”); Linda Sánchez, *Push Back Against the Dead Hand of a Lame Duck*, ROLL CALL (Dec. 8, 2008), http://www.rollcall.com/issues/54_62/-30594-1.html.

¹⁸⁰ See Beermann, *supra* note 28, at 952–53, 1005; Mendelson, *supra* note 28, at 603, 616–63; O’CONNELL, *supra* note *, at 915–16, 971–75.

¹⁸¹ See O’CONNELL, *supra* note *, at 974.

¹⁸² See, e.g., H.R. 34, 111th Cong. (2009); S. 8, 111th Cong. (2009); H.R. 7296, 110th Cong. (2008); Beermann, *supra* note 28, at 1004–05 (noting several possibilities for restricting late-term action); Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf> (discussing one proposal that would have suspended the effective date of rules in the final ninety days of an administration until at least ninety days into the new administration). Cf. Adrian Vermeule, *The Constitutional*

liberals depending on the outgoing president.¹⁸³ Banning the practice by amending the APA, for example, almost certainly will not happen.¹⁸⁴ There are obstacles in practice as well. Take the ban on midnight regulations. Even if the ban were politically feasible, it would not accomplish much. Instead of trying to push out regulations by January 20, agencies would instead work to enact rules before the new deadline. Midnight would simply become 11 p.m.¹⁸⁵ Agencies could still engage in rushed decisionmaking and the like. Alternatively, agencies might try to avoid the restrictions on rulemaking entirely by implementing policies through adjudication or other means.¹⁸⁶

Consequently, instead of the traditional turn to doctrine and reform, this Article concludes with something a bit more unusual. It examines the implications of the empirical work for politicians. Specifically, it suggests effective strategies for outgoing and incoming presidents, assuming that these presidents care about advancing their policy preferences.¹⁸⁷ The strategies for outgoing presidents are simple. Most critically, outgoing presidents can make their policies harder to overturn. First, they can finish the rules they propose. A rule promulgated by prior notice and comment can generally be rescinded only by notice-and-comment procedures.¹⁸⁸ A rule that has been proposed but not finished can be withdrawn without notice and comment. Such withdrawals are not easily reviewable by courts.¹⁸⁹

Second, outgoing presidents can finish rules early enough that the rules become effective before the presidents leave office. Most rules take effect after thirty days.¹⁹⁰ Major rules have sixty-day waiting periods.¹⁹¹ As dis-

Law of Congressional Procedure, 71 U. CHI. L. REV. 361, 434–36 (2004) (explaining that several state constitutions prohibit legislators from introducing bills in the final days of the legislatures' sessions).

¹⁸³ See, e.g., Cochran, *supra* note 179 (from the right); Kamen, *supra* note 179 (from the left); Weidenbaum, *supra* note 179 (from the right); Sánchez, *supra* note 179 (from the left).

¹⁸⁴ Cf. Beermann, *supra* note 28, at 1006 (noting potential constitutional problems with any attempt by Congress to restrict the exercise of executive power).

¹⁸⁵ O'CONNELL, *supra* note *, at 974.

¹⁸⁶ *Id.*

¹⁸⁷ Many of these strategies can be modified for outgoing and incoming Congresses.

¹⁸⁸ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (explaining that "rescission or modification of an occupant-protection standard is subject to" arbitrary and capricious review).

¹⁸⁹ There are some exceptions. See Gersen & O'Connell, *supra* note 23, at 1188–89 ("First, if the relevant statutory scheme expressly contemplates the withdrawal of a proposed regulatory action in particular circumstances, courts will typically review the withdrawal. . . . 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.").

¹⁹⁰ 5 U.S.C. § 553(d) (2006) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.").

cussed in more detail below, if a rule has been enacted but has not yet taken effect, it can often be suspended, at least for brief periods, during which time a new administration can work to rescind it. Here, truly last-minute regulations are less appealing not because they suggest illegitimacy but rather because they are easier to overturn. The delay in effectiveness is not sufficiently long, however, to force outgoing (or potentially outgoing) administrations to enact regulations before the November election in order for them to take effect before inauguration. In many ways, President George W. Bush was extremely successful in performing these strategies at the end of his Administration. His Chief of Staff set deadlines for the completion of rules that ensured, if followed, that the rules would take effect before Bush left office.¹⁹²

The strategies for incoming presidents are more complex. First, new presidents can undo undesirable regulatory actions of the previous administration. Second, new presidents can formulate their own regulatory agendas.¹⁹³ I will discuss each in turn.

To start, there are some simple legal actions incoming presidents can take if they want to counter midnight and other regulatory actions by the preceding president. As all recent presidents have done, they can order agencies to withdraw final rules sent to the *Federal Register* in the final days of an outgoing administration (and to get permission from the new administration before sending any new rules for publication). To comply with existing law and court orders as well as to permit truly necessary action, exceptions should be made for statutory and judicial deadlines and for measures necessary for public health and safety. As has been done in the past, agencies can seek permission from OIRA to not withdraw particular actions that fall in these categories.¹⁹⁴ To avoid potential constitutional concerns, the directive should not apply to independent agencies, such as the FCC, because of their greater legal protections. Presidents, of course, can ask such agencies to comply voluntarily, as President George W. Bush did.¹⁹⁵

¹⁹¹ 5 U.S.C. § 801(a)(3) (2006) (“A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—(A) the later of the date occurring 60 days after the date on which—(i) the Congress receives the report submitted under paragraph (1); or (ii) the rule is published in the Federal Register, if so published . . .”).

¹⁹² See *supra* notes 117–18 and accompanying text.

¹⁹³ I have previously discussed these strategies in an online report. See O’CONNELL, *supra* note *, at 11–15.

¹⁹⁴ See, e.g., Card Memo, *supra* note 8, at 7702 (“With respect to regulations that have been sent to the OFR but not published in the Federal Register, withdraw them from OFR for review and approval as described in paragraph 1, subject to exception as described in paragraph 1. This withdrawal must be conducted consistent with the OFR procedures.”).

¹⁹⁵ *Id.* (“Finally, in the interest of sound regulatory practice and the avoidance of costly, burdensome, or unnecessary regulation, independent agencies are encouraged to participate voluntarily in this review.”).

New presidents can also order agencies to suspend—for a limited period—the effective dates of final regulations that have not taken effect and to offer a short defense for each suspension. Because regulations generally do not take effect until thirty or sixty days (depending on their significance) after they are published in the *Federal Register*, rules finalized at the very end of an administration will not be in effect when a new president takes office. During the suspension period, the new administration can assess whether the rule should be implemented, modified, or rescinded.

The suspension of a rule's effective date does raise some legal issues. The suspension often counts as a final agency action, and thus is typically reviewable in court under the APA if the challenger has standing to sue.¹⁹⁶ Although courts are typically deferential in reviewing agency action,¹⁹⁷ they have struck down some suspensions of final rules.¹⁹⁸ Limiting the suspension to anywhere from 90 to 120 days, during which time an agency can then engage in notice-and-comment procedures to undo the rule, and providing a short explanation for the suspension will make judicial deference more likely, however. President Obama's Administration engaged in such a careful suspension process.¹⁹⁹ In the worst case (thinking from the perspective of an incoming administration), an agency can also "unfreeze" the suspension of an effective date in the face of a judicial challenge, making any challenge to the suspension moot and thus unreviewable in court.²⁰⁰

New presidents can also coordinate with the Department of Justice to settle lawsuits over specific midnight regulations so that new agency leaders can revise those rules.²⁰¹ Practically speaking, a judicial decision strik-

¹⁹⁶ See 5 U.S.C. § 704 (2006).

¹⁹⁷ See 5 U.S.C. § 706(2)(A) (reviewing most agency action under an "arbitrary and capricious" standard).

¹⁹⁸ *Natural Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 204–06 (2d Cir. 2004) (holding that the Department of Energy's suspension of the effective date of prior regulation did not comply with the APA's requirements); *Pub. Citizen v. Steed*, 733 F.2d 93, 105 (D.C. Cir. 1984) (holding that the National Highway Traffic Safety Administration's indefinite suspension of treadwear grading requirements did not comply with the APA); *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 760–62 (3d Cir. 1982) (scrutinizing the EPA's indefinite postponement of amendments to pollution regulations for compliance with the APA's procedural requirements); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580–83 (D.C. Cir. 1981) (reviewing the Department of Labor's postponement of implementation of mine safety regulations under the APA).

¹⁹⁹ See Emanuel Memo, *supra* note 1; Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Executive Departments and Agencies 2 (Jan. 21, 2009) [hereinafter Orszag Memo], available at <http://www.ombwatch.org/files/regs/PDFs/OrszagMemo09-08.pdf> (instructing agencies that in order to "extend" the effective date of a regulation, they must "promptly provide a 30-day notice-and-comment period, seeking public comment about both [the] contemplated extension of the effective date and the rule in question" among other items); *supra* text accompanying note 1.

²⁰⁰ See Beermann, *supra* note 28, at 984 n.122, 993.

²⁰¹ This is different than not defending a regulation in court. The Obama Administration instructed agencies to consider that possibility in particular circumstances. Orszag Memo, *supra* note 199, at 2 ("In special cases, and only upon further consultation with [Office of Legal Counsel] and OIRA, you

ing down a rule often has a similar effect to an agency repealing a regulation through the rulemaking process. If individuals or groups harmed by a midnight regulation challenge its substance or its rulemaking process in federal court, new agency leaders can agree not to enforce that regulation and to start proceedings to rescind or modify it.²⁰² For instance, in June 2001, the Department of the Interior under new Secretary Norton settled a challenge brought by snowmobile makers to a midnight regulation enacted at the end of the Clinton Administration barring snowmobiles in Yellowstone National Park. The settlement, which had to be approved by the district court judge, required the National Park Service to reassess the environmental impact of snowmobiles in the park.²⁰³

Finally, the White House and Congress can use the Congressional Review Act (CRA), which establishes a fast-track legislative process, to repeal undesirable midnight regulations that have already taken effect.²⁰⁴ Like a court striking down a rule, congressional invalidation of a rule under the CRA can substitute for the lengthy process of rescinding a regulation by notice and comment. The CRA sets somewhat technical limits on the use of its fast-track procedure, which depend on when the House of Representatives and the Senate adjourn their annual sessions and on how many days they meet before adjournment. For example, according to the Congressional Research Service, any final rule submitted to Congress after May 14, 2008, likely could have been repealed by the new Congress under the CRA.²⁰⁵ Thus, the CRA provides a way to challenge some rules issued under the previous administration that have already taken effect, making its

may consider the appropriateness of not defending a legally doubtful rule in the face of a judicial challenge.”).

²⁰² See generally Rossi, *supra* note 28, at 1032–43 (examining “rulemaking settlements” by outgoing and incoming presidential administrations).

²⁰³ Katharine Q. Seyle, *U.S. to Reassess Snowmobile Ban in a Park*, N.Y. TIMES, June 30, 2001, at A10; see also Rossi, *supra* note 28, at 1041. Both environmentalists and snowmobile makers saw the additional review as a possible mechanism to undo the Clinton ban that was set to take effect in 2002. See Seyle, *supra*. As with suspensions of effective dates of midnight regulations, rulemaking settlements also may be subject to judicial review at two points. First, the court decides whether to approve the settlement. See Rossi, *supra* note 28, at 1044–45. Second, the court may be asked to assess the validity of the rule once it has been enacted. See *id.* at 1051. There seems, however, to be no significant case law on the legitimacy of a rulemaking settlement itself. An agency can better protect itself from a legal challenge by providing a rational justification for its decision to enter into a settlement barring the enforcement and mandating the revision of a midnight regulation. See *id.* at 1040–43. Rulemaking settlements may be less attractive to incoming administrations that are more pro-regulatory than the outgoing administration. For instance, a settlement to not enforce a regulation that allows truck drivers to be on the road for longer periods may not be attractive. In such a case, the incoming administration could institute new notice-and-comment procedures to make a stricter rule but keep the problematic rule in place while it did that.

²⁰⁴ 5 U.S.C. §§ 801–808 (2006). The CRA is considered fast-track legislation because it gets around the cloture rule in the Senate. See HALCHIN, *supra* note 103, at 6–8. Congress can, of course, repeal almost any regulation at any time through the ordinary legislative process.

²⁰⁵ COPELAND, *supra* note 8, at 15.

reach more extensive than the technique of suspending effective dates discussed previously. Nevertheless, since the CRA was enacted in 1996, Congress has used it successfully only once, at the start of President George W. Bush's Administration to repeal the Occupational Safety and Health Administration's midnight ergonomics rule enacted before President Clinton left the White House.²⁰⁶ Despite many calls to use it at the start of the Obama Administration, neither the new Administration nor Congress seemed interested in using the CRA to counter the regulatory actions of the outgoing Administration.²⁰⁷

The second broad strategy for incoming presidents involves the formulation of a new regulatory agenda that could increase or decrease regulatory demands. Although incoming presidents may want to repeal certain midnight regulations enacted by their predecessors, they focus entirely on such efforts at their peril. They also can direct or pressure agency heads to immediately establish *new* rulemaking objectives, consistent with their policy priorities. The rulemaking process is not short.²⁰⁸ To get off the ground, the White House (and Congress) need to agree on priorities with new agency leaders. Then agency leaders can quickly move to establish new rulemaking priorities, consistent with these objectives. The primary goal with this strategy is to advance policy preferences of incoming presidents; to be sure, the strategy has additional effects, including potentially decreasing the amount of midnight regulation at the end of an administration.

This suggestion presumes that there are new agency leaders in place to oversee the rulemaking process. Recent presidents have generally staffed their cabinets and picked heads of other major agencies quickly.²⁰⁹ They have taken much longer, however, to select officials for lower but still critical positions within the bureaucracy. For example, the Obama Administration still had only 64.4% of Senate-confirmed executive agency positions filled after one year.²¹⁰ Vacancies in top agency positions may help explain

²⁰⁶ *Id.* at 13–15.

²⁰⁷ The nature of the transition—incoming congressional majorities and the White House being from the same party and rules enacted by an outgoing administration of the opposing party—was the most conducive to the CRA's use since its adoption. See Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, N.Y. TIMES, Jan. 12, 2009, at A10.

²⁰⁸ See *supra* Part IV. As lengthy as these average durations are, they do not account for the time needed to develop the NPRM.

²⁰⁹ It took until late April to get all fifteen of President Obama's cabinet secretaries in place. The past five presidents—Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush—all finished the appointment process faster by at least a month. SEC'Y OF THE SENATE, PRESIDENTIAL CABINET NOMINATIONS: PRESIDENT JIMMY CARTER THROUGH PRESIDENT GEORGE W. BUSH, available at <http://www.senate.gov/reference/resources/pdf/cabinetable.pdf>; O'CONNELL, *supra* note 101, at 22 n.3.

²¹⁰ See O'CONNELL, *supra* note 101, at 2. The Reagan Administration had filled 86.4%; the George H.W. Bush Administration had 80.1% in place; the Clinton Administration stood at 69.8%; and the George W. Bush Administration had staffed 73.8% of the jobs. *Id.*

why new administrations generally have started fewer, not more, rulemakings in the first year than in later years.

Once regulatory priorities are established, the White House (and Congress) can work with executive agency leaders to issue NPRMs and final rules swiftly. The Office of Management and Budget must approve major NPRMs (and final rules) from cabinet departments and executive agencies before they can be published.²¹¹ This review process, in place since the Reagan Administration, can be contentious.²¹² To get NPRMs issued more quickly, OIRA could establish a separate, faster review track for rulemaking proposals connected to important regulatory priorities of the administration. OIRA also could work more actively with agencies prior to the official review stage so that the review process goes more smoothly. Finally, OIRA could prompt slower acting agencies for proposals.²¹³

Finally, on this strategy of formulating an affirmative regulatory (or deregulatory) agenda, the White House (and Congress) can work with agency leaders to determine which priorities can be achieved without prior notice-and-comment procedures. In some cases, the president may be able to issue an executive order in place of a regulation. In other cases, agencies may be able to enact regulations without prior opportunity for comment as direct final rules or interim final rules.²¹⁴ Such devices do, however, generate more litigation risks than traditional rulemaking because injured parties often can challenge the agency's choice to forgo prior notice and comment.²¹⁵

²¹¹ Exec. Order No. 12,866, *supra* note 5, at 642; *see also* Exec. Order No. 13,422, *supra* note 5; Exec. Order No. 12,291, 3 C.F.R. 127, 131–34 (1982), *repealed by* Exec. Order No. 12,866, *supra* note 5.

²¹² *See* KERWIN, *supra* note 68, at 226 (showing decreasing percentage of agency rules approved without change from 1981 to 2001); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 848–49 (2003). For instance, in May 2007, the National Oceanic and Atmospheric Administration submitted a proposal to limit the fishing of krill, an important food source for whales and other species in the Pacific Ocean. OIRA rejected (temporarily) the proposed rule in October. *See* Letter from Susan E. Dudley, Adm'r, Office of Info. & Regulatory Affairs, to John J. Sullivan, Gen. Counsel, U.S. Dep't of Commerce (Oct. 30, 2007), *available at* http://www.reginfo.gov/public/return/return_doc_20071030.pdf.

²¹³ The last two Administrations have used explicit directives to agencies to encourage regulatory action. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1277–80 (2006) (discussing the use of “prompt letters” by OIRA); Kagan, *supra* note 51, at 2290–99.

²¹⁴ U.S. GEN. ACCOUNTING OFFICE, *FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES* 6–7 (1998); *see supra* Part III.A; *see also* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX L. 343, 343–44 (1991) (examining the use of interim final rules in the Department of the Treasury); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 401–02 (1999) (discussing the allure of direct final rulemaking).

²¹⁵ *See* Gersen & O'Connell, *supra* note 48, at 956–59 (discussing various cases in the presence of statutory deadlines).

In sum, there is a range of actions outgoing and incoming administrations can take to improve their ability to advance particular policy preferences through regulation. To be clear, this Article does not take a stance on whether any of these actions is desirable as a matter of social welfare or in terms of democratic legitimacy. Rather, in some rough sense, the Article provides political advice; by acknowledging the realities of political transitions on regulatory actions, it contemplates politically feasible and politically attractive responses.

In addressing rulemaking cycles—crack-of-dawn responses to midnight regulations—this Article tries to fill some gaps in what we know about rulemaking and transitions. More work, however, remains in each of the three fields or audiences to which the Article is addressed: political science, law, and politics. That research will further bring together political science and law in considering a common and important form of policy-making.