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

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INTRODUCTION

Burying bad news is one of the oldest tricks in politics.[1] As David Gergen, then an adviser to President Reagan, quipped in 1984, "[i]t was one of the first lessons I learned when I arrived in Washington. If you've got some news that you don't want to get noticed, put it out Friday afternoon at 4 p.m."[2] More recently, a spate of controversial agency policies were buried

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[1] The evidence of controversial policy announcements being made just before weekends and holidays is largely anecdotal. One rigorous empirical study concluded that the president is less likely to sign executive orders or legislation containing good news on Fridays. Stefano DellaVigna & Joshua Pollet, Strategic Release of Information on Friday: Evidence from Earnings Announcements (Jan. 15, 2005) (unpublished manuscript on file with authors). The string of executive orders issued on Fridays or immediately before holiday weekends is striking. For example, the Executive Order interpreting Common Article 3 of the Geneva Conventions as not applying to enemy combatants was issued on a Friday. Executive Order 13440 (July 20, 2007), 3 CFR 229 (2008). This Friday phenomenon for executive orders is not a recent innovation in politics. President Nixon's order granting broad authority to investigate Americans suspected of being threats to national security was also issued on a Friday. Executive Order 11605 (July 2, 1971), 36 Fed Reg 12831 (1971). To be certain, not all potentially controversial executive orders are issued on Fridays. President Kennedy's order to end racial discrimination in subsidized housing was issued on a Tuesday. Executive Order 11063 (Nov 20, 1962), 3 CFR 261 (1963). President Truman's order to racially integrate the military was issued on a Monday. Executive Order 9981 (July 26, 1948), 13 Fed Reg 4313 (1948). In the last two examples, the Presidents likely wanted to maximize media attention.

[2] Stephen Engelberg, The Bad News Hour: 4 P.M. Friday, NY Times A20 (Apr 6, 1984). President Reagan made the following announcements on Fridays: the formal end to the international peacekeeping force in Lebanon,

in the holiday or weekend news cycle. In a letter sent one Friday evening during a congressional recess in August 2007 to state health officials, the Director of the federal Center of Medicaid and State Operations announced new standards that make it much harder for states to cover more children under the Children's Health Insurance Program, angering officials in New York, New Jersey, California, and other states.[3] In the afternoon of Friday, December 22, 2006, the Securities and Exchange Commission released a "technical perfecting amendment" to its rules concerning executive compensation that permits companies to report a lower amount for overall payment to top officials.[4] Six days later, during Christmas week, the Food and Drug Administration issued a notice seeking comments on its findings that cloned animal milk and meat pose no dangers to consumers.[5]

Agencies also appear to hide cancellations of proposed policies, especially those of earlier administrations. On December 31, 2003, the Occupational Safety and Health Administration cancelled proposed rules that would have required hospitals, prisons, and homeless shelters to test their employees for tuberculosis, distribute facemasks, and quarantine infected workers, stating that voluntary standards were sufficient to protect public health.[6] No major newspaper reported the cancellation of the uncompleted rules, which had been years in the making under President Clinton's administration.[7] Senators James Jeffords (I-VT) and Patrick Leahy (D-VT) formally complained about holiday announcements of significant regulatory policy changes by President George W. Bush's administration, but according to President Clinton's spokesperson for the Office of Management and Budget (OMB), all administrations "consider the timing of a controversial regulatory announcement."[8]

At first glance, these political anecdotes seem to mimic stories from the corporate world, where companies sometimes report unexpected poor earnings results on Fridays or after market trading has closed for the weekend. Comparing Friday-night disclosures across public and private spheres is, on one hand, quite natural, and, on the other hand, quite challenging. One can track the timing of announcements in both contexts by drawing up lists of regulatory decisions and earnings disclosures with relative ease. The content and consequences of these

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the release of a commission report criticizing the Administration's arms control policies, the controversial settlement of a big antitrust case against AT&T and IBM, the restoration of tax breaks to schools that discriminate on race, and the imposition of lifetime nondisclosure mandates on more than 100,000 federal officials. Id.

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

[4] Cindy Skrzycki, New Rules Delivered Just in Time for Holidays, Wash Post D1 (Jan 9, 2007). The SEC contended that the timing of the "noncontroversial" policy announcement resulted from when the Office of Management and Budget (OMB) approved the rule for promulgation. Id at D7.

[5] Id.

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

[7] Id.

[8] Skrzycki, Just in Time for Holidays, Wash Post at D1 (cited in note 4). See also Seth Borenstein, Bush's Environmental Policies Have Been a Matter of Detail; Wrought Quietly, Big Changes Have Set Critics Howling, Milwaukee J Sentinel 19A (Jan 26, 2003) (listing a series of environmental policy announcements made by the current Bush administration on Fridays).

announcements, however, are far easier to measure in the business context—primarily by looking to forecasted versus actual earnings and subsequent market prices in the short and long term—than policy announcements in the political environment.

Compelling anecdotes tend to attract rigorous analysis and indeed, in the business context, the economics literature has long grappled with precisely how and why the timing of information release affects market response.[9] The legal literature, however, has been comparatively devoid of either theoretical or empirical analysis of the policy context.[10] Despite

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[9] The corporate literature has fleshed out several theories to explain the timing of business announcements. The most intuitive theory posits that companies want to minimize or postpone public and market scrutiny of bad news. See Mark Bagnoli, William Kross, and Susan G. Watts, The Information in Management's Expected Earnings Report Date: A Day Late, a Penny Short, 40 J Accounting Rsrch 1275, 1279–80 (2002) (listing reasons managers might delay earnings reports); Anne E. Chambers and Stephen H. Penman, Timeliness of Reporting and the Stock Price Reaction to Earnings Announcements, 22 J Accounting Rsrch 21, 22 (1984) (finding that delayed earnings reports are associated with negative returns, suggesting that they contain bad news); Aswath Damodaran, The Weekend Effect in Information Releases: A Study of Earnings and Dividend Announcements, 2 Rev Fin Stud 607, 608–09 (1989) (finding that firms are more likely to report bad news on Fridays and after markets close); James M. Pattell and Mark A. Wolfson, Good News, Bad News, and the Intraday Timing of Corporate Disclosures, 57 Accounting Rev 509, 525 (1982) (concluding that the likelihood of companies releasing bad news increases after the close of trading); Stephen H. Penman, The Distribution of Earnings News Over Time and Seasonalities in Aggregate Stock Returns, 18 J Fin Econ 199, 203 (1987) (demonstrating that earnings reports published later in the calendar quarter are more likely to convey bad news). A related theory hypothesizes that although businesses cannot hide poor results with a now 24-hour news cycle, weekends and holidays can "distract" investors temporarily. See DellaVigna and Pollet, Investor Inattention at 1 (cited in note 1). See also Mark Bagnoli Michael Clement, and Susan G. Watts, Around-the-Clock Media Coverage and the Timing of Earning Announcements 22–23 (Dec 2005), online at http://ssrn.com/abstract=570247 (visited Sept 24, 2008) (finding that continuous media coverage decreases opportunities for negative after-trading announcements, but still finding evidence of negative earnings news released on Fridays). Another theory, at odds with the first two, suggests that companies instead announce bad news earlier (and perhaps loudly) to manage analyst expectations. See Carl R. Chen and Nancy J. Mohan, Timing the Disclosure of Information: Management's View of Earnings Announcements, 23 Fin Mgmt 63, 65 (Autumn 1994) (quoting CEO survey responses suggesting that they often release lower than expected earnings earlier); Jeffrey T. Doyle and Matthew Magilke, The Timing of Earnings Announcements: An Examination of the Strategic Disclosure Hypothesis at 2–3 (Mar 2008), online at http://ssrn.com/abstract=995580 (visited Sept 24, 2008) (disputing the conventional view that managers engage in opportunistic release of information).

[10] But see J.R. DeShazo and Jody Freeman, Timing and Form of Federal Regulation: The Case of Climate Change, 155 U Pa L Rev 1499 (2007) (discussing the EPA's decision to wait and see regarding climate change pollutant regulations). See also Jacob E. Gersen and Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U Pa L Rev 923 (2008) (examining the role of statutory and judicial deadlines in changing agency behavior); Jacob E. Gersen and Eric A. Posner, Timing Rules and Legal Institutions, 121 Harv L Rev 543 (2007) (analyzing timing rules imposed on legislative and regulatory activity); Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va L Rev 889 (2008) (examining rulemaking activities early and late within presidential administrations). The political science literature contains some studies that implicate timing issues, but none, as far as we are aware, emphasize the strategic issuance of agency decisions. Consider Paul Pierson, Politics in Time: History, Institutions, and Social Analysis (Princeton 2004); Daniel Beland and Patrik Marier, Protest Avoidance: Labor Mobilization and Social Policy Reform in France, 11 Mobilization 377 (2006); Janet M. Box-Steffensmeier, Laura W. Arnold, and Christopher J.W. Zorn, The Strategic Timing of Position Taking in Congress: A Study of the North American Free Trade Agreement, 91 Am Polit Sci Rev 324 (1997); Daniel P. Carpenter, Groups, the Media, Agency Waiting Costs, and FDA Drug Approval, 46 Am J Polit Sci 490 (2002); Amihai Glazer, et al, Strategic Vote Delay in the U.S. House of Representatives, 20 Legis Stud Q 37 (1995); Tajuana D. Massie, Thomas G. Hansford, and Donald R. Songer, The Timing of Presidential Nominations to the Lower Federal Courts, 57 Polit Rsrch Q 145 (2004); Alan M. Jacobs, The Politics of When: Redistribution, Investment, and

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

Our thesis is straightforward. We suggest that the conventional anecdotal wisdom about the bureaucracy burying bad news is simply wrong or incomplete, at least in its most typical and general form. Our critical claim is part conceptual and part empirical. Conceptually, we note that administrative agencies in the United States are some of the most extensively monitored government actors in the world. Almost all policy decisions an agency makes must be published in the Federal Register for all to see.[17] Even informal policies that are not legally binding are publicly available.[18] Most legally binding agency rules require notice and an opportunity for public comment by any affected interests—comments to which the agency must adequately

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Policymaking for the Long Term, 38 Brit J Polit Sci 193 (2008). There is also literature on bureaucratic delay. See, for example, Amy Whritenour Ando, Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay, 42 J L & Econ 29 (1999); Daniel P. Carpenter, Why Do Bureaucrats Delay? Lessons from a Stochastic Optimal Stopping Model of Agency Timing, with Applications to the FDA, in George A. Krause and Kenneth J. Meier, eds, Politics, Policy, and Organizations: Frontiers in the Scientific Study of Bureaucracy (Michigan 2003); Lea-Rachel D. Kosnik, Sources of Bureaucratic Delay: A Case Study of FERC Dam Relicensing, 22 J L, Econ, & Org 258 (2005); Mary K. Olson, Managing Delegation in the FDA: Reducing Delay in New Drug Review, 29 J Health Polit, Policy, & L 397 (2004); Hilary Sigman, The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence, 44 J L & Econ 315 (2001).

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

[12] See generally Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J L, Econ, & Org 243 (1987).

[13] See generally John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex L Rev 113 (1998); Richard W. Murphy, Hunters for Administrative Common Law, 58 Admin L Rev 917 (2006).

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

[15] See, for example, Geoffrey P. Miller, Independent Agencies, 1986 S Ct Rev 41; Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum L Rev 573 (1984); Richard H. Pildes and Cass R. Sunstein, Reinventing the Regulatory State, 62 U Chi L Rev 1 (1995). Compare Steven G. Calabresi and Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L J 541 (1994); Steven G. Calabresi and Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv L Rev 1153 (1992), with Lawrence Lessig and Cass R. Sunstein, The President and the Administration, 94 Colum L Rev 1 (1994). See generally Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies, 36 Am U L Rev **[STARTING PAGE #?]**(1986).

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

[17] See 5 USC §§ 552(a)(1)(D), 553(b)–(d) (2006).

[18] See 5 USC § 552(a)(1)(D).

respond.[19] With some notable exceptions,[20] final policy decisions by federal agencies in the United States are stunningly visible, even if the internal decisionmaking process of agencies is not entirely transparent. The idea of agencies hiding controversial policy actions by announcing them on Friday afternoons and running for the door is about as silly as Gulliver hiding among the Lilliputians by covering his eyes. The actions may not produce leading newspaper headlines by the time Monday rolls around, but that does not mean there is no one watching. The simple conventional account simply does not fit with legal constraints imposed on agencies by statutes like the Administrative Procedure Act (APA).

We also provide an empirical critique of the conventional wisdom by analyzing a dataset of agency rulemaking actions over twenty-five years. The data evidence little timing manipulation. Important agency rulemaking decisions are not more likely to be issued on Fridays or weekends. Nor is this form of strategic timing manipulation correlated with political or institutional conditions commonly thought to drive agency desires to reduce the visibility of decisions. Although we cannot conclusively reject the possibility that agencies use timing in the way the conventional account suggests, we find little to no systematic evidence to support it.

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

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

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

Even in this more nuanced story, however, existing procedural restrictions in the law ensure that this strategy may be exceptional rather than typical. The promulgation of final rules, for example, is typically associated with a delay before implementation[21] and an extensive set of possible grounds for challenging the decision in court.[22] The delay rule facilitates monitoring and makes strategic timing a more difficult strategy to use effectively. Both Notices of Proposed Rulemakings (NPRMs) and Notices of Inquiries (NOIs)—typically mandatory before issuing new policy—are explicitly designed to generate public attention and allow for interested parties to participate in the regulatory process.[23] Such decisions are "running public performances": they are on display for all to see and while they often do not last forever, there is no meaningful sense in which the performance can be hidden from view.

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

If our critique and reformulation of the timing of agency action is correct, more attention should be paid to rulemaking withdrawals as a class of administrative actions.[24] Although the rescissions of binding rules[25] and complete agency inaction[26] have long generated considerable

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[21] See 5 USC § 553(d) (30-day lag before rule becomes effective); 5 U.S.C. § 801(a)(3) (60-day lag before major rule becomes effective).

[22] See, for example, 5 USC §§ 553, 706(2) (2006); United States v Mead Corp, 533 US 218, 224–25 (2001); Chevron U.S.A. Inc v NRDC, 467 US 837, 840 (1984); Motor Vehicle Manufacturers Association v State Farm Mutual Auto Insurance Co, 463 US 29, 41 (1983); Sierra Club v Costle, 657 F2d 298, 312 (DC Cir 1981) ("[P]etitioners present an array of statutory, substantive, and procedural grounds for overturning the challenged standards."); Weyerhaeuser, 590 F2d at 1024–25 (challenges based on agency's statutory authority, procedural fairness, and abuse of discretion); Nova Scotia Food Products, 568 F2d at 249 (whether promulgation of agency rule was arbitrary, capricious or an abuse of discretion).

[23] See 5 USC § 553(b)–(c); Mariano-Florentino Cuéllar, Rethinking Regulatory Democracy, 57 Admin L Rev 411, 419–22 (2005) (describing the "limited right" of the public to participate in regulatory rulemaking).

[24] We use the terms "rule withdrawal", "rulemaking withdrawal", "withdrawal of a proposed rule", and "withdrawal of an uncompleted rule" interchangeably. The terms refer to the abandonment or cancellation of a rulemaking that the agency had not yet completed. In other words, rule withdrawals are not rescissions of rules already in effect. Such rescissions typically require notice and comment or legislative repeal; whereas, withdrawals do not. See 5 U.S.C. §§ 801–808 (2000) (establishing fast-track legislative repeal process); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (providing example of rescission through notice and comment); Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (allowing agencies to withdraw regulations "until virtually the last minute before public release").

[25] See, for example, Merrick B. Garland, Deregulation and Judicial Review, 98 Harv L Rev 505 (1985) (discussing impacts on judicial review of the many rule rescissions that formed the wave of deregulation); Marianne Koral Smythe, Judicial Review of Rule Rescissions, 84 Colum L Rev 1928 (1984) (same).

analysis in the regulatory politics literature, withdrawals of uncompleted rulemakings are rarely a topic of discussion in the commentary.[27] Courts tend to treat withdrawals differently than other forms of agency decisions, though explicit discussion of such agency action is remarkably sparse. There is consensus that courts can review them if specific statutory schemes explicitly contemplate the abandonment of proposed action or if the agency faces a mandatory duty to regulate. Conflict currently exists among courts as to whether review of other withdrawals is permissible. Although there are good reasons for distinguishing withdrawals of unfinished rulemakings from the enactment of new rules and the rescission of old rules, the differential treatment in the law makes timing more important for withdrawals than for other agency decisions. Given the spike in rulemaking withdrawals after a presidential transition (typically the abandonment of rulemakings that were started but not completed under the previous administration),[28] rule withdrawals should occupy a more central role in administrative law scholarship. Yet, because withdrawals combine features of both agency inaction and agency policymaking, balancing the competing doctrinal imperatives to protect agency discretion and to keep agencies accountable present serious challenges for administrative law.

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

I. TIMING OF AGENCY POLICY

The extant positive literature on the administrative state has emphasized a series of critical questions about the balance of powers among the legislature, executive, courts, and agencies. How does Congress decide how to structure agencies?[29] Under what conditions does

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

[27] But see Robert Shull and Genevieve Smith, The Bush Regulatory Record: A Pattern of Failure, OMB Watch (Sept 2004), online at http://www.ombwatch.org/regs/patternoffailure (visited Sept 24, 2008) (lamenting the withdrawal of many public health, safety, and environmental proposals during the George W. Bush administration); O'Connell, 94 Va L Rev at 959–63 (cited in note 10); Raymond Murphy, Note, Judicial Supervision of Agency Action: The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules, 53 Geo Wash L Rev 86 (1985) (sketching out the scope of judicial review of rule withdrawals based on then-recent court decisions).

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

[29] See, for example, David E. Lewis, Presidents and the Politics of Agency Design (Stanford 2003). See also Jacob E. Gersen, Designing Agencies: Public Choice and Public Law, in Research Handbook in Public Law and Public Choice (Dan Farber and Anne Joseph O'Connell eds 2009).

Congress delegate to agencies rather than produce policy directly through legislation?[30] To what extent can Congress constrain agencies by using structure and process restrictions at the front end,[31] or budgets and oversight at the back end?[32] Does and should the president exercise significant control over regulatory policy?[33] What role do courts have in shaping agency decisions?[34] Do agencies pursue largely private interest goals or public interest aspirations?[35] Although definitive answers to many of these questions have eluded scholars, the intellectual terrain is well trodden, and we will not revisit it here. In both law and political science, however, questions of the timing of agency decisions have been comparatively neglected.[36]

To the extent that timing has received any sustained treatment in administrative law, its treatment has typically been limited to two narrow areas. First, various commentators have analyzed the ways in which courts do and should review agency failures to act entirely[37] or unreasonably delay in reaching decisions.[38] Second, and often related, timing rears its head in

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

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

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

[33] See, for example, Elena Kagan, Presidential Administration, 114 Harv L Rev 2245 (2001).

[34] See, for example, R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act (Brookings 1983); Richard W. Waterman, Amelia A. Rouse, and Robert L. Wright, Bureaucrats, Politics, and the Environment (Pittsburgh 2004); Peter H. Schuck and E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L J 984.

[35] See, for example, Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government (Princeton 2008).

[36] But see note 10.

[37] There is a fine difference between an agency deciding that it will not take a particular action and an agency not acting (often called agency inaction). The Supreme Court's recent decision in Massachusetts v EPA, 549 US 497, 127 S Ct 1438, 1449–50, 1459 (2007) (reviewing the EPA's decision to deny a petition for rulemaking to regulate greenhouse gas emissions), is an example of the former; its decision in Norton v Southern Utah Wilderness Alliance, 542 US 55, 60–61 (2004) (dismissing suit brought against the Bureau of Land Management for failure to take action to protect public lands from damage caused by off-road vehicles), is an example of the latter. We refer here to agency inaction.

[38] See 5 USC § 706(1) (2006) (providing that a reviewing court shall compel an agency to take an action that was "unreasonably delayed"); Norton, 542 US at 61 (deciding that the Bureau of Land Management was not legally required to take action, so its action could not be "unreasonably delayed"); Telecommunications Research and Action Center v FCC, 750 F2d 70, 79 (DC Cir 1989) (evaluating FCC's five year delay in its inquiry into AT&T's rate of return for reasonableness); Forest Guardians v Babbitt, 164 F3d 1261, 1272, 1274 (10th Cir 1998) (concluding that Interior Department unreasonably delayed in protecting habitat of silvery minnow because Congress imposed a deadline on agency action); Oil, Chemical and Atomic Workers International Union v Zegeer, 768 F2d 1480, 1488 (DC Cir 1985) (holding that Mine Safety and Health Administration was proceeding on a reasonable schedule to regulate miners' radon exposure, so court order was not warranted). See generally Eric Biber, The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction under the Administrative Procedure Act, 60 Admin L Rev 1 (2008); Eric Biber, Two Sides of the Same Coin:

discussions of regulatory ossification as scholars debate whether the costs of procedural requirements for agency rulemaking lengthen the rulemaking process or discourage agencies from adopting socially beneficial rules altogether.[39] In both these areas, timing questions concern the duration of agency action or inaction; that is, how long does it take for an agency to formulate a policy decision or how long has the agency taken no action? These are important topics, but our focus is on timing in a simpler sense.[40] Once an agency has made a policy decision internally, when will that decision be announced to the public and why does it matter? Although we mainly emphasize the impact of timing decisions on the distribution of monitors of the agency action, we note in passing that timing may also substitute for content or process in regulations. An agency, for instance, could adopt a less controversial policy using abbreviated procedures but issue it during a period of high media and political visibility; by contrast, an agency could adopt a more controversial stance using more formal procedures, but provide limited notice and hide the decision in the weekend news cycle.[41]

A. The Conventional Account

To the extent that there is conventional wisdom about the use of timing by agencies, it is that the visibility of agency actions can be reduced if actions are announced during a holiday or weekend news cycle or other times when congressional attention is lower than normal, for example, when Congress is in recess. The micro-foundation for this view is generally left unspecified and on close examination, it is somewhat inconsistent. Is it that the news media simply do not register government actions taken on Friday afternoons? Do interest groups with

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Judicial Review of Administrative Agency Action and Inaction, 26 Va Envir L J 461 (2008); Lisa Schultz Bressman, Judicial Review of Agency Inaction: An Arbitrariness Approach, 79 NYU L Rev 1657 (2004); DeShazo and Freeman, 155 U Pa L Rev 1499 (cited in note 10); Jody Freeman and Adrian Vermeule, Massachusetts v EPA: From Politics to Expertise, 2007 S Ct Rev 51; Ronald M. Levin, Understanding Unreviewability in Administrative Law, 74 Minn L Rev 689 (1990).

[39] See, for example, Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation (Harvard 1993); Jerry L. Mashaw and David L. Harfst, The Struggle for Auto Safety (Harvard 1990); 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); Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex L Rev 525 (1997); Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L J 1385 (1992); Peter L. Strauss, The Rulemaking Continuum, 41 Duke L J 1463 (1992); Jason Webb Yackee and Susan Webb Yackee, Is Federal Rulemaking "Ossified"? The Effects on Congressional, Presidential, and Judicial Oversight on the Agency Policymaking Process (Jan 3, 2008) (unpublished manuscript, on file with authors).

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

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

millions of dollars at stake in agency decisions head out early for their vacation homes and never bother to check what happened the week before? Are legislative staffs oblivious to this practice?

As we note below, both the conventional account and our modification emphasize the relationship between the timing of decisions and associated monitoring costs. In our view, the main mistake of the conventional account is its assumption that issuing policy during low-visibility time periods makes monitoring costs essentially so high such that no one will observe the hidden policy and it will be all but impossible to mobilize political opposition. A problem for this view has to do with short-term versus long-term equilibria. Even if this were a successful short-term strategy, it is difficult to construct a long-term equilibrium in which such behavior is rational. If the media and interest groups do not pay attention to agency decisions announced on Friday afternoons or holidays, then surely it is in an agency's interest to announce certain decisions at those times. But once interest groups or reporters get wind of the practice, they should pay extra-special attention to an agency's Friday and holiday announcements. And if the level of public attention is no less intense on those days, facilitated by a now 24-hour news cycle, then it will no longer be a best response for the agency to announce controversial policies at such times. The conventional wisdom describes a set of strategies that is off the equilibrium path.

A second reason the conventional account falters is that most forms of agency action will be available for public review independent of timing. For example, an NPRM is typically open for at least sixty days so that comments can be taken.[42] A final rule generally does not go into effect for at least thirty days to allow for notice and legal challenges to take place prior to implementation.[43] Major rules, in particular, cannot take effect for at least 60 days.[44] As a result, it is unlikely that announcing decisions on a Friday afternoon will hide much of anything. Yet, the weekend media cycle may give less attention and coverage to these actions and the natural monitors in Congress may be less able to mobilize quick opposition. But if agencies regularly engage in such behavior, interest groups and legislators should anticipate and adjust their own behavior accordingly. At best, hiding controversial decisions in this way would be a short-term political strategy, not the sort of generational political wisdom that can withstand the test of time and political dynamics.

Instead of using timing to hide decisions, we argue that agencies can make strategic timing decisions to affect the monitoring costs of Congress, the White House, interest groups, the media, and the general public. Again, this does not, as is commonly asserted, block the visibility of agency actions. Rather, it drives a shift in the population of potential monitors for any given

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[42] See Executive Order 12866 § 6(a)(1), 58 Fed Reg 51735 (1993) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."); Making Your Voice Heard at FDA: How to Comment on Proposed Regulations and Submit Petitions, Food and Drug Administration (Feb 7, 2008), online at http://www.fda.gov/opacom/backgrounders/voice.html (visited Sept 24, 2008).

[43] 5 USC § 553(d).

[44] 5 USC § 801(a)(3). A major rule is any rule OMB finds will have or is likely to have "an annual effect on the economy of $100,000,000 or more," "a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions," or a "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 USC § 804.

agency action. We begin therefore by developing an informal theory of timing decisions that captures the intuition underlying the conventional wisdom about burying bad news in the weekend news cycle. The Article's theoretical innovation is to emphasize the relationship between timing, monitoring costs, and selective participation[45] by interest groups in agency policy-making processes.[46]

B. Selective Monitoring of Agencies

To help motivate the analysis, note that most policy in the United States is implemented by the bureaucracy and agency problems are attendant in any such congressional delegation of government authority.[47] Administrative law seeks to manage the risk that agency behavior will diverge from the preferences of the public or other political institutions. Effectively monitoring agency behavior is usually a necessary condition for minimizing agency drift.

The average agency is monitored by a diverse mix of public actors and private interest groups. Some of this monitoring is formal. The White House, for example, reviews agency rules and significant guidance documents before they are issued.[48] Congress creates and funds agencies, proscribes specific responsibilities, and often supervises work using information requests, committee hearings, and other oversight tools.[49] Courts review the procedure and substance of agency actions relying on an extensive body of statutory and doctrinal tools.[50] Less formally, interest groups and members of the public often track agency actions and may petition

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[45] See generally Christopher R. Berry, Imperfect Union: Representation and Taxation in Multi-Level Governments (2008) (unpublished manuscript on file with the authors) (developing the idea of selective participation in other political contexts).

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

[47] For overviews of the delegation literature, see Epstein and O'Halloran, Delegating Powers (cited in note 30) (exploring the history and theory of delegation and delegation mechanisms); D. Roderick Kiewiet and Mathew D. McCubbins, The Logic of Delegation: Congressional Parties and the Appropriations Process (Chicago 1991) (same).

[48] See Executive Order 12866, 58 Fed Reg 51735 (1993) (setting forth reforms to the regulatory scheme including greater regulatory review and oversight), as amended by Executive Order 13422, 3 CFR 191 (2008).

[49] See generally Roger H. Davidson and Walter J. Oleszek, Congress and Its Members (CQ 10th ed 2006). See also Joel D. Aberbach, Keeping a Watchful Eye: The Politics of Congressional Oversight (Brookings 1990); Epstein and O'Halloran, Delegating Powers (cited in note 30); Lewis, Presidents at 44–48 (cited in note 29); McCubbins, Noll, and Weingast, 3 J L, Econ, & Org 243 (cited in note 12).

[50] See note 22.

other political actors as well as the agencies themselves to shift regulatory outcomes.[51] The media bring agency deeds and misdeeds to light too.[52]

Each potential monitor naturally has preferences about the substance of agency policy, usually preferring that an agency's final decisions be as close to their preference as possible. Monitoring the bureaucracy, however, is not costless. Interest groups monitoring agency action must balance the benefits of monitoring agency behavior with its costs.[53] As a result, it is generally only groups with something at stake that are willing to bear the costs of monitoring. Suppose that each of these interest groups has a different expected benefit from monitoring agency decisions, perhaps because they have different concerns or because they have different abilities to respond to decisions. If so, there will always be some group for whom the existing marginal cost of monitoring is near equal to the marginal return from monitoring. Any factor that increases the costs of participation will make the expected returns from monitoring negative. These interest groups for whom it was just barely worth participating given the existing costs and benefits, will cease to when monitoring costs increase.

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

To get some sense of the benefits and costs of monitoring, which can range from relatively trivial to significant, consider two classic forms of congressional oversight of agencies: "police patrols" and "fire alarms."[54] According to McCubbins and Schwartz, "[i]nstead of sniffing for fires, Congress places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm."[55] Most

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[51] See Daniel P. Carpenter, Protection Without Capture: Product Approval by a Politically Responsive, Learning Regulator, 98 Am Polit Sci Rev 613 (2004); Scott R. Furlong, Interest Group Influence on Rule Making, 29 Admin & Socy 325 (1997); Jason Webb Yackee and Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J Polit 128 (2006); Susan Webb Yackee, Assessing Inter-Institutional Attention to and Influence on Government Regulations, 36 Brit J Polit Sci 723 (2006).

[52] See, for example, Goldstein and Cohen, Bush Forces a Shift in Regulatory Thrust, Wash Post at A1 (cited in note 6). See generally Cary Coglianese and Margaret Howard, Getting the Message Out: Regulatory Policy and the Press, 3 Harv Intl J Press/Polit 39 (June 1998).

[53] See David Epstein and Sharyn O'Halloran, A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy, 11 J L, Econ, & Org 227, 228 (1995) (drawing inferences about interest group "fire alarms" based on a formal model of interest groups).

[54] McCubbins and Schwartz, 28 Am J Polit Sci at 166 (cited in note 32).

[55] Id.

oversight of agency action occurs through threats by interest groups to sound a fire alarm to Congress because such oversight is cheaper than direct police patrolling such as regular hearings and investigations by congressional members.[56] Although police patrols and fire alarms were defined to describe categories of congressional oversight, they also help illuminate monitoring efforts by the other branches of government, interest groups, the general public, and the media. The White House is much like Congress—able to engage in police patrols but often reliant on fire alarms. The courts, by contrast, cannot do their own patrolling and must wait for an alarm to be pulled. Interest groups, the general public, and the media are the ones who generally pull such alarms, often after engaging in police patrols of their own.

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

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

C. Timing and Monitoring Costs

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

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[56] Id at 166–69.

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

Importantly, the effectiveness of this strategy will vary depending on the type of underlying action. It may work sometimes for final rules, but it should work much more effectively for a subset of less prominent agency actions. Where delay, transparency, and judicial scrutiny are not built into the administrative process, the prospect of strategically manipulating the timing of decisions is more sensible. Part of what makes the conventional timing story less than wholly compelling is that new rules are usually proposed, considered for many months with extensive public comments, announced, and then implemented only after affected parties have considered whether to challenge the decision in court. In other settings, however, agencies make policy decisions without prior notice and comment, using such devices as interim final rules, direct final rules, ostensibly nonbinding policy statements, and so on.[57] Some of those devices do not take effect immediately.[58] Additionally, especially after shifts in administration, many of the most controversial agency decisions will be whether to implement or withdraw rules started by prior administrations.[59] Rule withdrawals occur without prior notice and comment or an ex-post lag. Rule withdrawals are sometimes challenged in court, but the burden of doing is typically much higher.[60] The returns from strategically manipulating timing should be greater for this class of actions than either the commencement of traditional rulemaking (through NPRMs) or the implementation of final rules. Although it would not be surprising to see little evidence of timing manipulation anywhere, if robust timing effects exist anywhere, it should be for this limited subset of decisions.

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[57] See Michael Asimow, Interim-Final Rules: Making Haste Slowly, 51 Admin L Rev 703, 704 (1999) (introducing interim final rulemaking); Jacob E. Gersen, Legislative Rules Revisited, 74 U Chi L Rev 1705, 1709–13 (2007) (defining different types of rules based on features including the presence of notice and comment procedures); Ronald M. Levin, Direct Final Rulemaking, 64 Geo Wash L Rev 1, 1–3 (1995) (introducing direct final rulemaking and contrasting it with interim final rulemaking); Lars Noah, Doubts About Direct Final Rulemaking, 51 Admin L Rev 401, 403 (1999) (arguing that direct final rulemaking is out of place in existing law).

[58] Direct final rules, for example, do not take effect until 30 or 60 days have passed, assuming no adverse comments are submitted in that period. Ronald M. Levin, Direct Final Rulemaking, 64 Geo. Wash. L. Rev. 1, 1 (1995).

[59] See, for example, Shull and Smith, The Bush Regulatory Record, OMB Watch (cited in note 27).

[60] See Part III.A.

The ability of agencies to use timing to raise monitoring costs will also vary according to the type of monitor: members of Congress and the general public may fare worse than the White House, which has other ways to monitor likely agency policy before it is issued. This ability may also differ by the type of monitoring the agency watchers use: "fires" become harder to see, raising the costs of those who look for or respond to them; by contrast, frequent police patrols should catch strategically timed actions. Finally, this ability to manipulate timing may depend on agency choices on other dimensions, including regulatory substance and procedure.[61] Given certain procedures and substance of an agency decision, timing that is less visible naturally imposes more costs on monitors than more visible timing. But less visible timing may trade off against more visible procedures or more palatable substance, leaving the cost-benefit calculation unchanged. For instance, an agency could announce uncontroversial regulations on Fridays, perhaps making monitoring at those times less attractive for interest groups; by contrast, an agency could issue contentious decisions on Fridays, likely making monitoring even more attractive or necessary for interest groups.[62] Timing decisions are then best understood as strategic decisions by agencies that can make it more difficult, other factors being equal, for watchers to interfere with their policy implementation. The timing of action makes effective monitoring of agency action more costly, which in turn should change the universe of interests participating in agency process.

II. Empirical Evidence

Another reason the conventional account is unsatisfying is that it is insufficiently attentive to the reality of regulatory politics. The strategic use of timing requires both desire and opportunity on the part of agencies. If the agency either does not care or is not engaged in controversial action, then there is no reason to try to reduce the visibility of decisions. Alternatively, the opportunity to use timing effectively may not be present, even if the desire on the party of agencies exists. Suppose an agency wants to avoid public controversy. When agencies take an action that upsets interests groups, these groups have two main options. One is turning to the courts and challenging the legal validity of the decision. The other is running to Congress and generating political opposition to the agency's proposal. The right locale for analysis then is whether and the extent to which changing the timing of decisions can affect the costs of reacting to agency action. First consider the relationship between bureaucratic timing and judicial review. For most types of agency actions, the timing of decision does not meaningfully affect the costs of judicial response. Because delay and visibility are explicitly built into most administrative process, interest group challenges will be no more difficult for policies announced on Fridays than policies announced on Tuesdays. Timing may play a more plausible role with respect to types of agency actions that are more difficult to challenge in litigation. Because legal challenge is more difficult, upset interest groups will have to generate a response

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[61] See generally Stephenson (cited in note 41).

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

in either the media or the legislature. If there is any weekend news effect, strategic timing of announcements could generate less controversy for this subset of actions.

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

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

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

A. Measuring Timing

Conceptual quibbles aside, it would be surprising if generations of political anecdotes were complete off base. This practice of manipulating the news cycle may be effectively utilized by agencies and other government organizations. Officials in multiple administrations and members of different political parties all seem to insist timing does reduce visibility. The analysis relies on a large database of agency rulemaking actions constructed from twenty-five years' (1983–2008) worth of federal agency semi-annual reports in the Unified Agenda of Federal

Regulatory and Deregulatory Actions.[63] The database contains considerable information on the rulemaking process, including, if applicable, the date of the NPRM, the date(s) of the comment period(s), the date when the final rule was promulgated (if the process was completed), the date the rulemaking process was withdrawn (if the process was not completed), and particular characteristics of the rulemaking. The database has information on the rulemaking activities of all 15 cabinet departments as well as 32 executive and independent agencies.

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

A first question is whether agencies do in fact manipulate the timing of decisions. Without the ability to peer inside the heads of administrators (or a survey of agency decisionmakers), answering this question requires a descriptive baseline. That is, what would the distribution of policy announcements look like if there were no manipulation of timing and how serious a deviation from that distribution would justify a conclusion that strategic timing decisions are being made? Because there is virtually no rigorous empirical work on this question,[64] we start with a parsimonious assumption, positing that the "no manipulation of timing" regime would produce a roughly uniform distribution of agency actions—essentially equal probability of occurrence at each possible point in the distribution. If agencies are only open for business during the week, one would expect approximately 20 percent of all agency actions to be taken (announced) on each day of the work week. If a given agency seems to cluster announcements disproportionately (much more than 20 percent) on Fridays, this might be suggestive evidence that timing dynamics are in play. Far from clustering final actions on Friday afternoons, however, the distribution of policy announcements by agencies is nearly exactly uniform.[65] No weekday produces less than 17 percent of final actions announced and agencies announce just less than 22 percent of final actions on that day. Although we do not make too much of this evidence, there is nothing in it to support the idea that agencies prefer to hide decisions in the weekend news cycle. The distribution of rulemaking starts (NPRMs) is almost identical, with little to no meaningful day-to-day variation.

In addition, the aggregate data could easily mask either the presence or absence of real underlying timing trends. For example, even if each day of the week has equal mass, it could be that the 20 percent announced on Tuesday are relatively uncontroversial policies, whereas the 20 percent announced on Fridays are extremely controversial. Without a way of measuring how controversial different decisions are, this possibility cannot be eliminated but controlling for rule

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

[64] But consider DellaVigna and Pollet, Investor Inattention (cited in note 1) (analyzing the timing of Executive Orders).

[65] Coding and results for all the data analysis are available from the authors.

characteristics does partially mitigate this issue.[66] There are certain exceptions, of course. Executive agencies announced significantly more NPRMs on Fridays in 1995, the first year Republicans had control of Congress since 1947. Independent agencies commenced many more rulemakings on Fridays in 1983. Cabinet departments announced significantly more final actions on Fridays in 1983, 1988, 1989, and 1994.

Given the obvious deficiencies of the aggregate descriptive data, a second empirical strategy is called for. Recall that timing manipulation should be a joint function of the desire to reduce political response to controversial policies and the ability to do so. As an empirical matter then, political and institutional conditions that would affect either the desire of agencies to reduce political response or the ability to do so should be correlated with the timing of agency action. The exogenous institutional conditions should be statistically associated with the probability that a given action is announced on a Friday or alternatively when Congress is out of session. This idea is straightforward, but also a bit sloppy in that it conflates the desire to avoid negative political response with the ability to do so; nonetheless, as a first approximation it is arguably defensible.

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

Or, suppose an agency has preferences that diverge from the president.[67] Given extensive presidential oversight over non-independent agencies instantiated in review by the OMB's Office

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[66] See []

[67] Arguably this is the case for (some) current staff of the EPA and President George W. Bush. See Janet Wilson, EPA Chief Is Said to Have Ignored Staff, LA Times A30 (Dec 21, 2007). In addition, the Office of Information and Regulatory Affairs (OIRA), which arguably shares the President's preferences, also recently rejected the National Oceanic and Atmospheric Administration's (NOAA) proposed rule to cut down on the fishing of krill, a marine species and important food source for whales and other animals in the Pacific Ocean. See Fisheries Off West Coast States; Coastal Pelagic Species Fishery; Amendment 12 to the Coastal Pelagic Species Fishery Management Plan, 72 Fed Reg 8335 (2007). OIRA returned the proposed rule for reconsideration eight months later. Susan E. Dudley (Administrator, OIRA), letter to John J. Sullivan (General Counsel, NOAA) (Oct 30, 2007), online at http://www.reginfo.gov/public/return/return_doc_20071030.pdf (visited Sept 24, 2008) After revision, OIRA accepted the proposed rule. See Fisheries Off West Coast States; Coastal Pelagic Species Fishery; Amendment 12 to the Coastal Pelagic Species Fishery Management Plan, 73 Fed Reg 29104 (2008).

of Information and Regulatory Affairs,[68] it seems unlikely that an executive agency could successfully use timing to raise presidential monitoring costs. An independent agency, however, might be able to manipulate timing. But an independent agency would do so only if presidential oversight affected its decisions.[69] Scholars have long theorized that independent agencies are more susceptible to congressional pressure precisely because of the lack of explicit presidential control.[70] If these assumptions about political control of independent agencies are correct, then this institutional feature—agency independence—should have virtually no impact on the probability that an action is announced on a Friday, but quite a large impact on whether an action is announced when Congress is out of session.

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

B. Discussion

Table 1 contains the results from four main probit regression models; each model estimated twice, once on a longer panel with less substantive information and once with a shorter panel for which we have more complete information. We estimate models for two types of agency decisions, final actions and rule withdrawals, and investigate two types of timing effects, the announcement of decisions on a Friday (or weekend) and the announcement of a decision when Congress is out of session.[71] Rather than estimate overly complicated models that make heroic demands on the underlying data, the analysis tends heavily toward towards parsimony, particularly given the preliminary nature of these findings. The coefficients presented in Table 1 are marginal effects; they can be interpreted as the marginal change in the probability that the given agency policy is announced for example, on a Friday, as the covariate or independent variable changes. To illustrate, in a model of Friday policy announcements, a marginal

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[68] See Nicholas Bagley and Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 Colum L Rev 1250, 1278–79 (2006); Robert W. Hahn and Robert E. Litan, Counting Regulatory Benefits and Costs: Lessons for the US and Europe, 8 J Intl Econ L 473, 476 (2005); Robert W. Hahn and Mary Beth Muething, The Grand Experiment in Regulatory Reporting, 55 Admin L Rev 607 (2003); Kagan, 114 Harv L Rev at 2290–99 (cited in note 33).

[69] Consider Lewis, Presidents (cited in note 29); Kagan, 114 Harv L Rev at 2376–77 (cited in note 33).

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

[71] Throughout the paper, we use the Senate recess schedules as an indicator of legislative recess. The House and Senate recesses overlap extensively, but not perfectly so.

coefficient of -0.20 on agency independence would indicate that independent agencies are 20 percent less likely to announce decisions on Fridays than non-independent agencies.

The models rely on two main sets of covariates or explanatory variables. The first is a set of variables indicating political and institutional conditions. These variables include whether the action was taken during a period of divided government, whether the year in which the action was announced was an election year or the year after a presidential election, whether control of Congress just shifted, and whether the issuing agency is independent or a cabinet agency. The second set emphasizes features of the regulatory action itself, including whether the action is economically or otherwise significant and whether it implicates state government interests. These action characteristics are an attempt to control for the baseline level of importance or controversy. Given the sheer size of regulatory actions in the database, coding a direct measure of potential controversy for each action is not feasible. Thus, in the analysis presented, we have to rely on the second set of proxies. To be certain, these measures are crude, but they are also the best available approximation.[72] Each of the four models is estimated twice. The first column contains more observations as it includes data from 1983-2008. However, one important substantive variable—whether the agency action qualifies as a "significant" action is not reliably coded until 1995. We thus re-estimate the models on this later subset of the data. In most cases, coefficients have the same sign and roughly the same magnitude; however, because there is no good methodological reason for favoring one set of estimates over the other, we present both sets of results.

First, note consider columns one and two. There are no independent variables that are either statistically or significantly associated with the probability that a final rule is issued on a Friday or weekend, with one exception. In column two (covering from 1995-2008), significant final actions are more likely to be announced on Fridays. This lends at least some credence to the anecdotal evidence about Friday announcements of controversial decisions. The effect is not huge, but it does seem to be genuine. Significant rules are about three percent more likely to be announced on Fridays than non-significant rules. Friday announcements are no more likely in election years or the years immediately after election years. Friday announcements are no more likely when government is united or divided. No other measured characteristic of the agency action itself—for example, whether the action impacts state government interests or the number of comment periods—is associated with Friday actions either. Indeed, the overarching

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[72] We also considered other ways to get at whether agencies were announcing "bad" or "good" news. We might expect rulemaking announcements by conservative agencies (such as the Defense Department) under President Clinton and liberal agencies (such as the Environmental Protection Agency or the US Agency for International Development) under Republican Presidents to be more controversial than the reverse. For example, the Don't Ask, Don't Tell policy for gays in the military under President Clinton and the refusal to regulate greenhouse gases under President George W. Bush generated considerable opposition. See, for example, Paul Quinn-Judge, Military Policy on Gays Detailed; Conduct Is Target, Not One's Orientation, Boston Globe 3 (Dec 23, 1993) (Don't Ask, Don't Tell); Massachusetts v EPA, 549 US 497, 127 S Ct 1438, 1449–50 (2007) (challenging absence of regulation on greenhouse gases). We coded the agencies in our database as liberal, neutral, or conservative using Professors Joshua Clinton and David Lewis's typology of agencies. Joshua D. Clinton and David E. Lewis, Expert Opinion, Agency Characteristics, and Agency Preferences, 16 Polit Analysis 3 (2008). We then examined whether announcements from agencies not perceived to be ideologically close with the President were announced in low-visibility settings, but found that not to be the case. Coding and regression results are available from the authors.

conclusion from the analysis of Friday policy announcements is that virtually none of the institutional, political, or agency characteristics that the conventional account might expect to be associated with the strategic use of timing are associated with Friday actions at all. This should give adherents to the conventional view at least some pause.

Still, there could be no identifiable associations in the data, even if the conventional account is correct, so long as agencies seek to hide a sufficiently small number of decisions. The aggregate data could mask real, though rare, associations. This possibility cannot be eliminated with our existing methods, but note that if it is true, the timing problem is less significant—not more—for it would mean that the manipulation of timing so infrequent as to be unidentifiable except by anecdote. In essence, the data might not be fine-grained enough or there might be too much noise in the data to find meaningful relationships. By the same token, the fact that the data do reveal a relationship between rule significance and Friday actions suggests otherwise. Similarly, if this aggregate masking problem were real, account it also implies that no other timing effects should be identifiable in the data. As it turns out, however, there are identifiable timing effects.

Columns three and four of Table 1 summarize the probability that a final agency action will be announced during a congressional recess. If Congress is out of session, all else equal, the costs of mobilizing a political response to unpopular policy should rise. We hesitate to place too much emphasis on the magnitude of coefficients and instead focus mainly on the direction and robustness of effects. All coefficients that are significant in one model are also statistically significant in the other, and all but one have the same sign. Rules producing an impact on state government are more likely to be issued during a congressional recess. In the year after a presidential election, final actions are somewhat less likely to be issued when Congress is out of session;[73] rules issued during periods of divided government are less likely to be issued during recess; and actions announced immediately after control of both chambers of Congress shift (e.g., 1995, 2007) are less likely to be announced when Congress is out of session. Although speculative, it may be that congressional attention is particularly acute during these time periods and thus, the marginal benefit of raising response costs is not worth the cost. The results raise many interesting questions, and many of these associations cry out for greater analysis and theorizing. For the moment, however, we note only the basic empirical associations.

The conceptual discussion also suggested that it may be more effective to use timing to affect monitoring costs with regard to actions that were harder to challenge ex post, like rule withdrawals. Columns five to eight, examine this possibility. First, note that a shift in congressional control increases the probability of action on Fridays (columns 6, 7), and seems to increase the probability that the rule will be withdrawn during a recess as well (column 8). That said, the opposite sign on the covariate that does not control for rule significance (column 7) suggests caution about any strong conclusions. If these effects are genuine, then timing dynamics for withdrawals differ somewhat from the dynamics for final actions. This should not be altogether surprising. Whereas final rules will be hard to hide from Congress anyway, withdrawn

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

rules may not be. The temptation to increase monitoring costs for rule withdrawals may be especially strong.

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

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

Unlike the effect on final actions, significant rules are less likely to be withdrawn on Fridays, which again stands to reason. Significant proposed rules have already received a great deal of attention because of their large economic or other major impact. The prospects of hiding these withdrawals are dim. Agencies are more likely to withdraw significant rules during a congressional recess however. The basic point is that variables one would expect to drive strategic timing decisions—if such decisions were being made by agencies—are in fact associated with the timing of withdrawals, but are not associated with the issuance of final rules.

* * *

Our view is not that timing is unimportant, but that timing influences regulatory politics in a somewhat different way from common intuition. While agencies may prefer to reduce the visibility of their actions, agencies will often be unable to do so. Empirically the dynamics of final actions differ from rule withdrawals. Although significant rules are more likely to be announced on Fridays and during congressional recesses, other political or institutional variables

that one might expect to be associated with the timing of such announcements are not. Political conditions seem to matter more for rule withdrawals, a subset of agency actions less subject to ex ante viewing or ex post challenge. Because rule withdrawals are more difficult to challenge in court, it is one of the few types of agency policies for which announcing in a lower visibility environment does in fact raise monitoring costs substantially. The availability of judicial review partially constrains an agency's strategic use of timing as to the weekend news cycle effect. But an agency can still use timing to drive up other monitoring costs: mainly, the costs of assembling a legislative coalition to respond to the agency's decision. When Congress is the likely responder to fire alarms, timing can drive up these costs.

This analysis merely skims the surface of how of agency timing decisions affect the rulemaking process. Future research might examine how agencies balance timing and procedural aspects of rulemaking. More specifically, do agencies issue guidance or interim final rules, which generally lack prior public comment and ex post delay in implementation, in low-visibility settings, compounding accountability concerns? For the time being, however, we hope to have shown that the conventional account of timing in politics is substantially less complete than generally assumed.

III. Institutional Implications

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

A. Abandoning Action

Despite their prevalence, the abandonment of proposed rulemakings is largely an absentee category in administrative law.[74] Withdrawals, if they are discussed at all as distinct

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[74] But consider Biber, (cited in note 38), at 29-30 (arguing that resource allocation concerns are mitigated for judicial review of agency withdrawals of partially completed rulemakings); O'Connell, supra note XX, at 959-63 (tracking withdrawals from 1983 to 2002); Jason M. Loring & Liam R. Roth, Note, After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations, 40 Wake Forest L. Rev. 1441 (2005) (examining withdrawals by the EPA, OSHA, and NHTSA); Robert Shull & Genevieve Smith, The Bush Regulatory Record (OMB Watch 2004) (analyzing withdrawals by the FDA and EPA from 2001 to 2004 and finding that they withdrew 60 and 52 percent of actions, respectively, carried over from the previous administration). There is much more discussion in the mainstream press, though overall that coverage is quite limited. See R. Jeffrey Smith, Under Bush, OSHA Mired in Inaction, Wash. Post, Dec. 29, 2008, at A1; Sarah Cohen & Laura Stanton, Comparing Presidential Action on Regulations, Wash. Post, Aug. 15, 2004, at A14, available at

agency decisions, are relegated to short notes in administrative law casebooks.[75] Current administrative law scholarship is focused almost exclusively on either final agency policy decisions or agency decisions not to act at all.[76] In the agency action context, the rulemaking process draws nearly all of the attention,[77] though agencies can also enact binding policies through adjudication.[78] The standard account is one of notice and comment rulemaking, where displeased parties might challenge the process or the outcome.[79] Less standard, but increasingly common in practice, are rulemakings without prior notice and comment, such as direct or interim final rulemaking.[80] Here too parties can contest either the means by which the agency decision was reached or the ultimate substance of the policy.[81] In either case, the agency decision might be a new regulatory initiative or might rescind a former policy that was already in effect, but regardless, if the parties have standing, it is relatively easy to get into court.

Agencies, of course, sometimes fail to act. Although agency inaction is sometimes grounds for legal challenge, in practice it is extremely difficult to drag an agency into court to defend its policymaking reticence.[82] In these inaction cases, the agency has not started the rulemaking process, but commentators uniformly conflate the absence of an outcome with the

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http://www.washingtonpost.com/wp-srv/politics/daily/graphics/regulations_081604.html; Amy Goldstein & Sarah Cohen, Bush Forces a Shift in Regulatory Thrust, Wash. Post, Aug. 15, 2004, at A1.

[75] See, e.g., Ronald A. Cass et al., Administrative Law 200-01 (5th ed. 2006); William F. Funk et al., Administrative Procedure and Practice 68-69 (3d ed. 2006); Jerry L. Mashaw et al., Administrative Law: The American Public Law System 895-97 (4th ed 1998).

[76] See generally DeShazo and Freeman, 155 U Pa L Rev 1499 (cited in note 10).

[77] See Bressman, 107 Colum L Rev at 1761–63 (cited in note 11) (providing a brief history of administrative law from the 1970s until today).

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

[79] See, for example, New York v EPA, 413 F3d 3, 10 (DC Cir 2005) (procedural and substantive challenges).

[80] See Office of the Vice President, Improving Regulatory Systems: Accompanying Report to National Performance Review at Recommendation 5 (1993), online at http://govinfo.library.unt.edu/npr/library/reports/reg.html (visited Sept 23, 2008); Administrative Conference of the United States, Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed Reg 43108, 43110–13 (1995); Asimow, 51 Admin L Rev at 712–15 (cited in note 57); Levin, 64 Geo Wash L Rev at 1 (cited in note 57); Noah, 51 Admin L Rev at 401–02 (cited in note 57).

[81] See, for example, NRDC v Abraham, 355 F3d 179, 184, 205–206 (2d Cir 2004) (holding that DOE withdrawal of air conditioner efficiency standards was improper based on its interpretation of statute and its manner of promulgating delays); Methodist Hospital of Sacramento v Shalala, 38 F3d 1225, 1236–1238 (DC Cir 1994) (upholding policy of Secretary of Health and Human Services to revise Medicare reimbursement rates, though it did not include notice and comment procedures).

[82] See, for example, Norton v Southern Utah Wilderness Alliance, 542 US 55 (2004).

absence of any rulemaking process and thus have not discussed rulemaking withdrawals in any depth.[83]

Rule withdrawals sit uneasily in between these two ideal types, of agency action and inaction.[84] When an agency withdraws a proposed rule, it has started a rulemaking process but has decided not to complete it. Commentators have generally ignored the issue of whether withdrawals are more like agency action or agency inaction,[85] and to the extent that the courts have considered it, they are not in agreement, as will be discussed in more depth below. But the answer to that classification question—as a positive and normative matter—actually constrains the ability of agencies to strategically time rulemaking withdrawals. If withdrawals are more like agency action, with traditional access to judicial review, agencies will have less incentive to manipulate the timing of withdrawals because interest groups will not find it harder to challenge those withdrawals in court if they are issued on a Friday rather than on a Tuesday. By contrast, if withdrawals are more like agency inaction, with less access to judicial review, agencies will have more incentive to manipulate timing. If legal challenges are less plausible, interest groups will have to use the media or Congress to advance their policy preferences; those tools are harder to use on weekends and when Congress is not in session.[86]While there is considerable confusion in the courts as to the reviewability of withdrawals, there is some agreement. We start first with the two accepted doctrines governing withdrawals. First, if the relevant statutory scheme expressly contemplates the withdrawal of a proposed regulatory action in particular circumstances, courts will typically review the withdrawal. The Endangered Species Act (ESA) is a prime example. Pursuant to the ESA, if the agency proposes to list a species (a process involving notice and an opportunity for public comment), it must within a year conclude that the species is endangered and list the species, conclude that the species is not endangered and withdraw the proposed listing, or conclude that there is scientific disagreement about whether the species is endangered and extend the decision period by six months.[87] When the agency determines that a proposed listing is not justified (that is, that the proposed species is not endangered) and withdraws the listing proposal, that action can be reviewed by the courts so long as the parties have standing.[88]

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[83] See, for example, Biber, 60 Admin L Rev 1 (cited in note 38).

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

[85] But see Murphy, Note, 53 Geo Wash L Rev 86 (cited in note 27). Biber, (cited in note 38) (labeling withdrawals agency action).

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

[87] 16 USC § 1533(b)(6) (2006).

[88] See, for example, Federation of Fly Fishers v Daley, 131 F Supp 2d 1158, 1169 (ND Cal 2000) (finding agency decision not to list a species of steelhead as a threatened species arbitrary and capricious); Save Our Springs v Babbitt, 27 F Supp 2d 739, 748 (WD Tex 1997) (finding agency decision to withdraw listing a species of salamander as endangered was arbitrary and capricious).

The Clean Air Act (CAA) is another example. The Administrator of the EPA must propose a rule establishing an emission standard for any hazardous pollutant, hold a public hearing, and then enact the standard or issue a finding that the agent is not a hazardous pollutant.[89] Withdrawals of proposed rules are reviewed as decisions not to implement proposed emission standards.[90] Under both the ESA and CAA, the agency must justify the withdrawal, providing a record on which the courts can review the agency action. But these statutes are the exception rather than the rule:[91] most statutes do not explicitly contemplate the abandonment of proposed rulemakings.

Second, even if the statutory scheme does not explicitly contemplate the withdrawal of proposed regulations, courts will often review agency decisions to abandon proposed action if the applicable statute imposes mandatory obligations on the agency to act. In Farmworker Justice Fund v. Brock, the DC Circuit reversed the Secretary of Labor's decision "not to promulgate a proposed occupational safety or health standard he finds to be necessary to fulfill the purposes of the OSH Act solely in the hope that state governments will provide equivalent protection in the next two years."[92] The court explained: "Whatever the extent of a particular agency's discretion under a particular statute, it does not encompass the authority to contravene statutory commands."[93]

Similarly, in Environmental Defense Fund v. EPA,[94] the DC Circuit concluded that the agency had acted arbitrarily and capriciously by withdrawing its proposed reinterpretation of the mining waste exclusion to the Resource Conservation and Recovery Act.[95] Reviewability was in some sense overdetermined. The agency conceded the court's jurisdiction, and the court cited the DC Circuit's holding in Montana v. Clark,[96] discussed below, which seemingly permits (at least in the DC Circuit) review of any withdrawal after notice and comment of proposed amendments to longstanding rules, if the longstanding rules are kept in effect. But the statutory provision at issue also imposed a set of mandatory obligations on the agency.[97] This second uncontested

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[89] 42 USC § 7412(b)(2)–(3) (2000).

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

[91] Similarly, under the Mine Safety and Health Act, the Secretary of Law may abandon a proposed "health or safety standard [if he] publish[es] his reasons for his determination" to withdraw it. 30 USC § 811(a)(4)(C) (2000). This is an explicit exception to the Secretary's "affirmative duty to complete" a rule once he has identified the need for it. United Mine Workers v Department of Labor, 358 F3d 40, 43 (DC Cir 2004) (Mine Safety and Health Administrator must provide adequate explanation for its decision to withdraw air quality rule).

[92] 811 F2d 613, 623 (DC Cir 1987), vacated as moot.

[93] 811 F.2d at 622.

[94] 852 F2d 1316 (DC Cir 1988) (finding that EPA's decision to withdraw was contrary to congressional intent and that the agency's reasoning only supported refining the proposal, not withdrawing it altogether. Id at 1329–1330).

[95] Id at 1318.

[96] 749 F2d 740 (DC Cir 1984).

[97] Environmental Defense Fund, 852 F2d at 1320.

doctrine on withdrawals comports with the rule announced in Norton v. Southern Utah Wilderness Alliance,[98] which permits review of complete agency inaction "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."[99]

Outside of these two doctrines, however, there is far less consensus concerning the reviewability of withdrawals, particularly those of proposed rulemakings that are not mandated by statute. This conflict, which is sometimes explicit, but often is implicit, has generated remarkably little discussion in the case law. The Supreme Court has not directly addressed withdrawals. The debate over reviewability, such as it is, largely pits the DC Circuit against the Ninth Circuit. The DC Circuit continues to rely on case law that precedes the Supreme Court's ruling in Heckler v. Chaney,[100] which barred judicial review of the Food and Drug Administration's decision not to take particular enforcement actions, to examine discretionary withdrawals. By contrast, the Ninth Circuit has refused to adopt a similar stance by vacating en banc a panel decision in line with the DC Circuit.

The DC Circuit has reviewed agency withdrawals of a narrow category of proposed discretionary rules for decades.[101] Panels in that circuit typically just quote a line from a 1984 case, Montana v. Clark: "The law in this circuit is clear that an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action."[102] By its terms, the line appears to cover withdrawals of uncompleted rulemakings. The agency in the case, however, had issued a final rule, which did not include the proposed amendments but instead kept the previous rules in effect.[103] The line also overstates the clarity of the Circuit's law on withdrawals. The previous "law in [the DC] [C]ircuit" is sparse. Some analysis appears in Center for Auto Safety v. National Highway Traffic Safety Administration.[104] After finding that the withdrawal of an Advanced Notice of Proposed Rulemaking was a "rule" under the APA,[105] the DC Circuit then analyzed whether the withdrawal was ripe for judicial review. Specifically, the court determined in a "pragmatic way" that because the withdrawal of proposed changes was

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[98] 542 US 55 (2004).

[99] Id at 64.

[100] 470 US 821 (1985).

[101] See, for example, Environmental Defense Fund, 852 F2d 1316. But consider Kennecott Utah Copper Corp v Department of the Interior, 88 F3d 1191, 1207 (DC Cir 1996) ("Because [the agency's] decision to withdraw the [proposed rulemaking] did not alter substantive legal obligations under previously published regulations, the agency's decision to withdraw the document did not constitute a 'regulation' within the meaning of § 113 of CERCLA.").

[102] 749 F2d at 744.

[103] Id.

[104] 710 F2d 842 (DC Cir 1983) (dismissing petition to review agency decision to withdraw proposed fuel efficiency standard because it was not ripe for judicial review).

[105] Id at 846.

a final decision to maintain the status quo (so far as those changes applied to cars built in 1985), it was reviewable.[106]

The most extensive discussion appears in NRDC v. SEC,[107] in which the DC Circuit explicitly considered the advantages and disadvantages of allowing judicial review of an agency's decision not to finalize a proposed rule.[108] The court, on balance, favored review in particular circumstances:

> [I]n a context like the present one, in which the agency has in fact held extensive rulemaking proceedings narrowly focused on the particular rules at issue, and has explained in detail its reasons for not adopting those rules, we believe that the questions posed will be amenable to at least a minimal level of judicial scrutiny.[109]

Not only is review predicated on the scope of agency proceedings prior to the withdrawal and on the nature of the agency's explanation, it also is quite deferential.[110] In short, review of withdrawals outside explicit statutory provisions and mandatory duties in the DC Circuit appears considerably narrower in practice than may first appear.[111]

The Ninth Circuit recently adopted the DC Circuit's case law from the 1980s in Animal Legal Defense Fund v. Veneman,[112] but later vacated its ruling.[113] Although no longer binding, the ruling provides the most recent comprehensive discussion of whether courts should review agency withdrawals of proposed policies. The majority concluded that the abandonment of a "proposed interpretative rule" was a final agency action within the meaning of § 704 of the APA

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[106] Id at 846–47 (quotation marks omitted). The court explained: "Thus, to the extent that NHTSA's public statements withdrawing its January Notice represent a binding decision not to adopt or enforce improved fuel efficiency standards for particular years in the future, but rather represent a decision to maintain the 27.5 mpg standard provided for by Congress, they logically should be ripe for review." Id at 847. The court determined, however, that the agency's decision to abandon the rulemaking as it applied to post-1985 models was not final. See id at 848–49.

[107] 606 F2d 1031 (DC Cir 1979) (upholding agency decision to deny petition for rules requiring disclosure of companies' environmental practices).

[108] Id at 1047.

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

[110] Indeed, in NRDC v SEC, the court affirmed the agency's decision. 606 F2d at 1062. See also Consumer Federation of America v. CPSC, 990 F2d 1298 (DC Cir 1993); NRDC v. EPA, 824 F2d 1146 (DC Cir 1987); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F2d 1216 (DC Cir 1983). But consider Competitive Enterprise Institute v. NHTSA, 956 F2d 321 (DC Cir 1992); Williams Natural Gas v. FERC, 872 F2d 438 (DC Cir 1989).

[111] See, e.g., Center for Auto Safety v. National Highway Traffic Administration, 710 F.2d 842 (DC Cir 1983) (holding that challenge to withdrawal of an advanced NPRM was not ripe)

[112] 469 F3d 826 (9th Cir 2006) (permitting challenge to USDA's decision not to adopt draft policy protecting the psychological wellbeing of primates in zoos and research facilities).

[113] 482 F3d 1156 (9th Cir 2007); 490 F3d 725 (9th Cir 2007).

and thus was reviewable by the courts.[114] The majority engaged in a two-part inquiry: "First, did the abandonment of a Draft Policy have legal consequences or determine rights or obligations? Second, does it make a difference that the [agency] had no legal obligation to propose or adopt the Draft Policy in the first place?"[115] It answered the first affirmatively and the second negatively.

The majority recognized that "[j]udicial second-guessing of such decisions triggers concerns of overreaching, particularly when the agency has already deemed the regulation unworthy of adoption."[116] Despite these concerns, the majority relied on three DC Circuit cases[117] to determine that courts may be able to review, at least minimally, the withdrawal of proposed discretionary agency action where the agency has met the two-part test in NRDC v. SEC.[118] It concluded that the draft policy at issue met both criteria.[119]

The panel was not unanimous. Judge Kozinski, in dissent, began: "In holding that we can review the withdrawal of proposed regulations an agency had no duty to adopt, my colleagues overlook the sea-change in administrative law wrought by Heckler v. Chaney, which held that we have no authority to review an agency's discretionary decision not to act."[120] He stressed that "adoption and nonadoption of regulations are asymmetrical events": the former "change[s] the law, and thus can sharply affect the legal interests of private parties"; the latter "leaves rights and responsibilities unchanged."[121] He also speculated on the implications of the majority's holding on agency decisions, arguing that "it discourages agencies from proposing discretionary regulations, lest they be stuck with them if they cannot convince a federal court that the record supports abandonment."[122] Judge Kozinski may have been in the minority on the panel, but may have been in the majority in the Ninth Circuit, which voted to vacate the panel's decision and to rehear the case en banc.[123] But before the Ninth Circuit could rehear the case, the parties settled

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[114] Veneman, 469 F3d at 839–40, 844.

[115] Id at 840.

[116] Id at 841–42.

[117] United Mine Workers, 358 F3d 40; Center for Auto Safety, 710 F2d 842; Professional Drivers Council v Bureau of Motor Carrier Safety, 706 F2d 1216 (DC Cir 1983) (upholding Secretary of Transportation's decision not to amend regulations governing hours-of-service for truck drivers).

[118] Veneman, 469 F3d at 843 (finding that the agency must have '"held a rulemaking proceeding'" and "'compiled a record narrowly focused on the particular rules suggested but not adopted'"), quoting NRDC v SEC, 606 F2d 1031, 1047 (DC Cir 1979).

[119] Veneman, 469 F3d at 844.

[120] Id (citations omitted). Judge Kozinski argues that two of the three cases relied on by the majority pre-date Chaney, and that the third did not involve a "discretionary course of action." Id at 850 n 9.

[121] Id at 847.

[122] Id at 850.

[123] 482 F3d 1156 (9th Cir 2007).

and agreed to dismiss the case with prejudice "provided that the panel's opinion and judgment are vacated," which the court did.[124]

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

Under the APA, courts can review only final actions.[125] As the Supreme Court explained in Bennett v. Spear:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."[126]

The withdrawal of an uncompleted rulemaking is published in the Federal Register and reported to the Unified Agenda of Federal Regulatory and Deregulatory Actions.[127] It appears to end the agency's decisionmaking process.[128] But an agency may withdraw a rulemaking because it is contemplating other options in a particular area. The withdrawal therefore may end one option but not the overall process.[129] Assuming a withdrawal does mark the consummation of the agency's decisionmaking process, it may not create legal consequences. A withdrawal, by definition, stops a rulemaking that would have imposed legal rights or obligations. If "maintaining the status quo has legal consequences" as well,[130] a withdrawal could be considered final action. At best, only some withdrawals constitute final agency action.

The APA also bars judicial review of actions committed to agency discretion.[131] In Heckler v. Chaney, the Court listed four reasons to justify the presumption of non-reviewability: that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," that "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not

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[124] 490 F3d 725 (9th Cir 2007).

[125] 5 USC § 704.

[126] 520 US 154, 177-78 (1997) (internal citations omitted)

[127] Curtis W. Copeland, Midnight Rulemaking: Considerations for Congress and a New Administration, at 10 & n.35 (Congressional Research Service RL34747, November 24, 2008).

[128] See, e.g., AARp v EEOC, 823 F2d 600, 605 (DC Cir 1987)

[129] 469 F3d at 852 (Kozinski, dissenting).

[130] 469 F3d at 840.

[131] 5 USC § 706(1).

infringe upon areas that courts often are called upon to protect," that "when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner," and that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict."[132]

Although the Court noted that the case "does not involve the question of agency discretion to invoke rulemaking proceedings," at least some of these justifications are applicable to withdrawals of uncompleted rulemakings.[133] The plausibility of these justifications for withdrawals of rulemakings seems to parallel their order, with the initial reasons appearing the most relevant. Although the Supreme Court has not directly applied these justifications to withdrawals, Justice Marshall, who concurred in the judgment of Heckler v. Chaney, believed the majority's reasoning was in conflict with the D.C. Circuit's decisions to review withdrawals of discretionary rules.[134] Judge Kozinski agreed. But the question still remains open. After all, when an agency withdraws a rulemaking proceeding, it often has already invested resources and created a record, lessening two concerns.[135]

This creation of a record plays critically in the final question, as to how detailed the record must be. The APA presumes that courts will review agency action on some kind of record.[136] The DC Circuit's case law ties reviewability of withdrawals of discretionary rules to the existence of a record for review. The more detailed the record, all else being equal, the more likely the DC Circuit will review a regulatory withdrawal. On one hand, the connection is compelling, at least to the courts. Courts need something to review. On the other hand, the connection creates problematic incentives for agencies. Why start the rulemaking process if there is uncertainty about whether it will be finished? Indeed, the more consideration the agency gives to a proposed rulemaking, the more likely it will face judicial scrutiny.

These three questions deserve attention on their own merits but they also have implications for standard administrative doctrines for more conventional agency action and inaction. They do not however address the elephant in the room when it comes to agency withdrawals—political transitions. Agencies tend to withdraw uncompleted rulemakings that were started under the previous administration. In NRDC v. EPA,[137] President Reagan's EPA had withdrawn a proposed emission standard from President Carter's administration.[138] Similarly, in Farmworker Justice Fund v. Brock, President Reagan's Secretary of Labor pulled a field

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[132] 470 U.S. 821, 831-32 (1985).

[133] Id. at 825 n.2.

[134] 470 U.S. at 850 n.7.

[135] See Biber, supra note XX, at 28.

[136] 5 USC § 706 ("the court shall review the whole record or those parts of it cited by a party); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 US 402, 419-20 (1971).

[137] 824 F2d 1146 (DC Cir 1987).

[138] See id at 1149.

sanitation standard proposed under President Carter.[139] In Animal Legal Defense Fund, President George W. Bush's Agriculture Department withdrew a draft policy announced under President Clinton.[140]

Withdrawals occur even if the transition involves the same party. In Competitive Enterprise Institute v. NHTSA, President George H.W. Bush's administration cancelled a rulemaking begun under President Reagan.[141] In United Mine Workers v. Department of Labor, the Mine Safety and Health Administration under President George W. Bush pulled a proposed rulemaking announced under his father.[142]

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

Although this area of administrative law is ripe for more extensive analysis, we suggest that the ultimate outcome should hinge on two factors. First, to the extent that judicial review of withdrawals will ossify the rulemaking process further and to the extent that ossification is undesirable, review should be less likely or more deferential. Second, to the extent that withdrawals are the result of political transitions, review should be more likely or less deferential if we care more about expertise justifications of the administrative state, and just the opposite if we emphasize a political accountability rationale for the bureaucracy.[143] Cast in this light, it should be clear that the judicial treatment of agency withdrawals implicates core features of the administrative state. Because withdrawals are much more likely to be the locus of strategic timing decisions, administrate law's treatment of withdrawals will be all the more important to get right.

B. Timing in Administrative Law

The above discussion examined the underdeveloped administrative law on the judicial review of agency withdrawals, a category of agency action that the empirical analysis suggested was more open to manipulation on timing grounds. This Part briefly considers how timing

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[139] 811 F2d 613, 617 (DC Cir 1987), vacated as moot.

[140] 469 F3d at 830–31.

[141] 956 F.2d 321, 323 (DC Cir 1992).

[142] 358 F3d 40, 42 (DC Cir 2004).

[143] Consider Marianne Koral Smythe, Judicial Review of Rule Recissions, 84 Colum L Rev 1928 (1984) (contending that courts should be more skeptical of recissions after political transitions of recently promulgated rules).

decisions might be seen as part of administrative law. Rather than advocate new doctrinal schemes for timing rules,[144] we try to locate timing questions within standard administrative law doctrines. To be certain, it is rare for parties, courts, or commentators to raise these sorts of timing claims in any of the contexts we discuss.[145] Nevertheless, these standard doctrines may be able to accommodate such claims.

1. Chevron

To start with, consider the familiar Chevron framework that requires courts to engage in a two-part inquiry in examining an agency interpretation of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[146]

The mechanics of Chevron Step 1 and Step 2 have been exhaustively analyzed elsewhere.[147] A more recent legal innovation arises from United States v.Mead Corp.[148] Mead solidifies a critical distinction between interpretations that qualify for Chevron deference, and interpretations that should be upheld only to the extent the agency's interpretation has "power to persuade," also known as Skidmore deference.[149] In recent years, administrative lawyers of all stripes have struggled to understand precisely what sorts of agency actions warrant which sort of deference from which courts in which circumstances.[150] Mead and related cases emphasize that judicial

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

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

[146] Chevron USA Inc v NRDC, 467 US 837, 842–43 (1984) (footnotes omitted).

[147] See generally Matthew C. Stephenson and Adrian Vermeule, Chevron Has Only One Step, Va L Rev (forthcoming 2009); Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi Kent L Rev 1253 (1997); Thomas W. Merrill and Kristin E. Hickman, Chevron's Domain, 89 Georgetown L J 833 (2001); Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex L Rev 83 (1994).

[148] 533 US 218 (2001).

[149] Id at 229.

[150] See Barnhart v Walton, 535 US 212 (2002); Mead, 533 US 218; Christensen v Harris County, 529 US 576, 586–88 (2000). See also Lisa Schultz Bressman, How Mead Has Muddled Judicial Review of Agency Action,

deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[151] Under this view, the degree of deference courts owe to an agency's statutory interpretation is therefore a partial function of the procedures used to generate an agency decision.[152]

There is, however, much disagreement about precisely which procedures qualify an agency interpretation for greater deference. Some contend that formal procedures—for example, the use of notice and comment, formal rulemaking, or formal adjudication—are necessary and sufficient for Chevron deference.[153] Others argue that such formality is neither necessary nor sufficient for Chevron deference.[154] Some courts rely on a varying combination of factors in determining how much deference to provide.[155] For example, in Barnhart v.Walton,[156] the Court listed "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" as providing, on balance, the justification for using Chevron deference in reviewing the Social Security Administration's interpretation at issue in the case.[157] Chevron Step Zero[158] occupies an increasingly central spot in administrative law.[159] The core inquiry is whether Congress would want courts to defer to this agency on this sort of decision issued in this sort of way. The near exclusive emphasis on procedural formality as the determinant of Chevron deference, however, may be premature. Professor Bressman has recently argued that instead of relying exclusively on procedural choices, courts should "truly gauge the existence of agency delegation"—by assessing the substance (and surrounding political realities) of the delegated authority.[160]

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58 Vand L Rev 1443, 1486 (2005); Kristin E. Hickman and Matthew D. Krueger, In Search of the Modern Skidmore Standard, 107 Colum L Rev 1235 (2007); Adrian Vermeule, Introduction: Mead in the Trenches, 71 Geo Wash L Rev 347 (2003).

[151] Mead, 533 US at 226–27.

[152] See generally Bressman, 58 Vand L Rev at 1486 (cited in note 150); Cass R. Sunstein, Chevron Step Zero, 92 Va L Rev 187 (2006); Vermeule, 71 Geo Wash L Rev 347 (cited in note 150).

[153] See, for example, Mead, 533 US at 245–46 (Scalia dissenting).

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

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

[156] 535 US 212 (2002).

[157] Id at 222.

[158] Sunstein, 92 Va L Rev 187 (cited in note 150). The phrase is originally from Thomas W. Merrill and Kristin E. Hickman, 89 Georgetown L J at 872 (cited in note 147).

[159] See Jacob E. Gersen and Adrian Vermeule, Chevron as a Voting Rule, 116 Yale L J 676, 688–90 (2007) (discussing rationales for Chevron and Supreme Court's settlement on legislative intent as the cornerstone

[160] Lisa Schultz Bressman, Chevron's Mistake, 58 Duke LJ 549, 554 (2009).

Just as the procedures used to formulate policy (and perhaps the substance of delegated authority as well) are a natural input for the Step Zero inquiry, so too is the timing of agency decision.[161] Rules intentionally issued or abandoned in low-visibility environments undermine both the political accountability and expertise rationales for giving agencies deference.[162] If we are correct that agencies use timing to make it harder for public and private parties—including Congress itself—to monitor and respond to agency decisions, then low-visibility actions seem precisely the sort for which Congress would not want courts to apply great deference. If a rational reconstruction of congressional intent is the key factor for Step Zero, it would be entirely sensible for courts to review low-visibility agency action less deferentially.[163] It would also be relatively straightforward for courts to do so. By contrast, assessing the substance of agency authority to see if Congress has delegated interpretative power is "complicated—multifactored and context dependent."[164] In sum, Chevron Step Zero could provide a natural way for courts to police strategic manipulation of monitoring costs by administrative agencies.

In addition to playing into the specific mechanics of Chevron, agency timing decisions also are relevant to broader concerns about responsiveness and competence, two cornerstones of deference doctrines. Cast in its best light, notice and comment rulemaking takes advantage of public input and agency knowledge to produce policy that reflects agency expertise and democratic legitimacy.[165] Strategic timing decisions undermine this process, reducing the opportunities for public participation and argument while simultaneously creating an appearance that motivations other than expertise are driving policy. Less deferential judicial review would help compensate.[166] These suggestions are clearly something of a stretch on existing law. As such, they should be taken as tentative ideas about where timing concerns might begin to fit into existing doctrine, rather than statements that such claims constitute anything approaching viable litigation strategies.

2. Arbitrary and Capricious Review

Arbitrary and capricious review of agency policy decisions, commonly referred to as "hard look" review, also provides a straightforward venue for incorporating the timing of agency action.[167] Under § 706(2)(A) of the APA, a court reviewing agency factual and policy

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[161] Consider Gersen and O'Connell, 156 U Pa L Rev 923 (cited in note 10) ; O'Connell, 94 Va L Rev 889 (cited in note 10).

[162] See generally Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 NYU L Rev 461 (2003).

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

[164] Bressman, supra note 160, at 604.

[165] See Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv L Rev 1511, 1542 (1992).

[166] Consider Stephenson, 120 Harv L Rev 528 (cited in note 41).

[167] For an overview of hard look review, see Mark Seidenfeld, 73 Tex L Rev at 128–29 (cited in note 147).

determinations "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[168] Hard look review has two dominant variants in modern administrative law. Procedural hard look requires that courts engage in a searching inquiry, including whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[169] On this front, dubious timing decisions may raise the specter that an agency has acted improperly, and thus timing actions that raise monitoring costs might result in a higher probability of finding the substantive policy decision arbitrary and capricious.[170] Much like agency decisions to forego particular procedures to rush out a non-emergency decision, these other timing practices would be a cue to the courts that something else may be awry.

Alternatively, the timing of agency action might itself be arbitrary and capricious, violating the second variant of hard look review: the substantive hard look doctrine.[171] If an agency's only reason for finalizing a rule during a congressional recess is to make it more difficult for Congress or affected private parties to observe and react to the decision, the timing decision itself might fail the court's hard look. To be sure, this suggestion too would also face considerable obstacles.[172] After all, although an agency's procedural choices may affect how its substantive choices are judged,[173] courts rarely second guess the procedural decisions themselves.[174] But the idea is not quite as far-fetched as it first might seem. Agency delay is regularly challenged on the ground that the delay itself is arbitrary and capricious.[175] Courts frequently hesitate to accept such challenges on the ground that delay most commonly results

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[168] 5 USC § 706(2)(A).

[169] Motor Vehicle Manufacturers Association v State Farm Mutual Auto Insurance Co, 463 US 29, 43 (1983). For an overview of procedural hard look, see M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U Chi L Rev 1383, 1429 (2004). See also Assn of Data Processing Service Organizations, Inc v Board of Governors of the Federal Reserve System, 745 F2d 677, 696–97 (DC Cir 1984).

[170] Consider Bonnichsen, 217 F Supp 2d 1116, 1125 (noting initially agency's decision to "[t]ak[e] advantage of a brief congressional recess" and finding, without connecting the timing element, the policy outcomes arbitrary and capricious); California Department of Health Services v Babbitt, 46 F Supp 2d 13, 15 (DDC 1999) (noting issuance of agency policy in the "waning hours of the [George H.W.] Bush Administration").

[171] See Magill, 71 U Chi L Rev at 1428–29 (cited in note 169).

[172] Courts cannot impose additional procedural requirements on agencies beyond those mandated by statute or the Constitution. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543–48 (1978).

[173] See Magill at 1431 ("[Mead] structures scope-of-review doctrine systematically by telling all agencies that there is a link between the policymaking form chosen and the standard of review applied.").

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

[175] See, for example, Massachusetts v EPA, 549 US 497, 127 S Ct 1438 (2007); Telecommunications Research and Action Center v FCC, 750 F2d 70 (DC Cir 1989); Forest Guardians v Babbitt, 164 F3d 1261 (10th Cir 1998); Oil, Chemical and Atomic Workers International Union v Zegeer, 768 F2d 1480 (DC Cir 1985).

from agency judgments about how best to allocate scarce internal resources.[176] This resource constraint concern, however, is notably absent with respect to agency actions on low-visibility days. Thus, the case for active, or at least existent, judicial review of the timing of action is even stronger here than in most delay cases.

C. Regulating Strategic Timing

On either the conventional account, which we hope by now to have partially rebutted, or a revised theory of bureaucratic timing based on monitoring costs, unfettered agency discretion as to when to announce policy decisions generates problems of good regulatory governance. These problems are unlikely to bring the administrate state to its knees, but if there is a deficiency, it is also relatively simple to remedy. This Part sketches several alternative timing regimes that might reduce the ability of agencies to increase the costs of generating political responses to agency actions. Because the legitimacy of agency decisions grows from the twin anchors of expertise and accountability, enhancing public monitoring of agency action should result in more legitimate public policy. This Part discusses several timing regimes that seemingly would restrict agency discretion in sensible ways: (1) Coordination Rules, (2) Random Issuance, (3) Reverse Delegation, (4) Veil Rules, and (5) Plural Release. None of these alternatives is uniquely applicable to the timing problem, nor is any a panacea. Each does, however, provide a partial fix to the timing problem. Each could be applied to all regulatory actions, or to particular subsets, such as significant rulemakings.[177]

The wrinkle here is that administrative law scholarship is replete with fights about the nature and extent of discretion agencies should have generally, but especially with respect to the allocation of internal resources. Scholars who are generally in favor of agency latitude would no doubt also argue that agencies should be given wide authority to make timing decisions. After all, timing decisions implicate the internal allocation of agency resources,[178] a trope that has been used for decades to encourage courts to avoid intervention.[179] Even assuming that agencies know better than courts or Congress how to best allocate their internal resources, if timing is left to agency discretion, the attractiveness of using timing strategically will only be exacerbated. In fact, Congress regularly restricts agency authority by imposing procedural restrictions and substantive constraints on agency action. Many of the proposed timing regimes discussed below would be less intrusive into internal agency resource allocation than these other requirements.

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[176] See Richard J. Pierce, Jr., Judicial Review of Agency Actions in a Period of Diminishing Agency Resources, 49 Admin L Rev 61, 90, 93 (1997) (arguing for a judiciary that approaches administrative law guided by socially beneficial outcomes).

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

[178] See Biber, 60 Admin L Rev 1 (cited in note 38); Cass R. Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U Chi L Rev 653 (1985). See also Gregory L. Ogden, Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight, 4 U Dayton L Rev 71 (1979); Pierce, 49 Admin L Rev 61 (cited in note 176).

[179] See generally Biber, 60 Admin L Rev 1 (cited in note 38).

1. Coordination Rules

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

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

2. Random Issuance

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

The random issuance rule not only reduces clustering vis-à-vis coordination timing rules, but also vis-à-vis the current legal status quo. The empirical analysis shows that some agency decisions not only cluster on certain days of the week, but also at certain times of the year when Congress is not in session. The random issuance rule would reduce clustering of both sorts and thereby mitigate monitoring costs problems. The downside of the randomness rule is that it may

generate artificial delay in the regulatory process.[180] For example, if final rules are ready to be released, but not actually announced until randomly selected, private actors affected by the new regulation will not benefit (or be hurt) in the interim. Given the extensive complaints about there being too much delay in the administrative state,[181] a rule that introduces even more delay might not be especially attractive.[182] In addition, agencies may try to game the system by finalizing or sending particular decisions at certain times, such as close to a congressional recess. And once again, the effect on aggregate visibility and monitoring of agency actions is ambiguous. What is clear is that the random issuance regime should eliminate agency use of timing decisions intentionally to affect monitoring costs.

3. Reverse Delegation

It is intuitive, but wrong, to say that all rulemaking actions issued in high-monitoring cost environments should be given more exposure. Some regulations are more important than others. An optimal exposure regime would not require equal monitoring for all regulatory decisions; rather it would calibrate the extent of monitoring to issue importance. Recall that the dynamics of regulatory politics should generally ensure that this is the case. Interest groups with a great deal at stake in a particular regulation will monitor more carefully. If many interest groups have much to gain or lose there will be more aggregate monitoring of the more important agency decisions. The core problem with strategic timing in our framework is that it drives some interest groups out of the universe of monitors, thereby not only reducing the aggregate amount of monitoring, but also shifting the median preferences of the monitors. In essence, strategic timing is a form of subterfuge that reduces the otherwise existing forces that calibrate the extent of monitoring to the importance of the decision. If so, simply taking the timing decision away from the agency could resolve many timing dilemmas. The random issuance regime accomplishes this, only by giving the timing decision to another agency, which might also use timing strategically for political ends.

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

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

[181] See Pierce, 47 Admin L Rev at 60 (cited in note 16).

[182] But see Gersen and O'Connell, 156 U Pa L Rev 923 (cited in note 10) (discussing whether judicial and congressional remedies for administrative delay may produce negative side effects on administrative law).

agency manipulation of fire alarm costs, but it still allows another political institution to raise monitoring costs for private actors.[183]

4. Veil Rules

The main drawback of the reverse delegation regime is that it merely substitutes one risk of bias for another. The reverse delegation scheme minimizes agency bias on timing, but maximizes congressional bias. Because one of the major problems with agency timing is the ability to increase fire alarm costs and therefore the probability of congressional reaction, this strikes us as a marked improvement. It does, however, generate a new timing problem that could be as serious as the old one. If the goal is to minimize the strategic manipulation of monitoring costs by public and private actors, other alternatives, such as veil rules, exist.[184]

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

The weakness of a veil rule in the regulatory timing context is that agencies often have a good sense of what the final rule will be at the time the rulemaking is initiated. Indeed, the agency must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved" in an NPRM.[185] Initiating a new pollution control rule that increases burdens on the utility industry will have a predictable response, even if the exact magnitude or nature of those burdens is not known ex ante. Thus, the veil rule is unlikely be especially effective in this context. In essence, there is not enough uncertainty behind the veil to prevent the decisionmaker from understanding the individual effects on the choice.

5. Plural Release

A plural release regime is another simple design option for the timing of regulation problem. This regime might require that agency actions issued on low-visibility days be re-issued on a high-visibility day. For instance, if the initial agency decision was issued late on a Friday afternoon, the plural release rule would require that it be issued again the following Tuesday. Or if the initial action was released during a congressional recess, the plural release regime would require that it be reissued when Congress is back in session. The reissuance rule does not eliminate the timing problem because the action may no longer be hot news when it is reissued

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

[184] Consider Adrian Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 Yale L J 399 (2001).

[185] 5 USC § 553(b)(3) (2006).

later on. However, the aggregate exposure would certainly be higher than the status quo, and the rule would reduce the monitoring costs borne by third parties for observing agency decisions. The plural release regime draws partially from legislative practice. Multiple reading rules are a standard facet of legislative procedure,[186] introducing delay into deliberations while also ensuring that parties are given an opportunity to consider the given proposal.

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

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

Conclusion

Politicians and journalists may like to swap anecdotes and innuendo of administrative agencies using timing to avoid public scrutiny. Much of this anecdotal behavior, if systemic, would seem perplexing, as a theoretical matter—off the so-called equilibrium path—and insensitive to the reality of regulatory politics. We have tried to bring both conceptual clarity and empirical rigor to these stories. The conventional wisdom is that agencies can simply bury bad news. It appears, however, that this type of behavior may be the exception rather than the rule. Often agencies will have no incentive to reduce visibility. More often, they will unable to do so, at least in the way that the conventional wisdom suggests. There is neither rigorous theory nor serious empirical analysis to support the conventional view.

In its place, we reconstructed a theory of timing that is more nuanced, plausible, and accurate. We argued that only rare forms of agency action are susceptible to hiding. For most actions, strategic timing of their issuance does not prevent visibility, but simply increases the difficulty of generating political opposition in Congress. We find seemingly robust timing effects on decisions announced while Congress is not in session, while we find modest timing effects for Friday announcements. We also find timing effects on withdrawals of uncompleted rulemakings, which are much harder to challenge in court. In our view, strategic timing is a rich and real phenomenon, but the conventional wisdom has over-emphasized the wrong locus and the wrong actions.

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[186] Gersen and Posner, Timing Rules and Legal Institutions (cited in note 10).

Given that the administrative state implements an enormous volume of policy in the United States, the interaction among agencies, interest groups, Congress, and the President is obviously of central importance. Positive theories of the administrative state abound—how agencies are structured, when and how Congress delegates work to agencies, how Congress constrains agencies at the front end and at the back end, how the White House directs agencies, how courts shape regulatory policy, how agencies push through socially beneficial policies—to name just a few.

To this point, the timing of agency action has played a bit part in administrative law: it should have a larger presence. Our aspiration is that our conceptual, empirical, and doctrinal work provides an analytic framework for courts and commentators to pursue renewed work on questions of timing in the administrative state. In addition, our analysis of timing reveals the importance of the abandonment of rulemaking proceedings. There is administrative law doctrine on such withdrawals, but it is underdeveloped. While we have sketched some preliminaries on this front, there is much work to be done. And that work is particularly relevant now as control of the White House has shifted and critical regulatory decisions are thus likely to be made in the withdrawals domain.

Table 1. Marginal Effects from Probit Models

	(1) Friday Final Action	(2) Friday Final Action	(3) Recess Final Actions	(4) Recess Final Actions	(5) Friday Withdrawals	(6) Friday Withdrawals	(7) Recess Withdrawals	(8) Recess Withdrawals
Independent	-0.006	0.015	0.004	0.021	-0.028	0.035	0.030	0.050
	(0.010)	(0.015)	(0.011)	(0.017)	(0.020)	(0.029)	(0.023)	(0.032)
Cabinet	0.011	0.013	-0.004	0.014	-0.022	0.010	0.056***	0.036*
	(0.007)	(0.011)	(0.009)	(0.013)	(0.015)	(0.018)	(0.015)	(0.021)
State Impact	0.003	-0.001	0.033***	0.029**	0.025	0.042**	-0.013	0.002
	(0.009)	(0.012)	(0.010)	(0.014)	(0.018)	(0.020)	(0.018)	(0.022)
Election Year	-0.009	0.000	0.036***	-0.037***	-0.008	-0.001	-0.003	-0.028
	(0.006)	(0.009)	(0.007)	(0.010)	(0.014)	(0.016)	(0.014)	(0.018)
Post Election Year	-0.001	0.004	-0.025***	-0.050***	-0.041***	-0.034**	-0.006	-0.028
	(0.007)	(0.010)	(0.008)	(0.012)	(0.014)	(0.017)	(0.014)	(0.019)
Congress Shifts	-0.009	-0.008	-0.102***	-0.145***	0.288***	0.091***	-0.096***	0.083***
	(0.010)	(0.012)	(0.011)	(0.013)	(0.019)	(0.026)	(0.017)	(0.028)
Divided Gov	-0.001	-0.013	-0.054***	-0.030***	-0.038***	-0.038**	0.062***	0.058***
	(0.006)	(0.009)	(0.007)	(0.010)	(0.013)	(0.015)	(0.013)	(0.017)
IRS	-0.013	0.010	0.026*	0.058***	0.129***	-0.106***	-0.184***	-0.045
	(0.012)	(0.019)	(0.015)	(0.022)	(0.029)	(0.029)	(0.023)	(0.041)
Significant Rule		0.031***		0.038***		-0.028*		0.044***
		(0.009)		(0.010)		(0.014)		(0.017)
Observations	25827	13030	25827	13030	7880	4474	7850	4474
Likelihood Ratio	12.39	18.90	223.42	182.03	424.22	46.58	170.69	52.14

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Data Appendix

The information on regulatory actions in this Article comes from a new database of agency rulemaking constructed from federal agency semiannual reports in the Unified Agenda of Federal Regulatory and Deregulatory Actions.[187] These reports, published in the Federal Register, list many important features of the rulemaking process. For notice-and-comment rulemaking, they provide the date on which the notice of proposed rulemaking, or NPRM, was issued, the date(s) of the comment period(s), the date when the final rule was promulgated (if the process was completed), and the date the regulatory action was withdrawn (if the process was not completed). For rulemaking without prior opportunity for public comment, the reports give the dates of direct and interim final rules.

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

The database contains information for all unique Regulation Identifier Numbers, or RINs, in the agenda reports for 15 cabinet departments, 10 executive agencies, and 22 independent agencies. The cabinet departments include the following: the 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 Interior; Department of Justice; Department of Labor (not including the Pension Benefit Guaranty Corporation); Department of State; Department of Transportation (not including the Surface Transportation Board and Saint Lawrence Seaway Development Corporation); Department of Treasury (not including the Internal Revenue Service); and the Department of Veterans Affairs/Veterans Administration.

The executive agencies include the following: the Environmental Protection Agency; Federal Emergency Management Agency; General Services Administration; Internal Revenue Service; National Aeronautics and Space Administration; National Archives and Records

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[187] The Unified Agenda is a primary source of rulemaking activity. The GAO keeps a similar database on completed rules under the Congressional Review Act using information reported by agencies. See 5 U.S.C. § 801(a). RISC also compiles counts of agency rules. Counts of rulemaking activity differ by government source. Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government 102-17 (2008). Although the primary source of information on agency rules, the Unified Agenda data have some disadvantages, including that individual agencies submit the data on their activities and that the reports miss many complexities of rulemaking (for instance, it is not possible to tell easily whether a rule is regulatory or deregulatory in nature). See O'Connell, supra note XX, at 927-29.

Administration; Office of Management and Budget; Office of Personnel Management; Small Business Administration; and the U.S. Agency for International Development.[188]

The independent agencies include the following: the Commodity Futures Trading Commission; Consumer Product Safety Commission; Equal Employment Opportunity Commission; Farm Credit Administration; Federal Communications Commission; Federal Crop Insurance Corporation; Federal Deposit Insurance Corporation; Federal Energy Regulatory Commission; Federal Home Loan Bank Board; Federal Housing Finance Board; Federal Maritime Commission; Federal Reserve Board; Federal Trade Commission; Interstate Commerce Commission; National Credit Union Administration; Nuclear Regulatory Commission; Office of Federal Housing Enterprise Oversight; Pension Benefit Guaranty Corporation; Saint Lawrence Seaway Development Corporation; Securities and Exchange Commission; Social Security Administration; and the Surface Transportation Board.[189]

The database includes, if applicable, relevant dates of traditional notice-and-comment rulemaking as well as binding rulemaking without prior opportunity for public comment (direct and interim final rules). It notes particular characteristics of rulemaking actions, including their significance and the existence of legal and statutory deadlines. The database also removes duplicate entries from the Unified Agenda reports.49 After those duplicate entries are removed, there are 46,023 unique RINs in the database. Each RIN contains all relevant regulatory actions. Of those RINs, 21,451 report at least one NPRM with an actual date,50 25,845 report at least one final action, 3,194 report at least one interim final rulemaking, 331 report at least one direct final rulemaking, and 7,885 report at least one withdrawal or deletion of action.

The database incorporates the following additional coding assumptions:

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

Types of actions. Actions are counted as interim final rules or NPRMs if the rulemaking action listed in the timetable field was an interim final rule or NPRM, respectively. Actions are counted as completed regulatory actions if the rulemaking action listed in the timetable field was a final rule or final action. Actions are counted as withdrawals if the rulemaking action listed in the timetable field was stated as a withdrawal or as deleted at agency request. Withdrawals are almost entirely of uncompleted regulatory actions, but some are of direct and interim final rules. Most critically, some regulatory actions that should have been listed as final actions, particularly before 2003, are listed in the timetable field as other. Such actions are not counted in the analysis presented here. More investigation needs to be done to see how many actions are being missed because of the coding scheme employed here. If an RIN had multiple dates for the same type of

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[188] All of these agencies are headed by a single Senate-confirmed appointee. Except for the IRS after 1998, the appointee serves at the will of the president and can be fired for any reason. The IRS Restructuring and Reform Act of 1998 set a five-year term of office for the IRS commissioner, which applied to the leader at the time as well, Charles Rossotti. The IRS is coded as an executive agency because most of the data here involve action prior to 1998 and because the IRS is often treated as an executive agency.

[189] All of these agencies are led by appointees who serve fixed terms and typically can be removed by the president only for cause. The Social Security Administration became an independent agency under the Social Security Independence and Program Improvements Act of 1994.

action, only one date was selected. For NPRMs and interim rules, the earliest date was used. For final actions and withdrawals, the latest date was used.

Significance of actions. Actions are deemed significant if the Priority Code field is listed as economically significant or other significant or if the major field was coded as “yes.”