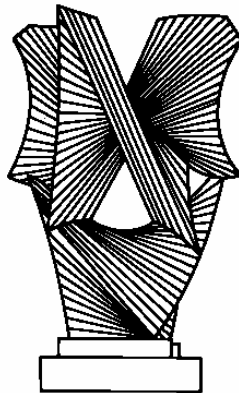


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TIMING RULES AND LEGAL INSTITUTIONS

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Timing Rules and Legal Institutions

Jacob E. Gersen^{*} and Eric A. Posner^{**}

Abstract. Constitutional and legislative restrictions on the timing of legislation and regulation are ubiquitous but these “timing rules” have received little attention in the legal literature. Yet the timing of a law can be just as important as its content. The timing of a law determines whether its benefits are created sooner or later, and how the costs and benefits are spread across time, and hence to the advantage and disadvantage of different private groups, citizens, and elected officials. We argue that timing rules are, and should be, used to reduce agency problems within the legislature and between the legislature and the public, and to mitigate deliberative pathologies.

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INTRODUCTION

Most fights about new legislation focus on the legislation's substance. Yet legislators regularly decide not just what to do, but when to do it, and often decisions about the timing of new law are just as critical as decisions about the content of new law. If a main goal of institutional design is to guard against undesirable legislative activity, regulating the *timing* of legislative choice might be more effective than directly regulating the *content* of legislation, or so we shall argue below.

In the United States Congress and many other legislatures, choice about timing is heavily regulated by what we term *timing rules*, which have been largely ignored in the legal literature,¹ and understudied in economics² and political science.³ This is unfortunate because a panoply of constitutional, statutory, and internal congressional rules constrain the timing of legislative action, and “the mere timing of a vote can mean

¹ The closest work in the legal literature is on the related but distinct topics of entrenchment and retroactivity. See, Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. BAR F. RES. J. 379 (1987). See also John O. McGinnis and Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665 (2002); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491 (1997). Prominent recent treatments of retroactivity include DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* (Chicago 2000); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Michael Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820 (1985); Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977).

² The relevant economics literature on timing generally focuses on options theory. For an introduction, see AVINASH DIXIT & ROBERT S. PINDYK, *INVESTMENT UNDER UNCERTAINTY* (Princeton 1994); Glenn R. Hubbard, *Investment Under Uncertainty: Keeping One's Options Open*, 32 J. ECON. LIT. 1816 (1994) (book review). For early foundations, see Andrew B. Abel, *Optimal Investment Under Uncertainty*, 73 AMER. ECON. REV. 228 (1983); Claude Henry, *Investment Decisions Under Uncertainty: The Irreversibility Effect*, 64 AMER. ECON. REV. 1006 (1974). For applications outside of investment theory, see W. Michael Hanemann, *Information and the Concept of Option Value*, 16 J. ENVIRON. ECON. MGT. 23 (1989); Robert McDonald, & Daniel R. Siegel, *The Value of Waiting to Invest*, 101 Q. J. ECON. 707 (1986). For more recent developments, see Andrew B. Abel, Avinash K. Dixit, Janice C. Eberly, & Robert S. Pindyk, *Options, the Value of Capital, and Investment*, 111 Q. J. ECON. 753 (1996). As applied to the legislature, see Francesco Parisi, Vincy Fon, & Neta Ghei, *The Value of Waiting in Lawmaking*, 18 EUR. J. L. & ECON. 131 (2004).

³ A handful of political scientists have worked on issues that implicate timing, but few have focused explicitly on timing issues. See, e.g., PAUL PIERSON, *POLITICS IN TIME* (Princeton 2004); Janet M. Box-Steffensmeier, Laura W. Arnold, & Christopher J.W. Zorn, *The Strategic Timing of Position Taking in Congress: A Study of the North American Free Trade Agreement*, 91 AM. POL. SCI. REV. 324 (1997); Alan M. Jacobs, *Backing into the Future: Reconceiving Policy Reform as Intertemporal Choice* (unpublished manuscript on file with the authors, 2007); Amihai Glazer, et al., *Strategic Vote Delay in the U. S. House of Representatives*, 20 LEGISLATIVE STUD. Q. 37 (1995). There is also a literature on bureaucratic delay; see, e.g., Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J. LAW & ECON. 29 (1999); Lea-Rachel D. Kosnik, *Sources of Bureaucratic Delay: A Case Study of FERC Dam Relicensing*, 22 J.L. ECON. & ORG. 258 (2006); Hilary Sigman, *The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence*, 44 J. L. & ECON. 315 (2001).

nearly everything.”⁴ Some timing rules speed up legislative decision making, while others slow it down. Some timing rules delay implementation of new law; others dictate complete and immediate implementation. In this Article, we develop a theory of timing rules, exploring both the optimal timing of legislative action, and the implications for attempts to constrain it.

Understanding the dynamics of legislative timing sheds light on the structure of rules that constrain legal institutions. We do not claim that timing rules are necessarily the result of intentional efforts to implement law in an optimal fashion, nor do we suggest that our framework completely describes the set of empirical timing rules observed in practice. Rather, our goal is to show how timing rules can drive policy, and to use actual timing rules in legislatures to motivate a theoretical discussion of the optimal timing of legislation. Timing rules can have both desirable and unfortunate effects on new law. Different sorts of timing rules can be understood as efforts to calibrate the timing of legislative consideration, enactment, and implementation of new law. For example, our theory suggests that timing rules should impose delay in decision-making scenarios where the incentives of political actors to hurry deviate (for one of a number of possible reasons that we specify below) from the underlying optimum.

This Article analyzes the effect of timing rules on the nature of new laws. As such, our work grows out of a tradition in political science and economics that analyzes the effects of procedural rules on substantive legislative outcomes,⁵ and more recent scholarship in law that seeks to explore the foundation of constitutional rules of procedure.⁶ Although timing rules may interact with other procedural rules in important ways,⁷ the issues that timing rules raise are distinct and sufficiently important to warrant an independent inquiry.

We propose that timing rules should be analyzed in the context of the principal-agent problems that dominate political institutions—where an agent has the authority to act on behalf of, and for the benefit of, a principal but might not do so because the agent’s

⁴ Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 349 (2003).

⁵ See, e.g., Gary W. Cox, *On the Effects of Legislative Rules*, in LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES 347 (Gerhard Loewenberg, Peverill Squire, & D. Roderick Kiewiet, eds. 2002); Keith Krehbiel, *Restrictive Rules Reconsidered*, 41 AM. J. POL. SCI. 929 (1997); Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information and Legislative Rules with a Heterogenous Committee*, 33 AM. J. POL. SCI. 459 (1988); Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 741 (1983); Arthur T. Denzau & Robert J. Mackay, *Structure-induced Equilibria and Perfect-Foresight Expectations*, 25 AM. J. POL. SCI. 762 (1981); Thomas Romer & Howard Rosenthal, *The Elusive Median Voter*, 12 J. PUB. ECON. 143 (1979); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27 (1978).

⁶ Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004); Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT’L REV. L. & ECON. 145 (1992); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 488 (1995).

⁷ See *infra*, Part III.A.

and the principal's goals are different. Agency problems dominate relationships between voters and legislators, Congress as a whole and committee members, and legislators and the bureaucracy. Timing rules can be understood as a partial response to these agency problems: timing rules facilitate monitoring of agents by principals and reduce the ability of ill-motivated agents to make policy decisions that violate the preferences of political principals. Much of our work then suggests an optimistic story about timing rules. For example, within the legislature, timing rules may ensure that committees develop relevant expertise, but also guard against excessive bias in legislation. Outside the legislature, timing rules can allow a diffuse and disorganized public to combat the influence of private interest groups on legislation and more carefully monitor legislative behavior. However, timing rules have a dark side as well. Many timing rules create new agency problems, generating risk of undesirable behavior by political actors in future periods. And because many timing rules are chosen by legislators themselves, if legislators are ill-motivated, then there is no reason to believe timing rules will always serve the good. We analyze these negative effects of timing rules as well.

Our thesis then is part positive and part normative. Many of the timing rules we identify can be given a plausible rationale within our framework. However, there are also examples of timing mismatch, where the benefits of delay or rapidity demanded by the timing rule fit poorly with what our theory suggests about the optimal timing of legislation. Rather than claiming that we can accurately explain why timing rules are adopted in fact, we offer a partial rational reconstruction of timing rules, emphasizing the range of effects that timing rules have on politics and legislation. Because these effects can be either desirable or undesirable in different contexts, our framework is part normative as well. Although we do not attempt to identify the one right structure of timing rules, we do identify a series of relevant variables that point towards more delay or rapidity in lawmaking. We also suggest reasons to prefer regulating legislative behavior using timing rules rather than using content-based restrictions, and to rely more robustly on timing rules as mechanisms for improving public policy.

Lest the discussion get too abstract too quickly, to motivate our discussion Part I begins by assembling a typology of timing rules that constrain the legislature. Part II develops a theory of the optimal timing of legislation and explains how the theory helps elucidate the choice of timing rules that constrain the legislature. Part III considers extensions of our theory, exploring the interaction of timing rules with other procedural rules, the enforcement of timing rules, the dynamics of timing rules in the retroactivity debate, and delegation to the bureaucracy.

I. EXAMPLES

Timing rules are specified in the Constitution, statutes, the formal rules of the Senate and House of Representatives, and the informal norms that constrain legislative action. The assortment of timing rules in these contexts is diverse, ranging from seemingly unimportant restrictions on the frequency or occasion for Congressional meetings, to rules that systematically build delay into the legislative process or force rapid legislative action. Our discussion here provides a sample, rather than the universe, of timing rules; it is intended to motivate the analysis rather than describe a complete set of rules to be explained.

Timing rules might initially be categorized into four types: Delay Rules, Rapidity Rules or Deadline Rules, Coordination Rules, and Trigger Rules. Delay Rules forestall action with the use of direct delay mechanisms. Deadline Rules mandate some action within a specified time period. Coordination Rules specify when an action is to take place, where the specific timing is arbitrary but a decisionmaking body would have difficulty coordinating on its own, for example, a rule of this sort might specify the date for the first meeting of Congress. Lastly, Trigger Rules use the timing of legislative action to trigger some other feature of the legislative process. We focus on delay rules and rapidity rules, but discuss other variants where relevant.

At this point, we should also specify some rough contours of our inquiry. Any procedural rule can have the effect of generating delay.⁸ The presentment requirement, for example, though not a de jure timing rule, will lead to delay, because the President can rarely sign a bill immediately after its passage. Although we wish to distinguish de jure timing rules from de facto timing rules, we are skeptical that a hard theoretical line between the two can be maintained. There is a risk that defining timing rules broadly will cover virtually all procedural rules, but nonetheless we attempt to draw on both categories throughout. We also consider the interaction of formal timing rules with other institutional characteristics—some of which are procedural rules.

A. Constitutional Timing Rules

Many Constitutional Timing Rules are part of a more general class of Constitutional rules constraining congressional procedure.⁹ The Constitution contains a medley of rules that regulate timing explicitly. First, some clauses of the Constitution specify a deadline by which some action must be taken. Article I, section 2, clause 3 is a deadline rule, specifying a deadline by which the first census shall be conducted and the interval at which a new census shall be conducted: “The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”¹⁰

Article I, section 8, clause 12 might be understood as a trigger rule. By mandating that “no Appropriation of Money to that Use [to raise and support armies] shall be for a longer Term than two Years,”¹¹ the military appropriations clause necessitates a repeated

⁸ Although timing rules can increase the costs of enacting legislation, we generally focus on the effect of timing rules on the legislative process rather than the effect of any rule that increases the costs of enacting legislation. Timing rules may increase enactment costs and can sometimes be analyzed as a subset of the class of costly procedural rules. Cf. Matthew C. Stephenson, *The Price of Public Action: Judicial Doctrine, Legislative Enactment Costs, and the “Efficient Breach” of Constitutional Rights* (unpublished manuscript 2007); Matthew C. Stephenson, *A Costly Signaling Theory of Hard Look Review*, 58 ADMIN L. REV. 753, 794-800 (2006); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J. L. ECON. & ORG. 469, 490-91 (2007).

⁹ See generally Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004).

¹⁰ U.S. Const., Art. I, sec. 2, cl. 3.

¹¹ U.S. Const., Art. I, sec. 8, cl. 12.

declaration by the legislature that the appropriation is necessary. By requiring recurrent action to continue a policy, the clause might enhance public deliberation about, and monitoring of, legislative policymaking.

Other constitutional rules mix triggers and deadlines. Article I, section 7, clause 2 mandates that “If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”¹² By specifying that after ten days, a bill passed by both houses of Congress and not yet signed by the President becomes law, the clause provides a hammer to force Presidential action. Setting aside the pocket veto, Presidential inaction cannot prevent a duly enacted bill from becoming law.

Article I, section 2, clause 1 might be understood as both a coordination rule, a deadline rule, and a trigger rule. The clause requires that “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”¹³ The clause coordinates the selection of Representatives, triggers public evaluation of legislative performance via elections, and requires that elections be held by the end of the two year term. The twenty-fifth amendment provides a detailed timeline for Presidential succession, and serves both coordination and trigger interests.¹⁴

Another set of constitutional timing rules specifies the time at which future events will occur in order to avoid the impossibility of a subsequent legislative body specifying the time of its own meeting (a subset of coordination rules).¹⁵ For example, “[t]he Congress shall assemble at least once every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different day.”¹⁶ The Constitution also requires that the Executive “shall from time to time give to the Congress information on the state of the union,”¹⁷ but does not specify the exact timing it is to occur. By modern norm the speech is delivered on the last Tuesday in January, but the date is not set by law. Some of these rules simply bootstrap the commencement of political institutions, and though they raise some interesting issues of their own, they are not the focus of our analysis. Rather, our focus is on timing rules that restrict the discretion of future political institutions, either generating delay in the legislative process or increasing the pace of legislative action.

¹² U.S. Const., Art. I, sec. 7, cl. 2.

¹³ U.S. Const., Art. I, sec. 2, cl. 1.

¹⁴ U.S. Const. Amend. XXV, sec. 4.

¹⁵ Vermeule, *supra* note 9; Jon Elster, *Constitutional Bootstrapping in Paris and Philadelphia*, 14 CARDOZO L. REV. 549 (1993).

¹⁶ U.S. Const., Art. I, sec 4, cl. 2. The clause was subsequently amended by U.S. Const. Amend. XX, § 2 (changing meeting date to January 3).

¹⁷ U.S. Const. Art. II, sec. 3, cl. 1.

The requirements that a bill pass both houses of Congress (bicameralism) and be presented to the President (presentment) impose delay, as noted above.¹⁸ So too, the Origination Clause which requires that all bills for raising revenue originate in the House,¹⁹ at least when measured against a baseline of both houses having proposal power. These are de facto timing rules. Other constitutional timing rules are absent from the federal constitution, but present in other constitutions. For example, many state constitutions regulate the time during which new legislation may be proposed, precluding the introduction of new bills within a certain number of days of the end of the legislative session.²⁰ Others require that two separate votes in two successive legislative sessions be taken in order to amend the constitution.²¹ These constitutional timing rules are just illustrations, but they illustrate the diversity of timing rules in constitutions.

B. Statutory Timing Rules

Statutes are another rich source of timing rules.²² For example, the Bipartisan Trade Promotion Authority Act requires Congress to schedule a vote on covered trade agreements with foreign governments within two months, while also prohibiting amendments.²³ “Fast-track” is a rapidity rule, the opposite of a delay rule.

The timetable for legislative action on the federal budget is also specified by statute.²⁴ The Congressional Budget and Impoundment Act of 1974 sets out a detailed timetable for the budget process requiring the President to submit his proposed budget fifteen days after Congress meets, Congress to complete action on bills and resolutions providing new budget and spending authority by September 15, and Congress to take final action on reconciliation bills or resolution or both by September 25.²⁵ Although the timeline provides coordination benefits, the statute is also intended to increase and routinize the pace of the budget process.

The National Emergencies Act authorizes the President to declare a national emergency. However, it also requires that “each House of Congress shall meet to consider a vote on a concurrent resolution to determine whether that emergency shall be

¹⁸ U.S. Const., Art I. sec. 7.

¹⁹ U.S. Const., Art I. sec. 7, cl. 1 (“All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.”).

²⁰ See Vermeule, *supra* note 9.

²¹ See, e.g., Mass. Const. amend LXXXI. For a survey of amendment procedures in U.S. state constitutions see ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES* (2D 2006).

²² On statutory control of subsequent lawmaking process, see generally Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005); Charles Tiefer, *How to Steal a Trillion: The Uses of Laws about Lawmaking in 2001*, 17 J.L. & POL. 409 (2001); Bruhl, *supra* note 4.

²³ 19 U.S.C. § 2191. The statute specifies the Rules of the House of Representatives and the Senate, but does so “with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.” 19 U.S.C. § 2191(a)(2).

²⁴ See 2 U.S.C. § 631.

²⁵ 88 Stat. 297, 306 (1974).

terminated.”²⁶ If a resolution is passed by one House, the statute requires that the resolution be immediately referred to the appropriate committee of the other House and be reported out of committee within 15 calendar days unless the House determines otherwise by yeas and nays.²⁷

Both the Budget Act and the National Emergencies Act provide timing rules in important policy domains, but other timing statutes are more mundane.²⁸ For example, the Alaska Natural Gas Transportation Act of 1976 outlines elaborate procedures and timing rules to be followed by Congress once the President makes determinations on Alaskan natural gas pipelines.²⁹ Similarly, the Fisheries Conservation and Management Act of 1976 specifies procedural rules including timing rules for the disapproval of international fisheries agreements.³⁰ Statutes of this sort have been variously referred to as “framework legislation”³¹ or “statutized rules,”³² but regardless of nomenclature, they often contain timing rules for enacting legislation. Indeed, many of these measures are explicitly “expedition” statutes, intended to speed up the process of congressional consideration.³³

An oddity in these statutes is that they often contain a specific statement that each House maintains the constitutional authority to change its rules at any time. In fact, if this authority is constitutional then these statutes need say nothing about the matter at all: either House might, at any time, alter its rules. It is an open question whether statutory restrictions on legislative rules could preclude subsequent alteration without a statutory amendment. We set this issue aside, noting only that our analysis remains valid so long as Congress treats statutory timing rules as binding.

C. Internal Timing Rules

Although the federal constitution regulates the timing of legislative action directly, its most important contribution to timing rules is the rules of proceedings clause,³⁴ which allows each house to determine its own internal rules of procedure. The House of Representatives adopts new rules at the commencement of each session by majority vote; the Senate considers itself a continuing body and the Standing Rules continue in effect from session to session. Both the House Rules and the Senate Rules contain an extensive set of provisions on timing. Below we offer a few examples from each legislative body.

1. Examples

²⁶ 90 Stat. 1255, 1256 § 202(b) (1976), codified at 50 U.S.C. § 1622.

²⁷ 50 U.S.C. § 1622(c)(3).

²⁸ See generally Bruhl, *supra* note 22, at 346 n. 9 (collecting statutes that specify congressional procedures).

²⁹ 90 Stat. 2903 (1976), codified at 15 U.S.C. § 719f.

³⁰ 16 U.S.C. § 1823; 90 Stat 340 (1994).

³¹ Garrett, *supra* note 22.

³² Bruhl, *supra* note 4.

³³ See generally Tiefer, *supra* note 22 at 410.

³⁴ U.S. Const., Art. I, sec. 5, cl. 2 (“Each House may determine the rules of its proceedings . . .”).

Most timing rules in the Senate are contained in Rule XIV on “bills, joint resolutions, resolutions, and preambles thereto.” Rule XIV.1 specifies that “Whenever a bill or joint resolution shall be offered, its introduction shall, if objected to, be postponed for one day.”³⁵ Rule XIV.2 is a three reading rule requiring that every bill and joint resolution receive three readings prior to passage, which any senator may request be on three different legislative days.³⁶ Both parts 1 and 2 of Senate Rule XIV are essentially minority-protecting delay rules. While a minority of one cannot forestall the legislation forever, a lone Senator, by the terms of the rule, can trigger some delay in the legislative process.³⁷ Another rule requires that “All reports of committees and motions to discharge a committee from the consideration of a subject, and all subjects from which a committee shall be discharged, shall lie over one day for consideration, unless by unanimous consent the Senate shall otherwise direct.”³⁸ Equivalently, one Senator may require that all bills being discharged from committee be held for one day.

Senate Rule XVII.3(a) allows for privileged consideration of a motion by the majority and minority leaders to refer a bill to multiple committees, but not until twenty-four hours after the motion has been printed and made available to Senators in the Congressional Record.³⁹ Senate Rule XVII.4(a) requires that all “reports of committees and motions to discharge a committee from the consideration of a subject . . . shall lie over one day for consideration, unless by unanimous consent the Senate shall otherwise direct.”⁴⁰ Rule XXVI governs committee procedure. One provision of the rule allows any three members of a committee to request a special meeting of the committee. “If, within three calendar days after the filing of the request, the chairman does not call the requested special meeting, to be held within seven calendar days after the filing of the request, a majority of the members of the committee may file in the offices of the committee their written notice that a special meeting of the committee will be held, specifying the date and hour of that special meeting. The committee shall meet on that date and hour.”⁴¹ The Rule allows a minority of a committee to trigger a special meeting, after a specified time period has elapsed. The various Senate Rules sometimes require rapidity in the legislative process and sometimes impose delay.

Although the Rules of the House of Representatives are adopted at the beginning of each Congress, in most sessions the House Rules also contain a good number of timing rules. Consider House Rule XVI governing Motions and Amendments, the parallel to the Senate’s three reading rule. House Rule XVI requires a full reading when the bill is first considered,⁴² a second reading when the bill is read for amendment in a committee of the

³⁵ Senate Rule XIV.1.

³⁶ Senate Rule XIV.2.

³⁷ Senate Rule XIV.

³⁸ Senate Rule XVII.4(a).

³⁹ Senate Rule XVII.3(a).

⁴⁰ Senate Rule XVII.4(a).

⁴¹ Senate Rule XXVI.3.

⁴² House Rule XVI(a) (“A first reading is in full when the bill or joint resolution is first considered.”).

Whole House,⁴³ and a third reading before a vote.⁴⁴ Reading rules serve familiar goals of notice, but they are also de facto legislative delay rules. Multiple reading rules are timing rules that impose delay on the legislative process.

House Rule XIII governs House calendars and committee reports. Rule XIII.2 (b)(2) requires that “the report of a committee on a measure that has been approved by the committee shall be filed within seven calendar days”⁴⁵ The rule establishes a deadline, essentially a rapidity rule. Other portions of the rule impose delay. Rule XIII.4(a)(1) specifies that “it shall not be in order to consider in the House a measure or matter reported by a committee until the third calendar day . . . on which each report of a committee on that measure or matter has been available to Members, Delegates, and the Resident Commissioner.”⁴⁶ House Rule XV.1(a) restricts the timing of a motion to suspend the rules: “A rule may not be suspended except by a vote of two-thirds of the Members voting, a quorum being present. The Speaker may not entertain a motion that the House suspend the rules except on Mondays, Tuesdays, and Wednesdays and during the last six days of a session of Congress.”⁴⁷ Rule XV.2(a) specifies that discharge motions shall be in order on the second and fourth Mondays of a month. By doing so the rule imposes some delay in the legislative process, but also coordinates the timing of motions to discharge. Rule XV.2(b)(1)(B) could be understood as either a delay or rapidity rule. It allows a motion to discharge “a committee from consideration of a public bill or public resolution that has been referred to it for 30 legislative days.”⁴⁸ Like the Senate Rules, the various timing rules of the House interact to inject delay and rapidity into the overall legislative process.

2. The Puzzle of Waiver

Unlike constitutional timing rules and arguably statutory timing rules, internal Congressional timing rules have a puzzling feature: the rules can be waived. For example, in the Senate, an internal rule can be changed by a supermajority vote,⁴⁹ suspended by majority vote with notice,⁵⁰ or suspended by unanimous consent without

⁴³ House Rule XVI(b) (“A second reading occurs only when the bill or joint resolution is read for amendment in a Committee of the Whole House on the state of the Union under clause 5 of rule XVIII.”).

⁴⁴ House Rule XVI(c) (“A third reading precedes passage when the Speaker states the question: “Shall the bill [or joint resolution] be engrossed [when applicable] and read a third time?” If that question is decided in the affirmative, then the bill or joint resolution shall be read the final time by title and then the question shall be put on its passage.”).

⁴⁵ House Rule XIII.2(b)(2).

⁴⁶ House Rule XIII.4(a)(1).

⁴⁷ House Rule XV.1(a).

⁴⁸ House Rule XV.2(b)(1)(B).

⁴⁹ And arguably a bare majority, depending on one’s interpretation of the Senate Rules. Various procedural gambits are surveyed in the commentary on the filibuster. *See generally* GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION & LAWMAKING IN THE U.S. SENATE* (Princeton 2006).

⁵⁰ Senate Rule V.1 (“No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day’s notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof.”).

notice.⁵¹ If the rule can be waived, how seriously should timing rules be taken as a restriction on legislative behavior? If legislators always act optimally, then the timing rule constraint is unnecessary. Legislators would delay when delay is warranted and speed up when rapidity is warranted. If legislators are ill-motivated, they would not adopt timing rules in time 0 to constrain themselves in a desirable way at time 1. Presumably, the ill-motivated legislature would like to maximize its ability to do ill across time periods. Our account adds little to the literature on this front.⁵²

The waiver concern does not apply to constitutional rules, and there is an open question about whether statutory rules of procedure can be altered without a subsequent statute repealing or amending the prior statute. But many timing rules are internal rules, and the importance of our project would be reduced if timing rules had no binding effect on legislative behavior.

The conventional wisdom is that internal rules are important and often constraining.⁵³ This should be no more or less true for timing rules than other rules. In part, this is because waiver can be costly either because of reputation or because of voting rules. If members of a legislature believe that timing rules provide general benefits, legislators may refrain from waiving timing rules to facilitate enactment of a specific piece of legislation. If respect for the rules emerges as a historical norm, concern for a legislator's reputation may make the rules binding in practice though waivable in theory.

Waiving the Senate Rules formally requires either one day's notice or unanimous consent.⁵⁴ Either some additional delay is required, in which case the primary delay rule is only partially avoided, or unanimity is required, which may be difficult to assemble. The degree of constraint imposed by internal timing rules is a function of the cost of waiver, which is a function of voting rules.

We assume that a rational legislature at time 0 might adopt some constraints on its behavior in time 1. Slowing down certain classes of decisions to avoid certain forms of political pressure is a stock justification for procedural hurdles in Congress and

⁵¹ Senate Rule V.1 ("Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.").

⁵² These questions are addressed by the literature on self-commitment. *See generally* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000)

⁵³ Compare the debate surrounding the "nuclear option" controversy in which the Senate rules would be altered by simple majority vote to avoid filibusters of judicial nominations. *See, e.g.,* David S. Law & Lawrence B. Solum, *Positive Political Theory and the Law: Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51(2006). Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331 (2005); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543 (2005).

⁵⁴ Senate Rule V.1 ("No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.").

delegation to bureaucratic institutions.⁵⁵ If legislatures use timing rules to structure deliberations, the effects of timing rules should be properly understood. This framing sidesteps the positive puzzle about waiver in a somewhat unsatisfying way, but not in a way that is unique to our work.

II. THEORY

We now provide a framework for understanding timing rules. First, we explain the costs and benefits of delaying legislative action. Second, we explain the effects of timing rules on Congress's incentives to delay or speed up legislative action. Third, we address what we call "internal" reasons for why Congress would want to constrain itself with timing rules—namely, to solve internal problems of cooperation among the members of Congress. Fourth, we address "external" reasons for timing rules as solutions to agency problems between Congress and the public. Although, for expository simplicity, we will focus on Congress, much of what we say applies to other government actors as well, as we will discuss in Part III.⁵⁶ Our theoretical discussion can be applied to many, but not all, of the empirical instances of timing rules highlighted above. The match between the general theoretical concerns emphasized in Part II and illustrations used to motivate the discussion is reasonably strong, but also clearly imperfect.

A. Optimal Timing in Light of Uncertainty

Suppose that Congress believes that certain legislation would create a public good worth B at a cost of C , where $B > C$.⁵⁷ The legislation could create the public good in period 1, period 2, or period 3. (Period 3 becomes relevant only when we address delay rules in Part B.) The cost is incurred at the same time as the benefit is created and the legislation lasts for one period. As time passes, additional information about the potential effects of the legislation is revealed: in particular, at the start of period 2 it is revealed whether $B > C$. Enacting a law incurs legislative costs, k , which might vary across periods, depending on how busy Congress is. Finally, we assume that if the creation of the public good is deferred, people may adjust their behavior during period 1. This may either reduce the costs C or equivalently increase the benefits B of the legislation. For

⁵⁵ Roger G. Noll & James Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 774–75 (1990); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 593 (2002). The independent central bank is the classic example of insulation of government decisions from political pressure. As others have noted, political insulation of this sort may be entirely rational. See Finn E. Kydland & Edward C. Prescott, *Time to Build and Aggregate Fluctuations*, 50 ECONOMETRICA 1345 (1982); Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POLIT. ECON. 473 (1977).

⁵⁶ One potential ambiguity in our analysis concerns the relationship between what might be called "legislative time" and "real-world time." Many of the rules we identify impose significant delay within the legislature, but trivial delay outside the legislature. For example, a rule requiring a delay of three legislative days imposes trivial delay in the real world. However, within the legislature where the legislative agenda is often overflowing, a delay of three legislative days may be extremely significant. We reference this distinction occasionally in our model and discussion. For the most part, the distinction is allowed to remain implicit.

⁵⁷ Although we emphasize public goods for purposes of discussion, there is nothing in our model that requires the legislation be for public goods rather than private goods.

simplicity, we focus on the cost side. To distinguish cases when people can and cannot adjust, we will refer to C_H and C_L , where $C_H > C_L$. If people can adjust, then the cost is only C_L ; if they cannot adjust, the cost is C_H .

Congress has a choice: it can pass the law in period 1, to go into effect the same period; or it can wait and pass the law in period 2, to go into effect in period 2. If Congress passes the law in period 1, then the benefit B will be created with probability p (while the cost, C , is certain); otherwise it will produce a benefit of (say) 0. Thus, acting quickly creates a risk that a law will produce no benefit, but it allows the public to enjoy the benefit of the public good immediately if it turns out that the benefit is created.

If Congress waits until period 2, then it will pass the law only if it turns out that $B > C$. Thus, Congress avoids the risk that it will incur legislative costs, k , to enact a law that produces costs and no benefits. Further, it enables regulated individuals to adjust, and so incur C_L rather than C_H . The disadvantage of waiting is that the public benefit, if it is realized, occurs later rather than sooner.

Note that a “period” is not meant to refer to a specific unit of time such as a year or a legislative session. The term is kept abstract and its meaning depends on the context to which the framework is applied. Such abstraction is necessitated also by the ambiguity of the effects of timing rules, which we will address below. Some rules effect delay of just a day or two, but given the demands on Congress’s time, the practical effect of such rules could be much greater.

To fix intuitions, consider an example. The public good is cleaner air; the benefit consists of aesthetic and health benefits; the cost consists of the cost of installing scrubbers for smokestacks. Relevant meteorological conditions will not be determined until period 2. With probability $1-p$, the scrubbers will do no good (because they turn out to eliminate particles that blow elsewhere and to have no effect on particles that remain within the area). If the public good is created in period 2, factory owners can adjust by installing scrubbers while smokestacks are already under construction or being repaired; if the public good is created in period 1, they cannot adjust in this way, but instead must take special steps to install the scrubbers.

The two main alternatives are as follows.

Immediate legislation. Congress enacts a law that creates the public good in period 1, to take effect in period 1. The benefit B is created with probability p , while the cost C_H of creating the public good and the legislative costs, k , are certain. Thus, the value of the action is $pB - C_H - k$.

Deferred legislation. Congress waits and then passes the law in period 2 if and only if the public good has positive value of B . Now the benefit B and the cost C_L (low cost because people have a chance to adjust, assuming they can anticipate deferred legislation) are incurred with probability p , as is the legislative cost. However, because of delay, the value of the action must be discounted by discount factor d , where $d < 1$. Thus, the value of deferred legislation is $dp(B - C_L - k)$.

It is clear and intuitive that immediate legislation dominates deferred legislation when the probability that B will be created is high, the cost of creating the public good is low, adjustment costs are low, legislative enactment costs are low, and discounting is

great. In our example, Congress should pass immediate legislation if it is highly likely that the scrubbers will clean the air (so further study adds little information), it is only a little cheaper to install scrubbers earlier rather than later (because there is no construction or repair going on), the particular environmental legislation is simple and cheaply enacted, and people value present benefits greatly over future benefits.⁵⁸

Now consider a third and fourth alternative.

Anticipatory legislation. Congress passes the law in period 1, to take effect in period 2.⁵⁹ The legislative costs, k , are incurred with certainty and without discounting; the public good is discounted and probabilistic. Thus, the value of anticipatory legislation is $d[pB - C_L] - k$. However, if $B=0$, Congress will repeal the statute at period 2 (if the costs of repeal are less than C_L) rather than incur the loss of C_L , so the actual value would be: $d[p(B - C_L) - (1-p)k] - k$.

Conditional legislation. Congress passes a law in period 1 that provides that the public good will be created in period 2 if and only if it has positive value of B . The value of this action is $d[p(B - C_L)] - k$. The cost of repeal is avoided.⁶⁰

Against the baseline of deferred legislation, one advantage of anticipatory legislation is that the legislative costs are incurred at period 1 rather than period 2. Normally it would be better to put off legislative costs (if they are discounted), but Congress might anticipate that legislative costs will be higher in period 2—because it will be busier or because political conditions will change. If p is very high, then anticipatory legislation could also be optimal for legislators. Another advantage of anticipatory legislation, albeit not shown in our notation, is that adjustment costs should be lower because citizens can more confidently rely on the public good being created. If anticipatory legislation is used, the public good will be created unless Congress repeals the law in period 2. If deferred legislation is used, the public good is created only if Congress finally acts in period 2. Because legislative action is more difficult and costly than inaction, anticipatory legislation increases the probability that the public good will be created at the time that citizens adjust. The probability of the public good being created in time 2 is a relevant variable for anticipatory, conditional, and deferred legislation. In our model, it is irrelevant to immediate legislation because the costs and

⁵⁸ To the extent that legislation creates irreversibilities, immediate legislation also sacrifices option value. See Parisi, et al., *supra* note 2.

⁵⁹ See, e.g., International Antitrust Enforcement Assistance Act of 1994, 108 Stat. 4597 (1994), codified at 15 U.S.C. §6210 (imposing reporting requirements on the Attorney General beginning three years after the date of enactment); Copyright Royalty and Distribution Reform Act of 2004, 118 Stat. 2341, 2369 (2004) (deferring implementation of Act for six months); Individuals with Disabilities Education Improvement Act of 2004, codified at 20 U.S.C. 1408(b) (imposing enhanced reporting requirements on the Secretary of Education two years after enactment); 42 U.S.C. 7521(a)(3)(C) (Clean Air Act) (deferring applicability of regulations to a time no earlier than the model year commencing four years after such revised standard is promulgated).

⁶⁰ See e.g., Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, 102 Stat. 2654, 2672-73 (1988), codified at 7 U.S.C. § 136q(f) (stripping states of authority to exercise enforcement responsibility pursuant to Act after five years unless the Administrator determines that state is adequately complying with other provisions of the statute).

benefits are realized entirely in period 1. If legislation distributed costs and benefits across time periods, the probability of repeal would be relevant to immediate legislation as well.

Generally, Congress would prefer conditional legislation to anticipatory legislation, as the former avoids the cost, C_L , in period 2, with probability $1-p$. The main problem with conditional legislation is that some decisionmaker—a judge, an agency, the President—must determine whether the conditions are met in period 2, and the decisionmaker might act dishonestly or opportunistically or simply erroneously. And if citizens expect that the decisionmaker will make the wrong decision in period 2, they will not adjust properly in period 1.

Going back to our example, Congress might pass an anticipatory law in period 1 that provides for the installation of the scrubbers in period 2. A conditional law passed in period 1 would provide that a decisionmaker—say, the Environmental Protection Agency—will order the installation of the scrubbers in period 2 if it finds that the meteorological conditions so warrant. As noted, anticipatory legislation would encourage regulated parties to adjust, but can result in bad law in period 2—or else requires Congress to act a second time and repeal the law. The conditional law avoids this outcome but at the risk of a bad or costly decision by the EPA.

Although the ideal types of legislation—immediate, anticipatory, deferred, and conditional—can be well-specified in theory, in any given case it may be unclear how to categorize a particular statute. Consider the Patriot Act.⁶¹ Many of its provisions gave law enforcement agencies powers that they had long believed necessary. On this backward-looking view, the Patriot Act was deferred legislation. But some of its provisions were, according to its critics, unnecessary given the uncertain level of threat post-9/11, though they could conceivably be necessary if the level of threat turned out to be high enough. On this view, those provisions of the Patriot Act were immediate legislation.

This ambiguity notwithstanding, the four types of legislation can be readily identified in the political landscape. Anticipatory legislation is common: many enacted statutes delay implementation until some specified future date—usually the start of the new calendar year. Other statutes phase in or phase out benefits or costs over several time periods. That Congress is uncertain that the anticipatory legislation will actually create the public good is revealed by the telltale sunset clause, which provides for the automatic repeal of the statute, suggesting that Congress is not sure that the legislation will be beneficial.⁶² Deferred legislation is also common. Waiting for future study is the norm in

⁶¹ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁶² This practice has an early genesis in the United States. In the First Congress, one debate centered on whether the Impost Act should contain a sunset provision, with Madison's proposal to include a sunset ultimately winning. At least one representative, Thomas Tudor Tucker of South Carolina, thought that virtually all statutes should contain sunsets. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 541 (2003) (quoting Tucker on his view that nothing could justify a perpetual law except "circumstances which would render a law equally necessary now, and on all future occasions"). Early bankruptcy statutes were similar. See Statute of 5 Geo. 2, ch. 30 (1732) (incorporating the Statute of 4 Anne, ch 17). See also Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L. J. 325, 333 n. 47 (1991); Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 156 (1982) (explaining that the 1705

legislative decisionmaking. Immediate legislation occurs most often during crises and emergencies. Conditional legislation is common but typically takes the form of legislative delegations to the executive branch.⁶³ A statute says that if certain conditions are met, then the President may or must take certain actions.⁶⁴

We have ignored numerous complications, one of the most important being statutes that create costs and benefits in different periods. For example, appropriating funds for the construction of a bridge incurs costs in period 1, when the tax bite is felt, for benefits in period 2, when the bridge is finished and can be used. Conversely, incurring debt in order to lower taxes creates a benefit for period 1, when taxpayers have more funds at their disposal, and a cost for period 2, when the debt must be repaid with interest. Costs and benefits can also be spread out in more complex ways across periods. It is important to keep these complications in mind, but we will ignore them in order to keep the analysis simple and because they do not detract from our main arguments.

Another complication we have ignored is the importance of partisan differences in determining when legislation is enacted. From the public's view, it might be optimal for a particular law to be enacted soon, and everyone might agree with this. Nonetheless, the minority in a legislature might hope to delay enactment until after the next election, which could result in the minority party becoming the majority party—or other advantages such as a new president who belongs to the minority party. If delay can be achieved, the law might be passed after an amendment that favors the minority party in some way. Another advantage of delay is that delay could deprive the majority party of a legislative success that would improve its chances at the election—unless, of course, the majority party can successfully blame the minority party for delay. All in all, it is a striking feature of the delay rules that they favor the minority group by giving them tools for pushing legislation off into a potentially sunnier political future. But in this way, delay rules are quite similar to supermajority rules, which have the same effect, and are extensively analyzed elsewhere.⁶⁵

Act, “like much legislation of the time, contained a ‘sunset’ provision”). Sunsets, of course, might be used for reasons other than uncertainty about benefits as well. See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

⁶³ See, e.g., section 11 of the Communications Act of 1934, as amended, which requires the Federal Communications Commission to review all of its regulations applicable to providers of telecommunications services in every even-numbered year, beginning in 1998, to determine whether the regulations are no longer in the public interest due to meaningful economic competition between providers of the service, and whether such regulations should be repealed or modified. 47 U.S.C § 161 (2000). That is, the FCC is to regulate, conditional on the existence of inadequate competition in the telecommunications industry.

⁶⁴ See, e.g., the various conditional laws discussed in *Marshall Field & Co. v. Clark*, 143 U.S. 649, 691-92 (1892). The Act of June 4, 1794 gave the President the authority to lay an embargo on all ships and vessels in the ports of the United States “whenever, in his opinion, the public safety shall so require.” 1 Stat. 372 (1794). The Act of March 6, 1866 gave the President authority to declare a prior statute inoperative “whenever in his judgement [the importation of neat cattle and the hides of neat cattle] may be made without danger of the introduction of spread of contagious or infectious disease among the cattle of the United States.” 14 Stat. 4 (1866).

⁶⁵ See, e.g., John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); Timothy Groseclose & James M.

So far we have suggested that Congress has good reasons for choosing one of the four temporal types of legislation. Timing allows Congress to economize on legislative costs, address problems quickly or enable citizens to adjust, and handle uncertainty about the effects of a legislative proposal.⁶⁶ But if Congress has the right incentives to time legislation, it would not need to be regulated by the rules described in Part I. Thus, we now turn to the question of why Congress might time legislation poorly, and whether these rules provide Congress better incentives. We also address the possibility that the rules themselves make things worse.

B. The Effect of Delay and Rapidity Rules

Suppose that the delay rules we discussed in Part I have the following effect. If Congress seeks to legislate for period i , it must begin deliberating in period $i-1$. The rules thus preclude immediate legislation: Congress can legislate only for period 2 in our schema. Deferred legislation means that Congress deliberates in period 1 but enacts for period 2.

As noted above, any particular delay rule might specify delay of just a day or two; others, real or hypothetical, might require a delay of a longer period. Moreover, the effect of an apparently modest delay of a few days may be quite significant within the legislature, where time and agenda resources are scarce. Also, the cumulative effect of many different rules could be to cause considerable delay or limited delay.

Anticipatory and conditional legislation must be understood in a special way. If Congress must deliberate in period 1 in order to enact a statute in period 2, but then enacts anticipatory or conditional legislation, then those types of legislation go into effect only in period 3. More formally, if Congress seeks to legislate for period i , it must begin deliberating in period $i-2$, so that it can pass anticipatory or conditional legislation in period $i-1$, which takes effect in period i .

The delay rules have two opposing effects. At first sight, they would only seem to increase the probability of deferred legislation. If Congress cannot enact for period i , then it must enact for period $i+1$. If Congress believes that anticipatory or conditional legislation is warranted, it must deliberate in period i , enact for period $i+1$, and then wait until period $i+2$ for the law to take effect. This means that the benefits of the law are discounted twice from the perspective of period i . Deferred legislation, where discounting occurs only once, thus seems comparatively attractive.

Yet the delay rules can also increase the probability of anticipatory and conditional legislation. If Congress anticipates that it cannot enact for a certain period after a problem arises, because of the delay rules, it will act earlier to address this risk and, if necessary, delegate power to other decisionmakers who can act more quickly.

Snyder, *Buying Supermajorities*, 90 AM. POL. SCI. REV. 303 (1996); Edward P. Schwartz & Warren Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992).

⁶⁶ In some circumstances, delay could conceivably increase the costs of implementation if regulated parties engage in strategic behavior to try to raise implementation costs in the hopes of avoiding subsequent implementation.

Delay rules cause delay only in the first case; but they can also cause Congress to act quickly, in anticipation of problems, so as to avoid being forced to delay when problems arise.

Which effect will predominate? As we have noted, deferred legislation is more attractive than anticipatory legislation if legislative costs are high, the importance of adjustment is low, and the probability that the public good will be valuable is low. Anticipatory legislation is more attractive than conditional legislation if the agency costs from delegating to another decisionmaker are high.

Consider again our example. If we imagine that Congress first learns of the negative health effects of the pollution in period 1, then delay rules mean that it cannot enact immediate legislation. Deferred legislation enables the law to go into effect in period 2, so that the benefits are discounted only once. If, instead, Congress enacted anticipatory or conditional legislation, so as to allow parties to adjust, the benefits will not be felt until period 3.

But in a more general sense Congress will realize at any given time that a new problem might arise in a future period. It knows that the delay rules will prevent it from addressing that problem immediately. So if it anticipates that pollution might be the source of future problems, it might, instead of waiting for the problem to arise, enact conditional legislation or even highly general anticipatory legislation. Conditional legislation delegates to the EPA, which then can respond quickly to the problem if necessary.

Rapidity rules can be similarly understood. If a rapidity rule is in place, then Congress must address a problem with immediate legislation; deferred, conditional, and anticipatory legislation are off the table. Thus, rapidity rules force Congress to act quickly when it might otherwise be inclined to delay. There is also the possible contrary effect: once a rapidity rule is in place, Congress might respond by enacting anticipatory or conditional legislation so that it will not subsequently be rushed into making a decision.

C. Internal Reasons for Regulating Timing

Congress is a collective body, and is subject to the pathologies of collective action. Over the years, Congress has developed various rules, norms, and practices that, on the most optimistic account, overcome the problems of collective action and enable Congress to enact desirable laws. One hypothesis, then, is that delay rules are one way that Congress structures internal decisionmaking to avoid the pathologies of collective choice.

1. Passion and Delay

The usual explanation for delay rules like the three-reading rule is that Congress wants to constrain itself from acting out of temporary passion, and that the costs of bad legislation caused by passion are less than the benefits that are lost as a result of the

constraint on quick action.⁶⁷ Because passion-induced law is more likely to be bad law, it is better to risk congressional inaction than to allow Congress to act quickly.

This conventional wisdom has serious difficulties. First, the types of stimulus that rouse Congress out of its stupor are just those types of problems that need quick congressional action. An emergency occurs: passion might interfere with rational legislative deliberation but careful deliberation is not desirable if time is of the essence. It is perverse to demand that the government come to a halt precisely when rapid governmental action is most needed.⁶⁸

Second, passion can provide needed motivation. The usual account of Congress stresses inertia rather than excessive action. To act, Congress must overcome a collective action problem, plus an effective supermajority rule. Congressional procedure is filled with hurdles that must be successively cleared to enact legislation. This means that the median voter will usually not have his or her way. Emotion is motivational, and passion might be just what is needed to overcome inertia caused by the individual rationality of members of Congress. If, as a collective body, Congress enacts desirable legislation too infrequently, delay rules that raise the costs of immediate action further exacerbate undesirable institutional tendencies.

Third, it is just when Congress is most roused to passion that timing rules are least likely to constrain it. An impassioned Congress will waive internal rules and use clear statements in order to overcome interpretive presumptions imposed by the courts. The importance of maintaining internal rules on timing and otherwise will be most visible to Congress when it is in a deliberative rather than passionate state.⁶⁹

Fourth, Congress itself often addresses future emergencies and other passion-inducing events by enacting conditional legislation during times of calm. Conditional legislation allows the executive to act without first obtaining legislative permission. The fact that something is being done by the government will reduce the pressure on Congress to act immediately. To the extent that passions temporarily addle congressional deliberation, the incentive to act immediately will at least be reduced.

2. Group Polarization and Delay

Despite these problems, the notion that delay rules enable people to overcome or mitigate deliberative pathologies retains a strong hold on intuition, and clearly underlies other areas of law, such as cooling-off laws that allow consumers to void contracts entered into under pressure.⁷⁰ Perhaps, the overall intuition is correct but the mechanism

⁶⁷ See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 364 (2004); JEREMY BENTHAM, *POLITICAL TACTICS* (M. James, C. Blamires, & C. Pease-Watkin, eds. 1999).

⁶⁸ See Eric A. Posner & Adrian Vermeule, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 61-64 (2007).

⁶⁹ Cf. Adrian Vermeule, *Self-Defeating Proposals: Ackerman On Emergency Powers*, 75 FORDHAM L. REV. 631, 640-49 (2006).

⁷⁰ See generally Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 774 (1989); Caroline O. Shoenberger, *Consumer Myths v. Legal Realities: How Can Businesses Cope?*, 16 LOY. CONSUMER L. REV. 189, 213-14 (assembling consumer cooling off statutes). The FTC

has not been adequately identified; perhaps, for example, delay rules can weaken the effects of group polarization and other phenomena caused by cognitive biases.

Group polarization refers to the empirically validated tendency of groups of like-minded people to make collective decisions that are more extreme than the decisions to which the group members would come if they voted independently.⁷¹ The phenomenon might not, at first sight, appear to be applicable to Congress, whose members are relatively heterogeneous, but it could certainly apply to some judgments of Congress, especially when decisions are initially made by a caucus of the majority party. One conjecture, then, is that delay rules could be a way of weakening the ill effects of group polarization and other decisionmaking pathologies.

The question is what the mechanism of group polarization is, and whether delay rules would throw sand into it. Unfortunately, the mechanism is not well understood. One possibility draws on the idea of social comparison: people want to be perceived favorably by other members of a group, and they are perceived favorably if they share other group members' views.⁷² The common desire for the favorable perceptions of others should create a feedback mechanism that drives people to the extreme. If so, it is hard to see how requiring delay prior to decision would improve outcomes. Instead, during the period of delay, people might have more time to bring their own views into alignment with the views of others. As Cass Sunstein notes, people who deliberate among themselves for a longer period of time might actually polarize to a greater extent.⁷³ Perhaps, in this context a rapidity rule would be better, as it might force people to express their opinions before they have a chance to develop a confident sense of what the opinions of other people in the group are.

Group polarization can also occur through information pooling, which has been modeled using the assumption of rational actors rather than cognitively biased actors. "Information cascades" occur when individuals within a group imitate the expressed opinions of earlier speakers rather than express their own opinions because they rationally assume that those earlier opinions, when consistent, reflect more aggregate information than what they have individually, but with the result that less information (in the aggregate) is brought to bear on the decision than if people did not cascade.⁷⁴ Cascades provide a stronger case for delay rules than social comparison does because of a key fact about information pooling: cascades are fragile because they are vulnerable to small external shocks such as the disclosure of additional information through public processes. A delay rule, then, prevents the cascading members of Congress from acting and during this period of suspended action an external shock—information that comes out from the media or that is supplied by interest groups—could break the cascade.

provides for a three day cooling off period for door to door sales. 6 C.F.R. 429 (2004). The Federal Truth In Lending Act, 15 U.S.C. § 1601 (2003).

⁷¹ See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

⁷² *Id.* at 88.

⁷³ *Id.* at 74 (discussing "iterated polarization games").

⁷⁴ See, e.g., Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151 (1998).

Whether this case for delay rules is plausible is hard to say. Information cascades are not well understood, and any benefit must be weighed against the cost—namely the delay in the enactment of a law that turns out to be desirable.

3. Agenda-Setting and Delay

Another explanation is that delay weakens the agenda-setting power of agents in Congress who control the legislative process. Congressional officials, including leaders and committee chairs, are given agenda-setting power for various reasons.⁷⁵ One influential theory suggests that, by delegating power to committee chairs, Congress gives them an incentive to invest in expertise, since committee members also have greater control of legislative outcomes, and thus can obtain extra rents that justify the investment.⁷⁶ On this theory, legislative outcomes will be biased in favor of the interests of the committee chairs, but they will be better for Congress as a whole (since a majority must approve the legislation) than they would be if no one invested in the relevant expertise. The theory thus depends on a delicate tradeoff: one must give the officials some agenda-setting control (so they invest in expertise) but not too much (or legislative outcomes will be excessively biased).⁷⁷

An advantage of delay rules is that they give other members of Congress a chance to evaluate bills coming out of committee, and to organize opposition to those bills if they conclude that they are not generally beneficial. To avoid such opposition, committee chairs will draft bills that are less biased in favor of their own interests. Too much bias will generate too much opposition.

One might argue that delay rules do no more than reduce the agenda-setting power of committee chairs, and thus could undermine the reason for delegating to committees in the first place—to provide committee members with an incentive to specialize and develop expertise.⁷⁸ This is partly true, but the peculiar benefit of the delay

⁷⁵ There are, of course, many ways of modeling the legislative process, costs, and internal organization of Congress. See generally KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988); Kenneth Shepsle & Barry Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987).

⁷⁶ Romer & Rosenthal, *supra* note 5. See also KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); David Austen-Smith & William Riker, *Asymmetric Information and the Coherence of Legislation*, 81 AM. POL. SCI. REV. 897 (1987); David Austen-Smith, *Sophisticated Sincerity: Voting Over Endogenous Agendas*, 81 AM. POL. SCI. REV. 1323 (1987).

⁷⁷ For the moment, we set aside the view that legislators care exclusively about the policy domains within the jurisdiction of their respective committees. While committee members surely care more about their policy domain than the domain of other committees, we assume committee members also care about other policies. There is a robust literature in political science about whether committee preferences are “outliers” relative to the preferences of the floor. See, e.g., John Londregan & James M. Snuder, Jr., *Comparing Committee and Floor Preferences*, 19 LEG. STUD. Q. 233 (1994); Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POLIT. SCI. REV. 149 (1990).

⁷⁸ See Christine DeGregorio, *Leadership Approaches in Congressional Committee Hearings*, 45 W. POLIT. Q. 971, 978 (1992) (quoting an aide on the House Interior Committee: “In a lot of ways we are not the masters of our own fates. Things come to us that some thing must be done about. Right now it is the Price-Anderson Act. It’s going to expire. There is a whole industry out there, and there are safe energy groups

rule—which distinguishes it from other rules that could be used to reduce agenda-setting power such as supermajority rules—is that it encourages *informed* opposition by members of Congress who can use extra time to obtain information. Committees will specialize less only to the extent that Congress exploits delay to inform itself more.

Delay rules have another advantage: they extend the time horizons of committee members by encouraging them to pass legislation that will have an effect only after they leave the committee. To the extent that members of committees might leave the committee in future terms and join other committees, they are more likely to take account of the general interest of Congress rather than their own narrow interest. Suppose, for example, that the chair of an agriculture committee wants to please farmers, but knows that because of delay rules, he can only push through bills that take effect next year and beyond, at which point he might be a member of the armed forces committee, when he depends less on the good will of farmers. Along this dimension, the impact of delay rules might change as a function of other congressional rules that allocate committee chairs. Chairmanships could be allocated either by seniority or on a rotating basis. Allocation by seniority creates an incentive for legislators to stay on committees rather than move from one committee to another. Allocation by rotation makes it more likely that committee membership will change from time to time. Delay rules might extend the time horizons of committee chairs in the seniority system but would not improve their incentives to take account of Congress's general interest. They could have that effect in the rotation system.

D. External Reasons for Regulating Timing

External reasons refer to a different agency relationship—that between Congress and the public. The public elects Congress to pass legislation to serve the public's interests, but for familiar reasons Congress might not do so. One reason is that interest groups are more organized than the general public, and thus they can better monitor members of Congress, and reward them (with campaign contributions and other assistance) if members of Congress enact laws that benefit interest groups at the expense of the public.⁷⁹ Another reason is that members of Congress might have private ideological or careerist goals (such as reelection) that leads them to prefer legislation that benefits themselves at the expense of the public. Members of Congress have an interest, for example, in entrenching themselves by passing legislation that gives them electoral advantages—franking privileges, and the like.

Timing rules could have two different functions. First, they might reduce these agency costs: timing rules are a partial solution to a central problem of democratic governance. Second, they might simply reflect these agency problems: that is, timing rules reflect the efforts of members of Congress to help interest groups or otherwise serve

that don't want to see it expire. So, that's our agenda and it's big." See also Jack L. Walker, *Setting the Agenda in the U.S. Senate: A Theory of Problem Selection*, 7 BRIT. J. POLIT. SCI. 423, 443 (1977) (discussing the role of reauthorization proceedings in Senate committees).

⁷⁹ Consider David Austen-Smith and Jeffrey Banks, *Elections, Coalitions and Legislative Outcomes*, 82 AM. POL. SCI. REV. 405 (1988); Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Robert Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19 (1973).

elected officials' private interests in vindicating ideological preferences or ensuring reelection.

1. Timing Rules as Solutions

One possible role of delay rules is that of reducing the advantages of interest groups in the legislative process. Suppose that when problems reach the attention of elites and the public generally, it takes some time for affected groups to mobilize resources to influence Congress. Suppose further that organized interest groups mobilize resources more quickly than ordinary citizens, because organized interests maintain institutions and staffs that monitor events and react quickly.⁸⁰ Interest groups will lobby Congress to act quickly before the general public can be mobilized in ad hoc style by political entrepreneurs. Once Congress legislates, the public will face a high barrier for obtaining its desired reform. If all this is true, then rules that require delay between when a problem is identified and when legislation may be enacted will weaken the relative power of interest groups, and thus increase the probability that publicly spirited legislation will be enacted.⁸¹ The rule affects the content of the legislation by affecting the timing of the legislation, and it does so in a desirable way if the influence of the general public naturally lags that of interest groups.⁸²

This point can be extended and made more general. Suppose, a delay rule failed to alter the eventual influence of interest groups over the content of a specific piece of legislation. Delay nonetheless may raise the probability of public awareness that such legislation has been enacted. If the public sanctions legislators for enacting private interest legislation, legislative responsiveness to private interest groups should lessen in the long term. The electoral sanction is crude because judgments about legislative performance on many dimensions must be aggregated into a single yes-no vote. Still, the threat of electoral sanctions seems to have some effect on legislative behavior. This long-term effect is more likely when delay rules are accompanied by transparency rules, as they often are within the legislature. Three reading rules might be understood in this way, both slowing the legislative process and raising the costs of secret legislative action. This effect is prominent when delay rules are paired with sub-majority triggers. For example, Senate Rule XIV.2 requires that the three readings of a proposed bill be on different calendar days, generating delay with an extremely low trigger threshold (a single legislator).

It is also possible that timing rules affect the price interest groups are willing to pay for legislation. Suppose, for example, that a delay rule prohibits immediate legislation. An interest group knows that an issue it cares about might arise at any period i , but it does not know when that will occur. Because of the delay rule, it cannot force

⁸⁰ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

⁸¹ See generally Elizabeth Garrett & Adrian Vermeule, *Transparency in the Budget Process* (unpublished manuscript, 2006).

⁸² The converse might be true as well. Suppose the general public is organized enough to oppose legislation in the short-term. The logic of collective action problems suggests diffuse public interest coalitions will not only be more difficult to create initially, but also more difficult to sustain. In this example, a delay rule would benefit the private interest if the opposing public coalition collapses during the interim time period.

Congress to pass a law in period i . If it waits until period i , and then acts, it can obtain the law for period $i+1$, but the benefits will be discounted, so the law might not be worth the lobbying costs. If the group instead acts prior to i by encouraging Congress to enact anticipatory or conditional legislation, it faces further costs. Because the problem is not yet known, anticipatory legislation will need to be very broad, which means that other interest groups might object, and so passage will be more difficult. When anticipatory legislation is used, there is also a risk that a legislature in period $i+1$ will defect from the original deal and repeal the legislation.⁸³ Conditional legislation introduces another decisionmaker, such as an agency, which might not take the interest group's view. Thus, the interest group will have to expend additional effort trying to influence the agency, reducing the value of the initial legislation. In all these ways, timing rules might make legislation less attractive to interest groups, though it is important to emphasize that it could also make public spirited legislation less effective as well.

A related possibility is that delay rules uniquely hinder interest groups, creating a screen that blocks at least some bad laws but lets through public spirited laws. Suppose that bad laws require lobbying by interest groups. Lobbying typically takes a lot of money, with big lobbying investments taking place in advance of passage of the bill. And suppose, by contrast, that good laws are not generally the result of lobbying or influence by the public, but instead are initiated by members of Congress who want to improve their chances for reelection by improving the economy, security, and other things that people care about. Delay rules have the effect of increasing the spread of time between the lobbying investment and the legislative return, thus reducing the rate of return on the lobbying effort. By contrast, delay rules should have no similar effect on publicly spirited bills. If there is no *ex ante* lobbying investment, delay cannot reduce the value of that investment.

We should add that the pure form of deferred legislation, whether or not compelled by strong delay rules, is a species of veil of ignorance rules.⁸⁴ A veil of ignorance rule is “a rule that suppresses self-interested behavior on the part of decisionmakers; it does so by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision.”⁸⁵ One way of doing so is imposing delay or deferred implementation.⁸⁶ In their strongest form, delay rules

⁸³ See John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INTL. REV. L. & ECON. 263, 266 (1992) (“Except in the rare case of a constitutional amendment, today’s legislature cannot prevent a future legislature’s majority from overturning its wishes.”). See also Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988); Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 S. CT. ECON. REV. 173 (1998) (discussing legislative durability and price of legislation). Cf. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 833 (1975) (explaining that the maximum price that an interest group will be willing to pay depends in part on the possibility of “adverse judicial rulings”).

⁸⁴ See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

⁸⁵ *Id.* at 399.

⁸⁶ *Id.* at 408 (“delay of the effective date of a rule, which restricts the range of a decision’s future application of the long term, rather than the short term, in the hope that decisionmakers’ long-term interests are inherently unpredictable.”). Cf. Ariel Porat & Omri Yadlin, *Promoting Consensus in Society Through Deferred-Implementation Agreements*, 56 U. TORONTO L. J. 151 (2006).

have a veil-like effect. Deferred legislation requires enacting legislation in period i that will not distribute benefits until period $i+j$. When the interim period is long, individuals may not know in period i what their position will be in period $i+j$. Veil rules may thus directly affect the motivation of legislators in desirable ways, making it more difficult to make decisions on the basis of narrow self interest.⁸⁷ Alternatively, the delay subset of veil rules may also facilitate good legislative behavior by making it easier for the public to monitor legislators and easier for members of Congress to monitor committee members. These desirable effects result from delay's impact on agency problems, rather than by draping a veil between legislators and the effects of legislation.

2. Timing Rules as Problems

Timing rules help mitigate certain agency problems in politics, but they also create new ones. Suppose that only interest groups monitor Congress and the public is largely passive. Delay rules might be a way of ensuring that interest groups have an opportunity to learn about, and influence, developments in the legislative process. Congress might fear that if it acts too quickly, interest groups that do not have a chance to provide input will be unhappy with the results. Delay rules slow down legislation so that interest groups can have influence. Perhaps some of these groups will have a desirable influence, but public choice provides many reasons to think otherwise.⁸⁸ While delay has the appearance of generating desirable deliberative benefits in Congress, the reality is darker. Delay simply generates greater opportunities for negative influence by private interests or rent-extraction by legislators. Moreover, because delay rules facilitate monitoring, delay makes it easier for interest groups to monitor legislators as well as the public. Rapidity rules have a dark side as well. Forcing rapid legislative action may generate errors in policy, reduce transparency, undermine monitoring, make back-room legislative deals easier, and so on. If delay generally helps mitigate agency problems, then rapidity is likely to exacerbate them. Timing rules might serve the negative interests of legislators or private groups.

This view has plausibility in some policy domains, but it is a bit too crude to describe timing rules in general. First, a now-conventional view is that legislation involves many variants. Different sorts of legislation generate different distributions of costs and benefits to private actors.⁸⁹ Environmental legislation produces concentrated costs on industry and diffuse benefits to the public. Tax policy often pits concentrated interest against concentrated interest. The underlying interest group dynamics will vary across different policy areas and the effects of timing rules will vary accordingly. If, on a theory of the optimal timing of legislative action delay is bad in a specific policy domain, a natural suggestion is that rapidity rules are good.

The difficulty is that timing rules can be manipulated to serve either good or bad ends. If timing rules affect the nature of legislation, timing can be manipulated to make

⁸⁷ For example, consider the setting of legislative salaries. See Vermeule, *supra* note 84, at 404.

⁸⁸ See generally DENNIS C. MUELLER, *PUBLIC CHOICE III* (Cambridge 2003).

⁸⁹ See WILLIAM ESKRIDGE, PHILIP FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 59 (3d ed. 2002).

policy worse instead of better. This concern is legitimate, but it is no more legitimate with respect to timing rules than most of features of political institutions. Transparency is often democratically desirable, but too much transparency in the wrong circumstances (e.g. national security) can be harmful. Closed rules, which prohibit amendments to pending legislation, can be used to prevent nongermane amendments on other topics or amendments that weaken the bill, but they can also be used to avoid amendments that would fix or strengthen the bill. Timing rules are similar in this respect; they can be used for good or for ill. The design task is to calibrate timing rules to the specific context. This task is not easy, but our analysis suggests it is important.

III. EXTENSIONS

A. The Relationship Between Timing Rules and Other Procedural Rules

Timing rules compose a portion of a larger class of procedural rules, rules that determine how a decisionmaker comes to a decision but not what the content of that decision is. Constitutional procedural rules, for example, provide that bills become law only if majorities in both houses vote in favor of them, or two thirds if the President exercises the veto. Statutory procedural rules like those contained in the Congressional Budget and Impoundment Act of 1974,⁹⁰ establish detailed procedural requirements with deadlines for the specification of a congressionally proposed budget.⁹¹ The timeline is accompanied by procedural restrictions, for example, precluding nongermane amendment (otherwise permitted) in the Senate,⁹² or making it out of order to increase spending beyond that authorized in the concurrent budget resolution.⁹³ Internal procedural rules include the filibuster rules, and other rules that govern the order in which a chamber does business, who gets the floor, what type of majority is needed to approve a motion, and so forth.

The relationship between timing rules and the other types of procedural rules is complex. An initial source of confusion is the substitutability of timing rules and many voting rules—an issue we addressed in Part I under the heading of “waiver.” Consider Senate Rule XIV.1, which provides that “Whenever a bill or joint resolution shall be offered, its introduction shall, if objected to, be postponed for one day.” At least in

⁹⁰ Pub. L. No. 93-344, 88 Stat. 297.

⁹¹ See generally Chryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Process*, 43 B.C. L. REV. 863, 872-73 (2002).

⁹² 2 U.S.C. § 636(b)(2) (as applied to concurrent budget resolutions); id. § 641(e)(1) (as applied to reconciliation bills).

⁹³ 2 U.S.C. § 641(d)(1) (House of Representatives), (2) (Senate) (2000). See Block, *supra* note 91, at 879-80. For a discussion of shifts in statutory budget rules, see Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595 (1988); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998)

principle, the Senate could change this rule by a supermajority vote,⁹⁴ suspend the rule by majority vote with notice,⁹⁵ or suspend the rule by unanimous consent without notice,⁹⁶ in which case the rule does not force delay at all. If a majority supports the bill, then it can first suspend the rule (assuming 60 Senators vote for cloture), and then vote in favor of the bill; if a majority rejects the bill, then the rule has no effect in any case. We suggested in Part I that reputational concerns might prevent this type of behavior. If members of a chamber believe that timing rules make sense in general, they may refrain from undermining the effectiveness of these rules by suspending them whenever they interfere with the immediate enactment of a bill they favor.

Supposing this is the case, then it seems clear that the timing rules and the other types of procedural rules address different types of problems, although these problems might be closely related. Consider, for example, a simple comparison of a supermajority rule that provides that a bill passes a chamber only if a supermajority votes for it, and a delay rule that provides that a bill passes a chamber only if a majority votes for it twice—at an initial period 1 and then after delay, at period 2.⁹⁷

To understand the effects of these rules, imagine that members' political preferences can be distributed along a line segment, with extremes at the end and the median in the middle. Suppose two bills are under consideration: one would reduce funding for family planning and one would eliminate funding for family planning. The median member of (say) the House favors reduction of funds, but the member who would be needed for a supermajority favors no reduction. Thus, if the supermajority rule is in place, no law will be passed.

At first sight, the delay rule would seem to allow the law to be passed. If the median member of the House supports the law, then under majority rule the law passes. However, the truth is more complicated. The reason is that the identity of the median voter can fluctuate over time, and the requirement of two votes implies that the median voter at both time periods support the bill. Given the possibility that a person who supports the bill the first time might oppose it the second time, an effective supermajority is necessary for the bill to survive.

An example will clarify the argument. Suppose that all members' preferences for the reduction in funds remain fixed between period 1 and period 2 except that of one person. Let us assume that N people favor the status quo and N people favor the reduction

⁹⁴ And arguably a bare majority, depending on one's interpretation of the Senate Rules. Various procedural gambits are surveyed in the commentary on the filibuster. *See generally* GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION & LAWMAKING IN THE U.S. SENATE* (Princeton 2006).

⁹⁵ Senate Rule V.1 ("No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof.").

⁹⁶ Senate Rule V.1 ("Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.").

⁹⁷ Note that in the case of deferred legislation, there need not be literally two votes. The legislature waits during period 1 and votes during period 2. But in practice some action must take place during period 1—the bill is introduced for example—and the legislature can vote to block further consideration, so in practice a first vote or majority acquiescence is necessary.

in funds. The remaining person—the potential tie-breaker—favors the status quo with probability 0.5, and favors reduction in funds with probability 0.5, reflecting the ambiguous balance of political forces in her district. (We might also imagine that in the interim she could be voted out of office and replaced.) If the bill is subject to a single vote, then the probability that it is enacted is 0.5. But if the bill must pass two votes separated by a delay, and the middle voter simply votes in favor of the position reflected by the balance of political forces in her district each time, then the probability that the vote will pass falls to 0.25. Thus, two majority votes separated by delay together with variance in preferences is effectively much stricter than a single majority vote or two majority votes that occur in rapid succession.

However, an interesting property of the dual vote system is that the effect of timing is *variable*. The effective strength of the voting rule increases with the variance of political preferences with respect to the relevant issue. If preferences are stable, then the median voter stays the same, in which case the second vote will be exactly the same as the first vote, and the overall probability of enactment is 0.5. If preferences are highly variable, the overall probability of enactment could fall, as we have seen, to 0.25. By contrast, a (for example) supermajority rule with no temporal dimension might be hard to satisfy in general, but its effect remains constant with respect to variability in preferences.⁹⁸

Should this difference matter? One can imagine situations where it would. Suppose that one of the benefits of a supermajority rule is that it prevents legislative churning—the excessive enactment and repeal of laws because of rapid changes in political coalitions. The cost of the rule is, of course, that many desirable bills will not pass because a supermajority cannot be constructed. The dual voting rule solves the churning problem without requiring such high decision costs when the conditions for churning do not exist. When preferences are variable and thus churning is a danger, the dual voting rule is an effective supermajority rule. When preferences are not variable, then churning is less of a danger, and thus the dual voting rule, by serving as an effective (simple) majority voting rule, allows legislation to proceed. To be sure, the requirement of two votes and a delay raises decision costs, and so the overall assessment of the rule would require one to take account of delay and multiple-voting costs as well.

Our purpose here is not to prove that timing rules are better than voting rules or vice versa. Clearly, both types of rules are needed. Our more limited aim is to show that timing rules have distinctive and sometimes attractive properties, and that these properties may explain why timing rules constitute an important subset of procedural rules.

B. Enforcement

⁹⁸ In our example, the law would not pass a supermajority rule because we assume that, except for the median voter, preferences are fixed. But suppose instead that everyone votes for the bill with probability 0.9. Then a supermajority rule will be satisfied less often than a non-temporal majority rule will. One could then construct a dual majority vote system whose strictness exceeds that of the supermajority rule when the temporal variability of the median voter's preference is high and not when it is low.

For timing rules to have meaningful effects on legislation, the rules must be enforced, either by Congress itself, the President, or the courts. None of these alternatives is without problems. Internal enforcement of rules by legislators constitutes a self-regulation regime in which regulated parties can waive the regulations. External enforcement of restrictions on congressional procedure is notoriously difficult. However, if each institution is capable of partial enforcement, timing rules can still produce important effects on legislative outcomes. Indeed, there are several reasons exist to think enforcement of timing rules will be easier and more effective than restrictions on the content of legislation.

1. Congressional Enforcement

Suppose no external actor is capable of enforcing timing rules. Congress might nonetheless self-regulate and enforce timing rules. Earlier we suggested that reputation and a generic norm in favor of rule-following in Congress might be sufficient to enforce timing rules, at least sometimes. An alternative to reputation and norms alone would be to give the Rules Committee in either House some sort of special enforcement authority. One alternative would include the responsibility to issue a public report every time legislation is passed without satisfying the timing rules;⁹⁹ another would be to grant authority to file ethics charges against legislators voting for a bill that failed to satisfy timing rules. But for the regime to work, the Rules committee would have to have good incentives—refusing to look the other way—when the rest of Congress has bad incentives. This is possible, but unlikely, at least absent a mechanism for altering the incentives of a discrete subset of legislators. If the rules committee faces the same incentives as the rest of Congress, then generic norms backed by reputation may be the only viable congressional enforcement scheme. Nor is it clear that ethics charges or (more modestly) a public pronouncement whenever a timing rule is violated would be a wise use of Congressional resources. One might “statutize” timing rules to make them more binding. Virtually all statutes that fix procedural rules also contain a clause making disclaiming any limitation on the constitutional authority of each house to make its own rules, but using statutes without such disclaimers remains a possibility. Such statutes would likely vest courts with the authority to enforce procedural rules, a possibility that we discuss below.

Although Congressional enforcement of timing rules is imperfect, it is theoretically possible. A long tradition in Constitutional law suggests that Congress must interpret the Constitution for itself rather than rely on judicial judgment and enforcement.¹⁰⁰ If the argument has vitality in the context of constitutional interpretation, there is no reason to assume that congressional enforcement of timing rules would be impossible. Nor is it clear that internal enforcement of timing rules is any more difficult

⁹⁹ As is currently done for legislation appropriating funds that are not authorized.

¹⁰⁰ See, e.g., James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For more recent discussions, see Thomas C. Grey, *Thayer’s Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993); Stephen B. Presser, *On Tushnet the Burkean and in Defense of Nostalgia*, 88 NW. U. L. REV. 42 (1993); and Mark Tushnet, *Thayer’s Target: Judicial Review of Democracy*, 88 NW. U. L. REV. 9 (1993).

than congressional enforcement of any of its rules. Although rules are regularly waived, they are also regularly adhered to and enforced.

2. Presidential Enforcement

Might the President be a more effective enforcer of timing rules? Suppose the President proclaimed that he would veto any legislation that failed to satisfy relevant timing rules, either because the rules were waived explicitly by a House of Congress or implicitly, as when a chamber ignores the timing rules. If the President could credibly make this pronouncement, it would constitute a partial fix for the enforcement problem. Unfortunately, in most cases a presidential statement like this one is not credible. And even if the President would like to hold himself to the statement, we know of no legal mechanism that would allow him to do so in a credible way.

When Congress passes a bill without satisfying timing rules, the President must choose between the status quo ante (without the new bill) and the proposed bill.¹⁰¹ So long as the proposed bill is closer to the President's ideal point than the status quo of no new legislation, the President's short term interest will be to sign the bill rather than veto it. While there may be circumstances in which the President would take the short-term loss to obtain a long-term gain, we think it unlikely that enforcement of timing rules constitutes such a case. Indeed, even if the President were (somehow) 50 percent more likely to veto legislation that failed to satisfy relevant timing rules, Congress could simply adjust the content of legislation to make it more attractive to the President. So long as the enforcement of timing rules constitutes a substantive policy value, we are hard pressed to see why the President would not simply bargain around the outcome, trading the enforcement of timing rules for some other policy goal. Additionally, if the President could credibly commit to vetoing any piece of legislation that failed to satisfy relevant timing rules, enforcement would still be imperfect because Congress could override the President's veto, in effect, choosing to reassert its initial timing rules waiver. Thus, while Presidential enforcement of timing rules might be a marginal improvement on congressional self-enforcement, it is unlikely to be a significant fix.

3. Judicial Enforcement

If Congress and the President are imperfect enforcers of timing rules, would courts be better? Although this is not the place for a critique or defense of judicial review, the case for judicial enforcement of timing rules is stronger than in many other areas of the law. For example, even if one supports judicial review of statutes for constitutionality, it is uncontroversial that courts sometimes struggle with the task of substantive review. If a statute is reviewed under the rational-basis test, it is virtually always upheld; if the strict-scrutiny standard is applied, the statute is almost always struck down. In part, this is because of the decisional burdens imposed by doctrine that asks judges to determine whether a state interest is "compelling enough" or whether a statute is "related enough," for example, to interstate commerce. When called upon to evaluate the substance or

¹⁰¹ See John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J. L. & ECON. 1 (1990).

merits of legislation, courts regularly struggle, not because of ineptitude, but because of the nature of the inquiry doctrine requires.

Identifying whether certain procedural requirements were met in the legislative process is relatively straightforward (although identifying instances of genuine waiver rather than rule-flouting may not be).¹⁰² The rules versus standards debate in the legal literature suggests related reasons that judges may be good at enforcing timing rules. A deadline imposes low decision costs on the enforcing judge; compare a rule that requires agency action “in a reasonable time period.” In general, if one thinks judges are good at judicial review of statutes, there is every reason to think that judges will be better at enforcing timing rules than substantive restrictions on congressional power. If one is skeptical about judicial competence in substantive judicial review, there is reason to be less skeptical about judicial enforcement of timing rules.

This is also true in other areas of the law. For example, an important debate in administrative law concerns whether judges should review the substance of policy decisions by administrative agencies or instead hold agencies to exacting procedures designed to ensure good decisions.¹⁰³ Historically, one side of this debate urged that judges should steep themselves in technical knowledge and evaluate the content of agency judgments; the other side urged that judges could not possibly make informed judgments about such matters, but could still make policy better by aggressively enforcing procedural restrictions on agency decisions.¹⁰⁴ Our thesis picks up on this old strain of debate, suggesting that judicial competence is better tailored to the enforcement of procedural restraints like timing rules than substantive review of legislation.

A problem for our view is that courts have often refused to enforce Congressional rules of procedure.¹⁰⁵ Given our suggestion that courts could do so cheaply and effectively, this brute fact might be unsettling. However, to say that judges usually do not enforce Congressional rules is not to say that they should not do so. If legislators conclude enforcement of timing rules would have desirable influences on policy, congressional intent would be a reason for judges to enforce rather than ignore timing

¹⁰² See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

¹⁰³ See, e.g., *National Resources Defense Council v. Nuclear Regulatory Commission*, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev'd sub nom.*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

¹⁰⁴ Chief Judge Bazelon thought courts were not well equipped to evaluate complicated scientific judgments by agencies, but could make decisions better by enforcing procedural restrictions on agencies. Judge Leventhal thought that judges could and should steep themselves in science to evaluate the merits of agency decisions. *Compare Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring) (“Because substantive review of evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures . . .”), *with id.* at 69 (Leventhal, J., concurring) (“Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions.”); see also *NRDC v. United States*, 547 F.2d 633, 655 (D.C. Cir. 1976) (Bazelon, C.J., separate statement concurring).

¹⁰⁵ Courts often rely on the “enrolled bill rule” which precludes judges from looking behind the enrolled bill to evaluate procedural defects. See *United States v. Munoz-Flores*, 495 U.S. 385, 408 (1990) (Scalia, J., concurring in the judgment).

rules. Unlike many internal congressional rules that either serve mundane ends or that Congress would clearly prefer courts not enforce, timing rules serve ends that facilitate democratic governance. If courts prefer not to enforce internal rules out of respect for coordinate branches or congressional preferences, timing rules might constitute a special case warranting an exception. If courts are nonetheless hesitant, the simplest way to facilitate judicial enforcement would be for Congress to enact a statute directing courts to enforce the rules.¹⁰⁶

Moreover, judicial refusal to enforce congressional rules of procedure does not preclude judicial enforcement of all timing rules. At a minimum, judges could and should enforce constitutional timing rules and statutory timing rules. Judicial reluctance to enforce congressional rules might be a reason to codify timing rules in statutes or constitutions, rather than a reason to eschew judicial enforcement altogether. Indeed, courts regularly enforce constitutional procedural requirements.¹⁰⁷ Many state courts also enforce other procedural restrictions far more unwieldy than timing rules. Single-subject rules are a prime example. Many state constitutions (and some statutes) contain clauses prohibiting legislation on more than one unrelated subject.¹⁰⁸ Ascertaining whether a given law runs afoul of a single subject limitation is notoriously difficult, but state courts enforce the procedural limitation anyway. One reason state courts struggle with this task is that single-subject limits require judges to make substantive evaluations about how closely linked different parts of legislation are; single subject rules are procedural restrictions that require content-based evaluations for enforcement. Because the enforcement of timing rules does not, timing rules are likely to be cheaper and easier to enforce than existing content-based procedural restrictions.¹⁰⁹

None of these institutional actors—Congress, the President, or the courts—will be perfect enforcers of timing rules; but, each is capable of partial enforcement. A mix of reputation, norms, and internal sanctions provides Congress with some enforcement resources. Although the President is unlikely to credibly commit to wield his veto to enforce timing rules, perhaps a greater presidential emphasis on clearing timing rule hurdles would support relevant congressional norms. Most timing rules enforcement is likely to be done by the courts. The pitfalls of judicial enforcement are not trivial, but nor are they so severe to warrant outright rejection of the regime. At a minimum, there are

¹⁰⁶ Cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

¹⁰⁷ See, e.g., *INS v. Chadha*, 462 U.S. 919, 954-55 (1987).

¹⁰⁸ The single subject rule has a long and storied tradition. For example, the Lex Caecilia Didia forbid laws consisting of unrelated subjects in Rome starting 98 B.C. ROBERT LUCE, *LEGISLATURE PROCEDURES* 548-49 (1922). See generally Millard H. Rudd, *No law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389 (1958).

¹⁰⁹ Judicial enforcement of statutory timing rules is also tangentially related to questions about the timing of judicial review more generally. Compare Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. (198, 233 (1994); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); with Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 86 (1997).

good reasons to think courts would be more willing and more able to enforce timing rules than other forms of limitations on congressional action.

C. Retroactivity

To this point, we have focused on legislation that is exclusively prospective. The possibility of retroactive legislation affects our analysis in several ways.¹¹⁰ Like delay rules, a requirement of prospectivity may reduce the effects of narrow self-interest on decisions because circumstances may change in the future.¹¹¹ Because actors know the past, but are uncertain about the future, a ban on retroactivity could reduce the ability of actors to narrowly tailor law to their own self-interest, at least at the margin. The legal bias against retroactive legislation is consistent with our theory of delay rules in that both delay rules and the presumption against retroactivity sometimes make it more difficult to enact legislation that pays off private interests. However, the effects of delay and prospectivity are independent.

Another way of putting this point is that Congress could undermine the beneficial effects of delay rules if it can enact retroactive legislation too easily. Earlier, we suggested that delay rules facilitate monitoring of agents by the public, and reduce the relative influence of interest groups over legislation. Delay allows slow and diffuse public attention to mobilize, reducing the advantage of well organized groups in the legislative process. However, public attention is often short-lived. Once public attention wanes, private interests can lobby again. Suppose that the delay in period i mobilizes the public to oppose a bill successfully that gives a tax benefit to the energy industry; no legislation is enacted in period i . By period $i+1$, public attention has waned, but the attention of industry has not. If the industry can now lobby and obtain legislation in period $i+1$ that applies retroactively to period i , the delay rule will not have prevented “bad” legislation during period i . Retroactivity, therefore, allows actors to evade some timing rules. The bias in the law against retroactivity may support the democracy-enhancing facets of delay rules on the legislative process.¹¹²

Timing rules may also encourage legislators to rely on retroactive legislation. If strong delay rules make immediate legislation costly, legislators will rely on deferred, conditional, or anticipatory legislation. If private actors or legislators prefer that benefits be accrued for activity during period i , when delay rules prohibit it, retroactive legislature

¹¹⁰ The retroactivity literature is vast. *See generally* SHAVIRO, *supra* note 1; Kaplow, *supra* note 1; Graetz, *supra* note 1.

¹¹¹ *See* Vermeule, *supra* note 84, at 408-09.

¹¹² Judges routinely presume that statutes are not intended to have retroactive effects, absent a clear statement to the contrary. *Landsgraf v. USI Film Products*, 511 U.S. 244 (1944); *Martin v. Hadix*, 527 U.S. 343, 352 (1999). The only Constitutional ban is the Ex Post Facto Clause. U.S. Const. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed”); U.S. Const. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder [or] ex post factor Law . . .”). *See generally*, Vermeule, *supra* note 6, at 409-10. The Constitution prohibits federal and state legislatures from enacting retroactive punishments, *Weaver v. Graham*, 450 U.S. 24 (1981), but not civil laws. *See generally* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996). Courts presume that agencies do not have the authority to issue retroactive rules. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).

enacted in period $i+1$ will be more attractive, all else equal. If retroactivity is bad (for reasons outside our framework), then either a presumption against retroactivity or weaker delay rules could reduce the frequency of retroactive legislation. The basic point is that timing rules can make retroactive legislation more attractive to legislators and retroactivity can undermine the effect of some timing rules.

A related topic is legal transitions. Scholars have long debated whether people whose wealth declines as a result of legal change should be compensated.¹¹³ The simplest setting is the taking of private property, but the basic arguments apply to any kind of legal change, such as regulatory change. On the one hand, compensating people for their losses provides them with insurance that might not be available in the market, and might cause the government to internalize the costs of its actions. For example, when the government condemns land for a new highway, property owners should anticipate this risk and be insured, and the government should be forced to take account of the costs as well as benefits of the highway. On the other hand, compensating people for their losses reduces their incentive to anticipate the changing needs of society and future government projects, with the result that they will overinvest in their property. In addition, if they want insurance against potential takings, they may be able to purchase it from private insurance companies. At the same time, it is far from clear that a compensation requirement causes the government to internalize the costs of its actions when taxpayers, rather than government officials themselves, pay these costs.

The debate has proceeded so far as though the only alternatives were full compensation (“just compensation” under the fifth amendment) or no compensation at all. However, delay rules provide an intermediate approach. With respect to the government, a delay requirement extends its time horizons, and increases the probability that a condemnation planned today will not occur until after the next election. Property owners have a chance to mobilize, and if there is some probability that a new party will take power, the delay rule reduces the risk that condemnations will be pursued for partisan reasons. Delay does not directly compensate the property owner, of course, but it will increase her bargaining power with respect to the government, which may be willing to pay her to sell quickly. A delay rule therefore provides more compensation than none at all.

D. Delegation of Regulatory Powers to the Executive Branch

Timing rules also implicate a range of important issues concerning delegation to the executive branch. In our framework, delegation to the bureaucracy is a form of conditional legislation, where the administrative agency evaluates whether the benefit of the legislation is greater than the costs. Delegation of this decision to an agency entails the standard laundry list of problems generated by principal-agent models.¹¹⁴ At a

¹¹³ See, e.g., Shaviro, *supra* note 1; Kaplow, *supra* note 1; Graetz, *supra* note 1.

¹¹⁴ For overviews of the delegation literature, see generally DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (Cambridge 1999); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991) (exploring the history and theory of delegation and delegation mechanisms). On bureaucratic drift particularly, see Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy:*

minimum, the agent might err; it might act strategically; it may have interests that diverge from Congress; or it may shirk. To these existing insights, our argument suggests delegation is a form of timing legislation and also a function of timing rules.¹¹⁵ Congress enacts legislation immediately, but any benefit or future sanction is evaluated and specified by the administrative agency. As we have suggested, strong delay rules may increase pressure on the legislatures to enact legislation in early time periods, with details filled in by agents in the future. Delegation can be made more or less likely by adjusting timing rules.

Related, Congress also uses a range of timing mechanisms to regulate the timing of agency actions, speeding up or slowing down the timing of bureaucratic decisions. Some of these timing mechanisms are explicit. The Clean Air Act Amendments of 1990 established a detailed timeline for EPA generation of regulations of specific air pollutants and designation of areas.¹¹⁶ For example, the Act required that governors submit area designations (attainment versus nonattainment) no later than one year after the promulgation of a new national ambient air quality standard,¹¹⁷ but the Administrator may not require the list sooner than 120 days after the new standard is promulgated.¹¹⁸ The Telecommunications Act of 1996 requires the Federal Communications Commission to review the degree of competition in the telecommunications industry every three years and adjust regulations accordingly.¹¹⁹ Many organic statutes contain delayed implementation clauses that provide 30-90 days before newly promulgated agency rules go into effect. Other agency timing rules are de facto. When Congress requires a decision on the record after an opportunity for a hearing, the statute triggers the time-consuming formal rulemaking and formal adjudication requirements of sections 556-557 of the Administrative Procedure Act.¹²⁰ Even informal notice-and-comment rulemaking is time-consuming, taking months or years, rather than days.¹²¹ Perhaps these provisions of the APA should be understood as timing rules as well.

Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431, 439 (1989) (discussing how agencies can shift policy outcomes away from the legislative intent).

¹¹⁵ Cf. Mathew D. McCubbins & Thomas Schwartz, *Police Patrol Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POLIT. SCI. 165 (1984).

¹¹⁶ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

¹¹⁷ 42 U.S.C. § 7407(d)(1)(A).

¹¹⁸ *Id.* § 7407(d)(1)(B).

¹¹⁹ Section 11 of the Communications Act of 1934, as amended, requires the Federal Communications Commission to review all of its regulations applicable to providers of telecommunications services in every even-numbered year, beginning in 1998, to determine whether the regulations are no longer in the public interest due to meaningful economic competition between providers of the service, and whether such regulations should be repealed or modified. 47 USC § 161 (2000). Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its broadcast ownership rules biennially as part of the review conducted pursuant to § 11. 110 Stat 56, 111–12 (1996).

¹²⁰ 42 U.S.C. §§ 556-557.

¹²¹ 42 U.S.C. § 553. See also Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

Whether explicit or implicit, delay rules of this sort serve many of the same interests in the administrative context as in the legislative context. Delay allows the principal (Congress) to better monitor the agent's (bureaucracy) decisions. Delay rules also allow the public time to organize and monitor, thus potentially reducing the influence of interest groups over the formation of regulation. However, both delay rules and rapidity rules are important. Either because agencies get captured by the interests they regulate (who may prefer no regulation) or because agents might shirk (and prefer inaction), deadlines on administrative process and decisions are equally important for controlling behavior. The agent might make a poor evaluation of whether $B > C$, or simply be lazy and be slow in making the determination. Because benefits are discounted, delay *after* the true value of B is realized imposes pure costs and no additional benefit.¹²² For example, the Toxic Substances Control Act¹²³ requires the agency to issue initial recommendations for listing of toxic substances within nine months.¹²⁴

Although we have focused on the legislature, the basic analysis can be applied with equal force to the bureaucracy. Although many components of the administrative process are regulated by Congress and courts, agency flexibility to choose the form and timing of decision is still the rule. Agencies are free to choose between rulemaking and adjudication,¹²⁵ between formal and informal rulemaking,¹²⁶ between making new policy immediately legal binding or only tentatively so.¹²⁷ There is nothing to preclude an agency from adopting its own procedural timing rules. Analogues to the typology of legislation also exist. The agency equivalent to conditional legislation is the Notice of Proposed Rulemaking, followed by a Final Rule. The NPRM announces that they agency will address a policy problem and proposes a tentative rule or regulation. At the end of notice-and-comment, the agency adopts the rule if the benefits of the rule exceed the costs. The rule generally applies prospectively in the period of final adoption. An agency might also rely on interim final rules that are binding and in place until "final" final rules are enacted and upheld. This sequence is a rough analogue to the use of anticipatory legislation that can be repealed in period 2, except that the interim rules are in force during period 1. Thus, administrative agencies face many of the same choices about the optimal timing of regulation, and the constraints thereon.

Another example that has received a great deal of attention in the literature is President Reagan's Executive Order 12,291, which required agencies to submit certain regulations for review by the Office of Information and Regulatory Affairs (OIRA) in the

¹²² Delay might be taken to be the problem in administrative behavior rather than the solution. If so, deadlines and rapidity rules are a reasonable response. Cf. 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).

¹²³ Pub. L. 94-469; 90 Stat. 2003 (1976).

¹²⁴ 90 Stat. 2010.

¹²⁵ SEC v. Chenery Corp., 322 U.S. 194 (1947).

¹²⁶ United States v. Florida East Coast Railway, 410 U.S. 224 (1973).

¹²⁷ See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI L. REV. 1383 (2004)

Office of Management and Budget (OMB) within the executive branch.¹²⁸ OMB review was supposed to ensure that agency regulations complied with cost-benefit analysis, but many critics believed that it was intended merely to delay regulation by requiring it to survive an extra layer of bureaucratic scrutiny by an intentionally understaffed office.¹²⁹ President Reagan's anti-regulatory philosophy lent credence to this charge, but President Clinton preserved OMB review because it gave him greater control over the regulatory process.¹³⁰ However, if OMB review was an implicit delay rule, Clinton partly countered this effect by issuing a rapidity rule, requiring that OMB review take no more than ninety days.¹³¹

Indeed, the evidence does suggest that timing is an important choice variable in regulation. Interest groups try to delay regulations that burden them; Congress tries to slow down and speed up regulations depending on their political value; and regulatory agencies themselves time regulations in response to pressures from interest groups, Congress, and others.¹³² Thus, it would not be surprising if the President tried to counter these pressures by imposing timing rules of his own.

If we think of OMB review as a pure delay rule, albeit shortened by President Clinton, it is susceptible to our analysis above. Delay does reduce the value of regulation by pushing its benefits off to the future—and anti-regulatory bias could well be the reason why President Reagan enhanced OMB review in the first place. But a delay rule also could have the beneficial effects that we have itemized. First, it allows additional information to emerge prior to issuance of the regulation; if this information indicates that the regulation will have unforeseen negative effects, then regulatory harm can be headed off. Second, it might reduce the effect of deliberative pathologies. If agencies polarize, or are trapped by polarized public views, then delay might help them avoid bad regulation.¹³³ Third, it might limit the agenda-setting power of agencies by giving hierarchical superiors in the executive branch a chance to inform themselves of the effects of regulations.¹³⁴ Fourth, it could reduce the incentive of interest groups to lobby for regulations by reducing their net present value. Whether these beneficial effects were an actual result of OMB review—either President Reagan's original approach or Clinton's modified version—remains an open empirical question.

¹²⁸ EXEC. ORDER NO. 12,291 (1981).

¹²⁹ See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1428-36 (1992) (describing incidents of regulatory delay as a result of OMB review); for a recent discussion, with citations to the literature, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1266-70 (2006).

¹³⁰ See Bagley & Revesz, *supra* note 129, at 1267.

¹³¹ EXEC. ORDER NO. 12,866 § 6(b)(2)(B)-(C).

¹³² See Kosnik, *supra* note 3.

¹³³ On this possibility, see Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000).

¹³⁴ Cf. MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* ch. 4 (2006) (discussing the way that cost-benefit analysis, even if merely a cost, can improve regulatory incentives).

CONCLUSION

An obvious way to structure political institutions to generate desirable policy is to regulate the content of legislation. Familiar examples include judicially enforced constitutional restrictions on legislation that categorizes on the basis of race or sex or legislation that imposes mandates on states without providing federal funding. Just as important, but less discussed, is regulation, including self-regulation, of the procedures used to enact statutes. In this Article, we have emphasized a subset of this second group: timing rules. Regulating the timing of legislative action avoids the well-known difficulties with regulating content, namely, that judges are poorly positioned to second-guess the policy judgments of legislators and to balance policy goals and constitutional values.

Timing rules support democratic goals by facilitating monitoring of legislators by the public, of committee members by floor-members, and as a general matter of agents by principals. Timing rules can help filter out laws that are not public spirited without precluding laws on specific subjects (e.g. race distinctions) or by form (e.g. single-subjects). Like other restrictions on legislation, however, timing rules are not costless, and can prevent legislatures from acting quickly when a crisis occurs or slowly when deliberation is necessary. They are also vulnerable to evasion, just as content-based restrictions are. The proper use of timing rules depends on context, and so one cannot at a high level of abstraction say whether the current system is optimal or not. Indeed, we have noted that Congress could use timing rules for bad ends, and this possibility must always be kept in mind. Timing rules then are no panacea. Like any tool, they can be used well or poorly.

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