Hi everyone,

Thanks for taking the time to attend this workshop. I’m presenting from my forthcoming book: *Bending the Rules: Procedural Politicking in the Bureaucracy*. I’ve attached here three chapters from the book - Chapter 1 (intro), Chapter 3 (theory), and Chapter 6 (empirical chapter). This is a lot of reading (!) and I’m not expecting everyone to pore over every word—**you may want to read the introduction (Chapter 1) and skim through Chapters 3 and 6** to get enough of the argument and approach to have a good discussion. I’m particularly interested in how to extend the argument to other venues beyond rulemaking, but all feedback is welcome.

Thanks again,
Rachel
Bending the Rules:
Procedural Politicking in the Bureaucracy

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University of Chicago Press
Forthcoming
Chapter 1

The Power of Procedure

Contraception—who has access to it and how it is paid for—is contested ground in the ongoing culture wars in the United States. As of 2018, contraception is legally considered a “preventative service” and, in most health insurance plans, women can obtain it without a copay or any out-of-pocket fees. When this so-called “contraceptive mandate” was first announced in August of 2011, it ignited a firestorm; the president of Catholic University opined that the policy would lead religious organizations to “abandon their commitment to serve poor people of all faiths” and that the rule impinged on individual freedoms.¹ These positions were supported by numerous religious organizations and businesses and, over the next two years, these groups initiated more than 60 lawsuits against the mandate.² Meanwhile, organizations on the left celebrated the policy change, with the president of Planned Parenthood describing the policy as a “historic victory for women’s health.”³

Many assume, perhaps reasonably so, that such an important policy change originated in the halls of Congress. Indeed, the mandate is often incorrectly attributed to the Affordable Care Act (ACA, or “Obamacare”),⁴ President Obama’s landmark healthcare program. However, while the ACA clocks in at more than 2,400 pages and addresses dozens of topics, including the requirement that insurers cover preventative services free of charge, it is mum on the payment status of contraception (i.e., whether contraception should be considered a preventative service and be provided free of charge). The contraceptive mandate actually

¹Garvey (2011).
²Morgan (2013).
³Rice (2011).
stems from a policy decision made by bureaucrats at the Department of Health and Human Services (HHS), a federal agency. In August of 2011, more than a year after the passage of the ACA, HHS drew on that legal authority to issue a discretionary but legally-binding rule stating that contraception should be considered a preventative service.

This example underscores a common misconception about how law is made in the United States. Schoolchildren are taught that elected legislators hold hearings, deliberate, and vote on bills, which are then sent to the president for his (someday her) signature. This is not inaccurate; many of the major policy changes that have occurred in the last 20 years—from the creation of Obamacare, to the passage of the Patriot Act, to the regulation of banks in the wake of the 2008 financial crisis—have been accomplished, at least in part, through the choreographed actions of Congress and the president.

But, this is not the only way that law is made; in fact it is not even the way the majority of new law is created in the U.S. today. Unelected bureaucrats—people who work at HHS or the Environmental Protection Agency (EPA) to name two among scores of agencies—routinely create, and subsequently implement, rules that carry the same force and effect as laws passed by Congress. By some estimates, more than 90% of American law is created by administrative rules issued by federal agencies. In 2014 alone, federal agencies issued more than 3,500 legally-binding rules, far outstripping the 224 new laws created by Congress and the president (and even those laws are typically implemented through rulemaking).

Like laws, bureaucratic rules or regulations—I use the terms interchangeably through-

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5The policy decision, which came in the form of a rulemaking, was actually jointly issued by HHS, along with the Department of Labor and the Department of Treasury. I focus on HHS here, since it was the lead agency on the rule, and the focal point of the backlash against the policy.

6The agency’s rule included an exemption for certain religious employers. The religious exemption proved to be the sticking point of the rule, as many opponents felt that the exception was too narrowly defined. HHS has subsequently relaxed the policy.

7Warren (2011).

8The judiciary also creates a body of case law through court decisions. That body of law is overshadowed by laws produced by the legislative process, although scholars debate the societal impact of policy changes made from the bench (see Rosenberg, 2008).

9Lawmaking figures drawn from the Congressional Record’s “Final Résumé of Congressional Activity” for 2014. Rulemaking counts are from the Federal Register.
out the book—are substantively important. As the contraceptive mandate rule demonstrates, rules have broad policy reach and meaningfully impact the daily lives of citizens. In recent years rules have also triggered the following policy changes:10

- In 1996, the Food and Drug Administration (FDA) published a rule that limited the advertising and promotion of cigarettes by manufacturers. Among other major changes, the rule prohibited cigarette sales to people under the age of 18 and limited the extent to which tobacco companies could promote their products through public events (e.g., sporting events and concerts) or materials (e.g., t-shirts).11

- In 2000, the Agricultural Marketing Service (AMS) established national standards for the labeling of agricultural products that are marketed as “organic.” These regulations created an accreditation program for state and private certifying entities and set certification standards for farms and handling operations. At the time, the program was described as the “strongest and most comprehensive organic standard in the world.”12

- In 2007, the Office of Surface Mining in the Department of Interior proposed a rule that allowed mountaintop coal mining. Prior to the rule’s issuance, the legal status of this mining practice was dubious, so the rule accelerated the use of mountaintop mining.

- In 2008, the Department of Health and Human Services promulgated a so-called “medical conscience” rule that required recipients of federal funds to allow doctors and nurses to abstain from participating in procedures (e.g., abortions) if those procedures were at odds with their religious convictions.

10 Rules can also address new and challenging policy problems. As of this writing, the Federal Aviation Administration is working on a series of rules to set boundaries for both commercial and recreational drone use and the Food and Drug Administration is drafting regulations that establish standards for the production and sale of electronic cigarettes.

11 The Supreme Court overturned this rule in the seminal *FDA v. Brown & Williamson Tobacco Corp.* (529 U.S. 120 (2000)) case. See Derthick (2011) and Kessler (2001) for fascinating accounts of the politics of tobacco in the 1990s and this FDA rule in particular.

• In 2009, the EPA issued a regulatory finding that greenhouse gas endangered public health. This finding laid the groundwork for a series of subsequent rules designed to limit or reduce greenhouse gas emissions. These rules constitute the largest organized response to climate change at the federal level.

• In 2011, the Office of Postsecondary Education in the Department of Education wrote a “gainful employment” rule that set benchmark standards for colleges and universities to meet in order to continue participating in the federal student aid program. The standards required programs to meet minimum thresholds, such as a base debt-to-income ratio for their graduates. The intent of the rule was to remove the bad apples from the federal student aid program, particularly for-profit and vocational schools that had been charging students high rates but delivering little in terms of educational and professional outcomes.

• In 2015, the Employee Benefits Security Administration within the Department of Labor (DOL) proposed a rule that addressed conflicts of interest for financial advisors. The proposed rule aimed to redress a loss in retirement savings of nearly $17 billion a year, resulting from the fact that some brokers who did not have a fiduciary responsibility to their clients selected investments that were in their own pecuniary interest. These self-serving investments cost clients more in fees than other potential investments that performed as well or better.

Of course, these are just a small subset of the policy changes that were generated through rulemaking. Each of them was also controversial and netted front page headlines; indeed, several were even challenged and subsequently overturned in court. However,

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13 The EPA issued this finding in response to the Supreme Court’s ruling in Massachusetts v. Environmental Protection Agency (549 U.S. 497 (2007)).

14 This rule was partially vacated by the D.C. district court in Association of Private Colleges and Universities v. Duncan (No. 11-1314 D.D.C. (2012)), leading the agency to restart the rulemaking anew. I discuss this rule in more detail in Chapter 2.

15 Further, some of these rules later became the target of the Trump administration’s regulatory rollback program. As I discuss later in the book, the Trump administration likely constitutes a distinct regulatory...
just as the bulk of laws passed by Congress lack substantive policy heft—instead tweaking existing programs, dealing with symbolic issues, or commemorating relatively trivial dates such as World Plumbing Day\textsuperscript{16}—the majority of rules issued by federal agencies deal with the mundane matters of the administrative state. For instance, in 2001 the AMS, the same agency that created the National Organic Program the year before, used rulemaking to set new standards for the size of holes in Swiss cheese.\textsuperscript{17} More recently, in 2007, the Office of Personnel Management (OPM) issued a rule that increased the amount that federal agencies reimbursed civilian employees for uniform purchases from $400 to $800 per year. While rules such as these are banal in the grander policy schematic, the point remains that, like laws, rules can fulfill a multitude of policy needs.

There are other parallels between lawmaking and rulemaking. Lawmaking is widely understood to be a political activity, meaning that in Harold Lasswell’s famous words it deals with “who gets what, when, and how.” Accordingly, scholars in the positive political science tradition have devoted considerable effort to understanding what motivates legislative actors, who has power within this process, what the strategic incentives of these actors are at each stage, and, ultimately, how laws are made (or not made).\textsuperscript{18} Traditionally, rulemaking was considered to be a rote administrative activity,\textsuperscript{19} with observers often describing it as a way to “fill up the details” of laws.\textsuperscript{20} This created a perception that policy changes made through rulemaking were both neutral and unimportant. In recent years, however, scholars have increasingly come to view rulemaking in the same vein as lawmaking; as a decidedly political activity.\textsuperscript{21}

\textsuperscript{16}World Plumbing Day was created by an act of Congress. It is celebrated on March 11\textsuperscript{th}.

\textsuperscript{17}For what it is worth, the new standards established that the cheese “eyes” should be between $\frac{3}{8}$ to $\frac{13}{16}$ inch in diameter to qualify as Swiss cheese.

\textsuperscript{18}For discussions on each of these points, see Beckmann (2010); Cameron (2000); Cox and McCubbins (2005); Binder (2003); Krehbiel (2010); Mayhew (1974, 2005).

\textsuperscript{19}This perception follows from Stewart’s (1975) “transmission belt” theory of bureaucracy, which posits that agencies merely carry out the statutory directives laid out by Congress and do not exercise their own political judgments.

\textsuperscript{20}This phrase originated with Justice Marshall’s decision in Wayman \textit{v. Southard} (23 U.S. 1 (1825)), which dealt with the legality of legislative delegation to the other branches.

\textsuperscript{21}See, for example, Gersen and O’Connell (2008, 2009); Nou (2013); Nou and Stiglitz (2016); O’Connell
The argument in this book builds from this emergent view that rulemaking is inherently political. It is political not just because it deals with politically important topics, but also because the bureaucrats that manage the process behave in politically strategic ways when creating new rules. Indeed, this is a book about how the regulatory sausage is made. Agency bureaucrats inevitably have preferences over the policies that are created through the rulemaking process. These preferences arise from a host of concerns, including those related to career advancement, job satisfaction, program quality, and even policy itself. However, bureaucrats are not free to implement their preferred policies unimpeded. Because rulemaking occurs in a separation of powers system, each of the three constitutional branches—the president, Congress, and the courts—can get involved in the process, often at the bidding of affected interest groups or other constituents. Once involved, these overseers can (and often do) redirect agency rulemaking efforts or sanction agencies that have overstepped bounds, which are real or perceived.

However, rather than capitulating to the demands of the political branches, my argument is that bureaucrats can use their position as both policy proposers and process managers to their advantage. That is, working within a set of established constraints, bureaucrats can use administrative tools to strategically and systematically insulate their rulemaking proposals from political scrutiny and interference. Scholars typically home in on bureaucrats’ advantage at the policy proposal stage; while this is undoubtedly important, my argument instead focuses on the process, specifically how bureaucrats manage the procedures associated with rulemaking.

Rulemaking procedures are typically cast as a way to constrain bureaucratic behavior; by forcing agencies to follow a set process, bureaucrats—theoretically speaking—have less room to maneuver than they might otherwise. However, procedures are implemented by the very bureaucrats whose behavior they are designed to constrain. Further, the expert bureaucrats that run the administrative process have superior insight on how rulemaking

procedures tend to play out and can use this information to steer policymaking. This enables bureaucrats to deploy procedures to their advantage in what I refer to as *procedural politicking*, or using procedures in strategic ways so as to insulate policies that are at risk of political interventions and ensure that bureaucrat-preferred policies endure.

Importantly, I do not take up the question of when and why bureaucrats choose to undertake the regulatory process in the first place—numerous scholars have already addressed that question. Rather, I consider what happens once that decision has been made and, more specifically, how procedural choices influence the course of a rulemaking. Ultimately, my goal is to encourage scholars and observers to think about how bureaucratic power is exercised in this policymaking venue.

### 1.1 Understanding Rulemaking

Before proceeding further, it is worth a detour to clarify just what a rule is—and what it is not. According to the Administrative Procedure Act (APA), the primary law governing the rulemaking process, a rule is a statement of agency policy that is designed to “implement, interpret, or prescribe law or policy” and that has general or particular applicability and future effect. Rules are distinct from adjudicative actions, which deal with individual case decisions, in that they are policies that apply uniformly to similarly situated individuals. The aggregate body of law that is created through the rulemaking process is

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22 For instance, Potter and Shipan (2018) argue that agencies adjust the volume of their rulemaking activity in light of the political environment. See also Boushey and McGrath (2015). Other scholars make the case that agencies can strategically pursue venues other than rulemaking to achieve policy gains. To take one example, Melnick (2014) argues that the the Office of Civil Rights within the Department of Education has often used guidance documents (and other non-binding policy instruments such as “Dear Colleague” letters) instead of rulemaking to make important public policy changes with respect to race and gender policies under Title IX in higher education. While these policy instruments are not legally binding, regulated parties often comply as if they were. Raso (2015) also considers how agencies trade off between rules and guidance documents.

23 P.L. 79-404.

24 A hypothetical example helps illustrate the difference between rulemaking and case adjudication. In May 2008, the Social Security Administration (SSA) revised its regulations regarding “Ticket to Work,” a program that allows disabled beneficiaries to return to work and still remain on the disability rolls (73 FR
referred to as the Code of Federal Regulations (CFR).

In order to create a new rule, agencies must typically follow a process known as “notice-and-comment,” which requires that affected parties must be given prior notice of a rule change and be afforded an opportunity to submit written comments on the change. This form of rulemaking, also known as “informal rulemaking,” is the most common way that agencies make changes to the CFR. Generally speaking, the process includes the publication of a proposed rule in the Federal Register, a comment period during which the public can participate, and the subsequent publication of a binding final rule in the Federal Register. The rule generally takes effect after a waiting period (usually 30 days after the final rule is published).

In studying this process, academic scholarship crosses several disciplinary boundaries, including economics, political science, law, and public administration. This interdisciplinarity has led to a rich, but disjointed body of research on the regulatory process. Scholarly research tends to focus either on external actors and how they can exert political influence over an agency, or on internal actors and how meaningfully they deliberate when making policy decisions.

The external perspective on bureaucratic politics is often premised upon a principal-agent framework. Borrowed from economics, this framework was developed to explain the dilemma an employer (the principal) faces with respect to her employee (the agent). Since the principal and the agent are assumed to have different preferences, there are a number

25 Like any bureaucratic process, however, there are numerous exceptions. For example, agencies can also publish a pre-rule (i.e., an Advance Notice of Proposed Rulemaking) or hold hearings in conjunction with the public comment period. I cover these procedural exceptions in more detail in Chapter 2.

26 The alternative, formal rulemaking, is rarely used. It is a cumbersome process, conducted in an adversarial and trial-like manner, with an agency “judge” who calls witnesses in a series of hearings. See Kerwin and Furlong (2011).
of intrinsic complications. Because the principal is unable to provide a complete enough contract to stipulate all of the conditions that the agent might possibly encounter and how the agent should behave in these circumstances, the agent is given discretion—which can be misused. The agent may also misrepresent themselves at the point of being hired (adverse selection) or change their behavior after securing the contract (moral hazard).

In the context of rulemaking, the legislature is typically conceived of as the principal (although the president and the courts are sometimes given this role) and the bureaucratic agency as the agent. The fundamental problem is that the principal wants the agent to produce rules (which in turn produce policy outcomes) that align with her preferences. The principal must delegate this function due to limits on both her capacity and her expertise. However, there is an information asymmetry; she can only observe outcomes in terms of the rules the agency publishes, and not the facts on the ground that led the agency to make that choice. More specifically, the principal cannot obtain this information without substantial investigation (which requires resources) and may not be able to acquire it at all.

Scholars have identified institutional mechanisms that a principal can implement in order to solve this “political control” problem and to incentivize the agent to adhere to the principal’s preferences. Most notably, in a series of seminal articles McCubbins, Noll and Weingast (colloquially known as “McNollgast”; 1987, 1989) argue that by establishing a process that an agency must follow before reaching a policy decision—otherwise known as “administrative procedures”—political principals can constrain agency decision-making.

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27 The model is often applied to questions of delegation, where the principal must decide which tasks to give to the agent (e.g., Bawn, 1995; Epstein and O’Halloran, 1999; Huber and Shipan, 2002). However, with respect to rulemaking, delegation has often already occurred. As I discuss in the next chapter, there is often a considerable time gap (sometimes spanning decades) between when a legislative action occurs and when an agency issues a rule based on that statutory authority (Wiseman and Wright, 2015). Accordingly, I focus on applying the framework to questions of oversight, and whether the agency is properly using the authority it has been granted.

28 Put another way, the agency has acquired policy expertise that is not shared by Congress or the president; for more on how agents deal with information problems see Gailmard and Patty (2013).

29 Other administrative procedures include advisory committees (Doherty, 2013; Moffitt, 2010) and reporting requirements (Doherty and Selin, 2014). Of course, the president and Congress have other tools to influence the bureaucracy aside from administrative procedures. For instance, the president can staff the agency with presidential appointees (Lewis, 2008) or centralize oversight of the agency into the Executive Office.
Rulemaking is considered the prototypical administrative procedure; by requiring notice-and-comment, the president and Congress are assured that they will be given advance warning of an agency’s intended policy change. Additionally, these principals need not monitor the process directly, but can rely on vigilant interest groups to sound a “fire alarm” and alert them if intervention is necessary.\(^{30}\) In this way, principals can stop a rule in its tracks when needed, rather than being presented with a noxious final rule as a \textit{fait accompli}.

The idea that external principals successfully steer the administrative process has been extraordinarily durable.\(^{31}\) Yet, this approach ignores the agency’s role in responding to these outside political pressures. The rulemaking process affords principals ample opportunity to intervene in agency decisions, but it is not all driven from the top down. Agencies have considerable powers of their own in the process. Instead of treating this relationship as rigidly hierarchical the relationship is likely a more dynamic one wherein principals institute processes and agencies strategically respond to those processes.\(^{32}\) This reconception of the process is particularly appropriate in the context of notice-and-comment, where the APA’s basic setup has been in place for over 70 years, enabling bureaucrats to learn and adapt to

\(^{30}\) The notion of fire alarm oversight originated with McCubbins and Schwartz (1984). This type of oversight relies on outside parties (usually interest groups) to pull a fire alarm and alert overseers to agency infractions. When compared with more traditional forms of routinized oversight like oversight hearings (which they dub “police patrols”), fire alarm oversight is believed to be less costly for overseers and may even be more effective at detecting infractions (Aberbach, 1990; Horn, 1995).

\(^{31}\) In spite of the framework’s deep roots, its application has both theoretical and empirical inconsistencies. On the theoretical side, Wiseman and Wright (2015) point out several logical inconsistencies in McNollgast’s (1987) original argument, particularly that \textit{deck-stacking} and \textit{autopilot}, the mechanisms by which procedures facilitate control, conflict with how the courts have interpreted agency legal obligations and rights under notice-and-comment. Their work provides an important contribution in that it meaningfully brings in the role of the courts.

On the empirical side, the evidence confirming external political influence over agencies is mixed. Some studies have shown that when the preferences of political principals change, agencies increase or reduce their outputs accordingly (e.g., Olson, 1996; Ringquist, 1995; Shipan, 2004; Weingast and Moran, 1983; Wood, 1988; Wood and Waterman, 1991), providing broad support for the idea that principals maintain some level of influence over agencies. However, while a statistically significant effect may suggest that there exists some level of influence, there is no sense of how much control is enough to determine which actors effectively dictate the course of public policy. In perhaps the only direct test of McNollgast’s argument, Balla and Wright (2001) find no evidence to support the idea that the groups that are supposedly favored by the administrative process actually receive preferential treatment, suggesting that procedures do not necessarily advantage principals.

\(^{32}\) For more on dynamic principal-agent models more generally, see Krause (1999); Moe (2006).
the process’s nuances, loopholes, and incentive structure.

In contrast to the external perspective on notice-and-comment taken in the political science and economics literature, public administration and legal scholars tend to take a more bottom-up, agency-centric approach. This perspective digs into how agencies manage their administrative functions and analyzes the normative implications of these activities.

This manifests most concretely in an attempt to understand whether agencies meaningfully deliberate and represent the public interest when making regulatory policies. A repeated finding is that there is an imbalance in the volume of public comments that agencies receive from business and other moneyed interests compared to public interest groups and citizens. Many have also pointed out that these moneyed and organized groups tend to enjoy privileged access to agencies at earlier stages in the process, even before a proposed rule is put out for comment. This creates an impression that the regulatory process is closed to outsiders, leading to investigations of whether agencies actually take this feedback into account in their final decisions. There is no consensus on that point; while some find that group comments are of no consequence for the agency’s final policy decision, others find that there is an effect, but that it holds only in certain contexts.

Taken together, concerns about a participatory imbalance and lack of agency responsiveness to comments have led many observers to dismiss notice-and-comment as fundamentally undemocratic. Perhaps, most famously Elliott (1992) described the process as “kabuki theater,” wherein agencies conduct all of the real business offstage and the drama on the public stage is just window dressing as agencies go through the motions.

Yet, studies like these that view the rulemaking process up close rarely consider the

33 See Golden (1998); Yackee (2006); Yackee and Yackee (2006); Wagner, Barnes and Peters (2011).
34 Chubb (1983); Furlong and Kerwin (2005); Golden (1998); Yackee (2006); Yackee and Yackee (2006); Wagner, Barnes and Peters (2011).
35 Magat, Krupnick and Harrington (1986); Nixon, Howard and DeWitt (2002)
37 See Bernstein (1955); Lowi (1969); Wagner, Barnes and Peters (2011). Meanwhile, others have considered how to engage citizens more meaningfully in the process (Mendelson, 2011; Farina et al., 2011).
broader political environment in which agencies operate and how that environment might affect an agency’s willingness to deliberate (and to do so publicly).\textsuperscript{38} Additionally, many (though not all) of these studies assume that agencies passively accept feedback from stakeholders, rather than actively (and strategically) inviting feedback and shaping its content.

Moving beyond rulemaking, other scholars have cast agencies and bureaucrats in a more strategic role. For example, Moffitt (2010) argues that the FDA strategically consults its advisory committees (i.e., standing groups of outside experts) when doing so spreads a drug’s risk from the agency to a broader group of stakeholders and burnishes the agency’s reputation. Similarly, Huber (2007) suggests that bureaucrats at the Occupational Safety and Health Administration (OSHA) practice “strategic neutrality” when it comes to enforcement policy. At high levels, OSHA makes strategic policy choices about which industries to target for enforcement actions, while lower level leaders insist that these decisions be implemented in a consistent and seemingly neutral manner. The net result is that that agency is able to build political support and accomplish agency leaders’ strategic ends, while maintaining a reputation for professionalism and competence. Though not focused on rulemaking per se, studies like these advance the perception that bureaucrats are strategic actors in an ongoing dynamic game. Yet, from a design perspective, this approach often yields a narrow focus on the inner workings of one agency.\textsuperscript{39} This deep-dive is often necessary in order to gain empirical and theoretical traction, but it invariably draws upon the unique cultural and professional norms of the agency under study, raising questions about the broader generalizability of such theories to other agencies.

Both the external and the internal perspectives raise important theoretical considerations about the politics of rulemaking. External actors can and do impose constraints on what agencies do. Internally, agencies follow their own set of processes and norms and can

\textsuperscript{38}A handful of studies have drawn out the effects of the political process on agency rulemaking decisions (see e.g., O’Connell, 2008; Potter and Shipan, 2018; Yackee and Yackee, 2009).

\textsuperscript{39}Additionally, the same agencies appear time and again as the foci of bureaucratic case studies. For example, the FDA is also studied by Carpenter (2010); Moffitt (2014) and Olson (1996), while OSHA is also studied by Kim (2007); Schmidt (2002); Scholz (1991); Scholz, Twombly and Headrick (1991) and Shapiro (2007).
exercise considerable autonomy. The theory I develop in this book bridges these perspectives. I acknowledge that the infrastructure surrounding notice-and-comment was created and is overseen by actors outside the agency, but I also consider how bureaucrats strategically respond to the incentives that the process induces. This allows me to identify systematic patterns of behavior in the regulatory process that persist across the administrative state.

1.2 Overview of the Argument

Studies of political institutions typically identify a set of fixed rules, and explore how strategic actors respond and adapt to changes in those conditions. I adopt that approach here, treating notice-and-comment as an institution in its own right and assuming that its strictures are externally imposed. This book tackles three questions: 1) What are bureaucrats’ incentives in the rulemaking process? 2) How do bureaucrats strategically manage the process in light of these incentives? 3) What are the broader implications of this behavior for democracy and policymaking by the bureaucracy?

Rulemaking is a time- and resource-intensive endeavor for agencies. Agencies devote months, even years to developing a rule, including time spent gathering information, conducting research, drafting and redrafting a policy, consulting with stakeholders, and managing and responding to public comments (which can number in the millions). Some rules require detailed technical assessments, such as cost-benefit analysis, and others require sign off by the Office of Information and Regulatory Affairs (OIRA), the White House clearinghouse for agency rules. The time it takes to complete all of these tasks is difficult to ascertain, since the point at which the agency first put pen to paper is not necessarily documented. Nonetheless, West (2004) finds that the average length of the proposal development period for the 42 rules in his study was more than five years. Given that the time from the publication of the proposed rule to the publication of the final rule alone averages more than a

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40Nou (2013) and West (2009) both discuss the labor involved in producing a new regulation.
year, it is clear that rules require a significant investment of the agency’s time and resources.

Rules are not created in a vacuum, but rather in the context of political oversight in a separation of powers system. And there are numerous points in the process of rule development, that political intervention—from the president or OIRA, from the courts, or from congressional overseers—can stall a rule or gut it altogether. However, agencies, or more specifically the bureaucrats that work within them, are not passive observers of this political exchange. Because the outcome of the rulemaking process affects so many aspects of bureaucrats’ livelihood, from their career prospects to concerns over policy and implementability, they can insulate policies that are under development from political intervention.\(^{41}\) Of course, since political overseers are sometimes supportive of agencies and their rules, insulation is not always necessary. Rather, it is when rules are most vulnerable to political interference because overseers are predisposed against them that bureaucratic insulation is warranted.

When it comes to rulemaking, bureaucrats are the “first movers,” meaning that they have the opportunity to initiate regulatory proposals. In doing so, they often have considerable latitude in the particulars of the policy they advance. An obvious way that agencies can make their regulatory proposals “stick” is by proposing regulatory policies that are tolerable to those political overseers who have the ability to overturn them. While making policy concessions is a tried-and-true strategy,\(^ {42}\) it may be unattractive from the agency’s perspective, since it may yield a policy that does not align with other policy goals of the agency or the policy preferences of bureaucrats themselves. Yet, agencies have another path to strategically insulate their rulemakings without sacrificing their preferred outcome: procedural politicking. An agency’s procedural powers include things like control over how a proposal is written or whether the agency consults its advisory board beforehand.

\(^{41}\)O’Connell (2008, 966) summarizes this position as follows: “Agencies presumably want at least some of their rules to “stick,” likely because of the rules’ economic, political, or career benefits. In other words, agencies want their rules not to be withdrawn before final enactment, not to be rescinded after promulgation, not to face hostile [OIRA] or congressional oversight, and not to be struck down by the courts.”

\(^{42}\)See, e.g., Cameron (2000) for a discussion of how a first-mover can propose policy in order to have it accepted by a veto player.
Some examples of HHS’s use of procedural politicking shed light on how such tools can be useful to an agency. Agencies can frame their rulemaking proposals in terms that are more acceptable in the current political discourse, or avoid the use of certain terms that may be politically charged. In the HHS contraception rule discussed in the introduction to this chapter, HHS staff were careful to frame the issue in medical terms, as a change that was necessary for women’s health and well-being. In an op-ed piece published in USA Today, HHS Secretary Kathleen Sebelius equated the policy with vaccinations for children, cancer screenings for adults, and wellness visits for seniors. In the press materials and the rule text itself, the agency employed the more neutral (and medical sounding) term “contraception,” avoiding the more loaded term “birth control.” These tactics, while nuanced, helped to shape the way the public—and political overseers—perceived the rule.

After a rule is drafted, it must be legitimated through “notice-and-comment.” Agencies again have considerable discretion in managing this part of the process and rarely do two rules receive the same procedural treatment at this stage. Rather, for each rule an agency makes decisions about how much stakeholder outreach to conduct (and how much of this will be done publicly versus privately), and when to release various documents, amongst numerous other choices. Manipulating these procedural choices allows agencies to protect their rules when the political climate is hostile.

Again, reflecting on the contraceptive mandate clarifies the role of procedures at this stage of the process. In crafting the contraceptive mandate, HHS was careful to consult with many stakeholders outside the agency, including the renowned Institute of Medicine (IOM) and the agency’s advisory committee. This consultation was consciously designed to transpire in the public eye; the advisory committee’s meetings were open to the public and the IOM produced a report that was made publicly available (and was widely reported by the media). Highly visible consultation of this nature is a procedural choice, and in this case

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43 In contrast, the opposition framed the issue as one of religious freedom.
44 Sebelius (2012).

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it helped to legitimize the agency’s decision in the public’s eyes and thereby insulate the policy from principals.

Procedural powers mean that agencies have considerable influence over how the rule-making process is managed, and that this influence helps them achieve independent political objectives. While political oversight of the rulemaking process can (and does) occur, these managerial powers make oversight more difficult and, therefore, less frequent. As a result, unelected bureaucrats have substantial leverage over the regulatory policies that become binding law, much more than our current understanding gives them credit for. Like all political actors in our system of checks and balances, bureaucrats do not operate unchecked, but they are a powerful political force in the American system.

1.3 The Approach

In making the argument that bureaucrats can strategically exercise autonomy in a highly constrained policymaking environment, I do not tell the story of one rule or one agency. Rather, the focus is on how bureaucrats in a host of agencies scattered across the federal government systematically respond to the incentives created by a procedure-bound policymaking process. In the chapters that follow, I trace the arc of the rulemaking process from when an agency first begins working on a rule to when it completes that regulatory action. I rely on both case studies and statistical analyses to make my case. I also draw from interviews with more than a dozen agency regulatory personnel and interest group officials. All nonessential statistical details are relegated to appendices or to footnotes, where interested readers may find them, but where others are not encumbered. My hope is not that any one individual case or test will definitively prove my theory, but rather that the preponderance of evidence will persuade readers of the argument.

The theoretical and empirical focus of this book is intentionally circumscribed: I focus
on agencies within the executive branch over the 20-year period from 1995–2014. I do this for two reasons. First, the time period of this study is a period of relative stasis in the political and legal landscape surrounding rulemaking. The rulemaking process has evolved over time. In the 1970s and 1980s several landmark court rulings and the establishment of centralized regulatory review by the White House led agencies to reinterpret their regulatory duties. In contrast, during the time period of this study, there were very few—if any—of these watershed moments. Additionally, early in his administration, President Clinton issued an executive order that altered how centralized regulatory review was managed. In prior presidential administrations all rules were reviewed, but from then onward only the most important rules were subject to review. Put differently, this period constitutes a distinct regulatory regime, where the rules and expectations of the regulatory game were clear to all of the parties involved. This regime was therefore different from the earlier period before Clinton’s order and, as I discuss in the concluding chapter, may differ from the years that immediately followed its close.

Second, rulemaking by independent agencies is fundamentally different than rulemaking by executive branch agencies and pooling the two types together would mask many important differences. Independent agencies are free from the strictures of presidential oversight, which alters the political context by removing one of the principals that agencies face. Specifically, while executive agencies are subject to centralized regulatory review, in-

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45 Where possible, I distinguish rules that are substantively important (e.g., contraception) from those that are less so (e.g., Swiss cheese holes).


47 One possible exception during this time period is *United States v. Mead Corp.* (533 U.S. 218 (2001)), which was decided in 2001. In that case, the Supreme Court ruled that court deference to agencies should be reserved for instances where the agency issued a rulemaking, and not necessarily for other administrative actions such as tariff decisions. Some have suggested that in the wake of *Mead* the benefits to agencies of issuing a rule increased (compared to other less-deferential agency actions), leading to an overall increase in the volume of regulatory actions produced (see, e.g., O’Connell, 2008). However, since my analyses are conditional on the agency choosing to write a rule (i.e., I do not try to explain *why* agencies decide to issue rules at the outset), this change does not affect my analysis.
dependent agencies are not. Additionally, many independent agencies like the Federal Communications Commission have a board structure and publicly vote on draft regulations. This process has no parallel in executive branch agencies and likely affects the way that these agencies draft regulations internally.

The net result of these design choices is that this study provides a complete snapshot of agency management of the rulemaking process over a finite but contemporary period of time. During this time, rules accomplished important policy objectives, but were subject to a set of relatively fixed political institutions. This allows for an exploration of how agencies respond to proximate changes in the political environment, such as changes in partisan control of Congress or the presidency. Understanding this regime also establishes a baseline against which future regulatory reforms can be judged.

1.4 Defining Bureaucrats and Agencies

In discussing the politics of rulemaking I frequently use the terms “bureaucrat” and “agency” to describe, respectively, the actor and the institution responsible for the creation of rules. These are catchall terms that apply generically across the large swaths of rules and units of the administrative state, but it is worth clarifying exactly what these labels mean in practice.

No one person is responsible for the creation of a rule. As I explain in more detail in the next chapter, rules are typically drafted by teams of people drawn from many different units within an agency. The creation of a single rule can involve program personnel, legal representatives from the General Counsel’s office, budget staff, economists, and paperwork specialists among many others. Most of these personnel are “careerists,” or civil servants

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48OIRA review does not extend beyond the executive branch, although in recent years several bills have been introduced in Congress to extend review to independent agencies. However, to date, none of these bills has gained any real traction.

49See Rothenberg and Sweeten (2015) for a summary of the FCC’s unique voting system. See also Bolton (2015).
who spend the bulk of their professional lives working in the federal bureaucracy. Some of the officials involved in the rulemaking process may be political appointees, or individuals who serve “at the pleasure of” the president. Among this elite group, only the very upper echelon is confirmed by the Senate.\footnote{David Lewis (2008) provides an in-depth description of the modern personnel system in the federal bureaucracy, highlighting the differing roles of careerists and appointees. See especially Chapter 2 of his book.}

The term “bureaucrat” then applies broadly to both career civil servants and political appointees. While the former group is almost always involved in some aspects of creating a rule, the latter group tends to engage intermittently and then only on higher-level policy issues. From the outside looking in, it is difficult to disentangle whether careerists (e.g., staff economists or program officials) or political appointees (e.g., the deputy secretary or secretary) are responsible for particular decisions. Most often it is a combination of many voices reaching consensus on a policy, with the balance of power tipped in careerists’ direction for less substantively important rules, and in appointees’ direction for more important rules. “Bureaucrat” then refers broadly to the consensus voice of individuals working on the rule and, where possible, I identify whether those individuals are careerists or appointees.

The term “agency” has many different uses in discussions about bureaucracy. Often it used to refer to a Cabinet-level department such as the DOL or an organization that is in the Executive branch but not a part of the Cabinet, such as the EPA. At other times, the same term is applied to smaller subunits or bureaus that fall under the umbrella of those larger organizations, such as OSHA within the DOL or the Office of Air and Radiation (OAR) within the EPA.\footnote{Selin (2015) describes differences in structural independence across these lower-level units. She refers to these units as bureaus.} For the sake of clarity, in this book I use the term agency to refer generically to an organizational unit of government. Where greater clarity is important, I refer to the lower-level unit—OSHA or OAR in this example—as the bureau and the higher-level unit—DOL or EPA—as the department.\footnote{Technically, the EPA is not a department, since that term is reserved for organizations that are in the president’s Cabinet. However, because this distinction does not matter for my theory, I gloss over such distinctions here.}
1.5 Contribution

*Bending the Rules*, the title of this book, is a phrase used to suggest that a set of rules is being adapted in order to make a goal easier to accomplish on one occasion. The rules in this case are the procedures associated with the notice-and-comment rulemaking process, and, I argue, they are adapted so as to ensure the proposed rules sponsored by bureaucrats survive to become binding law. The maneuvering this requires means that bureaucrats must be strategic and exercise discretion. These are not new ideas; as one scholar succinctly states, “substantial agency autonomy is a fact of regulatory life.”

Indeed, Carpenter (2001) develops a theory of bureaucratic autonomy that is rooted in the notion that autonomy is a central aspiration of bureaucrats. Using a historical case approach, he shows how autonomy is built, not given, based on the efforts of bureaucratic leaders to enhance the agency’s reputation. Where his argument is based on the entrepreneurialism of individual managers, the contribution that this book makes is in identifying a *mechanism*—procedures—by which bureaucrats can translate their autonomy into concrete policy gains. Additionally, because my empirical arguments rests on analyses of approximately 11,000 rules from 150 bureaus over 20 years, I am able to speak to how this mechanism is employed across the administrative state under different political conditions.

Understanding the persistence of bureaucratic autonomy is important because so much attention is often directed at explaining limits placed on bureaucrats by the political system. In other words, the external perspective discussed previously receives the lion’s share of both academic and popular attention. Yet, procedures are a reliable way that bureaucrats can carve out autonomy in the face of such limits. While the substantive focus of my argument is on rulemaking, procedures are the bread and butter of bureaucratic agencies. Therefore, the logic of procedural politicking can naturally be extended to other

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53 Croley (2003, 832).
54 See also Huber’s (2007) account of how OSHA bureaucrats exercise their duties in a politically savvy manner, while maintaining a veneer of administrative neutrality.
procedure-laden contexts to show how those in charge of administering the process secure preferred outcomes. Within the bureaucracy, such extensions naturally include government contracting, regulatory enforcement, and personnel hiring. They also include policy decisions at the state and local level, as well as policymaking in other governmental systems. In other words, bureaucrats may be able to bend the rules in these other procedural venues in order to steer the process in their preferred direction. In the words of Max Weber, the father of the study of the modern bureaucracy, “bureaucratic domination means fundamentally domination through knowledge.” Procedural politicking draws from this insight that knowledge of procedures—and how to manipulate them strategically—is an essential source of bureaucratic power.

Procedural politicking comes with normative consequences. As previously discussed, very few people are familiar with the particulars of how a new rule is made. As one former agency official put it, most people have a better chance of being struck by lightning than of understanding the rulemaking process. One study notes that this may even extend within the Washington Beltway: “even lawyers and people who work for the federal government tend not to understand the rulemaking process unless they have been personally involved in some way.” Those who do understand and engage with rulemaking tend to have an institutionalized stake in the outcome of the process and the resources to back up their convictions. When bureaucrats deploy key procedures that restrict participation, obfuscate, and render their work less visible, they may reinforce the already existing disparity between the average citizen and these moneyed interests. Seen in this light, procedural politicking helps to explain why the rulemaking process is widely perceived to be an insiders’ game.

55 As quoted in Swedberg and Agevall (2005, 19).
56 Interview with former agency general counsel, December 2016.
57 Farina et al. (2011, 9).
1.6 Roadmap for the Book

The arc of this book tracks the stages of the rulemaking process. That is, I show how a strategically-minded agency responds to separation of powers constraints imposed at each stage of the process.

In the next chapter, I describe the nature and the process of rulemaking. The rules governing rulemaking are arcane; indeed, their very arcaneness is central to my theory. But, because the argument I make rests in part on the ability of agencies to use their procedural prerogatives to their advantage, it is important for readers to have a basic understanding of the process itself. This chapter briefly explains that process, highlighting key areas of agency discretion. I also explain the different oversight mechanisms that the president, Congress, and the courts have over rulemaking.

Chapter 3 presents the theory and explains agencies’ managerial advantages. I demonstrate that, from the agency’s perspective, writing a rule is a significant investment, presenting important opportunity costs and staking the agency’s reputation. As such, agencies make sure that the rules they write represent their preferred (albeit constrained) policy. Fortunately, from the agency’s perspective, they have tools that help them protect their investments. These include the power to propose a policy—a power that is well understood by political scientists—as well as procedural power. Because interventions by the president, Congress, or the courts are costly to the agency, I argue that agencies use their procedural powers strategically to avoid political sanctions and secure policy gains. The chapter concludes with a set of testable hypotheses, derived from the broader theory, that offer expectations about how agencies will strategically manage procedures relating to proposed rule writing, public consultation, and timing.

The next three chapters delve into the ways that agencies use these procedural tools strategically. Chapter 4 tackles the writing of proposed rule, investigating how agencies can
draft a proposal in a way that effectively insulates it from political oversight. I begin by introducing the *Regulatory Proposals Dataset*, a new dataset of approximately 11,000 rules from 150 agencies, as well as the measures that I use to separate the most important rules from the least important ones. Using these data, I then explore how agencies manipulate the accessibility of a rule as a tool of procedural politicking. Relying on text analysis tools, I show that bureaucrats write longer and less readable rules when political principals are at ideological odds with the agency and when interest groups serve as more active monitors.

Chapter 5 picks up at the next stage of the rulemaking process: public consultation. Here I show how the feedback that an agency receives from key stakeholders can either enhance or detract from a rule’s prospects. Anticipating this, agencies craft their consultation strategies with key external constituencies in mind. Focusing on the public comment period, I show empirically how agencies extend or limit public consultation opportunities in response to the political environment. This analysis highlights the important role that outside audiences, and an agency’s core interest groups in particular, play in the procedural politicking game.

In Chapter 6, I look at timing, specifically how it is employed as a procedural politicking tool at the final rule stage. I argue that agencies sometimes speed up the publication of a final rule—and other times slow it down—so as to ensure that the rule is not released in a political environment that may lead it to be overturned. Additionally, in this chapter I consider—and ultimately rule out—some alternate explanations for the observed patterns of regulatory pacing. Observers often bemoan the sluggish place of the rulemaking; this chapter offers a decidedly political explanation for regulatory delay.

In Chapter 7, I show in a case study how a multitude of procedural tools functioned in the context of a single, high-profile rule. This approach allows me to draw a direct connection between the procedural machinations undergirding a rulemaking and the final policy outcome. The rule in question was issued by the FDA under the Obama administration,
and required chain restaurants and other retail food establishments to display nutritional information on their in-store menus. The so-called “menu-labeling rule” was difficult for the FDA to tackle, and I explain how the FDA used the tools introduced in the previous chapters to steer the process in its preferred direction. Because much of what happens in rulemaking occurs behind the agency’s closed doors, I draw on interviews with bureaucrats and interest group officials, as well as primary source documents to illustrate these mechanisms.

The evidence demonstrates that bureaucrats do not neutrally implement the administrative process. Rather, they use their political acumen and procedural prerogatives to insulate policies from political interference. Chapter 8 draws out the public policy implications of this bureaucratic power. I consider how political polarization is likely to affect procedural politicking in the longer term and also whether, normatively speaking, citizens should be concerned that unelected bureaucrats have such an outsized influence over the direction of public policy in the United States. I conclude by considering how the lessons learned about importance of bureaucrats’ incentives and capabilities speak to a number of regulatory reform proposals that have been floated in recent years.

1.7 Summary

The contraceptive mandate rule that began this chapter was controversial; some spectators described it as a rallying call for a “War on Religion.” Given the extent of the backlash (and under a court mandate), HHS under the Obama administration expanded the religious exceptions in the rule to include several groups that the 2011 version had excluded. Since, presumably, the intent of the policy was to expand women’s access to contraception, this watered down the policy considerably. When the new Trump administration came into office with a decidedly different agenda focused on deregulation, they also took aim at the rule and attempted to further relax the rule’s religious and moral opt-out provisions. However, to date, the courts have blocked Trump’s efforts to roll back the rule—largely on proce-
dural grounds. That is, the courts have kept the Obama-era rule intact because the new administration has not followed the appropriate procedures in attempting to roll the rule back.\textsuperscript{58}

The post-promulgation politics of the contraception rule highlight three important features of my argument. First, while rules are not immortal, the policies created through rulemaking are hard to undo. Second, as the court’s rebuff of the Trump administration demonstrates, a nuanced understanding of procedures is critical to successfully managing the process. Third, and perhaps most importantly, rules make important and durable policy changes. Stepping back, it is clear that regardless of how the squabbling over exceptions is resolved, HHS successfully moved the policy needle on contraception. The conversation is now not whether employers have to pay for contraception—they do and, by all accounts, they will continue to have to do so. Instead, the conversation pertains to which employers can be excluded from this general requirement. In the broadest sense, the contraception rule has successfully changed contraception policy on the ground; according to a study in \textit{Health Affairs}, as a result of HHS’s policy, in 2015 women spent 50\% less out-of-pocket on birth control pills, saving an estimated $1.4 billion per year.\textsuperscript{59} The rest of this book aims to develop a more nuanced understanding of how an agency like HHS was able to secure this victory and to unpack the broader implications of such strategic behavior. Let’s get started.


\textsuperscript{59}Becker and Polsky (2015).
Chapter 3

Rulemaking as a Strategic Enterprise

“If you let me write the procedures and I let you write the substance, I’ll [beat] you every time.”

— Former Rep. John Dingell

Representative John Dingell (D-MI) served in the U.S. House of Representatives for nearly 60 years and currently holds the record as the longest serving member of Congress in history. As the above quote illustrates, Dingell knew how the game was played. He knew that rather than attacking a difficult policy head-on, it is often easier to sidetrack a bill by referring it to an outside commission for additional study or by calling for a vote to table a measure, a procedural maneuver that “effectively defeats a proposal without rendering a clear judgment on its substance” (Oleszek, 1996, 12). Skilled legislators like Dingell also resort to procedural means to get difficult or controversial items passed through the chamber. For instance, the budget reconciliation process allows savvy legislators to circumvent the 60 votes needed to overcome a filibuster in the Senate.2

Yet, when it comes to the bureaucracy, procedures have traditionally been understood as a mechanism for political overseers to constrain what bureaucrats do, since these overseers establish procedures at the outset. This logic is fundamentally short-sighted. Since bureaucrats implement and manage these procedures, they can take on a life of their own.

1Quoted in Oleszek (1996, 12).
2Reconciliation procedures have been used to pass several major policy reforms, including welfare reform in 1996, the 2001 and 2003 Bush tax cuts, and the Affordable Care Act in 2010. See Reynolds (2017) for a careful accounting of the politics of the reconciliation process.
and can be employed strategically much as they are in Congress. As George Krause (1999) puts it, influence is a “two-way street.” And, in the realm of rulemaking, procedures can be an avenue for bureaucratic influence and power that exists separately from the power to propose and implement policy.

This chapter lays out a theory of—and develops testable hypotheses around—how and when agencies engage in procedural politicking. The argument is built on the assumption that bureaucrats have an incentive to see the policies they propose in their rulemakings succeed. However, as Chapter 2 explained, rulemaking is a constrained policymaking venue; the president, Congress and the courts all have tools to veto a rule or otherwise punish an agency. While proposing a policy that would satisfy all overseers is one way (and sometimes a necessary one) that an agency can ensure a rule does not provoke oversight consequences, compromise is often suboptimal from the agency’s perspective. Another option, often more appealing to agencies, is the strategic use of procedures to insulate a rule from oversight. This approach can alleviate the need to make significant policy concessions.

I focus on three distinct phases of the rulemaking process: drafting, consultation, and timing. These procedures are most likely to be employed strategically—that is, in ways that raise monitoring costs for principals or that persuade principals of the agency’s position—precisely when agencies expect that their principals might punitively deploy tools from the oversight toolbox. The interest groups that monitor an agency can also be critical to an agency’s procedural strategy, as groups can be more or less supportive of an agency’s goals—and, accordingly, more or less willing to pressure principals into providing oversight. By relying on procedural politicking at moments when the political environment is particularly inhospitable, agencies can enhance a rule’s prospects of surviving to become legally-binding. Rather than a purely administrative activity, the portrait that emerges in this chapter is one of rulemaking procedures as a carefully crafted political strategy.

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3Stewart (1975).
3.1 The Strategic Enterprise

Some rulemaking projects succeed while others fail. By success, I mean that a proposed rule that the agency has invested in by conducting research, engaging with stakeholders, and drafting—goes on to become a binding final rule. Failure, however, is also a possibility. When this happens all the resources that went into these activities are essentially squandered. And failure can come short of a regulatory veto (i.e., an overturn of a rule by the Office of Information and Regulatory Affairs (OIRA), by Congress, or by the courts). For example, unforeseen political events may compel an agency to make undesirable changes to a policy. Bureaucrats then spend additional time and effort on revisions and are left to implement a less than desirable policy.

Success in rulemaking is important to the agency’s broader policy agenda. Given the time, research, and effort involved in completing a rulemaking, the choice to initiate a new rulemaking project is a commitment. Once an agency has made that commitment, other opportunities are essentially foreclosed. This is not a hypothetical concern; nearly all agencies face a backlog in rulemaking, with an ever-increasing list of policy fixes and improvements on the regulatory to-do list. This point was made concretely during the course of an interview for this project. While sitting in the office of one agency’s regulatory director, I noticed a white board listing approximately 30 ongoing rulemaking projects at the agency, along with the stage of completion for each. Should any one of those projects be held up—by, say, a request for information from Congress or a particularly difficult review from OIRA—the time and resources the agency would devote in responding would draw directly from another project on that same board. In other words, regulatory projects present opportunity costs, since time the agency invests in issuing one rule comes at the direct expense of others.

The success of a rulemaking project can also enhance an organization’s reputation,

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4A separate question, of course, is whether the rule goes on to accomplish its intended policy goal.
5See Kerwin and Furlong (2011).
while failure can detract from it. The concept of organizational reputation has gained increased attention in recent years, with scholars agreeing that, for the most part, agencies strive to develop and maintain reputations for competence and superior performance. Concerns over reputation can shape the level of autonomy granted to an agency and also the administrative choices that agencies make. A rulemaking failure, on the other hand, has the potential to damage the agency’s autonomy, as Congress and the president may be less willing to delegate activities to an agency with a poor reputation in the future. Agencies deal with the same OIRA desk officers, members of Congress, congressional committees, judges, and journalists again and again, meaning that the problem can compound since these actors may scrutinize the agency’s actions more closely after regulatory setbacks.

Figure 31 illustrates the theoretical logic linking concerns about an agency’s agenda and reputation to choices made during the rulemaking process. Agency choices are represented by dashed squares. The entire rulemaking process occurs within the context of the broader political environment, which influences an agency’s choices about policy and procedures, as well as the eventual outcome of the process. That outcome can be success or failure (or something in between) and it can have consequences both for an agency’s ability to accomplish its policy agenda and for its organizational reputation. However, agencies are not merely observers of the outcome of their rules. Instead, taking into account the political environment at a given point in time, they can make strategic choices that make particular outcomes more or less likely. Accordingly, the figure also highlights that the final outcome is the product of both the policy contained in the rulemaking proposal and the procedures

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6Carpenter’s (2001) work is perhaps the most widely known on this point. Using a historical approach, he argues that agencies can build support coalitions with key interest group allies and establish reputations for reliability and efficacy. The agency can then capitalize on its positive reputation to achieve greater autonomy. See also Carpenter (2010); Carpenter and Krause (2012); MacDonald and Franko (2007).

7For instance, Moffitt (2010) argues that concerns about reputation guide the Food and Drug Administration’s (FDA) decisions about advisory committee consultation. By engaging externally and having outsiders acknowledge a drug’s risks, the FDA can “demonstrate that any failure associated with the policy is inherent to the policy itself and not attributable to (lack of) agency expertise.” Similarly, Carpenter (2002) demonstrates that reputation-based concerns affect the timing of new drug application approvals at the FDA. See also Maor, Gilad and Bloom (2013).
used to manage the rulemaking process. I now pause to consider each of these factors in greater detail.

The Political Environment

Agencies operate within a political context and, as Figure 31 shows, this environment influences not only the actions that the agency takes, but also affects the outcome of the rulemaking process itself. Broadly construed, the political environment includes the three constitutional branches—the president, Congress, and the courts—as well as a constellation of interest groups that have a stake in the agency’s regulatory actions. As the previous chapter made clear, each of the constitutional actors has the authority to issue a regulatory veto or to otherwise sanction an agency for a perceived overstep of its authority. Agencies therefore have good reason to take the preferences of these actors seriously and to factor them into their decisions about policy and procedure.

Interests groups—by which I mean organized entities that include businesses and public interest groups—also influence the political environment. Although they do not hold the same formal powers to reward and sanction agencies as do the political branches, these stakeholders can increase an issue’s salience in the eyes of those that do hold formal oversight power. In other words, while interest groups have very little power to directly sanction agencies, they can pressure political overseers to either exert or withhold their influence. This pressure augments a rule’s prospects for success if groups are aligned with the agency’s purposes; when powerful groups support the agency’s regulatory agenda, they can help to

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8The political environment can be expanded further to include other actors such as the media, or narrowed to focus on particular actors who have interests relevant to the agency (e.g., individual members of Congress or particular interest groups). The focus on the president, Congress, the courts, and interest groups, which are consistently present, allows me to make a general argument that holds across a large swath of agencies.

Potter Chapter 3–5
convince skeptical political overseers. Alternately, group influence can work against the agency; when powerful groups oppose the agency they can encourage political principals to open their oversight toolbox—and possibly deploy a regulatory veto. As McCubbins and Schwartz (1984) famously described it, interest groups can pull “fire alarms” and activate oversight.

Since agencies work in different policy areas, the constellation of interest groups they deal with varies. For example, the Environmental Protection Agency (EPA) is situated between business interests that strive to reduce the regulatory burden the agency imposes on industry and environmental groups that aim to increase protections for the natural environment. The balance of power between these opposing interests has shifted across time. In the 1970s, during the heyday of the environmental movement (and when the EPA was first created) environmental groups enjoyed considerable political clout. Over time, the power of business groups in comparison to that of environmental groups has increased. Meanwhile, other agencies, like the National Science Foundation (NSF), have a narrower regulatory reach, with policies that affect a more unified group of stakeholders—in the NSF’s case mostly universities and research institutions. Regardless, agencies are keenly aware of the powerful interest groups in their operating space (and, if relevant, whether the balance of power among groups has shifted), as well as how groups are predisposed to respond to particular policies. Accordingly, agencies adjust their approach to both policy and procedures based on whether group involvement in their rulemaking is likely to improve or diminish a rule’s prospects for success. Put differently, agencies condition their strategies based on the responses they anticipate from relevant interests.

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9The stakeholders groups in an agency’s orbit are truly diverse. For instance, the Occupational Safety and Health Administration is juxtaposed between labor and management interests, while the Centers for Medicare and Medicaid Services’ stakeholders include healthcare providers, insurers, patient advocacy groups, and the states. The differences in interest group constituencies may affect an agency’s strategic choices (see, e.g., Gormley, 1983); future work exploring these relationships is certainly welcome.
10See Moe (1989).
11See Chapter 5 of Wilson (1989) for a typology of agencies according to the mix of groups that are affected by the agency’s dealings.
12This should not be read as an argument that agencies have complete information about how relevant

Potter Chapter 3–6
Of course, the political environment is not a constant. Sometimes agencies operate in an environment where there is broad political support for their mission and the types of rules they are advancing. Far more common, however, one—or more—of an agency’s political principals is skeptical of the agency and what it is trying to accomplish. When this occurs, the machinations of disaffected interest groups may prove particularly effective as they can fall on sympathetic ears. Accordingly, agencies must make policy and procedural choices with extreme care. For instance, President Obama was ideologically in step with the EPA and worked closely with that agency to issue regulations aimed at reducing climate change. However, when Republicans gained control of the House in 2010, their Tea Party-infused agenda focused on eliminating “job-killing regulations,” among which EPA regulations were a prime target. Indeed, the chair of the House Energy and Commerce Committee went so far as to promise EPA Administrator Lisa Jackson that she would be called to testify before Congress so often that she should reserve her own parking space on Capitol Hill. True to this pledge, in the first year after Republicans took control of the House, Administrator Jackson testified before the House a total of twelve times.

In this kind of environment—where a principal is hostile to the agency’s actions—rules are at high risk of failing. Anticipating this threat, an agency can maneuver to help its rules succeed in the face of adversity. That is, while most theories of agency policymaking suggest the EPA should have abandoned its rulemaking projects in this environment, the agency nonetheless persevered. In spite of Congress’s increased scrutiny of the EPA, under Jackson’s leadership the agency issued a number of critically important environmental rules

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13 Throughout the book, I am careful to distinguish presidential preferences and actions from agency ones. Although President Obama famously declared his ability to accomplish executive action, by stating “I’ve got a pen and I’ve got a phone,” presidents do not write or promulgate rules. Instead they rely on agencies to accomplish this task. While presidents sometimes work in concert with agencies, at other times they work toward opposing ends. It is precisely this variation in presidential support and opposition that I intend to highlight in conceptualizing the political environment.

14 See the Economist (2011). By contrast, Jackson’s predecessor Stephen Johnson testified before Congress only four times in his two-and-a-half year tenure.
during the 112th Congress. These included a rule to curb greenhouse gas emissions from new coal-fired power plants, a rule that addressed air pollution associated with hydraulic fracturing (or “fracking”), and a rule that required power plants in 27 states to cut their emissions by between 54 and 73 percent. These were not trivial policy changes. For instance, the fracking rule was considered by most observers to be the first federal foray into regulating this emergent drilling technique. The rule was ambitious too; the agency used its extant authority under the Clean Air Act to issue the rule despite the opposition of industry and many in Congress. Meanwhile, the agency did not slow the rate of its regulatory activity, issuing more than 150 “significant” rules during this time period. In other words, the agency was doing something to shore up its regulatory agenda in spite of strong congressional opposition. I argue that strategic policy and procedural choices allowed the agency to proceed in the face of this adversity.

Policy Choices

The rulemaking process begins once an agency has decided to issue a rule—either because some other actor (e.g., Congress or the courts) has prompted them to do so or because they have independently recognized a need. The question then becomes: what policy should the agency propose?

A policy choice is an agency decision about the direction in which the agency should

\[15\] P.L. 91-604.

\[16\] This figure is based on the number of “significant” rules that the Office of Management and Budget (OMB) selected for review during the 112th Congress. It is on par with EPA’s regulatory volume in previous congresses.

\[17\] See Chapter 2. Although there is a distinction between rules that are mandated (i.e., directly required by statute or judicial order) and those that are discretionary (i.e., agency-initiated) in principle, that distinction becomes blurred in practice. Even when a policy is mandatory, the agency can have considerable discretion over how the policy is implemented or may attach additional provisions to the rule that Congress or the courts in no way intended. In a recent study Haeder, Yackee and Yackee (2016) examine congressional regulatory mandates to the Department of Interior (DOI) over a 40-year period. They find that DOI has routinely failed to issue rules that are required by statute. Upon further scrutiny, then, mandatory rules may be much more discretionary in nature than they initially appear. Thus, rather than being a dichotomous concept, is it more appropriate to consider this as a continuum with fully-mandatory and fully-discretionary rules at each end.

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take a regulatory program. Sometimes, the question of precisely which policy to propose is a relatively trivial one, such as whether the agency should require regulated parties to submit a form on a monthly or a quarterly basis. However, policy questions lie at the very heart of rulemaking and agencies often have considerable discretion over them when preparing a draft rule. For instance, the agency may decide to include or exclude entire industries from the scope of a rulemaking that imposes new regulatory burdens. One such policy choice occurred in 2010 when the Federal Aviation Administration issued a proposed rule to extend its commercial service pilot fatigue and rest regulations to cover charter and cargo flight operations.\textsuperscript{18} This policy choice created winners (e.g., safety advocates) and losers (e.g., charter and cargo carriers who subsequently faced stricter pilot service times).

In the face of opposition, an agency cannot usually just propose its preferred, or ideal, policy when making a rule. Rather, as numerous theoretical models of agency policymaking demonstrate, agencies are constrained and therefore strategic in which policies they can offer in a system of separation of powers oversight.\textsuperscript{19} These models are typically based on a spatial logic and show how tools of political oversight—like the regulatory veto—ensure that agencies take the preferences of political overseers that possess this power into account when proposing policy. For example, if an agency proposes a policy that is too extreme compared to the preferences of, say, the president, that rule is likely to get overturned through the course of OIRA review. The veto results not only in wasted agency effort, but, presumably, in a worse policy outcome from the agency’s perspective since policy will either revert to the status quo or some other actor will set policy. As a result, agencies propose policies that are as close as possible to their own ideal policy, while still being tolerable for the president. The same logic applies to congressional and judicial oversight.

Put more precisely, agencies propose policies that are a constrained optimum, or the

\textsuperscript{18}See 75 FR 55852; September 14, 2010.
\textsuperscript{19}This general result follows from a series of well-known models of delegation, where overseers set some sort of constraints and agencies maximize within these bounds. See, for example, Bawn (1995); Epstein and O’Halloran (1999); Ferejohn and Shipan (1990); Shipan (2004); Volden (2002). See also McCubbins, Noll and Weingast (1989).
best policy they can achieve in a world where they are subject to political checks. However, even with a policy that is constrained, agencies are still at an advantage when they propose a policy compared to having some other entity such as Congress make the policy instead (e.g., by passing a law). This is because were Congress to set the policy, they would not have to take the agency’s preferences into account at all and would simply offer their own ideal policy. Because the agency proposal factors in the agency’s preferences, while the congressional proposal does not, there is real value—from the agency’s vantage point—in being the agenda-setter and being able to propose policies through the rulemaking process.

Understanding agency choices about where to set policy has been a central theme of previous scholarship. My argument is that procedures also play an important role in influencing the outcome of the administrative process. Importantly, the use of procedures may alleviate some of the constraint on the policies that agencies select. That is, by employing procedures strategically, agencies may not need to make as many policy concessions and may even gain policy benefits in the process. This is not to say that agencies do not make constrained policy choices, but rather that procedural tactics may free agencies up more than in a policymaking scenario that does not take procedures into account.

Procedural Choices

Procedures are an established way of that an agency does something, usually in a certain order. While procedures imply routine and predictability, they do not mean that rulemakings will be carried out in the same way every time, but rather that there is a infrastructure in place that sets an expectation about how things should generally follow from rulemaking to rulemaking. Procedural questions permeate every stage of the rulemaking process. They include considerations such as: How should the initial proposed rule be drafted

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20 The value of agenda-setting is another established result from the formal modeling literature. As Ferejohn and Shipan (1990, 7) succinctly state, “by being empowered to make the first move, the agency has an important strategic advantage.”

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and who should do it? Should the process begin with a proposed rule or, is the policy action urgent enough to warrant the agency invoking “good cause,” which skips the proposed rule and begins the process with an emergency interim final rule (thereby bypassing the public comment period)? Who should be consulted, when, and how often?

Procedures are not optional; some choice has to be made at each step of the process or a rulemaking cannot proceed. Procedures are not neutral either. For example, in writing a rule an agency can choose to make it accessible, thereby engaging a broader audience, or obscure, thereby limiting outsider participation. Each procedural decision factors into the final outcome of the rulemaking process. Procedural politicking is rooted in the idea that bureaucrats have expert insight into the consequences of these procedural choices and, accordingly, can capitalize on them for political advantage. Doing so bolsters the prospects of a rule surviving and eventually becoming a binding final rule in an inhospitable political environment.

If bureaucrats build a rulemaking process around procedures that are not carefully selected and managed, opposition can foment, introducing opportunities for intervention from principals. On the other hand, a process that is skillfully orchestrated can help to suppress potential opposition and open a path to success where none previously existed. Some procedural tools raise monitoring costs for principals, while others build support or minimize opposition.

Procedural politicking is often intended to manage external audiences. However, it does not affect all audiences equally. For the mass public, some tactics make it less likely that individuals will engage with a rulemaking—they will be less likely to read and digest the rule, less likely to submit a comment on the rule, less likely to contact a political principal about a rule, and so on. However, given the low level of public engagement in rulemaking overall, the impact may be minimal. Organized interests—affected industries and interest groups—are much more likely, ex ante, to participate in the process; procedures also affect

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these stakeholders, albeit in a different way. Not only does procedural politicking “up the ante”—requiring groups to devote more resources to the rulemaking process—it also makes it harder for these groups to expand the scope of the conflict beyond their particular interests (i.e., get outside audiences to engage with the rule). This may result in procedural tactics reinforcing already existing participatory disparities in the rulemaking process.

As I explain in the remainder of this chapter, there is no one way to maximize procedures; the exact manner in which procedures are strategically employed depends on both the political environment and the stage of the process at which it comes into play. There are, nonetheless, systematic trends worth uncovering. As a strategic tool, procedures are particularly advantageous for agencies, because on their face they appear to be a “neutral” part of an administrative process; the agency had to make a choice, so choosing, say a relatively long comment period rather than a shorter one, is part of a choice set that can be considered (or at least argued) to be routine and pro forma.

3.2 The Role of Bureaucrats

The theory advanced in this book holds that agencies strategically respond to the political environment, but agencies are not monolithic entities. Rather, as I noted in Chapter 1, agencies are collections of individual bureaucrats, and those individuals may differ in important ways. It can be useful to aggregate these actors for the sake of analysis, but doing so runs the risk of missing insights that arise from understanding variation in motivations among the individuals within an agency. As it turns out, irrespective of individual motivations, all types of bureaucrats are likely to benefit from a successful rulemaking project and suffer setbacks from a failed one.\(^{21}\) As a consequence, it naturally follows that, at an

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\(^{21}\)The extent of the impact may vary by type. In this section, I consider differences in bureaucratic types according to their motivation, but another distinction that scholars frequently draw is between political appointees, who are “in and out” of the agency, and careerists, civil servants who spend major portions of their careers at the agency. However, the four types of bureaucrats considered here neatly address this divide. Political appointees are much more likely to draw from the ranks of zealots and climbers. As
aggregate level, agencies pursue policy success, since all of its constituent parts share this preference. In other words, the theory is still sound when reconstituted on an individual-level foundation.

To understand why, it is illustrative to examine the effects of a rulemaking failure at one agency—the Department of Transportation (DOT)—on four types of bureaucrats: zealots, or those who are policy-motivated; climbers, or those who are career-motivated; professionals, or those who closely adhere to professional norms and practices; and slackers, those who are motivated to minimize their own workload or to attend to other internal agency dynamics that are not policy-related.22,23

In 1995, Congress directed the DOT to amend its regulations on truckers’ work hours to incorporate the latest science about human fatigue and alertness.24 A revision was sorely needed, since the existing rules had not been updated since 1939 and there were numerous societal advances, as well as technological advances in the trucking industry, in the intervening years.25 Five years later in 2000, the Federal Motor Carrier Safety Administration (FMCSA) issued the so-called “Hours of Service” (HOS) proposed rule, which was the cul-

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Kerwin and Furlong (2011, 274) explain, “involvement in rulemaking provides political appointees one of the best ways to leave a mark on an agency that they will probably be with only for a short time.” For some leaving their mark means affecting policy (i.e., zealots), whereas others hope to leave a mark in order to achieve career gains (i.e., climbers). Careerists draw from all four types, although Downs (1967, 96) characterized slackers as typically populating the lower tiers of the agency hierarchy.

22This section draws upon and expands the discussion in Potter and Shipan (2018). However, while they focus on the importance of policy production, the argument here centers on the importance of the procedural components of rulemaking.

23These should be considered as loosely stylized groupings of bureaucrats, rather than mutually exclusive classifications. These are my own categorizations of bureaucratic types, but they align well with those of previous scholars. Policy-motivated zealots have been described in numerous studies (see, e.g., Dilulio, 1994; Feldman, 1989; Golden, 2000; Meier and O’Toole, 2006). Meanwhile, the term “climbers” is borrowed from Downs (1967) although the archetype has been described by others (Fiorina, 1989; Kerwin and Furlong, 2011; Niskanen, 1971), while professionals are aptly characterized by Dilulio (1994) and others who focus on norms and organizational culture (Golden, 2000; Brehm and Gates, 1993; Wilson, 1989). Lastly, while there are many negative stereotypes about bureaucrats who are on a “9 to 3” schedule, some scholars have developed a more nuanced definition of the slacker category (Brehm and Gates, 1993; Gailmard and Patty, 2007). Of course, as Golden (2000) argues most people are likely motivated by a host of incentives; it follows, then, that these typologies serve as useful illustrations, rather than as strict categories.

24See §408 of the Interstate Commerce Commission Termination Act (P.L. 104-88).

25DOT had made minor amendments to the policy in 1962, but 1939 remained the last substantive revisiting of the standard.

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mination of years of research and stakeholder consultation. What followed for the agency was an epic saga that involved the courts, Congress, and multiple proposed and final rules on HOS. After FMCSA finalized the rules in 2003, it was sued and lost three separate times over the course of six years. Each lawsuit forced the agency to revisit some part of the 2003 final rule and reissue a new final rule. By October of 2009, the weary agency abandoned the rulemaking and agreed to start the entire HOS rulemaking process anew.26

The enterprise had failed. Despite nearly 10 years of effort to craft and revise its rule in a way that would make it stick, the agency had not succeeding in creating a new HOS policy.27 This failure was costly. FMCSA was created by Congress in 2000,28 and its struggles with HOS occurred during the agency’s infancy, as it was trying to establish a reputation as a competent and effective regulator. Indeed, the HOS rule was the new agency’s first major rulemaking and the ensuing debacle certainly did not help the agency to burnish its credentials. Two of the court rulings had taken the agency to task for a failure to be thorough—once for neglecting to address an issue that the statute had required the agency to address and a second time for not being transparent about its methodological assumptions.29

This unsuccessful rulemaking negatively impacted each type of bureaucrat at the agency. To begin, policy-driven zealots concerned themselves with writing a rule that maximized road safety, which is key to the organizational mission of FMCSA. This ethos was echoed in my interviews with FMCSA agency staff and an industry official involved with

26 There was also a new presidential administration overseeing the agency at that point in time, which may partially explain the agency’s willingness to start over. There was some speculation in the press that that the Obama administration offered up the old HOS rulemaking in exchange for a smooth Senate confirmation for the new FMCSA Administrator, as the timing of the two events was suspiciously close.
27 At that point, the agency started anew, issuing another HOS proposed rule in December of 2010 and a subsequent final rule in December 2011. The new regulations took effect in July of 2013, 18 years after the original congressional mandate to DOT.
28 The early efforts on HOS (from 1995–2000) were managed by the FMCSA’s predecessor agency, the Federal Highway Administration.
29 See Public Citizen v. FMCSA (374 F.3d 1209, 1216 (D.C. Cir. 2004)), and Owner-Operator Independent Drivers Association, Inc. v. FMCSA (494 F.3d 188, 206 (D.C. Cir. 2007)). In both cases the D.C. Circuit court ruled against the agency on the grounds that the agency had been “arbitrary and capricious.”
FMCSA’s regulations, as well as in the agency’s strategic plan, which mentions the word “safety” no less 196 times in its 28 pages.\textsuperscript{30} When the HOS policy was repeatedly rebuffed, zealots suffered since it meant that policy remained at the status quo, a policy set in 1939 that fell far short of modern safety standards.\textsuperscript{31} Zealots were also thwarted on other policy fronts. Agency resources were repeatedly tied up revising—and revising again—the HOS rule. This was problematic because resources at the agency were fairly constrained during the time period that HOS revisions were taking place; in spite of its fledgling status, on average the agency had an annual staff increase of about 1\% during this time period. In addition, the agency’s dinged reputation further limited the autonomy that zealots required in order to pursue ambitious new policies.

Reputational concerns also affected the prospects of so-called “climbers.” Climbers are motivated by advancing their career within the agency or outside of it; as Kerwin and Furlong (2011, 35) note, those bureaucrats who work on prominent rules get “considerable visibility in an agency and may become marketable on the outside.” This is, of course, contingent on the rulemaking project being successful; a botched rulemaking project is unlikely to return the same positive rewards and can even have negative reputational consequences. Further, climbers realize their career ambitions through aggrandizing their agency; as Fiorina (1989, 44) puts it: “One’s status in Washington... is roughly proportional to the importance of the operation one oversees. And the sheer size of the operation is taken to be a measure of importance...” Again, the size of FMCSA was fairly constant during this period, and the failed HOS rule did not make for a compelling argument to increase the agency’s resources. Climbers’ prospects were thereby limited.

Professionals seek to ensure that the agency subscribes to prevailing professional norms and also adhere to the internal culture of the agency. FMCSA’s rulemaking staff is

\textsuperscript{30}Federal Motor Carrier Safety Administration (2012).

\textsuperscript{31}At least this was the status quo until 2004. After the D.C. Circuit vacated the HOS final rule that year, Congress passed a law (P.L. 108-310) temporarily establishing the 2003 final rule as law until FMCSA could issue a new final rule, which it did in 2005. Zealots still lost out under this new status quo, however, since it was temporary and did not set a viable, long-term safety policy for the agency.

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comprised of white-collar professionals, but they do not draw from any one particular field. Thus, professionals at FMCSA were most concerned about getting the HOS policy “right”; that is, selecting a policy that would ultimately be able to be successfully enforced given the agency’s capacity, safety concerns, and the structure of the trucking industry. Failure to evade meddling from the courts and Congress detracted from the goals of professionals. These actors did not share the agency’s outlook on safety, and pushed the agency toward certain solutions and away from others. For professionals who would have preferred to make decisions based on technical and policy criteria, this was problematic. That is, political considerations may have forced professionals to deemphasized aspects of HOS policy that may have been substantively more important. Further, the court rulings repeatedly dinged the agency for policy and procedural missteps, effectively accusing it of a lack of professionalism. Such criticisms acutely sting for those who pride themselves on knowing how to competently execute the rulemaking process.

Last (and perhaps least) come the slackers, the catchall term for bureaucrats who are motivated by factors other than policy, career, or professional considerations. Here, it is straightforward to see that slackers were worse off; whatever their individual contribution to the HOS rule, they were forced to redo it several times (likely on top of their other ongoing workload). Additionally, the work environment for slackers likely deteriorated as a result of the HOS failure. Compared to a counterfactual world where the proposed rule continued seamlessly to finalization and implementation after the 2000 proposed rule, agency morale was lower, since HOS was one of the agency’s chief policy priorities. Additionally, top DOT

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32 According to the Office of Personnel Management’s FedScope database, in 2006 approximately 37% of FMCSA staff in the DC headquarters held advanced degrees. The diversity of the agency’s rulemaking staff was confirmed in interviews with two DOT officials.

33 In this case, the goals of professionals and zealots aligned nicely, but this might not always be the case. For example, professionals at FMCSA could plausibly advance a policy that maximizes road safety, while (deregulatory) zealots could advocate for a policy that focuses on minimizing costs on regulated parties.

34 Agency morale is often assessed via personnel surveys conducted by the Office of Personnel Management (OPM). While OPM did not disaggregate data to the bureau level, it is possible to evaluate morale at the DOT during this timeframe. Between 2004 and 2008, employees at DOT were significantly more likely to respond negatively (“Dissatisfied” or “Very Dissatisfied”) when asked the question “Considering everything, how satisfied are you with your organization?” (Office of Personnel Management, 2008). In 2004, 24.5%
and FMCSA officials likely scrutinized the work products of FMCSA rulemaking staff more carefully after the rule was repeatedly rebuffed\textsuperscript{35}—not an ideal situation for a slacker.

Although it is just one rule, the FMCSA’s experience with the HOS rule in the first decade of the new millennium illustrates a larger point: each type of bureaucrat working within the agency would have preferred an outcome where the HOS proposed rule was successful: that is, finalized quickly and subsequently implemented. Within the agency, all types were made worse off by the repeated rehashing—and eventual failure—of the rule.\textsuperscript{36} The takeaway is that it is reasonable to assume that rulemaking success is in the shared interest of bureaucrats working within the agency, regardless of their type.

3.3 Procedural Politicking in Practice

What does procedural politicking look like in practice? The answer, of course, is that it depends on the procedure: what does it do, and at what point in the process does it come into play? Through the course of creating a new rule, bureaucrats face a menu of procedural options. Although it is often presumed that the Administrative Procedure Act (APA) dictates the procedures that agencies must follow to create a new rule, the procedural framework established by this law is surprisingly minimal, leaving bureaucrats with plenty of room to maneuver. Former Supreme Court Justice Scalia (1978, 348) explained, “insofar as the text of the APA is concerned, the choice within this available spectrum of possible procedures was left to each agency.” Wiseman and Wright (2015) further note that only two-thirds of one page of the original nine pages of the enacted law actually addressed the subject of DOT employees recorded negative responses, while in 2008 37.2% of employees responded negatively. While this does not speak directly to the HOS issue at FMCSA, it is consistent with the notion that morale was on the decline during this period.

\textsuperscript{35}This is conjecture on my part. However, it is commonsensical to assume that a supervisor would give greater attention to an employee’s work following a series of organizational missteps.

\textsuperscript{36}FMCSA’s HOS rule is an example of a rulemaking failure. Consideration of a rulemaking success would entail the same type of counterfactual exercise, where each type’s utility would need to be considered in light of what would have happened had the rule failed. However, the result of such an exercise would yield the same result: that success is a rising tide that lifts all boats.
of rulemaking. As I have noted, what the APA does include is four basic requirements: when writing a new rule, an agency must (1) provide notice of the proposed policy change; (2) solicit public input; (3) publish a final rule; and (4) allow some time between the final rule’s publication and the effective date.\footnote{See 5 U.S.C. §553.} Even then, the law allows agencies to waive the first and fourth requirement in some cases and altogether exempts policies dealing with the military, foreign affairs, or internal agency management. In all other respects, the law is silent on procedural particulars.

There are, however, policy-specific procedural constraints imposed on agencies by other laws. Requirements included in statutory language often direct agencies about how additional procedures should be layered on top of the basic requirements. For example, the Higher Education Act (HEA) requires the Department of Education (ED) to take extra steps when writing rules pertaining to student financial assistance.\footnote{These additional steps were added as part of the 1986 (§482 of P.L. 99-498) and 1998 amendments (§490(D) of P.L. 105-244) to the Higher Education Act of 1965 (P.L. 89-329).} When drafting a new rule under this legal authority, ED is required to follow a “master calendar,” whereby only final regulations published by November 1 can take effect by July 1 of the following calendar year.\footnote{See §482(c) of the HEA. The master calendar is intended to provide stability in financial aid programs, so that changes to the program do not occur in the middle of an academic year.} For the most part, Congress tacks on the majority of agency-specific procedures; the other constitutional branches largely refrain from dictating procedures.\footnote{In earlier periods, particularly the 1970s, activist courts were heavy-handed, in some cases directing agencies to take additional procedural steps or to make overtures to particular types of stakeholders. In the rulemaking regime studied here, procedural interference by the courts was unusual. The turning point on this front came in 1978, with a landmark Supreme Court decision on the appropriate role of the courts in evaluating the sufficiency and scope of agency procedures. In \textit{Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council} (35 U.S. 519 (1978)), the Supreme Court overturned an earlier anti-agency decision by the DC Circuit. Their logic was that that agencies, not courts, were best situated to evaluate their own procedures; the question at hand involved whether the Atomic Energy Commission, which had written a rule on nuclear power, had sufficiently “ventilated” the key issues in the rule so that affected stakeholders could evaluate the proposal. See Metzger (2005).}

I focus on three key procedural politicking tools: writing, or control over the composition of the rule;\footnote{Some readers may question whether writing is truly a procedure. However, the definition of a procedure provided earlier in this chapter provides a broad understanding of a process-related undertaking. Given that the APA only includes four basic requirements, the open-ended nature of the writing requirement is consistent with the definition of a procedure.} consultation, or how the agency manages its interactions with stakeholders.
outside the agency; and timing, or how the agency manages the temporal aspects of the process. While these three tools do not constitute the universe of procedural decisions, they are core to the process and shared across rulemakings; bureaucrats at every agency must decide about these procedures for each and every rule that crosses their desks.

The Power of the Pen

Bureaucratic authorship of rules can be an important persuasion tool. The way a rule is written can convince readers that the agency’s proposed course of action is a sound one. For instance, a regulatory text that is packed with citations to scientific material may lend credence to a policy idea that might seem half-baked on its own. Alternatively, a rule may be drafted in a manner that dissuades readers from engaging too deeply with the underlying policy. Texts that are written densely or in jargon, for example, set up barriers by requiring more of a reader’s cognitive energy and attention. In the procedural politicking context, bureaucrats can use writing tools to persuade or to make supervisory review more difficult; that is, bureaucrats can make it harder for principals to anticipate the consequences of their rules, or dissuade them from intervening at all. As laid out in Table 31, agencies have numerous writing tools at their disposal, including framing, manipulating analytical assumptions, and making the policy more or less accessible.  

[Table 3.1 about here.]

Framing is generally understood to mean “[selecting] some aspects of a perceived reality and make them more salient in communicating text, in such a way to promote a particular problem definition, causal interpretation, moral evaluation and/or treatment recommenda-

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42The tools presented in Table 31—and the two “toolkit” tables that follow—should not be read as exhaustive lists.

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The basic premise is that any issue can be viewed through a variety of lenses, and the interpretation of the issue may change depending on which lens is put into focus. Successful framing can shape how outsiders—principals and other stakeholders—perceive and react to a controversial rule.

There is a not a “one size fits all” frame that agencies should employ when a rule is at risk. Rather, because rules deal with so many different policy areas, the optimal frame (from the agency’s perspective) will vary. A return to the FDA’s tobacco rules in the mid 1990s illuminates the role of framing in rulemaking. In his account of the development of the agency’s proposed rule, former Commissioner Kessler (2001) describes why the agency adopted a frame of nicotine addiction as a pediatric disease. Importantly, the agency chose not to focus on adult smoking—even though many of the rule’s reforms would have limited adult access to tobacco products—and also refrained from appeals to moral authority. In a country where one in four adults smoked cigarettes, these approaches might have hardened opposition, but appeals based on children’s health were likely to engender more universal sympathy. Framing the issue in this way allowed the FDA to outcompete other actors and achieve its preferred outcome.

Framing is important because it establishes the terms upon which stakeholders will encounter a rule and how they respond to it.

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43 Framing is conceptually distinct from priming, which suggests that the individual apply an evaluation criterion (which typically draws on an categories or constructs in that individual’s memory) over other possible criteria, and agenda-setting, which is the transfer of salience from elites to an audience (Chong and Druckman, 2007; Scheufele and Iyengar, 2014).

44 As Poletta and Ho (2006, 188) explain, “the ways in which political actors package their messages affect their ability to recruit adherents, gain favorable media coverage, demobilize antagonists, and win political victories.” Framing effects have been demonstrated in a many contexts, including how firms’ quarterly results are perceived and in the extent of public support for the Supreme Court (e.g., Nicholson and Howard, 2003; Wade, Porac and Pollock, 1997). There is less scholarly understanding of how elites strategically select frames, although there is a general sense that there is a strategic element to this. For example, litigants are artful in choosing how to frame their briefs before the Supreme Court, but the exact frames selected depend on the context (e.g., petition or respondent, and how the issue was framed in the lower courts). See Wedeking (2010).

45 Between 1995 and 1997, 24.7% of adult Americans were cigarette smokers (Centers for Disease Control and Prevention, 2016).

46 The agency achieved its preferred outcome (i.e., a binding final rule) in the short term. In the longer term, the Supreme Court overturned the rule in FDA v. Brown & Williamson Tobacco Corp. (529 U.S. 120 (2000)).

47 This does not mean that stakeholders will necessarily accept the agency’s frame or that the frame will
Framing a proposal in an advantageous light can also include appeals to authority, which can burnish a rule’s bona fides in high risk scenarios. Steeping a proposal in scientific, technical, or legal citations enhances a policy’s external validity and demonstrates that the agency has done its homework.\textsuperscript{48} This can signal to overseers and interest groups that the agency would be a formidable adversary if challenged. For example, the FDA’s completed proposed rule on tobacco regulation, issued in 1996, included references to 118 scientific studies and ran 221 pages.\textsuperscript{49} Only four of those pages contained the proposed regulatory language that would make the legal changes to the \textit{Code of Federal Regulations}. The remainder of the text included: 169 pages of preamble text explaining the legal authority, impact, and implementation plan for the proposed rule, and 51 pages of analysis addressing the rule’s costs and benefits, as well as its impact on the economy, families, federalism, paperwork, property rights, and the environment. This was an explicit strategy on the agency’s part: as Kessler (2001, 296) explains: “We had allowed ourselves to become vulnerable to criticism by making statements without having all the supporting facts behind them... I decided that everything we did must be totally data-driven.”

Agencies can also select scientific or technical assumptions to bias a rule’s analysis toward the agency’s preferred outcome. For instance, one industry official that I interviewed complained that the FMCSA adopted a “tortured logic” in its technical assumptions for the Obama-era HOS rule.\textsuperscript{50} On the benefits side of the ledger in the cost-benefit analysis, the agency assumed that, by forcing truckers to take more breaks, truckers would sleep more

\textsuperscript{48}Strategic appeals to authority have been identified in other contexts as well. For example, in a study of how firms justify chief executive officer compensation, Wade, Porac and Pollock (1997, 641) find that “when companies have more concentrated and active outside owners, they are much more likely to justify their compensation practices by citing the role of compensation consultants as advisors in the compensation-setting process.”

\textsuperscript{49}See 61 FR 44396; August 28, 1996.

\textsuperscript{50}Interview with trucking industry official, June 2016.
hours, which would then lead to greater health, which in turn would increase longevity. Thus, the costs of the rule were offset in part by estimated returns in reduced mortality for individual drivers.\textsuperscript{51} Industry officials found this assumption to be questionable—truckers might choose to sleep more with mandated breaks, but they also might choose other activities instead.\textsuperscript{52} While arbitrating between whether industry or the agency had a better grip on how truckers would spend an additional hour-long break is beyond the purpose here, it is indisputable that this assumption aided in justifying the agency’s analysis. In the end, FMCSA’s analysis yielded a positive net benefit for its preferred policy of approximately $205 million per year.\textsuperscript{53}

Agencies may also draft rule texts in ways that obscure the intent or the impact of the policy. By writing a rule that is dense or that relies on technical jargon, agencies can discourage non-experts from engaging with the rule. Additionally, the agency creates uncertainty among principals (who are likely non-experts) about the precise consequences of the policy. Specifically, agencies can draft proposed (and, subsequently, final rules) in ways that make it hard to discern exactly what the rule does and how it will impact different constituencies. This overlaps with appeals to authority since it can emerge as a consequence of peppering the text of the rule with scientific and technical citations, but it can also exist

\textsuperscript{51}Reduced mortality was then monetized in terms of the value of a statistical life, which, consistent with the DOT’s standard practice, was set at $6 million. See Chapter 5 of the agency’s regulatory impact analysis for an explanation of the FMCSA’s analytical methodology for the final rule (Federal Motor Carrier Safety Administration, 2011).

\textsuperscript{52}See the preamble to the final rule for discussion on this point (76 FR 81134; December 27, 2011).

\textsuperscript{53}Wagner (2009) raises a similar critique regarding a controversial EPA rule known as the Clean Air Interstate Rule, or CAIR. In conducting the required regulatory impact analysis (RIA), the EPA produced a report that was 240 pages long and included more than four dozen tables and a separate 180 page appendix. The agency presented a cost-benefit analysis of their proposed option and only one other policy option: the status quo. While the principles of good policy analysis generally require consideration of many policy alternatives, “by providing such a limited glimpse of the policy alternatives, EPA [reduced] the risk of being hung up in litigation about the viability of close competitor approaches” (Wagner, 2009, 59). Additionally, the EPA relied on highly conservative estimates of many of the most controversial points of the rule and conducted excessive uncertainty analyses around these estimates. The intent was to make the rule unassailable on these points and to appease industry critics. In the end, Wagner concludes that the EPA’s approach to the RIA in this case was a masterful manipulation; it resulted in a benefit-to-cost ratio of 25 to 1 for the agency’s proposed policy and served an advocacy mechanism to promote the agency’s preferred course of action. For more on manipulation of assumptions in cost-benefit analysis see Livermore (2014).
independently of that strategy. Agencies can simply craft rules using more obfuscatory language that requires a higher level of sophistication or takes more time to comprehend; in so doing, the agency raises the costs for outsiders—whether it be staffers on Capitol Hill, OIRA desk officers, interest groups officials, or individual citizens—of meaningfully engaging with the rule.54 Similarly, rules that extensively appeal to scientific authority can still be written in an accessible and straightforward way.

Stepping back, the manner in which a proposed rule is written, then, can be used to make it more difficult (or less desirable) for outsiders to scrutinize or attack the policy. Following the procedural politicking logic, agencies will be more likely to use writing tools to obfuscate, insulate, and convince when their rules are at greater political risk. That is, if one of the agency’s political principals is not aligned with it, that agency will be inclined to write the rule in a way that protects it from a potential political interference.

Of course, the stakeholder groups that are affected by the agency’s rules play a particularly important role in monitoring rule documents. After all, these groups are likely to be directly affected by the rule (should it become final) and may also have insight into the details of how a particular proposal is likely to play out in the real world. It follows then that if the agency anticipates that affected groups will oppose a proposed rule—and that principals are likely to agree with any complaints groups raise about the rule—then writing strategies will become particularly useful in fending off political incursions.

The Power of the Participation Valve

Public participation in rulemaking is the hallmark of notice-and-comment. Consulting with stakeholders is a way that agencies can both gather information from regulated parties about policies and legitimate the policies that they have developed. It is also, however, a

54Owens, Wedeking and Wohlfarth (2013) make a similar argument in the context of the Supreme Court, where they show that justices write opinions in a more obfuscatory way when their decisions are at greater risk of being overturned by Congress.
way that stakeholders can find problems with the agency’s proposal and throw up roadblocks that could potentially lead to political problems down the line.

The actual participatory requirements in rulemaking are minimal. The APA merely dictates that the agency “shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”55 This means that while the agency must allow for some level of public participation, the extent of that participation is largely at the agency’s discretion.

This is where procedural politicking comes into play; an agency can choose to expand or restrict participation opportunities depending on the nature of the feedback they anticipate receiving. If stakeholder feedback is expected to reflect positively on the rule (or to be relatively innocuous), it can bolster the rule’s prospects going forward. Negative feedback can have the opposite effect. Recognizing this, agencies can adjust participation opportunities accordingly. Crucially, agencies are better positioned than their principals to forecast the tenor of participation.

Table 32 lists several procedural choices that affect stakeholders’ participation opportunities. Some of these tools—such as publishing an Advance Notice of Proposed Rulemaking (ANPRM), holding a hearing, engaging in negotiated rulemaking, or having a longer period for public comment—increase stakeholders’ access to a rulemaking.56 To take one example, if an agency opts to have a hearing on a proposed rule, that hearing is held in addition to the opportunity for stakeholders to submit written comments on a proposed rule (one of the APA’s few requirements). Accordingly, the choice to have a hearing is a “bonus” of sorts; it expands the ways in which a stakeholder can offer feedback on a rule in progress and encourages participation by a larger set of stakeholders.

56 These tools should not be considered equivalent to one another. For example, choosing to engage in negotiated rulemaking is a considerable resource investment on the part of the agency (since selecting a negotiating committee is burdensome and committees typically meet numerous times in order to craft a proposal), much more so than, say, the one-time cost of the agency hosting a hearing on the proposed rule.
There are other tools, however, that decrease access for stakeholders, making it more difficult—at the margins—for stakeholders to participate or diminishing the impact of their feedback if they do. These tools include having a shorter public comment period, timing the public comment period at an inconvenient time (for either stakeholders or political principals), and publishing an interim final rule. For instance, as explained previously, one procedural choice is for the agency to avail itself of the APA’s “good cause” exception and to publish an interim final rule rather than a proposed rule. Although interest groups still are given the opportunity to submit written comments on an interim final rule, those comments come after the interim rule has taken effect. Stakeholder comments may still influence the agency’s final decision, since the agency is still supposed to issue a subsequent final rule. However, the effect of group concerns—and especially the weight such concerns carry with principals—are muted since the policy is effectively the new status quo and (for the most part) represents a done deal.

[Table 3.2 about here.]

There are meaningful potential benefits to consulting with external stakeholders through these procedures. By engaging with key groups, the agency can improve the policy and perhaps enhance its implementation prospects.\(^57\) For example, holding a public forum (e.g., a hearing about the proposed rule) allows stakeholders from both sides of an issue to air out their grievances, which may give stakeholders a greater appreciation of other perspectives on an issue and help neutralize opposition. Creating more opportunities for public participation may also generate buy-in from stakeholders. One agency rule-writer explained that his agency held lots of listening sessions for some rules, because the listening sessions “allows folks to have their piece” and that they were less likely to oppose the rule as a result.\(^58\)

\(^57\)Coglianese and Lazer (2003) summarize this position with respect to environmental policy, stating that “firms are often better positioned than government regulators to know important details about the environmental risks created by their production processes.” See also Moffitt (2014); Woods (2013).
\(^58\)Interview with DOT official, May 2016.
In addition to policy legitimacy, offering greater consultation opportunities can enhance an agency’s reputation.\textsuperscript{59}

However, unlike consultation that occurs during the proposed rule development stage (i.e., \textit{ex parte} consultation), the participation procedures listed in Table 32 are all \textit{public}, on-the-record consultations.\textsuperscript{60} This means that the feedback that the agency receives through these avenues becomes part of the rulemaking record, and can be used in the event that some stakeholder chooses to take the agency to court over the rule at a later date. That is, stakeholder participation can lay the groundwork for future litigation.\textsuperscript{61}

There are other costs to increasing participation opportunities. Facilitating participation requires agency resources, since agency personnel must be assigned to engage with stakeholders and read and respond to comments. Stakeholder management and comment-processing can also slow down the rulemaking process. From an informational perspective, public feedback on an agency’s proposal may not be all that valuable either. For instance, one EPA official I spoke with estimated that fewer than 10\% of comments that agency receives contain new or noteworthy information.\textsuperscript{62} After all, if agencies gather information from key stakeholders privately in advance of the public portions of notice-and-comment, then they may already possess the information required for implementation.

In short, stakeholder participation in rulemaking can yield both substantive costs and substantive benefits to the agency. However, there is also a political calculation that an agency must make with respect to participation opportunities. If groups are not supportive of an agency or a proposed rule and principals are also skeptical of the agency, the risk that the entire rulemaking enterprise could be upended increases. In this situation increased

\textsuperscript{59}There is a considerable literature on the benefits of public engagement as a way of enhancing an agency’s reputation and legitimacy; see Carpenter (2001, 2010); Carpenter and Krause (2012); Krause and Douglas (2005); Maor, Gilad and Bloom (2013) and Moffitt (2010, 2014).

\textsuperscript{60}A notable exception is consultation with the agency’s advisory committee; these sessions can be open or closed. While relatively rare, closed sessions are confidential and not publicly observable.

\textsuperscript{61}Schmidt (2002).

\textsuperscript{62}Interview with EPA official, May 2013. See also Chubb (1983); Naughton et al. (2009); Yackee (2012); West (2004).
participation opportunities can mean greater opportunities for fire alarms to be pulled and responded to in adverse ways. This puts the agency under heightened political scrutiny, and enhances the likelihood of a veto. Further, if stakeholders make a case that the agency is incompetent or overstepping its authority, other political consequences may ensue. This means that when political principals are not aligned with the agency and the agency anticipates negative stakeholder feedback, it is in the agency’s interest to reduce participation opportunities since complaints about the agency or the rule are more likely to find a sympathetic ear among the agency’s adversaries. In contrast, in circumstances where groups are likely to bolster the agency’s position, the agency may find itself increasing participation opportunities. That is, if groups support the agency’s position and principals do not, having groups weigh in on the agency’s proposal may yield the substantive benefits discussed earlier and serve to convince overseers that the agency proposal has merit—or at least that intervening in the rulemaking may raise issues with a groups of powerful interests.

Historically, scholars have focused on the benefit agencies receive from obtaining information from regulated parties through the notice-and-comment process. In evaluating the level of participation that an agency allows for, I am not assuming that agencies already have complete information and that public consultation is entirely uninformative to the agency. Rather, my point is that sometimes agencies do not need information from regulated parties, as the policy itself is straightforward or they already have the requisite information. At other times, agencies do need information. In these cases, the agency can get information publicly through the public comment period or, if public consultation is too risky given the political environment, can collect it through more private means (e.g., conducting research, holding off-the-record meetings with individual stakeholders).

The basic idea is that expertise is costly to acquire, and agencies must make decisions about whether to acquire it internally or externally. See Gailmard and Patty (2013); Stephenson (2008) and Stephenson (2010).
The Power of Pacing

Rules surface and come to the attention of political overseers at different points in their lifecycle. For instance, a rule is more visible and receives more attention when it is published (either at the proposed or the final stage) than when the agency is quietly working on the policy behind closed doors. Although exogenous events may occasionally bring rules to light at other points, in general, agencies control when their rules enter the spotlight. Temporal control over the moments when a rule is publicly prominent is, therefore, another arrow in the bureaucrat’s quiver. While some procedures are used to strategically raise a given principal’s monitoring costs or to persuade principals of a proposal’s merits, timing tools may allow bureaucrats to choose which principals will respond to the agency’s rule in the first place.

Table 33 lists the temporal decisions that bureaucrats make when issuing a rule. These include controlling when the rule is published and when the rule takes binding effect. Sometimes, the agency can draw attention to their rules at points when principals are more sympathetic to the agency’s goals. All else equal, an agency would prefer to make policy in a situation where its principals are favorably predisposed, than a situation where they are not. By slowing up or speeding down the process, bureaucrats may be able to choose whether the principals that review their policies are more or less receptive to their goals.

Table 3.3 about here.

64 Timing when the public comment period occurs is another tool by which bureaucrats can control the temporal dimension. However, I consider this under the consultation heading since it directly affects the level and impact of interest group participation during the consultation phase of rulemaking, rather than changing who the principals in question are.

65 I include implementation delays—where the agency delays the effective date of the rule after the rule has been finalized—as part of the timing toolkit, even though their use is heavily constrained by the courts. There are several ways such delays can occur—rules may be postponed at the start of a new administration or while ongoing litigation is settled (see §705 of the APA). However, excessive or prolonged use of implementation delays is an invitation for groups to bring suit against the agency. Courts do not typically side with agencies in these cases, making it an inherently risky strategy.
Control over timing is useful for the agency because what might be perceived as a rash or ill-conceived policy in one political environment may be regarded entirely differently in another. What this means in practice is that agencies may delay a rule to have it surface in a more advantageous political clime. At other times, agencies may speed up the process to take advantage of a favorable moment. Regardless of the climate, timing tools can be used to limit the amount of scrutiny a rule receives overall.

Delay can have considerable upside for an agency. When the political environment is disadvantageous, waiting to issue a decision allows for more attractive possibilities to develop; exogenous events may shift political priorities in ways that make the agency’s decision less salient to political overseers. More significantly, the overseers themselves may change. Sitting on a rule, a tactic that is known colloquially as “slow-rolling,” can mean that a new coalition of political overseers will be responsible for evaluating the agency’s decision when the decision finally becomes public.

Consider a hypothetical draft final rule that is particularly contentious. Perhaps OIRA signaled political opposition to the proposed rule during its review. Interest groups may also have become animated during the public comment period and gotten Congress involved. The release of the final rule is an important moment when the agency fully reveals its final policy and, if a political principal remains dissatisfied, war can be waged. However, until the final rule is released, no one outside the agency knows what the final policy will be. The agency may resolve issues in a way that a principal finds satisfactory, or it may stick with its original proposal. As long as this ambiguity remains, the agency deflects interventions by claiming to be “working on it.”

Central to the logic of delay is the reality that the time horizon of bureaucrats is typically longer than that of political overseers. Recall that agencies often take years to finalize a proposed rule. So, if an agency wants to write a rule and expects that they may

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face opposition, they can play the waiting game, idling until the environment improves when a new principal takes over. This is much more than an issue of term limits and transitions. Politics is unpredictable. For example, few would have predicted Senator Jim Jeffords’ (R-VT) 2001 decision to caucus with the Democrats, which caused a switch in party control of the Senate. Nor would many have counted on President Richard Nixon’s sudden decision to resign in the face of the Watergate scandal or Justice Antonin Scalia’s untimely death in 2016 and the vacancy it introduced on the Supreme Court. While unexpected, such events are nonetheless frequent and often reshape the political landscape in surprising ways. Unforeseen shakeups can make agencies worse off, but they can also make them better off. When the presentation situation is adverse it can make sense to hold out for a better day to come.

Conversely, if the political environment is favorable for the agency, they can issue the rule quickly in order to capitalize on the situation. This is “fast-tracking,” the opposite of slow-rolling. An oft-cited example of agency fast-tracking is the midnight rulemaking phenomenon, where, at the tail end of a presidential administration, agencies rush to complete rules that are supported by the outgoing president. While midnight rulemaking is controversial, this may only be because it is more readily observed than other types of fast-tracking, as otherwise expeditious rulemaking may be perceived as routine, or even efficient. Consistent with the idea of procedural politicking, agencies should thus use their control over the pacing of the rulemaking process to try to ensure that rules come to fruition when compatible principals are in power.

Importantly, agencies may not be able to wait out interest groups in the same way that they can slow-roll a principal. No one interest group oversees an agency; constellations of interest groups are typically involved in providing oversight. Therefore, should one group lose clout, other like-minded groups may step in to fill the void. In other words, macro

67 For an evaluation of the merits and frequency of midnight rulemaking, see Copeland (2008); O’Connell (2011); Stiglitz (2013).
68 Sometimes these groups even band together to lobby an agency; see Nelson and Yackee (2012).
changes in the power and mix of interest groups in an agency’s sphere are slow to occur and may not transpire in the amount of time that individual bureaucrats have to carry a particular rule to completion—even with bureaucrats’ extended time horizons. This implies that the relationship between regulatory pacing and political principals is not conditioned on the interest group environment as it is for other procedural politicking strategies.

### 3.4 Politics by Other Means

Procedural politicking helps to explain a puzzle posed in Chapter 2—why are regulatory vetoes so rare? Federal agencies issue thousands of proposed and final rules each year that deal with all manner of policy issues. Political principals frequently (and often publicly) find fault with the rules that agencies write. For example, in a 2013 decision on the DOT’s HOS rule, the DC Circuit court opined that the agency had made “unwise policy decisions.” Yet, despite such critiques, overseers interfere in the rulemaking process infrequently. OIRA reviews only a fraction of the rules agencies produce, and among the rules it does review, vetoes less than 10%. Congress gets involved even less frequently, and, when rules are litigated in court, judges support agencies more often than not. To wit, even while chastising the DOT for being “unwise,” the court still upheld the rule, stating that the agency “won the day not on the strengths of its rulemaking prowess, but through an artless war of attrition.”

In the legislative process, scholars have traditionally pointed to anticipatory policy concessions as the primary explanation for the dearth of vetoes. Charles Cameron (2000) shows that presidents do not need to actually issue a veto to influence the bills that Congress passes. Rather, the mere specter of a veto can shape the bills that Congress writes, a behavior that Bachrach and Baratz (1962) refer to as the “second face of power,” wherein

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70 However, issuing a veto can be useful to the president in extracting concessions in successive rounds of bargaining, a process that Cameron (2000) refers to as veto bargaining. For additional work on anticipatory power, see also Ferejohn and Shipan (1990); Howell and Pevehouse (2011); Tsebelis (2002).
power operates through anticipation and does not require visible compulsion. In other words, because the president has the power to veto, when drafting bills Congress makes policy concessions before sending the bill down Pennsylvania Avenue.

In the regulatory context, the natural extension of this model is that agencies make policy concessions so as to avoid regulatory vetoes. However, regulators are far from passive actors in this exchange and in some ways they are even advantaged. While concessions undoubtedly occur, their procedural control over the process allows agencies to be less constrained than they first appear when it comes to rulemaking. Procedural power, in turn, can enable agencies to not only avoid vetoes (and other political consequences), but can also, if used strategically, introduce a way for agencies to get more of what they want in terms of policy leeway. In other words, procedures exist as a pathway outside of policy concessions for agencies to dodge the regulatory veto and extract policy benefits.

3.5 Summary

Agencies can deploy their procedural prerogatives to sidestep political oversight, either by incrementally raising oversight costs or sapping a principal’s desire to provide oversight in the first place. This chapter has unpacked the strategic logic of procedural politicking, including the role that it plays in the rulemaking process and how it interacts with the motivations of individual bureaucrats.

Focusing on three distinct aspects of the rulemaking process—writing, consultation, and timing—I explained how and when agencies deploy particular types of procedures to their advantage. This theoretical discussion has testable empirical expectations, which, for ease of reference, are summarized in Table 34. These hypotheses are not specific to any one agency, since the incentives created by the notice-and-comment process and political oversight are expected to have a comparable effect on similarly-situated agencies.
The political environment is a key component of each hypothesis. When that environment is adverse, agencies have an incentive to engage in some level of procedural politicking. Critically, an adverse political environment does not require the extreme case where all three constitutional branches are aligned against the agency. Rather, when assessing the political environment an agency takes stock of each branch and adjusts its response accordingly. In other words, this is a question of degree and one should expect procedural responses to be calibrated to the extent of political opposition the agency faces at that point in time. However, the opposition of just one principal is sufficient to imperil a rule and invoke procedural politicking.

Over the course of the next four chapters, I explain individual procedures in greater depth and empirically evaluate these expectations. These hypotheses are not tied to one specific branch or form of oversight. Instead, I allow the empirical tests to distinguish how an agency chooses from the menu of procedural tools available. To foreshadow, the results are nuanced, suggesting that agencies may view particular procedures as more influential at fending off oversight from one overseer rather than another. Additionally, I do not provide an empirical test for each and every procedural tool discussed in this chapter. Rather, I assess a representative set of tools that are systematically observable across agencies and rules. The goal is to substantiate the empirical reality of procedural politicking rather than unpack its every nuance.

I begin in the next chapter with an investigation of writing as a tool of procedural politicking. I also introduce the *Regulatory Proposals Dataset*, a trove of approximately 11,000 agency proposed rules that informs the analyses throughout the remainder of the book. I rely on the texts from agency proposed rules to explore the *Strategic Writing Hypothesis* and the *Conditional Writing Hypothesis*. Using text analysis tools, I show that agencies do indeed use composition to insulate rules from political risk by strategically manipulating the accessibil-
ity of their rules. In Chapter 5, I continue this investigation with a careful look at the ways that agencies engage with the public when escorting a rule through notice-and-comment. Focusing in on the public comment period, I consider whether the evidence supports both the Limited Consultation Hypothesis and the Expanded Consultation Hypothesis.

In Chapter 6, I give close consideration to one timing tactic: the release of an agency’s final rule. I show that agencies strategically slow-roll and fast-track rules as a way of evading political oversight. This analysis provides strong evidence in support of the Strategic Timing Hypothesis. And in Chapter 7, I study one rulemaking at the FDA as a way of gauging how these procedural tools work in the context of a real-world case. Strictly speaking, this chapter does not test the hypotheses developed here, but it does allow for a nuanced consideration of many strategies in the case of one important rule. It also allows me to draw a connection between procedural politicking strategies and policy outcomes.

All told, these empirical explorations provide a rich and nuanced understanding of how agencies strategically manage the procedural aspects of rulemaking. Importantly, the argument does not suggest that agencies never make policy concessions to avoid having rules overturned. Rather, taken together the preponderance of evidence suggest that concessions are not the only avenue to success in the rulemaking process. Procedural means offer a way for entrepreneurial bureaucrats to get what they want.
Figure 31: The Influence of Rulemaking Choices on an Agency’s Agenda and Reputation
Table 31: The Writing Toolkit

<table>
<thead>
<tr>
<th>Tool</th>
<th>Description</th>
<th>Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy Framing</td>
<td>Agency frames policy in ways that avoid certain known political or policy landmines</td>
<td>proposed rule</td>
</tr>
<tr>
<td>Analytical Assumptions</td>
<td>Agency generates cost-benefit analysis (or other analytical requirement) relying on assumptions that favor the agency’s preferred policy</td>
<td>proposed rule</td>
</tr>
<tr>
<td>Text Accessibility</td>
<td>Agency drafts proposed rule in a way that is inaccessible to non-experts or raises the costs of engagement</td>
<td>proposed rule</td>
</tr>
</tbody>
</table>

*Notes: While these tools are available at both the proposed and final rule stage, they are most formative early on at the proposed rule stage.*
<table>
<thead>
<tr>
<th>Tool</th>
<th>Description</th>
<th>Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advance notice of proposed rulemaking</td>
<td>Agency chooses whether to publish an AN-PRM or not</td>
<td>pre-rule</td>
</tr>
<tr>
<td>Regulatory negotiation (“Reg neg”)</td>
<td>Agency decides whether to develop the proposed rule in concert with a negotiation committee comprised of stakeholder entities</td>
<td>pre-rule</td>
</tr>
<tr>
<td>Advisory committee meetings</td>
<td>Agency consults with its advisory committee in the process of writing a rule</td>
<td>pre-rule, proposed rule</td>
</tr>
<tr>
<td>Length of comment period</td>
<td>Agency chooses how many days to allow the public to comment</td>
<td>proposed rule</td>
</tr>
<tr>
<td>Timing of comment period</td>
<td>Agency chooses when public comment period will occur</td>
<td>proposed rule</td>
</tr>
<tr>
<td>Outreach forum</td>
<td>Agency holds outreach forums, including public hearings, focus groups, listening sessions, etc.</td>
<td>public comment period</td>
</tr>
<tr>
<td>Interim final rule</td>
<td>With “good cause,” the agency waives the notice stage of the process, and solicits comments on a final rule that takes effect immediately</td>
<td>final rule</td>
</tr>
</tbody>
</table>
Table 33: The Timing Toolkit

<table>
<thead>
<tr>
<th>Tool</th>
<th>Description</th>
<th>Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publication timing</td>
<td>Agency chooses when the rule is published</td>
<td>proposed rule, final rule</td>
</tr>
<tr>
<td>Effective date</td>
<td>Agency decides when the final rule should take legal effect</td>
<td>final rule</td>
</tr>
<tr>
<td>Implementation delay</td>
<td>Agency postpones the effective date of the final rule after publication</td>
<td>final rule</td>
</tr>
</tbody>
</table>
Table 34: Summary of Procedural Politicking Hypotheses

**Strategic Writing Hypothesis**
Agencies will use writing tactics to raise oversight costs when the political environment is adverse.

**Conditional Writing Hypothesis**
Agencies will use writing tactics to raise oversight costs when the political environment is adverse and when relevant interest groups are predisposed against the agency.

**Expanded Consultation Hypothesis**
Agencies will expand participation opportunities when political principals are not aligned with the agency and when relevant interest groups are predisposed in favor of the agency.

**Limited Consultation Hypothesis**
Agencies will limit participation opportunities when political principals are not aligned with the agency and when relevant interest groups are predisposed against the agency.

**Strategic Timing Hypothesis**
Agencies will use timing tools to release rulemaking decisions in more favorable political environments.
Chapter 6
Timing as a Tool

“But a bureaucracy, above all, endures. If defeated today, it lies in wait to win tomorrow.”

— Donald Rumsfeld (2013, 183)
Former Secretary of Defense

In modern construction, cranes and derricks do, quite literally, much of the heavy lifting. The Occupational Safety and Health Administration (OSHA), the federal agency responsible for regulating these machines, set new regulatory standards for their operation in 2010, but prior to that the last set of standards was issued in 1971. In the intervening 39 years between the two standards, technologies changed dramatically, making the old standards obsolete long before OSHA got around to updating them.¹ There was considerable human cost to OSHA’s inaction, as crane and derrick accidents piled up at construction sites across the country at alarming rates.² According to one interest group’s estimate “every year that goes by without the new rule in place another 53 people die and 155 are injured in accidents that could and should have been prevented” (O’Neill et al., 2009, 15).³

There are two stories of why OSHA took nigh four decades to update its regulations.⁴

¹For example, the 1971 rules were developed around crawler cranes; much of contemporary crane usage involves hydraulic cranes and uses computers, technologies that were nascent or nonexistent in 1971. For instance, the 2010 regulations banned the use of cell phones (which did not exist in 1971) by on-duty crane operators.
²Levine (2008).
³Ibid.
⁴OSHA was not working on the cranes and derricks regulations during this entire period. In 1998, the agency met with its expert advisory committee and established a working group to recommend changes to the regulatory standards for cranes and derricks (see Advisory Committee on Construction Safety and Health, 1998). Four years later in 2002, the agency convened a regulatory negotiation committee to develop
The first story is that regulating cranes and derricks is a highly complex and technical business. Figuring out the details of a policy that would apply to approximately 267,000 construction, crane rental, and crane certification establishments and affect about 4.8 million workers simply took the agency a long time.

The second story is a more political tale. OSHA seriously began working on the cranes and derricks rule in 1998, late in the Clinton administration. The agency initiated the new rulemaking in response to pressure from public safety advocates and from the construction industry itself, the latter wanting more stringent standards that would shelter them from litigation and would apply equally to all competitors. According to one public interest group, “if ever there were a rule that seemingly should have breezed to adoption, this was it” (Lincoln and Mouzoon, 2011, 3). Yet, there was little political support within the George W. Bush administration to continue this type of reform at OSHA. In fact, OSHA did not finalize the rule until 2010, when a new and more sympathetic Democratic administration led by President Barack Obama had taken office. Obama-era OSHA Administrator David Michaels admitted that there was a political component to the agency’s foot-dragging; “frankly, there were a number of years when standard setting was not given a high priority by the other administration... When [Obama’s Labor Secretary Hilda] Solis came in with new leadership team, we were able to then move quickly” (Walter, 2010). In other words, OSHA waited until a more supportive presidential administration was in place before proceeding with the final rule.

In this chapter, I build on this second, political explanation and investigate the extent to which regulatory timing is a strategic response to the political environment. It is not uncommon for rules to take a long time—from many years to even decades—to complete. While some rules linger indefinitely, others are urgently rushed through the process. Indeed,

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5 Another participant noted that both union and industry groups, “agreed that the current regulations [were] archaic and [failed] to address the daily hazards faced by construction workers” (Podziba, 2012).
while the cranes and derricks rule was languishing at OSHA during the Bush years, OSHA finalized dozens of rules including a rule that would change the method for evaluating workers’ risk from on-the-job chemical exposure. That proposal was perceived to make it more difficult to issue future rules regulating worker exposure and was supported by the Bush administration. In the pages that follow, I argue that the considerations about the pace of rulemaking correspond to an agency’s strategic calculations about what political principals are willing to tolerate and what the response might be to issuing rules that a principal does not favor. That is, I consider how strategic timing is used as a procedural politicking tool.

6.1 Connecting to Theory

As the opening quote from Washington insider and former Secretary of Defense Donald Rumsfeld suggests, agencies preside over the temporal aspects of policymaking—and timing can therefore be leveraged to ensure the ultimate success of a rulemaking project. Speeding up or slowing down rules to capitalize on the political climate are strategies that are so well-known inside the Washington Beltway that they have names—respectively, “fast-tracking” and “slow-rolling.” Fast-tracking is the idea that an agency expedites a rule to have it come to fruition in a favorable political environment, while slow-rolling is the idea that an agency might draw out the rulemaking process in order to avoid a particularly unfavorable political environment.

As the cranes and derricks rule demonstrates, rules can take a long time to complete. Delays like this are frustrating for the regulated community, as they create uncertainty about the future and hinder effective long-term planning. Additionally, since regulations are intended to benefit society, there are presumably losses associated with putting them off.


Under E.O. 12,866, agencies should only “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Although there is flexibility in how this is implemented, the idea that regulation should result in net benefits is a core governing principle of the U.S. regulatory system.
While rules that are fast-tracked often fly by without notice, rules that stagnate tend to attract the attention of regulatory observers. Many scholars attribute such delays to the onerousness of the rulemaking process. In addition to the basic requirement for notice-and-comment, agencies often have to conduct cost-benefit analysis and sundry impact analyses (e.g., effects on small business, tribes, paperwork, the environment, civil justice, or children). The number of such requirements has increased over time, as political principals layer new requirements on top of old in an attempt to continue to exert influence over agencies. As a result of the growth of these requirements and an increase in the number of procedural steps, some scholars argue that the process has become “ossified.”\(^9\) In this view, agencies are so laden down by all these requirements that they cannot regulate quickly—or perhaps at all. Judicial review also contributes to ossification; since courts strike down agency rules with some regularity, the expected return on completing a new regulation is lower \textit{ex ante}.\(^10\) This creates an incentive for agencies to move deliberately with an eye toward crossing all the “i’s” and dotting all the “t’s,” or to avoid rulemaking altogether. For instance, Mashaw and Harfst (1986) argue that legal culture and an activist court led the National Highway Transportation Safety Administration (NHTSA) to abandon rulemaking in favor of case adjudication in the early 1970s. These concerns have intensified over the years;\(^11\) writing in 1991, McGarity noted that “it is much harder for an agency to promulgate a rule now than it was twenty years ago.”\(^12\)

Without a doubt, these factors slow the pace of rulemaking, but the object of interest here is the more political part of the story. “Midnight rulemaking” at the end of a presidential administration clearly demonstrates that agencies are capable of moving quickly when

\(^10\)Jordan III (1999); Livermore (2007); Pierce (1995).
\(^12\)The ossification theory has its detractors, however. In a series of articles Yackee and Yackee (2010, 2011) find little empirical evidence that the volume or the pace of rules has meaningfully slowed with the imposition of more procedural requirements; ultimately, they conclude that the ossification argument is over-egged. See also Raso (2010). And while Livermore (2007) contends that ossification exists, he suggests that it stems from a broader status quo bias, rather than from procedural impediments.
political circumstances warrant it. Moreover, there is substantial variation in timing both within and between bureaus, but the ossification thesis only explains the deceleration of the process. The reality is much more dynamic. The choice to fast-track certain rules and to slow-roll others can affect a rule’s, and ultimately an agency’s, fortunes. It is a political choice.

This is the logic underlying the Strategic Timing Hypothesis, which posits that agencies will use their procedural control over timing to make sure that their rules are announced in a favorable political environment. By either rushing to make a policy public when the current political configuration is supportive of the agency or slowing down and waiting in hopes that the political situation will improve, the agency can bolster the prospects of a controversial rule. Of course, agency bureaucrats cannot choose who sits in the Oval Office, on Capitol Hill, or on the bench, but they can benefit from the natural transitions that occur in the political system, namely electoral turnover and changes in the courts. Critically, the Strategic Timing Hypothesis does not hinge on the disposition of interest groups, as the mechanisms described in the previous chapters did. Agencies cannot “wait out” interest groups in the same way that they can slow-roll a principal. Interest group oversight is provided by networks of groups with long time horizons, meaning that oversight is not contingent on one actor and shifts in interest group power are slow to occur.

Although agencies make many timing decisions—such as when to publish the proposed rule, when the final rule should take effect, and whether to delay the implementation of the effective date—in this chapter I focus on when an agency finishes working on a final rule and the agency’s ultimate policy choice is shared publicly. Until a rule reaches this point, no one outside the agency knows how an agency will address the issues (if any) raised during the public comment period. That is, by sitting on a final rule, an agency is able to effectively

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13 However, bureaucrats can and do vote in electoral blocs that influence the selection of political principals; see Chen and Johnson (2014) and Moe (2006).
14 As Harris and Milkis (1989) explain, both agencies and their attendant interest groups often arise as the result of social movements. The implication for interest groups is that their influence is not tied to any one actor, but rather a network of actors.
able to evade criticisms. From the outside the agency appears to be working out the kinks of a policy proposal, meaning that things are still prospective and potential critics must wait and see how any outstanding issues are resolved. When the final rule is actually published, only then are its contents known and critics can begin to pick it apart. If some parties are particularly opposed to the rule and the agency chooses not to accommodate them in the final rule, this is the point at which full-on war can be waged.

6.2 Strategically Timing Final Rules

In order to strategically time rules, agencies must have information about the predispositions of political principals. While they cannot perfectly predict, agencies can anticipate when a political principal might be more, or less, likely to overturn a rule (or punish the agency in some other way). At the very least, they are able to discern when the present moment is so adverse as to make delaying for an uncertain future preferable. However, given that the forms of oversight are exercised differently among the branches, the types of information available to agencies about principals’ preferences also varies.

With respect to the president, rulemaking oversight is direct and explicit. By the time the agency is gearing up to issue a final rule, the agency has a good sense about where OIRA stands on it. At the proposed rule stage, OIRA gave the agency feedback on the rule: either by declining to review the rule altogether, or choosing to review it and either waving it through or pushing back on the agency. This information provides the agency with insight into OIRA’s position on the rule, and if that stance is less than favorable, then there should be no rush to send the rule back to the same hostile reviewers.

With respect to Congress, agencies have less specific information about key actors’ positions on individual rules since legislative oversight is driven by fire alarms rather than consistent, institutionalized interaction. However, while less precise than presidential oversight, partisan cues are a useful heuristic for how rules are likely to be received. While

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agencies themselves are not partisan, scholars agree that some agencies have a more liberal
mission while others have a more conservative one. Accordingly, agencies with more liberal
missions might proceed with greater caution when Republicans are relatively strong and vice
versa.

A similar logic regarding strategic timing applies to the courts. In some periods, based in part on the extent to which monitoring interest groups are litigious, the courts closely scrutinize agency behavior. At other times the courts are sleeping watchdogs. Being sued is a setback for an agency; they are rarely commended for their good behavior, but can be heavily penalized.\(^{15}\) Even if the agency has a strong case, litigation is costly and watchful courts may incentivize delay. As Jones and Taylor (1995, 333) note, “the mere threat of [lawsuits], due to their concomitant delays and increased workload and costs, may influence the [agency]’s decisionmaking before decisions are even made.”

When the agency is repeatedly being hauled into the courtroom, they may move slower until the court’s attentiveness diminishes, or groups bring suits less frequently. With a reduced pace, the agency can digest what is happening in the courts, and pay greater attention to specific issues or new doctrines that may be emerging. On the other hand, if the courts are quiet, the agency can speed up the rulemaking process to capitalize on the current repose.

These expectations about each of the branches follow from the Strategic Timing Hypothesis; as the agency’s rapport with a given principal diminishes the agency is more likely to move slower on the rule. I now look for empirical evidence to evaluate this expectation.

\(^{15}\)While agencies have a high affirmance rate in the courts, they by no means win every case (e.g., Mashaw and Harfst, 1986).
6.3 Measuring Timing Effects

Using the data from the *Regulatory Proposals Dataset*, it is possible to evaluate how long it takes agencies to finalize rules—from the moment that the proposed rule is published to when the draft final rule leaves the agency. The analyses that follow explore the political determinants of the time it takes an agency (in months) to finalize a proposed rule. A key prediction of the ossification thesis is that the average time to issue a rule should be quite lengthy, a conjecture which—in aggregate—is borne out empirically.\(^{16}\) As shown in Figure 6.1 the median time for issuing a final rule is about one year (median=11.0 months, s.d.=15.5 months).

![Figure 6.1 about here.]

There is, however, considerable variation around the average time to finalization both within and across agencies, and this is where the political story comes in. For instance, even though they are both bureaus within the USDA, the Agricultural Marketing Service finalizes rules, on average in about nine months, while the Forest Service typically takes slightly under two years. Some rules take just over a month to move from the proposed to the final stage. Others take much longer to finalize. In the period under study, the longest time to finalization came from a Food and Drug Administration rule that set good manufacturing practices for infant formula. It was proposed in 1996, and finalized in 2014 (205 months, or approximately 17 years later). While this is an outlier, nearly 10% of the rules in the *Regulatory Proposals Dataset* took longer than three years to move from the proposed to the final stage. In other words, it is not out of the ordinary for an agency to have a rule in the queue for a long period of time—long enough to outlive congressional sessions and presidential administrations.

\(^{16}\)This should not, however, be taken as "proof" that ossification exists, as a long completion time could arise from a variety of processes.

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Existing theory, be it the ossification thesis or arguments based on agency design features, do not speak to this variation. Certainly, the possibility that pace may result from internal factors—and perhaps intentional foot-dragging or acceleration by the agency—is widely overlooked. Put differently, much of the literature has concentrated on the lengthy average time it takes to finalize a rule, but few have considered the variation around that mean—and specifically the idea that the variation might be strategic.\(^\text{17}\)

In assembling a regression model to test the *Strategic Timing Hypothesis*, I rely on the same covariates introduced in the previous chapter with one exception: a new measure of the level of presidential opposition to a particular rule that takes into account the rule’s history at the proposal stage. As noted in previous chapters, the president enjoys a privileged position with respect to agency rulemaking; through OIRA the president’s agents have the opportunity to review agency draft rules before they enter the public domain. I leverage this prior review and measure whether OIRA chose to review the proposed rule and, if so, how long that review lasted. Recent work suggests that OIRA reviews tend to last longer when OIRA and the agency disagree about the substance of the rule.\(^\text{18}\) The result is a more fine-grained measure of presidential opposition that is only available for analyses at the final rule stage.

Technically, OIRA has 90 days to review an agency rule, but this standard is often not followed in practice. I rely on this variation to proxy for OIRA support or opposition

\(^{17}\)The idea that bureaucrats may consider the temporal dimension is not new, however; scholars have established the judicious use of timing by agencies in other contexts. For instance, Muehlenbachs, Sinha and Sinha (2011) show how the Environmental Protection Agency is strategic when making announcements to the press. They find that the agency tends to announce environmental awards earlier in the week, whereas enforcement actions and regulatory changes tend to be announced on Fridays and before holidays. They argue that this is an explicit strategy on the part of the agency to bury adverse news in the weekend and holiday news cycles, when the items are less likely to receive public attention and scrutiny. In a similar vein, Gersen and O’Connell (2009) consider the timing of the publication of agency final rules. They find significant effects for the publication of significant final rules during congressional recesses, but less so for Friday publication of rules. And, of course, strategic timing undoubtedly affects policymakers’ decisions in a number of other venues, from position-taking in Congress (Box-Steppensmeier, Arnold and Zorn, 1997), to judges’ decisions about when to retire (Spriggs and Wahlbeck, 1995), to when local bureaucrats schedule elections (Meredith, 2009).

\(^{18}\)See Bolton, Potter and Thrower (2016) and Heinzerling (2014).
to a particular rule. The variable *OIRA Review Time* counts every day that the proposed rule was under review at OIRA—this ranges from 0 days (when OIRA declined to review the proposed rule altogether) to more than 700 days. Because of the skewed nature of the review length, I add one day and take the natural log of the number of days. Importantly, this review occurs *before* the clock starts, so it is not included in the “clock time” for the analysis.\(^{19}\)

### 6.4 Evaluating Strategic Timing

Since the object of interest in the analysis is the time to finalization for agency proposed rules, I rely on event history models. This approach is frequently used in medical studies to model how long a patient survives given some set of factors. The model estimates the “hazard rate”—usually the likelihood that the patient will die—at a particular point in time given a set of covariates about the patient that may be fixed across time (e.g., race) or time-varying (e.g., weight). While “failure" in the prototypical medical event history model is the patient’s death, in the present case failure is the finalization of the proposed rule. Specifically, the hazard rate in this case indicates the likelihood that the agency will finalize a proposed rule at time \(t\). The unit of analysis is a rule-month, where each month that a rule remains unfinalized is an observation.

Event history models are particularly useful for this analysis because they can incorporate time-varying indicators.\(^{20}\) Many models include one observation per case, typically

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\(^{19}\)In Chapters 4 and 5, I relied on a more blunt measure of ideological agreement between the president and the agency: *Unaligned President*. While *OIRA Review Time* is a more refined measure of the level of disagreement between the agency and the president since it is focused on the *rule level*, it would not have been appropriate to employ in the tests in those chapters, since OIRA review may directly affect an agency’s choices about procedures relating to the proposed rule (i.e., writing and consultation). In particular, OIRA review may be correlated in systematic ways with rule readability in particular that are not related to the political argument I make. However, the results I present in this chapter are robust to using *Unaligned President* in lieu of *OIRA Review Time*.

\(^{20}\)Additionally, the event history model takes into account proposed rules that were censored, meaning that they were started during the study’s timeframe but remained unfinalized at the end of the period of observation.
measured at the initiation of a case and held constant for the duration of that case. Here the question of substantive interest is how agencies respond to changes in the political environment, meaning that I rely on several of covariates to change during the course of each case. Table 6.1 lists the model variables, their expected effect on the hazard of finalization, and whether they are time-varying or time invariant.

аста 6.1 about here.

An important consideration when conducting an event history analysis of agency rule production is determining when the clock should start and when it should stop (i.e., when a rule should be considered to be proposed and when it should be considered finalized). While initially it may seem that the clock should start when the agency publishes a proposed rule in the *Federal Register* and stop when the final rule is published in the *Federal Register*, this approach ignores the role of OIRA review at the final rule stage. OIRA reviews a subset of what it deems to be the most important rules at the final rule stage and declines review for the remaining rules. The duration of this second OIRA review varies from just a few days to several months or longer.\(^1\) Since the duration of this review is outside of the agency’s control, I consider submission to OIRA to be the end of the agency’s strategic timing efforts (for rules that OIRA reviews). In other words, I start the clock with the publication of the proposed rule and stop it when the final rule leaves the agency’s control, either because OIRA selected it for review or, for rules that OIRA declined to review, because it was sent to the *Federal Register* for publication.\(^2\)

Table 6.A1 in the Appendix to this chapter presents the results of the event history analyses.\(^3\) Table entries are Cox proportional hazard coefficients, where a positive coefficient

\(^{1}\)Bolton, Potter and Thrower (2016).

\(^{2}\)Ideally, I would start the clock when the agency first put pen to paper to start working on a rule. Unfortunately, as I explained in Chapter 2, this is not systematically recorded across agencies and rules. To the extent that the current setup misses these early stages of development, it biases against my findings, since agencies may delay at the early stages of the process rather than the later stages when there is more public scrutiny.

\(^{3}\)Readers may note that there is a slightly smaller sample size reported in Table 6.A1 than in the models
means that the hazard rate is increasing and the rule’s expected duration is decreasing (i.e., the rule will be published more quickly). A negative coefficient implies the converse: a decreasing hazard rate and an increase in expected duration (i.e., it will take longer for agency to finalize the rule). The models are stratified on the bureau, which allows the baseline hazard to vary for each bureau.  

The models consistently support the expectation that agencies avoid issuing rules when the political climate is less favorable. To understand the substantive magnitude of these effects, I plot the hazard ratio graphically in Figure 62. The dots in this figure indicate whether the key explanatory variables increase or decrease the probability of a rule being finalized in a given month. The baseline for comparison is 1; a hazard ratio of 2 indicates that a one-unit increase in the independent variable will make the rule two times more likely to be finalized in a month. A ratio of .5 suggests that a rule is half as likely to be finalized. As the probability of being finalized increases (decreases), rules are expected to proceed through the process more quickly (slowly).

[Figure 6.2 about here.]

The expectation with respect to the president is that if there was conflict between the agency and the president during OIRA’s review of the proposed rule, progress toward finalizing the rule will be slower. The negative and statistically significant coefficient on the OIRA Review Time variable supports this proposition. While the magnitude of the hazard ratio seems small, this is an artifact of the logged variable. An unlogged specification (not

24From Chapter 5. This discrepancy owes to rules that were transferred to or merged with another RIN after the proposed rule stage. I drop these from the analysis here since it is not clear whether the “same” rule is being finalized in these cases.

25In essence, stratification allows the researcher to control for unobserved bureau-specific factors. This is akin to including bureau fixed effects, although it does not produce bureau-level coefficients. For all models, robust standard errors clustered on the rule are included in parentheses. I also report the results of global chi-square tests of the proportional hazards assumption for each Cox model and am able to reject the null hypothesis of no violation.

25More specifically, the points represent the estimated hazard ratio for each coefficient and the horizontal lines denote 95% confidence intervals.
shown) suggests this effect is substantively large: for every additional day of OIRA review, the risk of rule finalization in a given month falls by about 0.3%, meaning that an additional 20 days of OIRA review is associated with a 6% reduction in the hazard of finalization in a particular month.

Agencies are also much slower to finalize rules when congressional opposition is relatively strong. Anticipation of a negative response from Congress slows the regulatory process; in a given month having strong congressional opposition (as compared to weak opposition) decreases the risk of finalization by 19%. The expectation regarding the courts is also borne out. The coefficient for the Court Cases variable is negative, as expected; while the hazard ratio appears small (HR = 0.98), this again should be considered in light of the unit. For every additional case that the agency has in the appellate court that month, the predicted incidence of rule finalization decreases by 1.2%.

As expected, the model indicates that there is no statistically significant relationship between Group Opposition and the timing of rule finalization. Impact and Complexity are both associated with slower completion times. In a given month, the difference between the rule with the highest impact is associated with more than a one-third reduction in the risk of finalization; the most complex rule is also associated with a roughly one-third lower risk compared to the least complex rule. These effects make sense since rules with a greater impact may require more consideration to complete and rules that are more complex may require greater technical scrutiny, both of which require additional time.

The analysis also indicates that rulemaking deadlines are effective at prompting agencies to move more quickly. Compared to rules with no deadlines, a judicial deadline for issuing a final rule increases the hazard of issuing a final rule 22%, while a statutory deadline has about half that effect. These findings bolster previous work showing that deadlines influence

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26 Because these variables are scaled between 0 and 1, the hazard ratios can be interpreted as the difference in the effect moving from the minimum to the maximum value.

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which projects agencies consider to be priorities.\footnote{For example, see Gersen and O’Connell (2008); MacDonald and McGrath (2016).} I reserve discussion of the effects of the capacity variables for a more in-depth exploration later in this chapter.

An agency’s pacing strategy is, therefore, largely premised upon its relationship with each of its political overseers. As explained in Chapter 3, I do not expect this relationship to be predicated upon the agency’s relationship with its interest group constituents (as it is with writing and consultation tools). Agencies cannot cool their heels with interest groups in the same way that they can with a principal. Interest group oversight is provided by networks of interest groups, meaning that shifts in interest group oversight are slow to occur. For instance, many groups such as the Sierra Club, the Natural Resources Defense Council, Earthjustice, and the National Wildlife Federation provide oversight of the Environmental Protection Agency (EPA). Should one group be unable to provide oversight, other groups could step up and carry the mantle. This logic applies to other context such as pharmaceutical companies and the Food and Drug Administration (FDA) and both employee and employer representatives and OSHA. Nevertheless, Figure 63 explores the conditional relationship between Group Opposition and the relative standing of each political principal. It shows the difference in pacing strategy between having an opposed principal and a supportive or opposed interest group constituency (see the Conditional Model in Table 6.A1 in Table for the associated model coefficients.)

[Figure 6.3 about here.]

What emerges from the figure is that when compared to having a supportive interest group constituency, having an opposed network of interest groups may compel agencies to speed up the rulemaking process. This relationship is apparent with respect to all three branches, although only substantively meaningful for the congressional variable. This congressional opposition effect suggests that agencies may be particularly concerned about groups activating congressional fire alarms. In particular, agencies may not want to cede...
additional time to opposed interest groups when that time that could be used to build a campaign against the agency’s rule. Overall, the results shown in these two models indicate that the disposition of principals vis-à-vis the agency critically influences the agency’s decision about how quickly or slowly to release the final rule.

6.5 Investigating the Mechanism Behind Delay

Evidence of strategic behavior is notoriously elusive; what appears to be a smoking gun upon first inspection, may turn out to be nothing more than smoke upon more careful consideration. With respect to regulatory pacing, it is not always easy to tell whether an agency is taking a long time because they are slow-rolling the current political regime or whether other more innocuous factors such as an authentic desire for information or consensus are producing delay. (The same can be said of rules that advance quickly through the process.)

Of course, this same ambiguity that frustrates researchers is also what allows procedural politicking to persist in the face of a naturally skeptical overseer. While my argument is that an agency’s strategic calculations affect rule pacing, other pathways could plausibly lead to the same observed outcome. If I can safely “rule out” these alternate explanations, then confidence in the strategic calculations argument should increase accordingly. In this section, I do just this, looking for ways to both confirm the proposed mechanism and dispense with competing explanations.

One way to confirm that delay is strategic is to look at what happens when there are changes in OIRA leadership. The politically-appointed OIRA Administrator is replaced with with some frequency within presidential administrations; Presidents Clinton, Bush, and Obama each had at least two OIRA administrators, with turnover occurring at irregular intervals. Each new administrator brings a fresh perspective to regulatory review. This holds
even within the same presidential administration. For instance, the two OIRA administrators who served under President Obama emphasized different issues and exercised distinct leadership styles. Cass Sunstein, who held the post first, was a renowned law professor, who had taught alongside Obama at the University of Chicago. According to his own account of his time as OIRA Administrator, Sunstein focused on behavioral economics and “nudges” (Sunstein, 2013). Sunstein was followed by Howard Shelanski, a lawyer and PhD economist, who came to the post after serving as the Director of the Federal Trade Commission’s Bureau of Economics. Shelanski emphasized timely review of regulations and regulatory lookbacks.

This pattern of different emphases by the OIRA Administrator is not confined to the Obama administration. An examination of OIRA review times from the Reagan administration to Obama administration also supports the notion that each OIRA Administrator brings their own “style” to review. Review of both proposed and final rules was quickest under the leadership of Chris DeMuth (Reagan appointee, 1981-1984) and slowest under James Miller (also a Reagan appointee, 1981). Following the changes to review instituted by E.O. 12866, review was quickest under Sally Katzen (Clinton appointee, 1993-1998), and slowest under John Spotila (also a Clinton appointee, 1999-2000). It is telling that the bookends of the variation in review time occurred within presidential administrations.

If agencies are indeed strategically timing rules, they should respond to these changes in OIRA leadership, since a new administrator may prioritize different issues in review, or prioritize different agencies. This, in turn, can enhance or detract from a rule’s prospects for successful finalization. Returning to the Obama appointees, a rule that was disfavored by Sunstein’s OIRA at the proposed rule stage, might have received different treatment at the

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28 Another way to think about this is to note that no OIRA administrator perfectly matches the president’s own preferences for regulatory review. The Administrator position is highly specialized and very few individuals are qualified, willing, and Senate-confirmable. This means that presidents do not have an unlimited pool of individuals from which to select and there is inevitably some amount of preference mismatch.

29 Media accounts often highlighted the differences in the two leaders’ background, and how these differences presumably translated into divergent regulatory preferences. See NYU Law (2013); Weatherford (2013); Yehle and Bravender (2014).

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final rule stage if Shelanski was at the helm, given his different leadership priorities. It follows then that having a new OIRA Administrator may wipe the slate clean, Put differently, for rules that were the source of tension between the agency and OIRA at the proposed rule stage, agencies should speed up the process when there is a new (proverbial) sheriff in town. However, the agency should slow down if they face the same leadership (again, presuming an adversarial review at the proposed rule stage), since there should be no rush to return for another hostile round of review.

To test this supposition, I create a time-varying indicator variable, Same Administrator, that takes a value of one during months when the same OIRA Administrator that reviewed the proposed rule is in charge, and zero after a new Administrator takes office. I then interact Same Administrator with OIRA Review Time. The expectation is that a new Administrator will lead to a break from whatever the prior reviewing regime offered (either a positive or negative review in expectation), while no change in the OIRA leadership suggests that the agency should anticipate the same treatment it received at the proposed rule stage to occur again.

I present the results of this estimation graphically in Figure 6.4, which plots the survival probabilities for a rule under three scenarios of conflict with OIRA: a low (10 days), medium (78 days), and high (180 days) level of OIRA review, for the same administrator that reviewed the proposed rule and for a new OIRA administrator.

Looking at Figure 6.4(a), the survival probability (i.e., the risk of a rule not being finalized) is consistently higher for a rule when a new OIRA Administrator takes office.  

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30See the OIRA Model in Table 6.A2 in the Appendix to this chapter for the model estimates from this analysis. The coefficient on the interaction term is negative and statistically significant suggesting that having a new OIRA administrator leads to a change in regulatory pace. Some of this effect undoubtedly owes to new presidential administrations. However, the inclusion of presidential administration fixed effects in the model suggests that much of this boost is attributable to having a new OIRA Administrator.
An OIRA review of 10 days is quite short—considerably less than the 90 days allotted in the governing order (E.O. 12,866)—suggesting that OIRA gave the proposed rule preferable treatment with an expeditious review. Figure 64(a) shows that agencies are much more likely to try to lock in that favorable treatment when facing the same OIRA Administrator. The second panel of Figure 64(b) shows the mean OIRA review time (78 days). Here, there is no appreciable difference between having an administrator change. The agency is no more—and no less—likely to finalize a rule given a change in OIRA leadership if it received the “standard treatment” at the proposed rule stage. Finally turning to the third panel, Figure 64(c), shows the results for a rule that received an above average review time of 180 days at the proposed rule stage. The opposite pattern from the first panel emerges; when a new Administrator is in place the agency is much more likely to finalize the rule. The probability of surviving is higher for these high conflict rules when the same Administrator that reviewed the proposed rule is still in office. Put differently, agencies use the information they have about OIRA leadership and its position toward a specific rule to inform pacing strategies.

These figures, which offer a more refined test of the theory, reinforce that strategic delay is the root driver of the findings presented earlier. More specifically, the graphs show that the preferences of OIRA at the proposed rule stage—and whether they hold for the current regime—affect when an agency chooses to finalize a rule. If the agency expects favorable treatment from the current regime, they fast-track the rule (Figure 64(a)), but if they expect unfavorable treatment they are more likely to slow-roll (Figure 64(c)).

Despite this affirmation, it is important to rule out other rival mechanisms that might also explain these observations about regulatory pacing. One possibility is that delay in the rulemaking process could be “sincere delay,” meaning that agencies work harder to get the policy right when they face an opposed principal. So, rather than delay serving as an at-

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31A related possibility is that the observed delay could result from agencies using the additional time to learn about the preferences of political principals and adjust the rule accordingly. While empirically distinguishing between these possibilities is not clear-cut, the idea that agencies are consistently changing proposed rules to suit principals is out of step with a key empirical finding in the literature. Numerous studies find that agencies make very few changes as a rule moves from the proposed to the final stage.
tempt to sidestep political oversight, sincere delay posits that when agencies are constrained by the political environment, they respond by working harder to please principals (e.g., by improving analyses). To distinguish between strategic and sincere delay, I interact *Complexity* with each of the three key political variables. If agencies are sincerely delaying, I anticipate that under political adversity agencies should take longer—and be less likely to finalize—the rules that are the most difficult. Complex policies require more effort and if agencies are sincerely delaying they should redouble efforts to “get hard policies right” when they expect serious scrutiny of their work. Put differently, if delay is primarily about improving quality, then complex rules should be the most delayed since improving their quality will take the most effort.

Although I reserve the results for the Appendix to this chapter (see the second model in Table 6.A2), the short version is that there is no support for the “sincere delay” mechanism.\(^\text{32}\) Of course, empirically detangling strategic delay from sincere delay is not perfectly straightforward, and while these results are not dispositive, they suggest that sincere delay is not systematically occurring across the sample of rules. This does not imply that quality improvements \textit{never} occur, rather that they are not the primary driver of the observed variation in timing.

Resource shortages could also plausibly drive delays in rulemaking. Shortages can affect an agency’s capacity and, in turn, its performance.\(^\text{33}\) This is consistent with what is known as a “resource-based” view of organizational management.\(^\text{34}\) The idea is that having certain resources can give a firm, or in this case an agency, a competitive edge in terms

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of performance. Likewise, resource deficits are understood to have a deleterious effect on performance. Since resource shortages are par for the course in bureaucratic agencies—agencies rarely have enough time, money, or personnel to accomplish all of their objectives—this could potentially explain many delays in the regulatory process.

With regard to regulatory pacing, there are two avenues by which resource shortages might lead to an outcome where agencies adjust the pace of rulemaking in response to the political environment. First, political principals control an agency’s resources, including authority over budget, personnel, and infrastructure decisions. Given this power, principals may reduce agency resources precisely when they are at ideological odds with an agency. In this instance, resource deficits—and not the agency’s strategic calculations—might be the force behind observed delay.

Additionally, capacity deficits at OIRA, which serves a gatekeeping role for executive branch agencies, could potentially slow the pace of rulemaking. OIRA’s capacity has waxed and waned across time, and when its capacity is lower, the office reviews fewer rules and takes longer to review the rules that it does bring in.\textsuperscript{35} Limits on OIRA’s capacity may disproportionately affect agencies the office is at odds with, since OIRA may de-prioritize its rules. Even though OIRA review of the final rule is not included in the clock time in the prior analyses, agencies may anticipate how OIRA’s diminished capacity would affect their rules and slow production accordingly. This could lead to delay occurring when the president is not ideologically aligned with the agency, although the underlying cause would be different.

To explore any potential impacts of the first type of resource constraint, I analyze the two capacity variables—Employment and Expertise—that have been included in the empirical models throughout this book. To account for variation in OIRA’s resources, I add a measure of that office’s capacity; \textit{OIRA FTE} is the number of Full Time Equivalent

\textsuperscript{35}Bolton, Potter and Thrower (2016).
employees (FTEs) in OIRA in a year.\footnote{This measure is from Bolton, Potter and Thrower (2016).} OIRA’s capacity is lower when it has fewer employees on staff, as each “desk officer” (i.e., the OIRA employee who reviews an agency’s rules) is responsible for a greater number of regulatory reviews.

As it turns out, while capacity constraints at the agency producing the rule or at OIRA are theoretically plausible explanations for delay, there is little evidence that they matter in practice. The results of this test are presented graphically in Figure 65; Table 6.A3 in the Appendix to this chapter present the capacity model, which includes the two standard capacity measures as well as the \textit{OIRA FTE} variable. What stands out in the figure is that \textit{Expertise} has a large effect on the hazard of rule finalization, suggesting that when an agency’s staff is more familiar with the workflow and pathways of the agency (and perhaps the department), rules can move through at a faster clip. Specifically, moving from the least to the most expert staff (measured by the proportion of the agency’s staff who have been there five years or more) is associated with a predicted incidence of rule finalization of 37%. While this is a large effect, it is worth noting that it is not statistically significant at conventional levels ($p = 0.11$), so some caution is warranted. Neither of the other two capacity variables, \textit{OIRA FTE} or \textit{Employment}, has a statistically distinguishable effect on the hazard of rule finalization. Overall, these results suggest that resource capacity issues—whether they be at the agency itself or at OIRA—do not systematically dictate how quickly agencies finalize rules. Importantly, the inclusion (or exclusion) of these capacity variables does not change the core results about the political environment—agencies still respond to opposition by principals by slow-rolling. This suggests that there is little evidence that agencies move slowly in response to capacity deficits, and certainly nothing that would displace the political explanation for variations in timing.

[Figure 6.5 about here.]
Overall then, there is little systematic evidence to suggest that the observed delays are sincere rather than strategic or that they are driven by capacity factors (either at the agency or at OIRA). These are the primary alternatives to procedural politicking and ruling them out should increase confidence that strategic delay—or more specifically, slow-rolling and fast-tracking—is doing the work when it comes to regulatory pacing. Finally, observing the changes in timing behavior with the addition of a new OIRA leader further reinforces the argument for a strategic mechanism.

6.6 Summary

Ossification and its attendant procedural hurdles have long been held up as the root cause for regulatory delay. Returning to the OSHA cranes and derricks rule that introduced this chapter, observers were quick to blame a slow and creaky bureaucracy. For instance, in explaining why the rule took so long, one public interest group highlighted OSHA’s procedural rigamarole:

OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses.\(^{37}\)

Ossification is a convenient scapegoat; few would disagree with the statement that rulemaking procedures are onerous. Yet, not all rules or all agencies are slowed by procedures and, if left uninterrogated, ossification actually camouflages strategic political behavior.

In this chapter, I considered whether strategic political calculations by agency bureaucrats play a role in the pace of rulemaking. Consistent with the theoretical expectations

\(^{37}\)Lincoln and Mouzoon (2011, 4).
developed in Chapter 3, I found that agencies have considerable mastery over timing in the
rulemaking process. With respect to all three branches, the evidence suggests that agencies
do “fast track” or “slow roll” rules. An event history analysis of more than 10,000 agency rules
from the Regulatory Proposals Dataset showed that rules take longer to finalize when OIRA
and the agency do not agree on the proposed rule, when the agency faces strong opposition
from Congress, and when the agency is more frequently before the courts. In other words,
timing is a tool that is attractive for agencies with respect to all three branches.

While these results indicate systematic timing effects, I found further evidence of
procedural politicking when the agency faces a new OIRA Administrator. Here, timing
speeds up or slows down depending on whether the new leadership is likely to help or hurt
a rule’s prospects. Finally, I considered two interpretations for delay that might point in
different directions. First, I considered whether agencies simply work harder when faced
with political opposition. Second, I looked for evidence of whether resource shortages, at
either the agency or OIRA, might lead agencies to move slower in the presence of ideological
discord. In both cases, the evidence supports a mechanism of strategic rather than sincere
delay.

The analysis in this chapter uncovered strategic timing patterns that persist across
a broad set of agencies and rules. While this evidence is consistent with the procedural
politicking theory, it necessarily glosses over the nuances of how decisions about procedural
strategies are made within agencies or how these decisions play out with respect to individual
rules. In the next chapter, I investigate these nuances in a deeper account of how the
Food and Drug Administration employed numerous procedural tactics in the case of one
controversial rulemaking.
Appendix to Chapter 6

[Table 6.2 about here.]

[Table 6.3 about here.]

[Table 6.4 about here.]
Figure 61: Time to Rule Finalization For Select Agencies, 1995–2014

Notes: Data from the *Regulatory Proposals Dataset*. Black diamonds indicate the median time to finalization for each bureau. Boxes indicate the 25%-75% range of the data and bars indicate the minimum and maximum values (excluding outliers). To aid visualization, only bureaus that produced at least 30 rules during the time period under study are shown. When appropriate, bureaus are listed with their respective department name in parentheses. See Table A1 in Data Appendix A for a complete listing of agency names and acronyms.
Notes: Hazard ratios from the Basic Model in Table 6.A1 in the Appendix to this chapter. Estimates with confidence intervals crossing the reference line at 1 are not statistically significant at the 95% level.
Figure 63: Conditional Effects of Group Disposition, Predicted Hazard Ratios

Notes: Hazard ratios from the Conditional Model in Table 6.A1 in the Appendix to this chapter. Estimates with confidence intervals crossing the reference line at 1 are not statistically significant at the 95% level.
Figure 64: Probability of Rules Surviving to Finalization under the Same and Different OIRA Administrators

Notes: Survival probabilities for a final rule for which OIRA gave a quick review of the proposed rule (10 days), for which OIRA had the average review time (78 days), and for which OIRA had a relatively long review time (180 days) for rules that have the same OIRA Administrator who reviewed the proposed rule (dashed line) or a new OIRA Administrator (solid line). For model specification, see the OIRA Model in Table 6.A2 in the Appendix to this chapter. Probabilities were generated using an unlogged OIRA Review Time to ease interpretation. Continuous variables held at their mean and dichotomous variables held at their modal values.
Figure 65: Predicted Hazard Ratios Including Resource Capacity

Notes: Hazard ratios from the Capacity Model in Table 6.A3 in the Appendix to this chapter. Estimates with confidence intervals crossing the reference line at 1 are not statistically significant at the 95% level.
Table 61: Description of Variables in the Event History Models

<table>
<thead>
<tr>
<th>Variable</th>
<th>Expected Effect on Hazard Rate</th>
<th>Time-Varying?</th>
</tr>
</thead>
<tbody>
<tr>
<td>OIRA Review Time (ln)</td>
<td>negative</td>
<td></td>
</tr>
<tr>
<td>Congressional Opposition</td>
<td>negative</td>
<td>✓</td>
</tr>
<tr>
<td>Court Cases</td>
<td>negative</td>
<td>✓</td>
</tr>
<tr>
<td>Group Opposition Impact</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Complexity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statutory Deadline</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Deadline</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Expertise</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

*Notes:* In the second column, “negative” indicates that a negative coefficient is expected, which implies that the hazard rate is decreasing and the rule’s expected duration is increasing. I provide sign expectations only for those variables for which there are clear theoretical predictions about the expected direction of the effect.
Table 6.A1: Cox Proportional Hazard Models of Time to Rule Finalization

<table>
<thead>
<tr>
<th>Expected Sign</th>
<th>Basic Model</th>
<th>Conditional Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>OIRA Review Time (ln)</td>
<td>-0.033***</td>
<td>-0.035***</td>
</tr>
<tr>
<td>(0.006)</td>
<td>(0.008)</td>
<td></td>
</tr>
<tr>
<td>Group Opposition × OIRA Review Time (ln)</td>
<td>0.004</td>
<td></td>
</tr>
<tr>
<td>(0.013)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Congressional Opposition</td>
<td>-0.200***</td>
<td>-0.263***</td>
</tr>
<tr>
<td>(0.062)</td>
<td>(0.072)</td>
<td></td>
</tr>
<tr>
<td>Group Opposition × Congressional Opposition</td>
<td>0.238</td>
<td></td>
</tr>
<tr>
<td>(0.131)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court Cases</td>
<td>-0.014*</td>
<td>-0.014*</td>
</tr>
<tr>
<td>(0.006)</td>
<td>(0.007)</td>
<td></td>
</tr>
<tr>
<td>Group Opposition × Court Cases</td>
<td>0.006</td>
<td></td>
</tr>
<tr>
<td>(0.014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group Opposition</td>
<td>0.070</td>
<td>-0.210</td>
</tr>
<tr>
<td>(0.053)</td>
<td>(0.159)</td>
<td></td>
</tr>
<tr>
<td>Impact</td>
<td>-0.461***</td>
<td>-0.455***</td>
</tr>
<tr>
<td>(0.114)</td>
<td>(0.114)</td>
<td></td>
</tr>
<tr>
<td>Complexity</td>
<td>-0.391*</td>
<td>-0.385</td>
</tr>
<tr>
<td>(0.198)</td>
<td>(0.198)</td>
<td></td>
</tr>
<tr>
<td>Statutory Deadline</td>
<td>0.118***</td>
<td>0.118***</td>
</tr>
<tr>
<td>(0.033)</td>
<td>(0.033)</td>
<td></td>
</tr>
<tr>
<td>Judicial Deadline</td>
<td>0.202***</td>
<td>0.201***</td>
</tr>
<tr>
<td>(0.051)</td>
<td>(0.051)</td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td>0.002</td>
<td>0.002</td>
</tr>
<tr>
<td>(0.001)</td>
<td>(0.001)</td>
<td></td>
</tr>
<tr>
<td>Expertise</td>
<td>0.363</td>
<td>0.382</td>
</tr>
<tr>
<td>(0.198)</td>
<td>(0.199)</td>
<td></td>
</tr>
</tbody>
</table>

President Administration Controls | Yes | Yes |
Bureau-level Stratification | Yes | Yes |
Num rules | 10,908 | 10,908 |
Num obs. | 202,068 | 202,068 |
PH test | 0.59 | 0.71 |

Notes: Table entries are coefficients obtained from proportional Cox models stratified at the bureau level. Robust standard errors clustered on the rule are in parentheses. Statistical significance: *p < 0.05, **p < 0.01, ***p < 0.001.
Table 6.A2: Cox Proportional Hazard Models of Alternate Pacing Mechanisms

<table>
<thead>
<tr>
<th></th>
<th>OIRA(^a) Model</th>
<th>Complexity(^b) Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>OIRA Review Time (ln)</td>
<td>-0.019(\ast)</td>
<td>-0.049(\ast\ast)</td>
</tr>
<tr>
<td></td>
<td>(0.009)</td>
<td>(0.018)</td>
</tr>
<tr>
<td>Same Administrator × OIRA Review Time (ln)</td>
<td>-0.025(\ast)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td></td>
</tr>
<tr>
<td>OIRA Review Time (ln) × Complexity</td>
<td></td>
<td>0.084</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.092)</td>
</tr>
<tr>
<td>Congressional Opposition</td>
<td>-0.178(\ast\ast)</td>
<td>-0.382(\ast)</td>
</tr>
<tr>
<td></td>
<td>(0.063)</td>
<td>(0.190)</td>
</tr>
<tr>
<td>Congressional Opposition × Complexity</td>
<td></td>
<td>0.965</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.950)</td>
</tr>
<tr>
<td>Court Cases</td>
<td>-0.015(\ast)</td>
<td>-0.012</td>
</tr>
<tr>
<td></td>
<td>(0.006)</td>
<td>(0.015)</td>
</tr>
<tr>
<td>Court Cases × Complexity</td>
<td>-0.007</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.072)</td>
</tr>
<tr>
<td>Same Administrator</td>
<td>0.071(\ast\ast)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.026)</td>
<td></td>
</tr>
<tr>
<td>Group Opposition</td>
<td>0.062</td>
<td>0.069</td>
</tr>
<tr>
<td></td>
<td>(0.053)</td>
<td>(0.053)</td>
</tr>
<tr>
<td>Impact</td>
<td>-0.444(\ast\ast\ast)</td>
<td>-0.463(\ast\ast\ast)</td>
</tr>
<tr>
<td></td>
<td>(0.114)</td>
<td>(0.114)</td>
</tr>
<tr>
<td>Complexity</td>
<td>-0.406(\ast)</td>
<td>-1.465</td>
</tr>
<tr>
<td></td>
<td>(0.198)</td>
<td>(1.045)</td>
</tr>
<tr>
<td>Statutory Deadline</td>
<td>0.118(\ast\ast\ast)</td>
<td>0.118(\ast\ast\ast)</td>
</tr>
<tr>
<td></td>
<td>(0.033)</td>
<td>(0.033)</td>
</tr>
<tr>
<td>Judicial Deadline</td>
<td>0.202(\ast\ast\ast)</td>
<td>0.201(\ast\ast\ast)</td>
</tr>
<tr>
<td></td>
<td>(0.051)</td>
<td>(0.051)</td>
</tr>
<tr>
<td>Employment</td>
<td>0.002</td>
<td>0.002</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Expertise</td>
<td>0.326</td>
<td>0.358</td>
</tr>
<tr>
<td></td>
<td>(0.199)</td>
<td>(0.198)</td>
</tr>
</tbody>
</table>

President Administration Controls | Yes | Yes
Bureau-level Stratification | Yes | Yes

Num rules | 10,908 | 10,908
Num obs. | 202,068 | 202,068
PH test | 0.82 | 0.79

Notes: Table entries are coefficients obtained from proportional Cox models stratified at the bureau level. Robust standard errors clustered on the rule are in parentheses. Statistical significance: *\(p < 0.05\), **\(p < 0.01\), ***\(p < 0.001\).

\(a\): This model shows the effects of a new OIRA Administrator on regulatory pacing.

\(b\): This model examines the conditional effect of complexity on regulatory pacing in order to assess an alternate mechanism based on sincere delay.

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### Table 6.A3: Cox Proportional Hazard Models of Resource Capacity on Regulatory Pacing

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient (SE)</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment</td>
<td>0.006 (0.004)</td>
<td></td>
</tr>
<tr>
<td>OIRA FTE</td>
<td>-0.033*** (0.006)</td>
<td></td>
</tr>
<tr>
<td>OIRA Review Time (ln)</td>
<td>-0.201** (0.062)</td>
<td></td>
</tr>
<tr>
<td>Congressional Opposition</td>
<td>-0.013* (0.006)</td>
<td></td>
</tr>
<tr>
<td>Court Cases</td>
<td>0.086 (0.055)</td>
<td></td>
</tr>
<tr>
<td>Group Opposition</td>
<td>-0.454*** (0.114)</td>
<td></td>
</tr>
<tr>
<td>Impact</td>
<td>-0.391* (0.198)</td>
<td></td>
</tr>
<tr>
<td>Complexity</td>
<td>0.118*** (0.033)</td>
<td></td>
</tr>
<tr>
<td>Statutory Deadline</td>
<td>0.201*** (0.051)</td>
<td></td>
</tr>
<tr>
<td>Judicial Deadline</td>
<td>0.002 (0.001)</td>
<td></td>
</tr>
<tr>
<td>Expertise</td>
<td>0.318 (0.200)</td>
<td></td>
</tr>
<tr>
<td>Num rules</td>
<td>202068</td>
<td></td>
</tr>
<tr>
<td>Num obs.</td>
<td>202068</td>
<td></td>
</tr>
<tr>
<td>PH test</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

**Notes:** Table entries are coefficients obtained from proportional Cox models stratified at the bureau level. Robust standard errors clustered on the rule are in parentheses. Statistical significance: $^* p < 0.05, ^{**} p < 0.01, ^{***} p < 0.001$. 
Bibliography


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