

**Writing the Rules of the Game:
The Strategic Logic of Agency Rulemaking**

by

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Dedication

To PBKP and HCP.

Acknowledgements

In the summer of 2005, with a freshly-minted Master of Public Policy degree in hand, I landed a job as a “desk officer” in the White House Office of Information and Regulatory Affairs (an institution with which the reader will soon become very familiar). At the time, I knew very little about notice-and-comment rulemaking, but I quickly became steeped in the intricacies of the process. The more I learned, the more I realized that the rules that agencies were writing through this process had major public policy consequences—affecting everything from the availability of various sunscreen products at the local pharmacy to the access the Boy Scouts had to public school facilities (a controversial issue at the time). Yet, people in Washington and media outlets like the *Washington Post* and the *New York Times* seemed to care more about Congress and the effect of legislation on public policy. Rulemaking was too esoteric to be of broad interest.

Far from “filling up the details” of laws, I saw (and continue to see) rulemaking as a way that unelected bureaucrats critically shape the course of public policy. The fact that relatively few people are paying attention to this process makes it all the more important to observe, study, and understand. This dissertation project is an attempt to transmit that insight into the academic domain. While the ultimate success or failure of this endeavor rests on my shoulders alone, many people helped shape this into a more rigorous, well-reasoned, and enjoyable project. To my family, friends, and colleagues: thank you. I am incredibly grateful for, and humbled by, your support.

The members of my dissertation committee have been an ideal combination of encouraging and demanding. My advisor Chuck Shipan has had a profound influence on how I approach political science research and this project in particular. He has patiently read many drafts, remained positive (even when things seemed hopeless), and pushed me not to settle for good enough. The only way I can think of to repay him is to try and live up to the example he has set. The other members of my committee have been invaluable each in their own way. Ken Kollman hosted a weekly dissertation group that kept me honest and allowed me to nurture (and, when appropriate, discard) new ideas. His open-minded approach caused me to think differently about this project time and again. I met with Rick Hall and Jowei Chen less frequently, but each time I came away amazed by how much this project could be improved in just one short meeting. Often when writing I felt as if I had Rick on one shoulder encouraging me to think about causal mechanisms, and Jowei on the other pushing me to frame the project in way that appealed to a wide audience. I am grateful that during my time at Michigan I have gotten to learn from each of these four professors.

Sometimes the most important part of writing a dissertation is not being laughed off the block when you feel like you rightly deserve to be. For that, I thank Richard Anderson, Vincent Arel-Bundock, Kate Bradley, Jean Clipperton, Dave Cottrell, Andrew Feher, Cassie Grafstrom, Maiko Heller, and Molly Reynolds. I would not have survived the first year of graduate school without the friendship and support of Erica Czaja and Meredith Sadin. I am also indebted to Skip Lupia, Jim Morrow, John Patty, Craig Volden, Barry Weingast, and Jon Woon, all of whom lent their expertise to help improve various aspects of this dissertation. Finally, although he probably doesn't realize it, Michael Moody gave me the confidence to believe that I could accomplish this crazy thing.

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Finally, my deepest debt of gratitude is owed to my husband Philip, who did not try to discourage me when I told him I wanted to pursue a Ph.D. in political science, but rather became a tireless advocate, a reasoned sounding board, and (when necessary) a shoulder to cry on. I could not ask for a better partner in life. It is to him that one half of this dissertation is dedicated. Our daughter Hazel has been subjected to more political science than your average three-year-old, but has remained a happy camper nonetheless. She has been a constant source of amusement, a much-needed distraction, and a reminder to make every day count. She claims the other half of this project as her rightful prize. I hope it is worthy.

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Chapter 1

Introduction

The 2010 midterm elections saw the Republican party gain more than 60 seats in the U.S. House. Invigorated by their newfound majority party status, House Republicans set straight to work implementing their Tea Party-influenced electoral mandate, which included eliminating so-called “job-killing regulations.”¹ Rules issued by the Environmental Protection Agency (EPA) seemed a particular favorite, with the chair of the House Energy and Commerce Committee promising 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 (Economist, 2011). 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.²

Yet in spite of this increased congressional scrutiny, under Jackson’s leadership the EPA issued a number of critically important environmental rules 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

¹The term “job-killing regulations” captures the zeitgeist of the 112th Congress; in the first twenty days of the session, the House convened twenty hearings that explored the link between regulations and the country’s job numbers.

²By contrast, her predecessor Stephen Johnson testified before Congress only four times in his two-and-a-half year tenure.

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 (P.L. 91-604) to issue the rule against 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.³

The EPA’s ability to use rulemaking to flout Congress is not uncommon. For instance, Fritschler (1969, 11) describes how the Federal Trade Commission (FTC) used rulemaking to require cigarette manufacturers to provide health warnings, even though such action was clearly against congressional intent: “Congress would not have done what the [FTC] did. The [FTC] rule called for a warning in advertising and on packages. Congress wanted neither, but the [FTC’s] action forced Congress to accept half the ruling.”⁴

In fact, agencies have an impressive batting average when it comes to rulemaking; by my calculation, nearly three quarters of the more than 4,000 rule proposals that agencies advanced between 2000-2010 went on to become binding law. The fact that agencies persevere is surprising given that Congress and the president frequently decry agency decisionmaking, as well as the red tape associated with regulations. Further, agency success with regard to rulemaking is not necessarily the outcome predicted by political science theories about oversight of bureaucratic agencies. For instance, in the case of the EPA, theories of congressional

³I define “significant” rules as those that the Office of Management and Budget (OMB) selected for review. This figure is on par with EPA’s regulatory volume in previous congresses.

⁴Congress responded to the rule by temporarily stripping the FTC of its oversight over cigarette advertising, which prevented that half of the rule from taking effect. The packaging part of the rule, however, stood firm.

control of the bureaucracy would predict that the agency would have reduced the volume of rules produced or at least curbed the ambitiousness of their rulemaking proposals given congressional hostility (e.g., Olson, 1996; Weingast and Moran, 1983; Wood and Waterman, 1991).

In this dissertation project, I seek to understand why agencies are so successful in this policymaking venue. I address two specific questions:

- How does the structure of the notice-and-comment rulemaking process affect the incentives of agency bureaucrats?
- Given these incentives, how do agency bureaucrats ensure that their rules become binding policy?

The results of this study provide insight into the role of unelected bureaucrats in the United States. My theory emphasizes the early stages of rulemaking, because these early moments are a key agenda-setting phase for the entire process. The implication is that agencies that want their rulemaking proposals to succeed must do their homework and invest considerable resources in the early phases of the process. The argument highlights how agencies use the tools at their disposal (proposal power, outreach with stakeholders, control over timing, etc.) to shepherd their preferred policies through this important process. I argue that expert bureaucrats have preferences over the selection of policy in the rulemaking process, but must be artful in employing these tools in light of oversight scrutiny from Congress and the president. These arguments contrast with the top-down view of agency rulemaking that

dominates the literature and have implications for the democratic accountability of unelected bureaucrats. To support this argument, I employ a variety of research methods, including a game theoretic model, statistical methods, and interviews with bureaucrats and interest group officials.

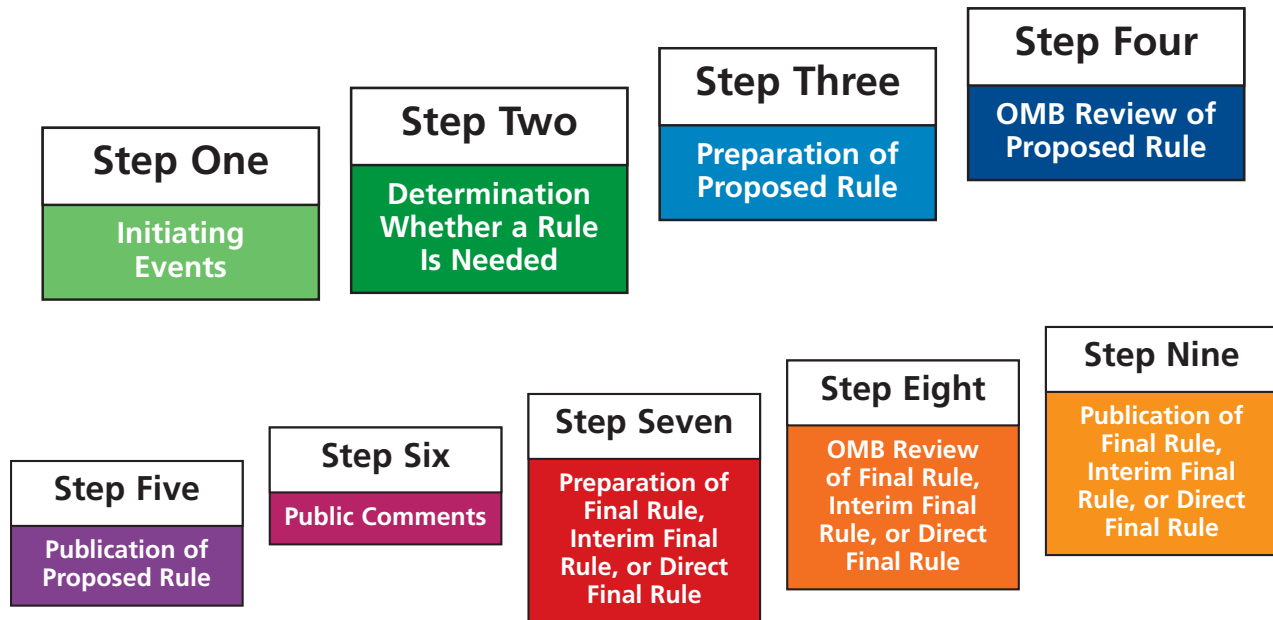
This introductory chapter proceeds in five sections. I begin by providing an overview of the notice-and-comment rulemaking process. This primer is necessary, not only because the process is esoteric, but also because the details of this process matter a great deal for the arguments that I make in this dissertation. I then explain how my argument regarding strategic proposed rules fits into the broader literatures on political oversight of the bureaucracy and agency rulemaking. Next, I explain the arguments that I make about strategic anticipation and the importance of the early stages of the process. The penultimate section discusses how this work contributes to our understanding of rulemaking as a political process and the final section lays out the plan for the dissertation, offering a roadmap to the arguments and evidence in each of the subsequent chapters.

1.1 THE NUTS AND BOLTS OF NOTICE-AND-COMMENT

The focus of this study is “notice-and-comment” rulemaking, the most common form of rulemaking in the United States.⁵ Rules created through this process carry the full force and effect of law and touch on nearly every aspect of our lives, from the fuel standards in the cars we drive to whether the “Plan B” morning-after pill is made available at the

⁵Notice-and-comment, or informal, rulemaking is not the only type of rulemaking, however. There are many other forms of rulemaking, including formal rulemaking which proceeds in a manner akin to a judicial hearing. There are also exceptions to notice-and-comment, such as the “good cause” exception which allows an agency to waive the proposed rule stage of the process and proceed directly with an interim final rule. For a thorough discussion of alternate forms of administrative rulemaking, see Kerwin and Furlong (2011).

Figure 1.1: Map of the Notice-and-Comment Rulemaking Process



Source: Adapted from the Reg Map (<http://www.reginfo.gov/public/reginfo/Regmap/>), a cooperative effort of the U.S. General Services Administration and ICF Consulting. See the Reg Map for considerably more detail on what happens during each stage of the process, as well as the legal requirements associated with each step.

local pharmacy. As such, they are a central way that policy change occurs in the American system.

Using notice-and-comment to bring a rule from the idea stage to the binding policy stage is an arduous process. Figure 1.1 outlines the many phases of this byzantine process. Although the process includes many stages, it is anchored around two points: the issuance of a proposed rule (Step 5) and, subsequently, a final rule (Step 9).

The initial impetus for a rule (Step 1) can come from many sources.⁶ For instance, Congress can include legislative language in a statute that directs an agency to write a rule on a specific topic or the president can ask agency leaders to draft a proposal to accomplish a key administration goal. Often, however, agencies draft proposed rules based on their existing legal authority (usually granted in the agency’s organic statute) in order to address problems that have arisen within the agency’s policy jurisdiction.⁷

Regardless of how the process is initiated, the act of drafting a proposed rule, while slightly different for each agency, generally takes the following path. First, a small rule-writing team is put together. This team usually includes staff from the program office, but can also include representatives from other program offices, from the General Counsel’s office, or even from political leadership (Interview with EPA official, May 2013; Interview with FDA official, May 2013). This team may decide that additional research is needed, which they will either do themselves or delegate to an outside group. The team may also decide that additional consultation with stakeholders is necessary. If this is the case, the agency may publish an Advance Notice of Proposed Rulemaking,⁸ which is simply a notice in the *Federal Register* which invites comments from the public on the types of policies and data the agency should consider in the proposed rule.⁹ Generally speaking, outreach during these early stages tends to be “informal and idiosyncratic” (West, 2009).

⁶According to the Reg Map, initiating events include: agency initiatives (agency priorities and plans, new scientific data, new technologies, accidents); required reviews; statutory mandates; recommendations from other agencies, external groups, states, or federal advisory committees; lawsuits; petitions; and prompt letters from OMB.

⁷In a study of 878 agency rules, West and Raso (2013, 504) find that 60% of the rules in their sample (and 53% of significant rules) were initiated based on the agency’s discretion, rather than a statutory mandate.

⁸This step is optional and is not pictured in Figure 1.1. As the name implies, it occurs prior to the publication of a proposed rule.

⁹Or, the agency may take a less formal route of holding “listening meetings” in which select groups are invited to come and present information to the agency.

What should be clear from this is that the drafting of a proposed rule can be an extremely time-intensive process, often taking years (West, 2009). Once the rule has passed the agency’s internal clearance process, the agency submits the rule to the Office of Information and Regulatory Affairs (OIRA) for review.¹⁰ OIRA, a component of OMB, is the White House clearinghouse for agency rulemaking. OIRA’s review is intended to make sure that the agency’s policy represents good governance principles (including cost-benefit analysis), is consistent with administration priorities, and does not conflict with the other programs managed by the federal government.

Once OIRA approves the rule and it is published, communication with outside parties becomes taboo.¹¹ In the case that outside contact occurs (usually for reasons outside of the agency’s control), the agency is supposed to generate a record that a contact occurred, explain the nature of the contact, and include it in the public (and court reviewable) docket.¹² This restriction remains in effect until the final rule is published.

After the proposed rule is published, the public is given an opportunity to weigh in on the agency’s proposal. At a minimum, this public consultation includes a public comment period during which members of the public can submit written comments to the agency. There is considerable variation in how many comments agencies receive on proposed rules during the comment period. Often agencies will receive no comments or only a very small number of comments. On the other end of the spectrum, agencies sometimes receive more

¹⁰With a handful of exceptions, OIRA’s purview is limited to executive branch agencies. For those agencies within the Executive, OIRA has the power to select which rules it chooses to review, as OIRA staff determine which rules fall under the definition of “significant.”

¹¹This is often referred to as *ex parte* communication, meaning “off-the-record, private communications between agency decision-makers and other persons concerning the substance of the agency’s proposed rule” (Lubbers, 2006, 335).

¹²For instance, several of the interviews that the author conducted for this research covered ongoing agency rules and were included in the agency’s public docket for those rules.

comments than they know what to do with; in 2012 the Environmental Protection Agency (EPA) received more than 2 million public comments on a controversial greenhouse proposed rule. Finally, agencies may choose to do additional outreach, by holding hearings or public forums.

The culmination of the rulemaking process is the final rule. After reviewing the public's feedback and deliberating, the agency decides whether or not to make any changes to the policy it laid out in the proposed rule. The agency is not bound to make any changes at the final rule stage, but it must explain in the preamble to the final rule the types of comments it received and why it chose to adopt or not adopt the commenters' suggestions. After submitting the rule through internal clearance, the rule is then sent back to OIRA for a second review. Subject to OIRA's approval, the final rule is published in the *Federal Register*. The rule then becomes legally binding for regulated parties after a waiting period, usually 30 days.¹³

The legal framework underpinning this process was first established under the Administrative Procedure Act of 1946 (APA, P.L. 79-404). The APA still remains the backbone for the process today, although numerous procedural requirements have been layered on top by Congress and the president. For instance, under Executive Order 12866 (EO 12866, 1993), the key EO governing agency rulemaking, agencies are required to conduct formal cost-benefit analyses for certain rules before submitting them to OIRA for review. In addition, the Small Business Regulatory Enforcement Fairness Act (P.L. 104-121) requires agencies to provide an assessment of whether each rule will have an adverse impact on small businesses.

¹³Current law requires that agencies have a minimum 30-day phase-in period before a rule takes effect (Lubbers, 2006), although this can be waived in emergency circumstances. Often for major policy changes, agencies will choose a period longer than 30 days to give regulated parties time to prepare.

Other requirements are targeted at specific agencies or specific types of rules. For instance, under the Higher Education Act of 1992 (P.L. 102-325), the Department of Education must conduct regulatory negotiation with stakeholders for all substantive rules that are issued under that law's authority.¹⁴

The Policy Significance of Rules

As previously alluded, rules touch on almost all policy areas. For instance, many important decisions emerging from the Patient Protection and Affordable Care Act (ACA, P.L. 111-148) and the Dodd-Frank Wall Street Reform Act ("Dodd-Frank," P.L. 111-203), arguably two of the most important pieces of legislation passed in the last decade, are currently being made through notice-and-comment rulemaking. Yet, not all rules produced by agencies have major policy implications; like executive orders (Howell, 2003) and laws (Mayhew, 2005), some rules issued by agencies do not have substantive policy import.

Considering the significance of a rule is one way to separate the wheat from the chaff. According to EO 12866, a significant rule is defined as any rule that is likely to:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

¹⁴Negotiated rulemaking, or *regneg*, is a modification of notice-and-comment that requires the agency to negotiate the proposed and final rules with a set of pre-selected stakeholders. While *regneg* was popular in the 1990s, it has fallen out of vogue in more recent years, although some scholars still see promise in this form of rulemaking (Kerwin and Furlong, 2011).

- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues (EO 12866, 1993, §3(f)).

However, even when just significant rules are considered, it becomes clear that rule-making has become a relatively routine activity for most federal agencies. For instance, in 2008, executive branch agencies proposed more than 276 “significant,” or policy-relevant, rules and finalized more than 312 such rules.¹⁵ And as Figure 1.2 illustrates, this volume has been a relatively constant feature of the regulatory state over the last two decades.

1.2 MOTIVATING LITERATURE

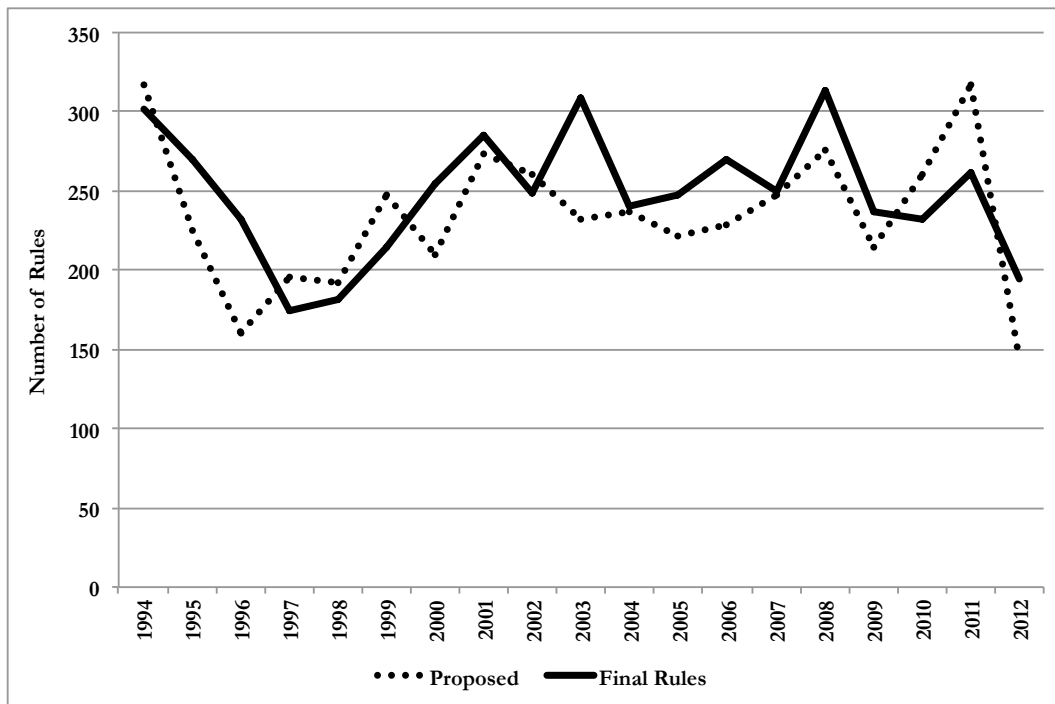
This project builds on two distinct and theoretically-rich literatures: political control of the bureaucracy and administrative rulemaking. I now discuss each in turn.

Administrative Procedures and Dynamic Political Control

The act of delegating policymaking authority (i.e., the ability to issue legally binding rules) from Congress and the president to a government agency is a consequential one. While this form of delegation is an entrenched (and perhaps necessary) feature of the modern administrative state, it gives rise to a classic principal-agent problem, one to which political scientists have given considerable attention. The fundamental problem is that the principal (in this case either the president or Congress) wants the agent (the agency) to produce rules that align with her preferences. However, there is a key information problem; the principal

¹⁵This is compared with a total volume (significant and non-significant) of approximately 600 proposed rules and 800 final rules issue by federal agencies during that same year, according to the *Unified Agenda*, a semi-annual accounting of all rulemaking by federal agencies.

Figure 1.2: Volume of “Significant” Proposed and Final Rules, 1993-2012



Source: Author’s analysis of data from www.reginfo.gov. I present data from 1994 onward as that is the year in which the new definition of “significant” under EO 12866 took effect.

can only observe outcomes (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 a substantial investment (and may not even be able to acquire it at all).¹⁶

To solve this “political control problem” scholars have identified a number of institutional mechanisms that a principal can implement in order to incentivize the agent to adhere to the principal’s preferences. The notice-and-comment process is one such mechanism that

¹⁶Put another way, the agency has acquired policy expertise that is not shared by Congress or the president.

falls under a broader class of tools called administrative procedures (McCubbins, Noll and Weingast, 1987, 1989), or processes that an agency must follow before reaching a policy decision.¹⁷ By requiring notice-and-comment, the president and Congress are assured that they will be given notice of an agency’s policy idea (and also the opportunity to stop the rulemaking process), rather than being presented with a final policy as a *fait accompli*.

Tools of political control, including administrative procedures and notice-and-comment, are generally deemed effective by scholars. For instance, in an early work McCubbins and Schwartz (1984) characterize administrative procedures as a type of “fire alarm” oversight, an analogy that draws on the point that this form of oversight relies on outside parties (usually interest groups) to pull a fire alarm and alert overseers to agency infractions. Compared to more traditional forms of routinized oversight like oversight hearings (which they dub “police patrols”), fire alarm oversight is less costly for overseers (and may even be more effective at detecting infractions) (Aberbach, 1990; Horn, 1995). Scholars have established a sense that political control is effective from an empirical perspective as well. Studies have shown that when the preferences of political principals change, agencies increase or reduce their outputs accordingly (Olson, 1996; Ringquist, 1995; Shipan, 2004; Weingast and Moran, 1983; Wood, 1988; Wood and Waterman, 1991). Yet while the finding that agencies are responsive may be statistically significant, it does not give us a sense of levels. That is, if an agency adjusts its output by 25% in response to a change to the political environment, should we conclude that the agency is responsive? Or does the remaining 75% of output

¹⁷Other administrative procedures include advisory committees (Balla and Wright, 2001; Moffitt, 2010) and reporting requirements. Of course, the president and Congress have other tools to control 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 of the President (Moe, 1985).

that is unaffected better speak to the issue of responsiveness?

This disconnect highlights the inherent tension between arguments about political control of the bureaucracy and arguments about the autonomy of bureaucratic actors. Given the levels of discretion associated with rulemaking, autonomy is worth considering, since as Croley (2003, 832) succinctly states, “substantial agency autonomy is a fact of regulatory life.” Carpenter (2001) develops a theory of bureaucratic autonomy that is rooted in the notion that autonomy is one of the core motivations for 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. Indeed, studies of bureaucratic organizations often focus on the importance of agency culture and professional norms in affecting agency decisionmaking (Kaufman, 1960; Milkis, 2005; Wilson, 1989), rather than purely political factors. Yet it is not clear how bureaucratic autonomy factors into standard accounts of political control over agencies.

Taken together these findings about limited responsiveness of agents, as well as bureaucratic autonomy, suggest that political control may be a dynamic relationship between principals and agents (Krause, 1999; Moe, 2006). That is, the typical approach to studying political control has been top-down, treating the process as unidirectional. In the prototypical game, the principal institutes a control mechanism, such as notice-and-comment, the agent responds by choosing a level of rulemaking or enforcement, and the game ends. However, agencies may be able to use their autonomy to adapt to the administrative procedures that are in place. As I explain in the sections that follow, this is particularly true with respect to notice-and-comment, where the APA, the key law governing the process, has been in place for nearly 70 years, enabling bureaucrats to learn and adapt to the incentive structure

created by notice-and-comment. In other words, there may be a bottom-up response that influences the effectiveness of political control mechanisms.

“Kabuki Theater” and the Study of Rulemaking

In contrast to the top-down approach to notice-and-comment taken in the political science literature, students of the rulemaking process take a much more agency-centric approach. This work, which hails primarily from the public administration and legal traditions, focuses more on the normative implications of the process, often with rather gloomy conclusions.

Scholars have noted that certain interest groups enjoy privileged access to agencies before the proposed rule is put out for comment (Chubb, 1983; Furlong and Kerwin, 2005; Golden, 1998; Yackee, 2006; Yackee and Yackee, 2006; Wagner, Barnes and Peters, 2011). The advantages for insiders continue throughout the process, as several studies find that industry tends to participate at a higher rate than public interest and other groups during the public comment period (Golden, 1998; Yackee, 2006; Yackee and Yackee, 2006; Wagner, Barnes and Peters, 2011).

At the final rule stage, there is less consensus among scholars about the effect of comments submitted by groups during the public comment period. At this point in the process, agencies choose whether or not to make changes to the proposed rule according to groups' requests (from written comments). While some scholars find that group comments have no meaningful effect on the final policy released (Magat, Krupnick and Harrington, 1986; Nixon, Howard and DeWitt, 2002), others find that there is an effect, but that it holds only in certain contexts (Golden, 1998; Yackee, 2006). Overall, however, there is no robust

finding that agencies make changes based on public comments.

The sense that the deck is stacked in favor of monied interest groups and that the process is generally closed to outsiders has persisted for decades and has led some scholars have to cast aspersions on the process, dismissing notice-and-comment as fundamentally undemocratic (Bernstein, 1955; Lowi, 1969; Wagner, Barnes and Peters, 2011). Elliott (1992) famously described the process as “kabuki theater,” wherein all of the real action occurs offstage and the drama on the stage is just windowdressing.

Yet, in spite of this substantial body of work and these grim pronouncements, there is little understanding of *why* we might observe the outcomes that we do. That is, what role do institutions play in allowing groups’ access to the process early on? Why might agencies systematically ignore the public comments received on rules when these comments are intended to improve the quality of the final policy? This is important because while the literature on administrative procedures focuses on institutions (and overlooks agency abilities), the literature on agency rulemaking ignores institutions completely.¹⁸ The theory I develop in this project demonstrates how notice-and-comment is an institution in its own right and, as such, agency bureaucrats respond to the incentives it creates. While this does not alleviate any normative concerns about the process, it does help explain the underlying mechanisms that produce the outcomes and points toward potential policy solutions (a point to which I return in Chapter 7).

¹⁸However, 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, 2013; Yackee and Yackee, 2009).

1.3 OVERVIEW OF THE ARGUMENT

In this dissertation, I make the case that political scientists have been overly optimistic about the extent to which notice-and-comment rulemaking and other administrative procedures facilitate political control. Taking cues from legal and public administration scholars, I argue that notice-and-comment has an implicit bias towards the early stages of the process, making it appear undemocratic. To establish this, I consider how administrative procedures appear on the receiving end (to agencies).

The theory that I develop places the bureaucrat in the driver's seat. From a bureaucrat's perspective, the administrative process is home turf. The APA has governed the rulemaking process for nearly 70 years, and OIRA review has been a fixture of the process for more than 30 years. While the individual players at the agencies have changed during this time, agencies have accumulated institutional knowledge about the rulemaking process, learning what works and what does not.

In other words, agencies have gained insight on how to game the administrative process surrounding rulemaking. Instead of focusing on the advantage that agencies enjoy because of their greater policy expertise, I emphasize the procedural prerogatives and greater political acumen of agency actors. I argue that, armed with this knowledge, they can and do strategically manipulate the rulemaking process to help ensure that it favors their preferred outcomes. Note that I am not making the case that agencies have perfect information about the preferences or future behavior of interest groups or political principals with respect to rulemaking. Rather, the argument here is that agencies have better information about the rulemaking process itself and that agency bureaucrats have an incentive to steer the process in their preferred direction.

This argument does not suggest that agency bureaucrats are malevolent in any way. Instead, it is rooted in the observation that agency bureaucrats are not neutral implementers of rulemaking policies. The people that write rules have preferences over policy that are independent of the preferences of political principals, those in Congress and in the White House. Further, the notice-and-comment rulemaking process creates an incentive structure that forces agencies to express those preferences early on in the process, making the proposed rule stage—and not the final rule stage—the critical moment in the notice-and-comment rulemaking process.

In sum, a number of incentives converge to make the proposed rule the critical moment in the life of a rulemaking. As such, agencies view proposed rules as investments and they write proposed rules that they want to see succeed.¹⁹ In order to make that happen, agencies act strategically in order to game the system. This dissertation unpacks that strategic behavior with respect to the actual selection of the policy included in the proposed rule (Chapters 3 and 4) and the administrative decisions surrounding the comment period associated with the publication of the proposed rule (Chapter 5).

1.4 CONTRIBUTIONS

This project makes several contributions to the study of bureaucratic politics and public administration. First, from a bureaucratic politics perspective, I approach administrative procedures from a bottom-up perspective, while still operating within the principal-agent and political control frameworks that are often used to describe these problems. While the

¹⁹This does not necessarily mean that agencies propose rules that contain their ideal policies. As I explain in Chapter 3, agencies propose rules in a constrained political environment. This means that the proposed rules they write are their most favored policy, given the constraints they face.

notion of political control over the bureaucracy is premised upon a power struggle between agencies and their political overseers, the precise way that bureaucrats subvert the intentions of principals is not made explicit. Many studies ignore the potential for agencies to subvert principals' intent altogether. Those that do are not explicit about how this subversion occurs. This project makes a contribution by *identifying specific mechanisms* by which bureaucrats can be subversive, and also shows how and when these mechanisms are strategically employed by agencies. This is important because it provides a micro-level foundation for broader theories of principal-agent relations.

Second, from a public administration perspective, I deconstruct the notice-and-comment rulemaking process and examine the nuances of this process from the agency's implementation perspective. This is important because the literature on rulemaking, while being notably sparse to begin with, also tends to dismiss the details of the administrative process as technical points unworthy of further examination. Yet, agency bureaucrats are themselves steeped in the details and nuances of this process, and use that insider knowledge to solidify support for the rules they propose. Thus, I elevate the details of the process to a level that satisfies the demands of a bottom-up theory. The result of this dual political science and public administration approach is that this project provides a bridge between two fields that often fail to speak to one another.

Finally, from an empirical perspective, the project offers many advances. To begin, I collect and analyze new data on several aspects of agency rulemaking, including a new dataset of regulatory vetoes by OIRA (Chapter 4) and micro processes with respect to the public comment period (Chapter 5). My data span both executive and independent agencies across a number of years. Additionally, I incorporate a variety of different cutting-edge

measures of agency ideology into my empirical tests about agency rulemaking. The net result is evidence that speaks to broad effects that exist outside of the narrow context of one agency or a small sample of rules.

1.5 PLAN FOR THE DISSERTATION

In the remainder of this dissertation, I present an examination of rulemaking in a political context. The purpose is to demonstrate how agencies behave strategically in the rulemaking process and to explain why this behavior matters. The analysis proceeds as follows.

The next chapter (Chapter 2) develops the argument about the importance of the proposed rule and agency strategy in greater depth. I explain how bureaucrats' preferences over policy apply to the rulemaking process. I also explain that the project's focus on the early stages of the notice-and-comment process is based on the logic that agencies view proposed rules as investments and that they work to protect those investments as the process unfolds. Together, these arguments lay a theoretical foundation for the evidence I provide in the ensuing chapters.

In Chapter 3, I argue that agencies have a potent agenda-setting power because they are able to "move first" by setting a proposed rule. This chapter explores how agencies harness this agenda-setting power by writing a proposed rule that they like or moderating the rule so that is more palatable to political principals. The mechanism by which the political principals are sometimes able to extract policy concessions at the proposed rule stage is by a threat of a regulatory veto. To formalize this relationship, I develop a signaling model of notice-and-comment, in which a Politician (generically, OIRA or Congress) and an

Agency bargain over policy. In the game, the Agency has private information about interest group disposition, which it uses to set a proposed rule and subsequently adjust a final rule. The Politician must choose whether to “veto” the agency’s rulemaking proposal. The model shows that ideological distance between the agency and its overseers, as well as the political salience of the agency to the president, are key features in proposal selection.

Chapter 4 empirically tests the key predictions that emerge from the model in Chapter 3. Using a new dataset of regulatory “vetoes” by OIRA, I show that although such vetoes are relatively rare events, they tend to occur more frequently in the context of increasing ideological distance between the president and OIRA, as well as the political salience and public support for a policy area. I conclude by considering how the model this applies to congressional vetoes of rules (i.e., the inclusion of a regulatory limitation rider in an appropriations bills).

In Chapter 5, I explore additional avenues for agency manipulation of the notice-and-comment process, beyond setting the proposed and the final rule. I argue that strategic agencies can employ “micro procedures” to help ensure the policies they propose survive to the final stage. Focusing on the agency-Congress relationship, I show that when agencies are ideologically distant from congressional overseers, they raise the costs for members of Congress to intervene in their rulemakings by engaging more with external stakeholders to build support coalitions and timing their actions to coincide with congressional recesses. Evidence from a new dataset of more than 5,000 proposed rules from 24 agencies shows that agencies indeed manipulate the length of the public comment period and the timing of the publication of these rules.

Chapter 6 addresses strategic agency behavior in the context of a specific rulemaking

case: the Food and Drug Administration's (FDA) menu labelling proposed rule. With this rule, the FDA carried out a mandate in the Affordable Care Act requiring chain restaurants to display calorie information on their menu boards. The purpose of this case study is to illustrate how some of the assumptions from the broader argument work in practice. Using evidence from agency rulemaking dockets and interviews with agency officials and interest groups, I show how FDA officials gathered key information about the policy well in advance of issuing a proposed rule and strategically set the proposed rules.

My dissertation concludes that bureaucrats are not purely faithful servants of their political masters. They set proposed rules strategically, and use microprocedures such as the length of the public comment period to ensure the adoption of their preferred policies. Because these strategies so often succeed, the net result is that the rules that become law represent the preferences of unelected bureaucrats, rather than their elected overseers in Congress and the White House. In addition to contributing to the literature on bureaucratic politics, these findings speak to when administrative discretion is too much of a good thing. The concluding remarks in the final chapter contextualize the findings of the dissertation and discuss the policy implications for the notice-and-comment process.

Chapter 2

Theoretical Foundations

In U.S. criminal law, prosecutors focus on establishing a suspect's motive, means, and opportunity to commit a crime. The idea is that to prove guilt one must first show that the suspect had a reason to commit the crime (motive), the ability to do so (means), and the chance to get it done (opportunity). These are necessary but not sufficient conditions to convict a suspect of the crime, and most clever television crime shows often find novel ways to further implicate the accused.¹

In terms of notice-and-comment rulemaking, I argue that agency bureaucrats have the motive, means, and opportunity to orchestrate the rulemaking process in ways that make their preferred outcomes more likely. There is, of course, no crime, but rather the resulting body of law is disproportionately influenced by unelected bureaucrats, and less so by elected principals or members of the public.

In this chapter, I focus on bureaucrats' *motives* with respect to rulemaking. I develop a theory of how bureaucratic preferences combine with the incentive structure surrounding notice-and-comment—specifically, the resource constraints, legal limitations, and psycholog-

¹In making this claim, I draw on years of experience as a loyal viewer of *Law & Order*, *Law & Order: Criminal Intent*, and *Law & Order: Special Victims Unit*.

ical aspects of the process—to motivate the agency to attend carefully (and strategically) to the proposed rule. In the chapters that follow, I then demonstrate the *means* by which agencies strive to get their preferences enacted, namely the drafting of the proposed rule and manipulation of the procedural components of the public comment period. And, because the process is so stacked toward the early phases of rulemaking, I argue that each proposed rule presents the agency with an *opportunity* to shape policy.

This analogy to a crime is admittedly crude; comparing agency rulemaking to criminal behavior is, undoubtedly, an overly dramatic characterization of the situation. Yet, the analogy serves well to illustrate several important points about the rulemaking process. This chapter proceeds with an overview of the broader argument. I then explain how bureaucrats' preferences function in practice and how they play into the incentive structure surrounding notice-and-comment. I conclude with a discussion of the implications of the theory for the subsequent chapters.

2.1 OVERVIEW OF THE ARGUMENT

This dissertation presents a theory of bureaucratic behavior. Rather than focusing on fire alarms or attempts to assert political control, I treat the bureaucrat as the central policy actor. The foundation for this theory, which I build in this chapter, is that agencies write proposed rules that they like and that they want to see succeed. In other words, I make the case that bureaucrats have a *motive* to behave strategically in the notice-and-comment process.

To establish this, I need to show two things. First, bureaucrats must have policy preferences that are distinct from the preferences of political principals, and they must use

the rulemaking process to express those preferences. To demonstrate this, I show that the idea that bureaucrats' preferences infiltrate their workproduct has deep roots in the study of the bureaucracy and can also be linked to popular concerns about "bureaucracy run amok."

Second, I must show that the proposed rule is the point in the process at when these preferences manifest (i.e., that bureaucrats do not wait and inject their preferred policies at the final rule stage). To demonstrate this, I show how, from the agency's perspective, the incentive structure of notice-and-comment leads the agency to treat the proposed rule as an *investment*. So, instead of waiting and substantively deliberating over a proposed policy after the public comment period, a confluence of resource, legal, and psychological factors leads agencies to invest in a proposed policy earlier in the process.²

Taken together, I argue that the preferences of bureaucrats and the incentive structure of notice-and-comment combine to demonstrate that agencies have a motive to see their proposed rules succeed. The implication is that, as the process progresses, agencies behave strategically in order to protect their proposed rule investments, with the ultimate goal of ensuring that the proposed rule becomes a final rule (i.e., binding law).

²Casting the proposed rule as an investment has important implications for our understanding of the rule-making process. One consequence is that it means that the proposed rule is costly rather than "cheap talk." While a proposed rule can sometimes be used as a bargaining chip (as I explain in Chapter 3), it is a costly enough gamble that is never treated as a "throw away" by the agency. Another implication of this argument is that agencies should make few changes to the rules at the final rule stage, since the important decisions will have been made earlier on the process and the agency will be entrenched in the proposed policy. Although, I don't explore this implication further in this project, it is supported in the work of many rulemaking scholars who find that agencies are generally reluctant to make changes to final rules (Fritschler, 1969; West, 2009)

2.2 AGENCY PREFERENCES IN RULEMAKING

The case that bureaucrats' preferences infiltrate their work is an easy one to make as it has a long intellectual history.³ Indeed, it can be traced to Weber (1978), who highlighted the efficiency of modern bureaucracy, but also noted that this efficiency comes at the expense of conceding considerable power to unelected experts. This same idea is, in a sense, the motivating principle behind the canonical principal-agent model that is often used to characterize the interactions between bureaucratic agencies and Congress and the president (Miller, 2005). If the preferences of bureaucrats (the agents) did not matter for the policy choices that they made, then principals would not need to concern themselves with overseeing bureaucratic outputs. Yet, oversight of the bureaucracy is a routine component of modern government, and it is often accompanied by a healthy dose of skepticism about the inclinations of unmonitored bureaucrats. For instance, Neustadt (1960) famously described Cabinet agency heads as the president's "natural enemies" and President Nixon extended this distrust from presidential appointees to the thousands of civil servants working in the agencies, stating "they're bastards who are here to screw us" (Waterman, Rouse and Wright, 2004).⁴

The notion that bureaucrats have preferences and that those preferences permeate into their professional doings lurks quietly behind the scenes in many studies (e.g., Bawn, 1995; Huber and Shipan, 2002; Huber, 2007). Indeed, policy motivations can be a more proximate means to self-serving ends. That is, agencies do not just write rules, they also

³I make a general case about the role of preferences in agency policymaking here, but it applies equally well to rulemaking since rules are important and binding policy choices made by bureaucrats.

⁴Additionally, fieldwork in public administration that demonstrates that bureaucrats care deeply about the issues that they work on (see, e.g., Feldman, 1989; Golden, 2000; Meier and O'Toole, 2006).

enforce them. So, in order to develop and implement a successful policy—which ultimately affects many aspects of a bureaucrat’s experience—the agency must select the right policy. This suggests that policy preferences need not be ideological (although they certainly can be), they can also be pragmatic and implementation-oriented.

Yet, pinning down the precise nature of bureaucrats’ preferences is difficult for both theoretical and empirical reasons. First, it is not clear exactly what motivates bureaucrats and how such motivations reduce to preferences. Scholars have identified a number of different sources of bureaucratic motivation, including budget maximization (Niskanen, 1971), career advancement (Golden, 2000; Gailmard and Patty, 2007), enhanced autonomy for the agency (Carpenter, 2001), and adherence to professional norms and organizational culture (Wilson, 1989; Golden, 2000; Brehm and Gates, 1993). Fortunately, for the purposes of this study it is not necessary to identify which of these mechanisms has greater explanatory power (and as Golden (2000) argues it is likely the case that multiple causes are simultaneously at work), as it suffices to say that bureaucratic preferences exist and that they matter for policymaking.

Examining potential sources of motivation highlights the fact that these are *individual-level motives*. Yet in order to speak to the theoretical issues addressed in this study (as well as many other problems in political science), an understanding of preferences at the *agency-level* is warranted. Aggregating the preferences of multiple actors into an aggregate choice function is a fundamental problem confronting social scientists (Arrow, 1963). In the bureaucratic case, the problem is exacerbated because agencies are composed of both political appointees and career civil servants, and it is not clear how to weigh the preferences of agency

leaders vis-à-vis the rank-and-file (careerists).⁵

Finally, measurement is a persistent problem with respect to ideology; even after parsing the theoretical and aggregation issues, developing reliable empirical measures of agency ideology is difficult. (See the Appendix to this chapter for a detailed explanation of extant measures of agency ideology and how I employ such measures in this dissertation.)

In spite of these issues, the preferences of agency bureaucrats are important in understanding the rulemaking process. Since solving these problems is beyond the scope of this project, I simply posit that agency preferences exist and explore how they affect the different phases of the process. While the empirical measures of agency ideology that I use to test the hypotheses that flow from the theory are necessarily noisy, by employing multiple measures I show that I am tapping into the deeper latent construct of agency preferences.

2.3 THE INCENTIVE STRUCTURE OF NOTICE-AND-COMMENT

In the previous section I argued that agency bureaucrats have preferences over policy and use the rulemaking process to advance those preferences. Yet the argument in this project is that agency bureaucrats write proposed rules that they like and that they want to see succeed. To make this case, I must also establish that the proposed rule (and not the final rule) is the point at which agencies stake their claim, a task to which I now turn.

I argue that the proposed rule is an “investment” (and thus the point at which agency preferences manifest) due to the incentives created by a combination of resource, legal, and

⁵A number of weighting schemes are plausible. For instance, one could count only the preferences of agency heads, only those employees with some level of formal policy authority, or, alternatively, every agency employee could carry equal weight. Each of these aggregation schemes carries an implicit judgment about the role of different personnel in making policy decisions and each might be appropriate depending on the question at hand.

psychological factors. As I explain in the paragraphs below, each of these factors leads to the agency to want to invest in the process early on, rather than wait and deliberate after receiving the public's comments.

Resource Considerations

Resource deficits, both in terms of budget and personnel, are a continual struggle for bureaucratic agencies (one might even daresay such deficits are a defining characteristic of government bureaucracies). Getting a proposed rule from the idea stage to publication in the *Federal Register* involves considerable resources and changes an agency's calculations in how they approach a proposed rule.

At the start of the process, agencies must dedicate resources to gathering research and conducting policy analysis.⁶ Research, which is used to justify the agency's policy decision, can be conducted by the agency itself or an outside vendor who conducts the research on the agency's behalf, or gathered from existing academic, policy, or technical studies. In addition to scrutiny over the scientific or technical rationale underlying their policy decisions, agencies are subject to a variety of analytical requirements in preparing proposed rules, including cost-benefit analysis, small business impact analysis, and other agency-specific analyses required by statute. According to Vogel (2012, 260), analytical requirements "have required agencies to invest considerable resources to developing extensive economic and scientific data sufficient to withstand legal challenges to their rule-making... It is estimated that 90% of the scientific factual data prepared by the EPA are to enable the agency's decisions to withstand judicial review."

⁶This discussion presumes a rule with relatively important policy implications, as research is generally not required for non-substantive rules (e.g., small administrative changes).

In the process of preparing a draft of the proposed rule, the agency may (or may not) consult with stakeholders outside of the agency to improve the draft policy. It is becoming increasingly common for agencies to engage stakeholders at this early draft stage⁷ and this again involves staff time and resources. After the analyses and consulting, the agency must prepare a draft of the proposed rule, itself a considerable task. West (2009, 580) explains that “important [proposed rules] are often accompanied by lengthy discussions (sometimes in excess of 100 pages) that may examine alternative courses of action and that may cite thousands of pages of supporting evidence.”

Once the draft policy is complete from the program office’s perspective, it goes through the agency’s internal clearance process. This is often quite contentious, as different units within the same agency can have a stake in the policy and a very different take on how the policy proposal should look (Interview with EPA official, May 2013). Things that the program office decided on months ago can get reopened and redecided at this stage.

After the draft proposed rule receives internal clearance from the agency, it is sent to OIRA for review. Although EO 12866 suggests that OIRA’s review should not exceed 90 days, reviews can be adversarial and often exceed the recommended time (see Bolton, Potter and Thrower, 2014). Again, issues that the program office considered closed can be reopened and relitigated during OIRA review. Following OIRA review, the agency sends the rule to the *Federal Register* for publication.

The time it takes to complete all of these tasks is difficult to ascertain, since the point at which the agency began accumulating data and having staff meetings about what

⁷A recent report by the Administrative Conference of the United States actually encourages agencies to conduct outreach when drafting a proposed rule, so long as they are transparent and avoid perceptions of favoritism or bias (ACUS, 2014).

a particular rule might include is not a matter of public record. Nevertheless, West (2004) finds that the average length of the proposal development period for 42 rules in his study was more than 5 years. And, when considered in light of the fact that the time from the publication of the proposed rule to the publication of the final rule is estimated to take anywhere between 8 and 25 months (O’Connell, 2008), rulemaking is a very time- (and by extension resource-) intensive undertaking indeed.

The point is that the preparation of a proposed rule soaks up substantial agency resources. This should be thought of as an opportunity cost, since time the agency invests in issuing one proposed rule comes at the direct expense of other rulemaking projects. This is particularly acute, since almost all agencies face a backlog in rulemaking, with an ever-increasing list of policy fixes and improvements on the regulatory to-do list (Kerwin and Furlong, 2011). Because of the costliness of the resource investment in a proposed rule, agencies cannot afford to treat a proposed rule as a “trial balloon.” Scrapping a proposed rule and starting anew (or having to issue a second proposed rule on the same topic) is not an efficient use of resources from the agency’s perspective.

Legal Considerations

From a legal perspective, agencies have an incentive to pin down the “right” policy at the proposed rule stage. Although many political science models of agency policymaking include strategic accommodation (where the agency proposes a policy that it does not prefer in order to adjust it closer to its own ideal point later on), this is not an optimal strategy in the case of notice-and-comment. Specifically, the principle of “logical outgrowth” states that an agency may not introduce meaningful changes at the final rule stage if those changes

were not adequately foreshadowed at the proposed rule stage (Kannan, 1996). If an agency violates this principle, the rule can be challenged in the courts and overturned on the grounds that it is arbitrary and capricious.

For instance, a recent court ruling overturned a final rule issued by the Department of Health and Human Services (HHS) on the grounds that the agency changed the meaning of a key part of the rule at the final rule stage. The rule pertained to the calculation of the reimbursement rate for Medicare Part E (treatment of disproportionately low-income patients). The proposed rule (2003) would have excluded certain patients from the numerator of the formula, while the final rule (2004) took the exact opposite stance and included those patients in the numerator. The change had considerable financial implications for regulated parties. In overturning the final rule, the federal district court noted that this was not a harmless error on the agency's part: "we ask ourselves, would a reasonable member of the regulated class— even a good lawyer—anticipate that such a volte-face with enormous financial implications would follow the Secretary's proposed rule. Indeed, such a lawyer might well advise a hospital client not to comment opposing such a possible change for fear of giving the Secretary the very idea...the Secretary's final rule was not a logical outgrowth of the proposed rule" (*Allina Health Services v. Sebelius*, D.C. Cir. 2014). In other words, the court vacated the rule because commenters had not been given adequate notice and the opportunity to comment on the new numerator.

Cases like this illustrate the point that, given the resources involved in the rulemaking process, it makes sense for agency bureaucrats to propose a policy that they like at the proposed rule stage, as they may not get a chance to change it later on (or if they do change it, it may be subject to legal challenges).

Logical outgrowth also highlights an important principle about rulemaking more generally; rules are more visible and receive greater scrutiny—from the public, the president, Congress, the press, the courts—after the proposed rule is published and enters the public consciousness. Further, everything from the publication of the proposed rule onward the becomes the basis of a record that is subject to judicial review (Lubbers, 2006).⁸

Overall, then the legal components of the rulemaking process suggest that it is worth an agency’s effort to try to pin down a policy that is legally viable—and that the agency likes—early on in the process. If the agency waits until later on (i.e., the final rule stage), their decision will be subject to greater public scrutiny and may raise issues related to logical outgrowth.

Psychological Considerations

Even after investing resources in a proposed rule and carefully weighing the legal consequences, some proposed rules would be better sent to the scrap heap than to the *Federal Register*, because they face dismal prospects of being finalized or withstanding legal challenges. Yet, I argue that psychological factors also incentivize agencies to protect their investments in proposed rules even in the face of long odds. The phenomenon that I refer to here is what psychologists describe as the “sunk cost effect,” or the idea that people have “a greater tendency to continue an endeavor once an investment in money, effort, or time has been made” (Arkes and Blumer, 1985). The effect has been found to hold in numerous organizational and personal contexts (see Brockner, 1992, for a review). In the context of rulemaking, the sunk cost effect suggests that instead of withdrawing a proposed rule (or,

⁸This is a stylized fact. As Shipan (1997) points out, the evidence that is subject to judicial review varies by agency and policy area, and is itself a political variable.

alternatively, issuing a second proposed rule to supplant the first) agencies work to defend the policy contained in the proposed rule.

In the context of rulemaking, the behavior may also stem from a psychological commitment to the policy that was included in the proposed rule (West, 2009). That is, agency rulewriters spend months (or, in some cases, years) developing the policy that is included in the proposed rule. At the end of the process, they have convinced themselves that the proposed policy is indeed the best policy given the circumstances at hand.

Finally, the desire to protect the proposed rule may also be rooted in the fact that the longer a proposed rule (or draft proposed rule) hangs around, the more it begins to seem like the status quo. And because human beings exhibit a status quo bias, they tend to be more resistant to changes to the status quo (Tversky and Kahneman, 1981). In other words, losing five dollars vexes us more than gaining five dollars gratifies us. In the context of bureaucratic politics, Carpenter and Krause (2012, 29) describe this as an agency's tendency toward inertia, wherein agencies tend to treat things as immutable, when they in fact still can be changed. Other scholars have noted this tendency with respect to rulemaking, as agency proposals are "increasingly difficult to stop or alter as they progress in their development" (West, 2009). In this case, status quo bias toward the proposed rule may indicate an unwillingness to return to the actual status quo or to consider an alternate policy proposal down the road.

In the context of the proposed rule, these psychological factors suggest that even though there might be good reason for an agency to scrap a proposed rule and pursue a different policy alternative—be that no policy or another policy contained in a second proposed rule—psychological factors encourage agencies to stand pat with the proposed rule

and protect their investment.

2.4 CONCLUSION

Returning to the crime analogy drawn in the introduction to this chapter, I have made a case for bureaucrats' *motives* with respect to the notice-and-comment process. I have argued that bureaucrats have preferences and that it is reasonable to expect that these preferences find their way into the proposed rules that agencies draft. I have also shown how resource, legal, and psychological factors cause the proposed rule to be perceived as an investment by the agency. Taken together, this suggests that agencies write proposed rules that they like and that they want to see succeed. The implication is that agencies have a reason to defend their proposed rules.

In the chapters that follow, I draw out the *means* by which agencies defend their proposed rules. There are many obstacles a proposed rule faces on the path to becoming a final rule, and, I point to a number of tools that agencies can use to help proposed rules surmount these obstacles. These tools are subtle, and rely on bureaucrats' superior expertise and familiarity with the details of the rulemaking process.

In the next chapter, I use a signaling model to show how, in the shadow of a regulatory veto (one potential roadblock), agencies strategically select which policy to include in the proposed rule. I show that these incentives mean that agencies sometimes, although not often, propose rules that are closer to principals' preferred policies than their own. In Chapter 4, I test the implications of this model on a new dataset of OIRA vetoes. And in Chapter 5, I show how this protectionist behavior extends to the public comment period.

The remaining challenge is to establish *opportunity*. I argue that each proposed rule

represents an opportunity for an agency to engage in getting preferred policies enacted into law. However, some of the strategies are more available or more necessary at some times than others. For example, in the signaling model, I show that agencies are more likely to propose their preferred policies when they are ideologically proximate to political principals. This suggests less of a need to protect the proposed policy in the case of ideological proximity, since it is less likely to come under attack. Further, as I show in the conclusion to this dissertation (Chapter 7), some agencies appear to be much better at getting their proposed rules past the finish line, suggesting that perhaps all opportunities are not created equal.

Finally, as referenced in the introduction, *motive*, *means*, and *opportunity* are necessary, but not sufficient conditions to establish that the rulemaking process is dominated by unelected bureaucrats. Showing that these strategies are successful in getting an agency what it wants is a difficult—if not impossible—bar to clear, a point to which I return in my concluding thoughts (Chapter 7). My hope is that the evidence I present in this dissertation serves to convince the reader (beyond a reasonable doubt) that agencies behave strategically in the rulemaking process.

2.5 APPENDIX: MEASURING AGENCY IDEOLOGY

The ideology of political actors is one of the primary explanatory factors for political outcomes in the American context. Given its theoretical importance, along with the quantitative nature of the discipline, it is unsurprising that political scientists have developed numerical estimates of the ideology of political actors on a left-right continuum. Most prominently, scholars have used congressional roll-call data to create measures of latent ideology for members of Congress.⁹ Outside of the legislative context, scholars have harnessed other data sources including newspaper editorials describing the ideology of Supreme Court nominees (Segal and Cover, 1989) and individuals' campaign contributions to elected officials (Bonica, 2013) to create measures of the ideology of political actors.

Extending such estimates of ideology to the bureaucracy has been tricky, since bureaucrats rarely take public positions on policy issues, and when they do it is not in a systematic and reliable manner. While early scholars relied on the president's ideology as a crude proxy for the agency (e.g., Cohen, 1986; Shipan, 2004) or whether the agency was created by a Democratic or Republican congress (Gilmour and Lewis, 2006), in recent years scholars have begun to develop more sophisticated measures of agency ideology (e.g., Bertelli and Grose, 2009; Nixon, 2004; Snyder and Weingast, 2000).

Because ideology plays a critically important role in this project, in the empirical chapters I use a mix of three cutting-edge measures of agency ideology.¹⁰ I focus on these

⁹The most influential scores, of course, being Poole and Rosenthal's (1997) NOMINATE scores.

¹⁰Of course, the three measures I use are not the only measures of agency ideology in existence. For instance, Krause and O'Connell (2014) are currently working to develop separate measures of appointee competence and loyalty. And Clinton et al. (2012) survey both careerists and appointees, asking them to "vote" on a number of bills pending in Congress. From there, they scale agencies and congressional actors on the same dimension. While their measures have considerable face validity, they are only available for the 109th Congress (2005-2006), and are not suitable for time series studies.

three measures, shown in Table 2.1, because they rely on published work and cover the greatest number of agencies.

The earliest measures that I use come from Clinton and Lewis (2008). Their estimates are based on a survey of bureaucracy experts, who were asked to evaluate the ideology of 82 agencies. Clinton and Lewis aggregate the experts' responses using a multirater item response model to create an estimate of each agency's ideology. The estimates cover both independent and executive branch agencies. Because experts were asked about the overall ideology of the agency (and not the ideology of the agency at a specific point in time) these estimates can be thought of as covering the ideology of the agency's mission (e.g., whether the Department of Labor is more liberal than the Department of State). There are two drawbacks to these data. First, they are not time-varying; each agency has one ideology estimate that does not change. Second, the scores are not scaled on the same dimension as other political actors, so while it is possible to compare agencies to each other, it is not possible to evaluate the ideological distance between the agency and, say, the president or the filibuster pivot at any point in time.

Bertelli and Grose (2011) create agency ideology measures that are time-varying. They scour the written congressional testimony of agency heads and identify positions that these leaders take on pending bills during their testimony. From there, the authors use a Bayesian scaling algorithm to place agency heads on the same scale as congressional actors and the president, relying on agency testimony, congressional roll-call votes and presidential statements on these bills. The resulting scores cover most Cabinet-level agencies from 1991-2004. Because these scores are focused only on the agency head (usually the Department Secretary), they assume a considerable role for agency leaders, and do not capture the

Table 2.1: Summary of Agency Ideology Measures

Authors	Method	# Agencies	Years	Focus
Bertelli and Grose (2011)	Data on Cabinet agency heads' public positions on bills, as coded in agency heads' written congressional testimony. Positions are then scaled to congressional actors and the president using a bridging technique.	16	1991-2004	Agency head only
Chen and Johnson (2014)	Data on agency bureaucrats' campaign contributions to sitting members of Congress. They map these donors to the members' Common Space NOMINATE score. The contributions then become weights, which are then used to create an aggregate agency score.	79	1994-2012	Political appointees and careerists
Clinton and Lewis (2008)	Survey of 37 bureaucracy experts, where experts rated the ideology of agencies. Experts' scores are then aggregated using a multirater item response model	82	1988-2005 ¹¹	Agency mission

ideology of other actors within that agency (e.g., career civil servants and lower-ranked political appointees).

Finally, in even more recent work Chen and Johnson (2014) create a measure that uses campaign contributions from agency employees to sitting members of Congress. They identify any campaign contribution by an agency employee of \$200 or more and match the dollar amount to the member's Common Space NOMINATE score. The aggregate contributions come to form weights, and the agency's ideology score is then a weighted

average of the campaign finance-weighted Common Space NOMINATE scores. The resulting scores implicitly weigh the preferences of high-level careerists and political appointees more than the rank-and-file (since executive leaders have higher salaries and tend to donate more to congressional candidates), but still speak to agency ideology at the broad agency level since they incorporate the preferences of career civil servants.¹² These scores vary by presidential campaign cycle (i.e., every four years), and are available from the Clinton administration to present.

Empirical Approach to Using Agency Ideology Estimates

Each of the estimates of agency ideology relies on a different data source and a different population of interest (that is, Bertelli and Grose (2011) focus on political appointees, while Chen and Johnson (2014) focus on both appointees and careerists, and Clinton and Lewis (2008) focus on agency mission). Additionally, as shown in Table 2.2 each measure covers a slightly different set of agencies and a slightly different time period.

Because of these distinctions, each of the measures taps into a different underlying dimension of agency ideology: Clinton and Lewis (2008) address agency mission, Bertelli and Grose (2011) address agency leadership, and Chen and Johnson (2014) capture a broader portrait of agency personnel. Indeed, this is evidenced by the relatively low correlation among the measures; for instance, the Bertelli and Grose (2011) and the Chen and Johnson (2014) scores only share a correlation of $\rho = .45$.

In order to take advantage of the measures, but also be cognizant of their differences, I employ them in different ways in different chapters. In Chapter 4, I rely primarily on Bertelli and Grose's (2011) measure since it focuses on agency leaders and I argue that the

¹²Indeed, Chen and Johnson (2014) use the data to test theories about the unionization of agency employees.

Table 2.2: Agencies Included in the Data

Agency Name	Clinton & Lewis	Bertelli & Grose	Chen & Johnson
Commodity Futures Trading Comm	+		✓
Dept of Agriculture	+		✓
Dept of Commerce	✓	✓	✓
Dept of Defense	✓	✓	
Dept of Education	✓	✓	✓
Dept of Energy	✓	✓	✓
Dept of Health & Human Services	✓	✓	✓
Dept of Homeland Security	✓	✓	✓
Dept of Housing & Urban Development	✓	✓	✓
Dept of the Interior	✓	✓	✓
Dept of Justice	✓	✓	✓
Dept of Labor	✓	✓	✓
Dept of State	+		✓
Dept of Transportation	✓	✓	✓
Dept of the Treasury	✓	✓	✓
Dept of Veterans Affairs	✓	✓	✓
Env't'l Protection Agency	✓		✓
Fed Deposit Insurance Corp	+		✓
Fed Emergency Mgmt Agency	✓		
General Services Admin	✓		
Nat'l Archives & Records Admin	+		✓
Nat'l Credit Union Admin	+		✓
Nuclear Regulatory Comm	+		✓
Office of Personnel Mgmt	✓		✓
Securities and Exchange Comm	+		✓
Small Business Admin	✓		✓
Social Security Admin	✓		✓

a) + indicates agencies included in Chapter 5, but not Chapter 4. Chapter 4 includes fewer agencies, because it was not possible to match all agencies to an appropriate Policy Agendas topic area.

b) The Department of Homeland Security was created in 2002 and is included in the data from the year 2003 onward.

c) The Federal Emergency Management Agency was subsumed into DHS at the time of its creation and is included in the data from 1981-2002 only.

key policy decisions pertaining to regulatory vetoes (the focus of that chapter) are made at that high level. In Chapter 5, however, I use Chen and Johnson's (2014) data, since the agency decisions in question (regarding the length of the comment period and the timing of the proposed rule's publication) are much more routine and are made at a lower level within the agency.¹³ In the latter chapter, I also use Clinton and Lewis's (2008) expert measures as a robustness check, since they capture a more general sense of the agency's mission (but lack the time-series dimension).

¹³This was confirmed in interviews with EPA and FDA officials, who indicated that for most rules, the program office did not partake in these decisions. Both indicated that, occasionally, the Administrator or Secretary's office would get involved for very high-profile rules.

Chapter 3

Dodging the Regulatory Veto: A Formal Model

Balancing the public health concerns of smoking with the commercial interests of the tobacco industry is a perennial struggle for regulators (Croley, 2009). The recent growth of electronic cigarettes (“e-cigarettes”) has presented regulators with a particularly acute challenge, as it is not immediately clear how such devices fit into the extant regulatory framework. These electronic devices simulate the experience of smoking a cigarette—users puff on a reusable metal tube which releases a nicotine vapor—but do not emit smoke and do not contain carcinogenic tars. While research on the health effects of e-cigarettes remains inconclusive, some states and localities have begun enacting prohibitions on the use of these devices in public spaces.¹

In the fall of 2013, faced with mounting public pressure for federal action, the U.S. Food and Drug Administration (FDA) began drafting a proposed rule to address e-cigarettes. Observers speculated whether the FDA would classify this new technology as an “alternative nicotine product” (following seven states), a “vapor product” (North Carolina’s definition), or under the current federal definition of “tobacco product” (Wilson, October 29, 2013). Each

¹For instance, three states (New Jersey, North Dakota, and Utah) and Washington, D.C. have banned the use of e-cigarettes wherever smoking is prohibited.

potential classification would carry different consequences. Defining electronic cigarettes as a “tobacco product” would bring the most significant impositions for the industry, including requiring the makers of e-cigarettes to disclose health concerns on packaging and subjecting the product to the federal cigarette sales tax. On the other hand, the creation of a new “vapor product” category at the federal level, the alternative preferred by the electronic cigarette industry, would likely result in a laxer standard since it would not automatically invoke the existing (and strict) regime. The “alternative nicotine product” category would fall somewhere in between.

As this e-cigarette example illustrates, there are many ways to accomplish a policy objective, and when writing new regulatory proposals, federal agencies are faced with multiple routes to achieving their goals. The policy that the FDA ultimately selects for inclusion in the e-cigarette proposed rule is important, as it will serve as the starting point for future policy discussions on e-cigarettes.² In other words, the issuance of a proposed rule serves as a critical *agenda-setting tool* (Kingdon, 2002; Cox and McCubbins, 2005) for agencies.

Yet, the agency is not necessarily free to pick the policy that it most prefers, because the preferences of other actors in the political system matter as well. Most notably, in order to have a proposed rule reach the final rule stage and become law, it must not be blocked by political overseers. While such “regulatory vetoes” (as I refer to them here) are rare events, they do occur and, as I show empirically in the next chapter, may occur with greater frequency than we often think. These vetoes may be issued by either Congress or the president, and, just as veto power has been shown to have strong anticipatory effects in other contexts (Cameron, 2000; Ferejohn and Shipan, 1990; Tsebelis, 2002), they have

²As of this writing the FDA has yet to release a proposed rule on e-cigarettes.

the power to critically shape agency behavior when writing proposed rules even if they are relatively infrequent.

In this chapter, I show how agencies strategically write proposed rules, selecting policies with an eye toward avoiding a veto while also remaining as faithful as possible to the agency's own policy preferences. This strategic action is necessary in order to protect the agency's investment in the proposed rule. To show how the second face of anticipatory power (Bachrach and Baratz, 1962) works in this context I develop a game theoretic signaling model that shows when an agency writes a unconstrained (i.e., preferable) version of a proposal, and when the agency scales back to a more constrained (i.e., less preferable) version of the proposal in order to dodge the regulatory veto. The model also generates predictions about when Congress and the president are more (less) likely to veto an agency's rule. The advantage of formally modeling the interaction between an agency and its political principals is that the predictions that emerge are more nuanced than a simple verbal model; I am able to derive specific predictions about how the actors make tradeoffs between political and policy benefits. The key takeaway is that, more often than not, agencies issue their preferred policies, rather than tempering their proposals to placate political principals. In addition, regulatory vetoes, while rare, tend to occur more for unconstrained proposals than for proposals that are moderated due to political considerations.

The remainder of this chapter proceeds in several sections. I begin by briefly describing how regulatory vetoes work in practice and demonstrating that, for an agency, it is critical to write a proposed rule in a way that dodges these vetoes. I then introduce a signaling model and explain how this type of model helps to clarify the logic underlying agency behavior when drafting a proposed rule. Next I present the fundamentals of the model, in-

cluding the key assumptions and the players, preferences, and sequencing of the game. The subsequent sections analyze the model and derive a series of hypotheses. The final section discusses these hypotheses in the context of the empirical tests offered in Chapter 4.

3.1 REGULATORY VETOES AND PROPOSAL SELECTION

As detailed in Chapter 2, drafting a proposed rule is a significant investment for an agency. As a result, having a proposed rule vetoed by Congress or the president is a highly unfavorable outcome since it essentially squanders the agency’s investment. Nou (2013) explains,

Reversals are costly. They can upend months, usually years, of work spent gathering data, reaching out to stakeholders, and considering and responding to public comments. This is to say nothing of the efforts required to draft regulatory text, analyses, and preambles with the sustained coordination of policy experts, economists, scientists, and lawyers through multiple stages of the rulemaking process. Moreover, reversals create more work for agencies by sending them back to the drawing board in settings where resources are already constrained and budgets consistently threatened. Reversals also thwart the policy preferences of the agency.

Nou’s argument relates specifically to presidential oversight of agency rulemaking through the Office of Information and Regulatory Affairs (OIRA). As the centralized clearinghouse for rulemaking, OIRA has the authority to formally review any rule written by an agency within the executive branch.³ OIRA review serves as an important check on the agencies. As Senator Coburn (R-OK) recently noted, OIRA is the “last line of defense. When a bad, or unnecessary regulation is coming, OIRA is the last place where someone

³This is a generalization. OIRA reviews agency rules under the authority of Executive Order 12866, which exempts certain classes of rules from review. In addition, OIRA has purview over the rules produced by a handful of “independent” agencies, like the Social Security Administration.

can say ‘No.’ And if you don’t say no when you should, these situations end in court, waste time and money and cause unnecessary heartache.”⁴

As this quote suggests, in the course of reviewing a rule, OIRA has the power to “veto” a rule, returning it to the agency for further consideration. In effect, the rule is dead. The agency may try to tweak the rule and resubmit it to OIRA at some future time, but all of the effort that went into crafting the current proposed rule has been wasted. Furthermore, the policy window has closed (Kingdon, 2002) and there is no guarantee that it will open again in the future.

However, an agency drafting a new proposed rule doesn’t just contend with presidential review; it must also consider the possibility of a congressional veto. Congressional vetoes can transpire in one of three ways. First, and most directly, at any point Congress can simply write a new law that overwrites the agency’s rule. Because laws passed by Congress supersede agency rules, the rule then becomes moot. A second and related congressional veto power exists under the Congressional Review Act of 1996 (P.L. 104-121). This law states that after issuing a “major” proposed or final rule (i.e., a rule with important financial or policy consequences)⁵ Congress has a period of 60 days to consider—and possibly annul—the rule. In order to execute the nullification, both chambers must pass a joint resolution and the president must sign it. Finally, the third path to a congressional veto involves a member

⁴Statement of Senator Tom Coburn, confirmation hearing of Howard Shelanski, nominee for OIRA Administrator, Senate Committee on Homeland Security and Governmental Affairs, June 12, 2013, <http://www.hsgac.senate.gov/hearings/nomination-of-howard-a-shelanski>.

⁵According to the Government Accountability Office, a “major” rule is any rule that meets at least one of the following criteria: “an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. §804(2)).

of Congress attaching a limitation rider to an appropriations bill prohibiting the finalization of a proposed rule or forbidding agency funds from being spent on the implementation of a final rule (MacDonald, 2010). Again, these riders prevent the agency from making a binding policy in that particular policy area.

In the next chapter, I explore the nuances and empirical regularities associated with these veto outlets, but at present, suffice it to say that vetoes of agency rules—by both Congress and the president—are possible and, indeed, occur with some frequency. Of course, the myriad paths for either a congressional or presidential veto of an agency’s rule are not secret; agencies are well aware of the potential for vetoes and can craft policies to avoid them. That is, agencies can scale back or enhance the ambitiousness of a policy proposal to make that proposal more palatable to a political overseer and deter him or her from issuing a veto. Implicit in this framework is the notion that there are many ways to accomplish a policy goal and the agency can select among different levels or policy alternatives when drafting a new proposed rule. This approach to understanding policy formulation is common in studies of public policy and, indeed, is explicitly required under EO 12866. That order directs agencies to conduct cost-benefit analysis not only for the policy they are offering in the proposed rule, but also for “reasonably feasible alternatives to the planned regulation.” However, more often than not such analysis is either not conducted, or is not done in a meaningful way (Carrigan and Shapiro, 2013).

In practice, the act of weighing alternatives is conducted when the agency is in the planning and drafting stages of writing a new proposal, well before the proposed rule is published in the *Federal Register* and well outside of public scrutiny. The policy that is then offered in the proposed rule is the result of careful planning and evaluation and should not

necessarily be thought of as the agency’s ideal policy proposal.⁶ While the policy proposed may be altered should it make it to the final rule stage, as explained in Chapter 2 there are resource, legal, and psychological factors that make it more difficult to make substantive policy changes at that late stage. This suggests that agencies have an incentive to propose policies that are as close to their ideal policy as possible at the proposed rule stage. That is, agencies are incentivized to treat the selection of a proposed rule as though it will ultimately be the binding policy issued in the final rule. As a result, agencies have to make a strategic calculation early on regarding how much of their “ideal” policy they will be able to achieve without being vetoed or whether they will need to make policy concessions in their proposal.

Other scholars have recognized that agencies select from a menu of alternatives when drafting new rules. Wiseman (2009) formalizes a model that shows that agencies strategically propose policies prior to submitting to OIRA in order to minimize the potential negative consequences that flow from OIRA review. His results suggest that agencies “pad” their rules (i.e., include some “fat” that can be “trimmed” during the course of review), an idea supported by Shapiro (2007) in a case study of a rulemaking at the Occupational Safety and Health Administration (OSHA). While these studies confirm the notion that agencies propose policies other than their ideal policies, they do not give a sense of *when* and *how often* this padding (or concessionary proposing) occurs. It is to this task that we now turn.

3.2 WHY A SIGNALING MODEL?

To fashion a more sophisticated understanding of how agencies draft proposed rules in order to dodge the regulatory veto, I develop a signaling model. The key advantage of

⁶Rather, it can be thought of as a constrained policy preference.

the model over a simple verbal description is that its predictions are nuanced, and allow us to get at the tradeoff that the actors make between policy and political benefits while also accounting for the role of beliefs. The intuition behind the model is that, from the agency's perspective, getting past the proposed rule stage is essential. After all, in order for a rule to take on the full force and effect of law, *it must reach the final rule stage*. In other words, surpassing the proposed rule stage is a necessary, but not sufficient condition to achieving the agency's desired policy outcome.

A signaling model allows us to disentangle the nuances of this behavior in a systematic way. Broadly speaking, signaling models are helpful in cases where two conditions are met: 1) there is an information asymmetry between the actors; and 2) the receiver recognizes that the signal sent by the sender may be inaccurate or incomplete (Cameron, Segal and Songer, 2000).

In this model, the information asymmetry between the agency and its political overseers is based on the idea that the agency has superior intelligence regarding interest group support for (or opposition to) the proposed rule (an assumption that I discuss in greater detail in the next section).⁷ Both the agency and its overseers (i.e., Congress and the president) care about the level of interest group support for the rule, but only the agency knows the actual level of support. The political overseer must then attempt to infer the level of interest group support from the type of policy that the agency proposes. This is a departure from the standard signaling model setup in that instead of having private information about its own type, the agency has private information about the interest group environment.

⁷This is an extension of the assumption, common to models of bureaucratic policymaking, that agencies have greater policy expertise. Indeed, I allow for agencies to have greater policy expertise, but also assume that they may have better political information.

The model also represents an advance over existing models in that it begins with the agency as first mover, rather than Congress or the president. That is, most models begin with some sort of elected official delegating policymaking authority to an agency (e.g., Bawn, 1995; Wiseman, 2009) or selecting a political appointee to lead an agency (e.g., Lupia and McCubbins, 1994; McCarty, 2004). After this initial move by the political principal, the agency moves second. While these models have the ability to speak to a great number of theoretically interesting questions, they are not well-suited to the study of rulemaking. Agencies issue hundreds of rules each year and it is hard to imagine any politician (no matter how omniscient) able to anticipate and delegate in response to the net effect of such rules. Rather, agencies issue rules based on new laws that are passed, but also based on the authority that was granted to them in their enabling legislation (which in most cases was issued decades ago) (West and Raso, 2013).⁸ This makes it plain that agency rules are not issued based solely on explicit grants of authority or delegation from some political overseers, but are based on existing legal authority. This suggests that having the agency as the first-mover is an appropriate way to model the rulemaking process.

3.3 MODELING ASSUMPTIONS

The model is rooted in several assumptions about political behavior during the rule-making process. I now introduce each of these assumptions in turn.

⁸For instance, the FDA issues hundreds of rules each year. While the menu labeling case covered in Chapter 6 is currently being promulgated based on an explicit grant of authority under the Patient Protection and Affordable Care Act of 2010, this is more the exception than the rule. The majority of rules issued by the FDA stem from the agency's organic statute, the Pure Food and Drug Act of 1906 (P.L. 59-384), or other long-standing statutes such as the Federal Food, Drug and Cosmetic Act of 1938 (P.L. 82-215).

Assumption 1. Agencies Have an Informational Advantage

A key feature of the canonical principal-agent model is that the agent possesses information that is not known by the principal. In the context of bureaucratic politics, this frequently translates into the agency (or bureaucrat) having greater expertise about the policy area than the principal and using that information to its strategic advantage (Miller, 2005). In this model I make a similar, albeit slightly different assumption about the information asymmetry between the agency and its political overseers. I assume that agencies know the disposition of interest groups vis-à-vis the specific policy contained in the proposed rule and that political principals do not.

Rather than supposing that this knowledge comes from a general expertise possessed by bureaucrats, I instead assume that agencies gather critical policy-relevant intelligence from stakeholders in advance of the publication of the proposed rule. Indeed, a growing amount of evidence suggests that agencies engage in significant amounts of *ex parte* (off the record) information gathering with interest groups while in the early stages of drafting a proposed rule. For instance, Chubb (1983) draws on a series of case studies of energy-related bureaucracies and interest groups and finds that most interest group influence comes informally, before a proposed rule is put forward for public comment. He interviews more than 70 officials related with energy policy in the late 1970s and reports that agencies developed cozy relationships with industry groups, and came to rely on the expertise they provided. This, in turn, led to frequent consultation *before* a proposed rule went out for comment. He summarizes his interviews as follows: “with two exceptions, every group with sufficient experience to comment explained that petroleum regulation was influenced in the early, formative stages, and that once proposed regulations reached the *Federal Register* they could

not be changed. At that point, as several oil company representatives put it ‘regulations are cast in cement’ ” (142).

Similarly, in a survey of interest groups conducted by Furlong and Kerwin (2005) in 2002, 86% of respondents that had engaged in the notice-and-comment process reported having informal contact with the agency *before* the proposed rule was published in the *Federal Register*. Of those respondents, 90% reported that the method was effective at getting the agency to make changes to the draft rule.⁹

And, in a more recent study, Yackee (2012) uses content analysis and a survey of interest groups for a set of 19 rules from the Department of Transportation to uncover the extent of group influence on rulemaking before the proposed rule. In the survey, interest groups respondents who participated before the proposed rule was published were “52% more likely to share data and scientific studies with rule writers than other participants, and 62% more likely to provide rule language” (387). Furthermore, these respondents who did engage informally early on reported that their actions were influential with respect to the proposed rule that was later published. Although the study’s design does not speak to the frequency of informal pre-proposal *parte* contact (just that it occurs), Yackee concludes that it is nonetheless an important source of agenda-setting and information-gathering in the rulemaking process.¹⁰

⁹Both of these figures represent an increase from a similar survey the authors conducted ten years prior; in 1992, 73% of respondents reported having engaged in informal pre-proposal contact, and of those respondents 85% rated it an effective lobbying technique. Effectiveness figures indicate the percentage of respondents who gave the method a “3” or higher (on a 5-point scale).

¹⁰See also West (2009) and Wagner, Barnes and Peters (2011). Broadly, these conclusions about early consultation may explain findings from the legal and public administration fields that suggest agencies rarely learn (Elliott, 1992) or incorporate information (Mendelson, 2011; Yackee and Yackee, 2006) that is provided formally during the public comment period. Pre-conferral may provide agencies with requisite information earlier in the process, meaning that the comment period may serve some other end, such as inducing groups to publicly reveal their information (see Gailmard and Patty, 2013).

Taken together, this suggests that agencies do their homework, consulting with key interest groups in advance and getting a good sense of the lay of the land, and are significantly advantaged in this regard vis-à-vis political principals. In Chapter 6, I use a case study approach to show how the FDA engaged with stakeholders extensively prior to publishing an important proposed rule on menu labeling. In the 13 months that it took the FDA to draft its proposed rule, it met with key stakeholder groups (formally and informally) and also solicited written feedback from hundreds of groups. The case demonstrates the plausibility of this assumption in practice; by the time the proposed rule was published in the *Federal Register*, the agency had a well-developed sense of how different interests lined up with respect to the proposed policy.

A key aspect of this assumption is that political principals—in this case congressional overseers and OIRA—do not share the knowledge about interest group disposition that the agency has accumulated. Recall that agency rules tend to deal with very specific policy topics, ranging from how to best disclose nutrition information on restaurant menu boards to how to restructure aspects of the federal student loan program to guard against fraud and abuse. While political principals certainly have some sense of where specific constituencies might line up with respect to, say, environmental policy, rules deal with very specific policy topics and the mapping between general preferences over the environment to specific environmental rules may not always be clear. Thus, agencies have an information advantage *with respect to the specific policy areas addressed in each individual rule*.

Further, agencies issue thousands of rules each year and the very nature of delegation ensures that political principals cannot be equally informed on every policy area. To put it in concrete terms, OIRA reviews about 620 rules per year and maintains a staff of

approximately 50 desk officers. Meanwhile, the agencies that work to write those rules have dozens of employees working on each rule. It would be impossible for OIRA desk officers (or, alternatively, members of Congress) to share the detailed knowledge of group support for each rule that those agency rule-writers possess.

Assumption 2. Interest Group Preferences Matter

In addition to having their own policy preferences (see Chapter 2), I assume that both the agency and its political overseers care about interest group preferences with respect to the policy. In this context, I use the term “group support” rather loosely to refer to the issue public or constituency that is affected by (and possibly mobilized in response to) the policy area that the proposed rule will affect, not to refer to the broad level of support for a policy that exists in the general public. The model incorporates a level of group support for the policy and payoffs accrue when the “right” policy is enacted and, in the political principal’s case, also when the “wrong” policy is vetoed.

The notion that the political overseers like Congress and the president care about choosing policy that is consistent with the preferences of affected publics should not be controversial. Members of Congress face a reelection constraint, while the president is concerned with the public perception of his management of the executive branch, his approval ratings, and his legacy. Taken together, this suggests that those groups that are attentive enough to have preferences over rulemaking proposals have the ability to threaten reelection prospects and are taken seriously by political principals.¹¹

¹¹In the model I separate out the Politician’s (i.e., the principal) policy preferences from their electoral preferences. On the one hand, this raises an issue since the policy preferences of elected officials are often thought to incorporate the preferences of electoral constituents. On the other hand, separating these two ideas out is not problematic once we consider that a Politician might have their own policy preferences

Yet, the idea that agencies are rewarded for selecting policies that are supported by interest groups and other constituents is less intuitive. After all, bureaucratic agencies are often characterized as the least democratic institutions in the American system and bureaucrats do not face the same electoral incentives as other political actors. Nonetheless, there are reasons that bureaucrats may want to attend to the preferences of their constituents. Carpenter (2001) points to the critical importance of an agency’s reputation in helping to build agency autonomy. Interest groups and other affected constituents play a key role in enhancing—or diminishing—an agency’s reputation, and therefore agencies pay heed to the concerns of these groups. And Bradley (2014) points out that interest groups can be powerful allies for agencies, as agencies can enlist them to lobby the legislature on their behalf. Other scholars highlight the role of interest groups in helping agencies to bring attention to policy areas (Rourke, 1984), secure budgets (Berry, 1989), and influence public opinion (Hrebendar, 1997).¹² Further, group support lends democratic legitimacy to agency decisions, a critical ingredient for creating rules that are durable and to which regulated parties comply. In the model, I refer to the agency’s payoff for making policy that its constituents prefer as a “reputation bump.”

This assumption about the rewards accrued from heeding group support on a proposed rule plays a critical role in the model. Namely, allowing the actors to have both policy preferences and electoral and reputation preferences (respectively) creates situations where vetoes of rules are observed in equilibrium. This is important, because as empirically demon-

that are distinct (and according to Mayhew (1974), secondary, to electoral concerns) from that of their constituents. These policy preferences might stem from personal beliefs or from the desire to accomplish other political goals (e.g., to use later in log-rolling negotiations).

¹²Of course, agencies also have an indirect interest in attending to interest group preferences, since political principals care them and, to a certain point, agencies want to curry favor with political principals.

strated in the previous section, vetoes occur with some frequency and should be considered “on-the-path” equilibrium behavior.

Other Assumptions in the Model

In addition to these two global assumptions, I also make two more mundane assumptions. First, I assume that agencies must issue a proposed rule. In other words, there is no “exit option,” where the agency can choose not to issue any proposed rule at all. This mirrors an important facet of reality in that agencies are frequently required to issue proposed rules, through a legislative mandate, by the courts, or as the result of some crisis. While not all rules are compulsory, this is a necessary assumption if we wish to understand the rules that are actually issued by agencies (or vetoed by principals).¹³ Second, I adopt a common knowledge assumption that players’ prior beliefs are symmetric and that other players’ preferences are known. In other words, the Politician knows the type of rule preferred by the Agency and the payoffs that the agency will receive for each type of rule. Conversely, the Agency knows the type of rule preferred by the Politician and the payoffs that accrue to the Politician from each policy action.

3.4 ELEMENTS OF THE MODEL

Every model is comprised of five basic components: players, preferences, a sequence of play, information, and strategies. Below, I identify and explain each of these elements for

¹³Another way of stating this is that both the agency and political principals are in general agreement that policy should be moved away from the status quo. The traction in the model comes from disagreement over how far policy should be moved from the status quo. See Potter and Shipan (2013) for a discussion of how agencies can adjust the volume and timing of the releases they release as political circumstances change.

this signaling model.

Players and Preferences

There are two players: an Agency (**A**) and a Politician (**P**).¹⁴ The Politician is generic and can represent either Congress or OIRA. The basic setup of the game is that the Agency can propose either a constrained or an unconstrained proposed rule and the Politician must decide whether to veto or not veto the proposed rule.¹⁵

Without loss of generality, I assume that the Politician prefers a constrained policy and the Agency prefers an unconstrained policy.¹⁶ The terms “constrained” and “unconstrained” are used here to connote the degree to which the Agency’s policy choice accords with his own policy preferences. A proposed rule that is constrained is one that is more palatable to the Politician, but less so to the Agency; in essence the Agency modifies the policy proposal to meet with the preferences of his political principal. If the Agency is feeling less encumbered, he chooses his more preferred alternative of an unconstrained policy. Further, I assume that the Politician prefers no rule (i.e., a veto) to accepting the agency’s unconstrained proposal.¹⁷

¹⁴In the remainder of this chapter, I use masculine pronouns to refer to the Agency and feminine pronouns to refer to the Politician.

¹⁵This model is very loosely based on Clark’s (2009) model of congressional court-curbing. I borrow the terms “constrained” and “unconstrained” from that model. However, where he uses the terms to refer to the decision made by a judicial actor (the receiver), I use the terms to refer to the decision made by the Politician (the sender).

¹⁶This implies that the Politician and the Agency do not share preferences (i.e., $\mathbf{P} \neq \mathbf{A}$).

¹⁷This last assumption is necessary in order to make an interesting case to study, yet it has a theoretical foundation. Rules are durable policy; not only are they cumbersome to overturn after they are finalized (Potter and Shipan, 2013), but agencies also treat them as if they are irreversible (Carpenter and Krause, 2012). As a result, it is reasonable to assume the Politician would prefer to have her preferred policy implemented—or no policy—than have an undesirable policy implemented by the Agency. See Section 3.8 for a more detailed discussion of the role of the status quo in this model.

Before choosing to offer a constrained or unconstrained proposed rule, the Agency observes the level of group support for making a policy change in that particular policy area, $\Omega \in \{L, \neg L\}$. This is private information not shared by the Politician. Group support can be either liberal or conservative. I assume that the Politician is more conservative than the Agency and so liberal-leaning group support ($\Omega = L$) favors the unconstrained rule. Conversely, when group support is conservative ($\Omega = \neg L$), a constrained policy accords with the preferences of these groups. This is a normalization made to simplify the analysis; exact analogues exist for the case where the Politician is more liberal than the Agency.

Players receive a policy benefit from the proposal enacted (or lack thereof) and a political benefit if they take action to make policy accord with the state of the world (i.e., interest group preferences). The Agency receives a policy benefit b_u if he proposes an unconstrained policy and it is accepted, and b_c if he proposes a constrained policy and it is accepted. Because the Agency prefers the unconstrained policy to the constrained one and payoffs are positive, this implies that $b_u > b_c > 0$. If the Agency proposes either policy and it is vetoed, he gets 0. If the Agency proposes a policy that aligns with the signal he receives about interest group disposition ($\Omega = L$ and $x = u$, or $\Omega = \neg L$ and $x = c$), he receives δ . This represents the reputation bump the Agency receives from setting policy that falls in line with their interest group constituency.

To simplify the model, I standardize the Politician's payoffs according to her preference ordering such that she receives a payoff of 1 for approving (i.e., not vetoing) a constrained proposal, a payoff of 0 for vetoing any proposal, and a payoff of -1 for approving an unconstrained proposed rule. However, even though the Politician does not know the true level of interest group support, if she vetoes a proposed rule that does not align with interest group

preferences (e.g., she rejects a constrained proposed rule when group support for the policy is liberal), she receives an additional payoff of γ . Similarly, if she approves a proposed rule that aligns with group support she also receives an electoral bonus of γ . As discussed above, this represents the electoral credit that the Politician can claim for overseeing an agency that selects the “right” policy or from stopping an agency that proposes the “wrong” policy.¹⁸

Finally, I make the assumption that $\gamma \geq 1$. Practically speaking, this assumption serves to narrow the range of equilibria in the model. From a theoretical standpoint, this presumes that electoral payoffs always precede policy ones, an assumption rooted in Mayhew’s (1974) observation that politicians are “single-minded seekers of reelection.” Put another way, this assumption simply makes the case that politicians only have the luxury of attending to policy concerns after they have dealt with the more immediate political concern of getting reelected.

A summary description of the variables included in the model is provided in Table 3.1.

Sequence of Play

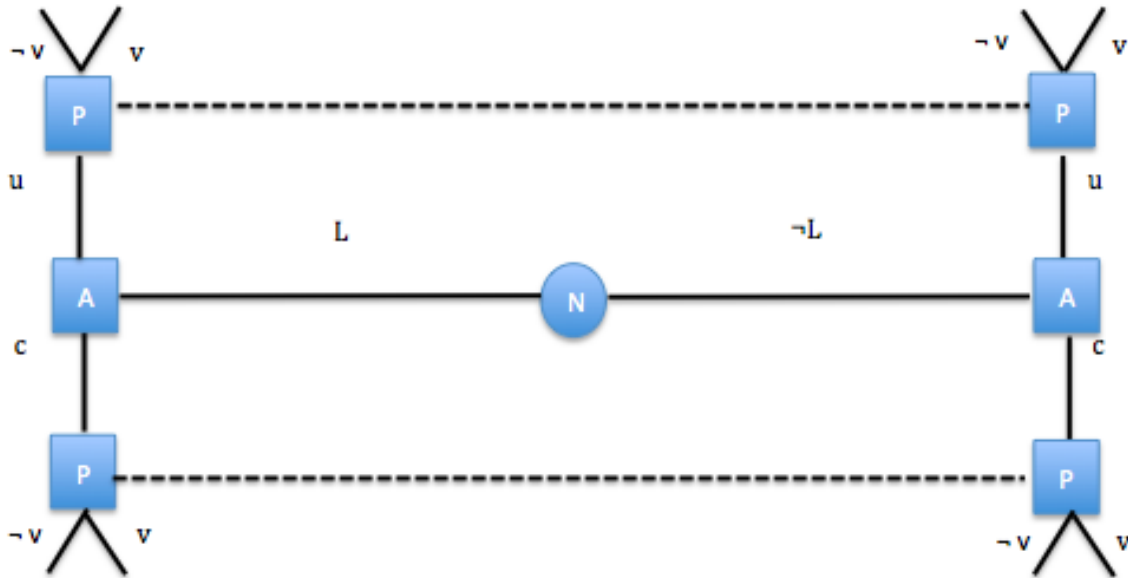
The game follows a standard signaling model setup, proceeding in three stages. To begin, **Nature** selects the level of group support for making a policy change, which can be either liberal or conservative such that $\Omega \in \{L, \neg L\}$, with $\Pr(\Omega = L) = \pi$. **A** observes Ω and selects a constrained or unconstrained proposed rule $x \in \{c, u\}$. Finally, **P** observes x and decides whether to veto or not veto **A**’s proposal. Players receive their attendant payoffs and the game ends.

¹⁸In cases where the Politician is indifferent between the payoffs, I assume that she prefers to clear a proposed rule, rather than veto it.

Table 3.1: Model Variables and Description

Symbol	Brief Description
α	Conditional probability with which the Politician mixes and chooses to veto the proposed rule
$b_i \in \{b_c, b_u\}$	Policy benefit to the agency from a constrained or unconstrained proposed rule, such that $b_u > b_c$ and $b_c > 0$
δ	Reputational payoff to the Agency from proposing a rule that accords with interest group position, s.t. $\delta > 0$
$d \in \{v, \neg v\}$	Decision made by the Politician to either veto or not veto (approve) the proposal made by the Agency
γ	Electoral payoff to the Politician for rejecting a proposal that is out of step with the level of interest group support or approving a proposal that is in line with group support, such that $\gamma \geq 1$
$\Omega = \{L, \neg L\}$	State of the world such that group support for making a policy change in a particular policy area is liberal (L) or not liberal ($\neg L$, conservative)
$\pi = Pr(\Omega = L)$	Probability that interest group support for moving the policy is liberal
q	Conditional probability with which the Agency mixes and chooses an unconstrained policy
$x \in \{c, u\}$	Policy proposal selected/ message sent by the Agency (constrained or unconstrained)

Figure 3.1: Extensive Form of the Signaling Model



The extensive form of the game is shown in Figure 3.1. Given this setup, A 's choice of a constrained or unconstrained proposed rule functions as a signal about its private information about the state of the world.

Beliefs

The Politician's belief about the true state of the world is defined such that $\pi = Pr(\Omega = L)$, where $\pi \in [0, 1]$ and $\Omega \in \{L, \neg L\}$. Upon observing the Agency's signal about the state of the world, the Politician updates her beliefs according to Bayes' Rule.

Strategies

A complete strategy set for each player is defined by a strategy for each node of play in the game, even those off-the-equilibrium path. A strategy for the Agency is a mapping from the state space into a message, $x : \Omega \rightarrow \{c, u\}$. A strategy for the Politician involves a mapping from her prior belief about the state of the world and the signal she receives into a decision, $d : [0, 1] \times \{c, u\} \rightarrow \{v, \neg v\}$.

3.5 ANALYSIS OF THE MODEL

This signaling model addresses how agencies leverage their asymmetric information to strategically set policy in the notice-and-comment rulemaking process. I rely on Perfect Bayesian Equilibrium (PBE) as the solution concept.

Three kinds of equilibria are possible: *separating*, where the Agency chooses a different type of proposal depending on the message he receives about group sentiment, *pooling* where the Agency selects the same type of rule regardless of the message he receives, and *semi-pooling*, where the Agency may randomize his strategy contingent on receiving a certain type of message. I now consider each in turn.

Separating Equilibria

In a separating equilibrium each type of the “sender” (i.e., an Agency faced with either liberal or conservative group support) chooses a different action, so that upon observing the sender’s action (i.e., the selection of an unconstrained or constrained proposed rule), the “receiver” (i.e., the Politician) knows with certainty the true state of the world. In this model, there is a separating equilibrium where the Agency engages in “truth-telling”

behavior such that he always selects a proposed rule that accurately represents the true level of constituent support for the rule. The first proposition states this in the language of the model; see the Appendix to this chapter for proofs of this and other propositions.

Proposition . If $\delta \geq b_u - b_c$, there exists a Perfect Bayesian Equilibrium where the Agency plays the strategy:

$$s_A = \begin{cases} u, & \text{if } \Omega = L. \\ c, & \text{if } \Omega = \neg L. \end{cases}$$

The Politician responds with the strategy:

$$s_P = \begin{cases} \neg v, & \text{if } x = u. \\ \neg v, & \text{if } x = c. \end{cases}$$

according to the belief that $Pr(\Omega = L|x = u) = 1$ and $Pr(\Omega = \neg L|x = c) = 1$.

Notably, in this equilibrium the game results in the Politician accepting any rule that the Agency proposes; no vetoes occur. The constraint $\delta \geq b_u - b_c$ indicates that this truth-telling behavior holds when the difference between the Agency's policy payoffs from an unconstrained and a constrained rule are low. This suggests that the Agency will be truthful and rulemaking can occur with few upsets when these two actors are ideologically proximate. This follows from a near universal axiom for signaling models that states that information transmission is more precise the closer the preferences of the sender and receiver (Bailey and Maltzman, 2011).

What we learn here, then, is that when the Politician and the Agency have similar ideological preferences (i.e., $b_u - b_c$ is small) *or* when the reputational payoff for the agency is high (i.e., sufficiently large δ) the Politician will accept rules proposed by the Agency. This occurs because the Agency is willing to truthfully convey the state of the world through the rule he proposes. The former result is unsurprising since if the Politician and the Agency are like-minded it is intuitive that the agency will be truthful. In the latter case, the reputational reward that the agency will receive for doing the right thing outweighs the policy benefit of always getting its preferred unconstrained policy enacted.

These dual mechanisms have very different implications. The first offers strong support for the ally principle—if Politicians select agencies that are ideologically close to them, they can achieve policy outcomes that match well with the political environment. The second points to an entirely different source of power—interest groups that can provide compelling returns to the agency can get their preferred policy enacted. This is a perhaps a story of “agency capture,” wherein groups that can bestow desirable rewards to bureaucrats (like revolving door jobs) can dictate the policymaking process. In each case, the Agency is a rainmaker, deciding who wins and loses in the policymaking process.

Pooling Equilibrium

In a pooling equilibrium, the Agency selects the same type of proposal regardless of the state of the world and, as a result, the Politician learns nothing about group support for the rule when she observes the proposed rule. In this model, there exists a unique pooling equilibrium, where the Agency always proposes an unconstrained rule, and it is not vetoed by the Politician.

Proposition 2. If $\delta < b_u - b_c$, there exists a Perfect Bayesian Equilibrium where the Agency plays the strategy:

$$s_A = \begin{cases} u, & \text{if } \Omega = L. \\ u, & \text{if } \Omega = \neg L. \end{cases}$$

The Politician responds with the strategy:

$$s_P = \begin{cases} \neg v, & \text{if } x = u. \\ \neg v, & \text{if } x = c. \end{cases}$$

according to the belief that $\pi > \frac{\gamma+1}{2\gamma}$.

This is the “bureaucracy gone amok” equilibrium, as it reveals a situation where the Agency will always offer his preferred unconstrained policy (regardless of the true state of the world) and the Agency’s preferred policy actually succeeds in getting past the proposed rule stage. This somewhat surprising maneuver is possible when the Politician believes that group support is liberal-leaning and that groups actually prefer the Agency’s unconstrained policy. In contrast to the solution from the separating equilibrium, the ideological preferences of the two actors need not be proximate in order for the Agency to stave off a veto.

This equilibrium reveals that when the agency’s preferred policy is very likely to be favored by interest groups, the Politician cannot credibly veto it. Because the Politician’s beliefs must be correct in equilibrium, this outcome is sustained if π is sufficiently high, relative to γ . As with the separating equilibrium, this pooling equilibrium predicts that the Politician will not veto the rules that the Agency proposes.

Semi-Pooling Equilibrium

The final class of hybrid equilibria is in many ways the most interesting since it allows the Agency to randomize in his selection of a constrained or unconstrained proposal. In turn, the Politician can mix her response, probabilistically choosing whether to clear or veto a proposed rule. In fact, the hybrid case is the only scenario in which we observe the Politician actually vetoing proposed rules in equilibrium.

Here, the Agency always offers an unconstrained rule when issue support is liberal and, when facing a belief that group support for a policy change leans conservative, mixes his selection of a constrained or unconstrained proposed rule, according to the following strategies and beliefs:

Proposition 3. If $\delta < b_u - b_c$, there exists a Perfect Bayesian Equilibrium where the Agency plays the strategy:

$$s_A = \begin{cases} u, & \text{if } \Omega = L. \\ q^* = \frac{\gamma\pi - \pi}{\gamma - \gamma\pi - \pi + 1}, & \text{if } \Omega = \neg L. \end{cases}$$

where q is defined as the $Pr(x = u | \Omega = \neg L) = q$. The Politician responds with the strategy:

$$s_P = \begin{cases} \neg v, & \text{if } x = c. \\ \alpha^* = \frac{b_u - b_c - \delta}{b_u}, & \text{if } x = u. \end{cases}$$

where α is defined as $Pr(d = v | x = u) = \alpha$ and \mathbf{P} 's prior belief is that $\pi < \frac{\gamma+1}{2\gamma}$.

In this equilibrium, the Agency only moderates his behavior by proposing a constrained rule randomly when group support is conservative ($\Omega = \neg L$). Otherwise, he proposes his more-preferred unconstrained rule if group support is liberal or randomly when Nature reveals a conservative level of group support.

Overall, this equilibrium is interesting for several reasons. First, it is the only equilibrium that supports on-the-path vetoes by the Politician. Second, it presents a portrait where the Agency is occasionally constrained by political oversight, but not always. This suggests that oversight is only sometimes meaningful in checking the Agency's behavior. Finally, these outcomes are sustained when the Politician's prior belief is that group support is conservative. I discuss each of these points in more detail in the sections that follow.

3.6 MODEL INTERPRETATION AND HYPOTHESES

The equilibria presented above indicate how both the Agency and Politician will behave under specific sets of conditions. Looking across these different cases, we can draw implications about behavior across (and despite) these conditions. Some of these observations have empirical implications, which I highlight when appropriate. In the next chapter, I empirically test many of these hypotheses to provide support for the theory laid out here.¹⁹

Veto Decisions

The model provides insight into the Politician's behavior, indicating when she vetoes rules and when she accepts them. In the model, the Politician observes either a constrained

¹⁹The emphasis in Chapter 4 is on testing the predictions relating to when regulatory vetoes occur (i.e., those pertaining to the Politician's behavior), rather than the predictions about the type of rules the Agency proposes. This emphasis is necessary as I was unable to identify a valid and reliable measure of the ideological orientation of proposed rules (i.e., whether they are constrained or unconstrained).

or an unconstrained proposed rule and must decide whether to accept or veto the rule—without knowing whether group support is liberal or conservative. This decision is based on several factors: her prior belief about the level of group support for a policy change (i.e., whether π leans conservative or liberal), the Agency’s political payoffs (δ), and the policy payoffs from a constrained (b_c) or unconstrained (b_u) policy.

Overall, in equilibrium, vetoes occur infrequently, arising probabilistically in Proposition 3 (and only for unconstrained proposals) and not at all in Propositions 1 and 2. This result provides some face validity for the model, as empirically speaking regulatory vetoes are rare events. The predicted dearth of vetoes suggests that the Agency operates relatively unchecked—in many of the cases, the Politician accepts the Agency’s rule even if it is not the “right” policy according to interest group support or it is not the Politician’s preferred constrained policy.

Understanding the empirical regularities associated with regulatory vetoes requires a careful examination of the hybrid case in Proposition 3, since this is the only situation where the Politician issues vetoes. To begin, note that vetoes are predicted only when the Agency offers an unconstrained rule. If the Agency offers a constrained rule in this equilibrium, the Politician will not veto it. This suggests the first veto hypothesis:

Veto Hypothesis 1. Regulatory vetoes of unconstrained rules will be more frequent than vetoes of constrained rules.

Of course, the model suggests that vetoes of constrained rules *never* occur, while this hypothesis implies that vetoes will transpire with reduced frequency for these types of

rules. While stylized, this modification recognizes that because vetoes are rare, they are not perfectly predicted by any model and also that off-the-equilibrium path vetoes will occur. As a result, the veto predictions I offer here speak to reductions in volume rather than to the complete absence of vetoes.

Next, a nuanced understanding of vetoes in Proposition 3 invites scrutiny of α^* , the probability with which the Politician vetoes an unconstrained rule. Figure 3.2 depicts this probability graphically, as a function of political payoffs and the ideological distance between the Politician and the Agency. To simplify the interpretation, I assume that the Politician and the Agency share the same payoffs (i.e., $\delta = \gamma$). This essentially reduces to the idea that the Politician and the Agency share the same constituencies.²⁰ This assumption does not meaningfully change the model's results.

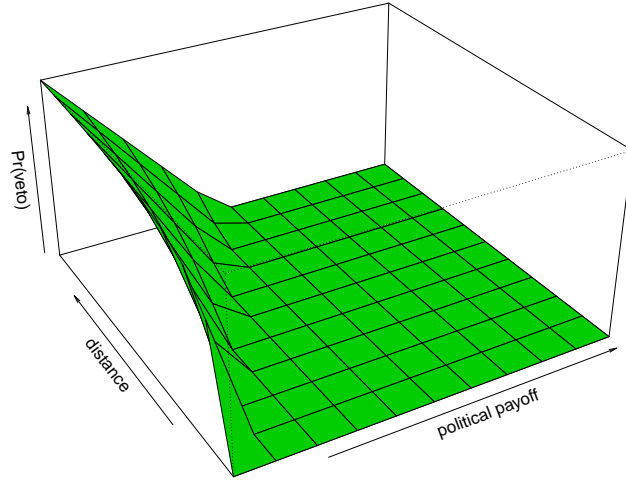
The figure shows the how political payoffs and policy benefits associated for the Politician and the Agency affect the probability with which the Politician vetoes rules (α^*). From this, we see that as the ideological distance between the Politician and the Agency increases, so does the veto probability. This is a straightforward result suggesting that when the Politician has strong policy preferences for her own policy, she is more likely to accept it (and not veto it). Meanwhile, as the political payoffs to the Politician increase, the probability of a veto decreases. The next two hypotheses restate these observations formally:

*Veto Hypothesis 2. Regulatory vetoes will increase as the ideological distance between the Agency and the Politician increases.*²¹

²⁰This is a reasonable assumption given that many of the groups that get involved in rulemaking also tend to lobby Congress and also OIRA (Kerwin and Furlong, 2011). Additionally, Golden (2000) and Yackee and Yackee (2006) find that business and industry participate at higher rates than public interest groups and individual citizens, a finding mirrored in much of the literature on lobbying Congress.

²¹Notably, I use the term “ideological distance,” as a shorthand for the difference in the policy benefits that

Figure 3.2: Political Vetoes of Unconstrained Rules under Proposition 3



Note: This figure depicts the parameter space for α^* in Proposition 3. The shaded area shows the probability that the Politician will veto an unconstrained rule. The y-axis shows the ideological distance between the Politician and the Agency ($b_u - b_c$), while the x-axis displays the political payoffs to the Politician (γ).

Veto Hypothesis 3. Regulatory vetoes will decrease when the Politician's electoral payoffs are high.

In addition, the model speaks to the interactive effect of political payoffs and ideological distance in producing a change in the probability of the Politician issuing a veto. The probability of a veto is highest when distance is high and electoral payoffs are low. This leads to three related hypotheses about how politics and ideology interact to produce vetoes.

accrue from an unconstrained a constrained policy ($b_u - b_c$). Its application stems from the observation that a constrained policy will be close to the Politician's ideal point and an unconstrained policy will be located near the Agency's ideal point. Thus, the ideological distance between these two actors serves as proxy for the difference in policy benefits from the two proposals. Additionally, ideological distance is a more useful referent from an empirical perspective.

First, we note that the probability of a veto is highest in the upper left quadrant of the figure (when ideological distance is high) and decreases as political payoffs increase. Next, we note that when actors are ideologically proximate (i.e., distance is low), the probability of a veto is at or near zero. The third hypothesis results from the observation that there is an appreciable gap in the probability of a veto between low and high levels of distance on the lefthand side of the graph (low political payoffs) and that this gap fades as political payoffs increase. Each of these observations, which follow directly from Figure 3.2, is stated formally below:

Veto Hypothesis 4a. When ideological distance is high, vetoes will decrease as political payoffs increase.

Veto Hypothesis 4b. When ideological distance is low, vetoes will have no relationship with political payoffs.

Veto Hypothesis 4c. At low levels of political payoffs, high ideological distance will have a greater probability of veto than low ideological distance.

Finally, we turn to an examination of the role of the Politician's prior beliefs play in issuing veto decisions. Notably, we see that Propositions 2 and 3 set a threshold value of $\pi = \frac{\gamma+1}{2\gamma}$. Below this threshold, the semi-pooling equilibrium obtains and vetoes should increase as π increases, and above it, the pooling equilibrium obtains and no vetoes occur. This suggests an inverted U-shaped relationship, as stated in the last hypothesis:

Veto Hypothesis 5. Regulatory vetoes will increase and then decrease as the Politician's prior belief that group support is liberal increases.

This is an imprecise prediction. Technically speaking, the hybrid equilibrium suggests that the probability of a veto increases up until the threshold point (since q^* is an increasing function of π , given $\gamma \geq 1$), after which the probability of a veto is zero under the pooling equilibrium. The inverted U-shaped function roughly approximates this distribution, but does not account for the steep drop off at the cut point. Although less accurate from a theoretical standpoint, this approximation is appropriate from the empirical perspective adopted in the next chapter, since few things in the real world have such a Manichean cutoff.

Overall, these empirical implications regarding the Politician's actions mesh well with reality. The Politician only vetoes unconstrained rules, which are less desirable for her in the first place. This may reflect the fact that regulatory vetoes are costly in terms of political capital and resources. However, looking across the propositions we see that the Politician accepts both constrained rules and unconstrained rules. This suggests a world where the Agency sometimes get what he wants (an unconstrained policy) and sometimes the Politician gets what she wants (a constrained policy), and that political payoffs and the ideological distance between the two actors plays an important role in determining these outcomes.

Agency Proposal Decisions

The model also speaks to the Agency's decision about what type of policy to propose. After observing the draw from Nature (i.e., liberal or conservative group support), the Agency is faced with a decision: propose a more desirable unconstrained rule or a less desirable constrained rule. Overall, the model presents a portrait where more often than not, the

Agency proposes an unconstrained policy (and it is subsequently accepted). In other words, the Agency anticipates the regulatory veto and is able to shape its proposal behavior (if necessary) so that, in equilibrium, unconstrained policies are frequently the outcome that we observe.

In the separating equilibria, truth-telling occurs; the Agency always heeds group preferences and the Politician accepts it. The unifying constraint here is that this outcome holds when the Politician and the Agency are ideologically proximate and $\delta \geq b_u - b_c$, as suggested in the first hypothesis:

Proposal Hypothesis 1. When the Agency's reputational reward is greater than the ideological distance between itself and the Politician, the Agency will propose policies that accord with group support.

This first hypothesis focuses on the *relative* value of reputational benefits compared to ideological distance. If groups can provide enough of a reward to the Agency and the Agency and the Politician aren't too far apart, groups can get their way. Yet, when reputational rewards are low compared to the ideological distance between the two actors, the Agency is more likely to do more of what he wants, as elaborated in the next hypothesis.

Comparing the Agency's responses after a liberal draw of group support ($\Omega = L$) in the pooling equilibrium (Proposition 2) and the semi-pooling equilibrium (Proposition 3) reveals that in these situations the Agency always goes against the group's wishes and proposes an unconstrained policy. However, this behavior is not observed in the separating equilibrium (Proposition 1), where the Agency always tells the truth and proposes a constrained policy when group support is liberal. The key difference between these cases is

that in Propositions 2 and 3, reputation benefits must be low compared to the difference in the policy payoffs between the Politician and the Agency (i.e., $\delta < b_u - b_c$), whereas in Proposition 1, the opposite case holds (i.e., $\delta \geq b_u - b_c$). This observation is summarized in the next hypothesis:

Proposal Hypothesis 2. When group support is liberal, the agency will disregard group beliefs and propose an unconstrained rule whenever reputation benefits are low compared to ideological distance.

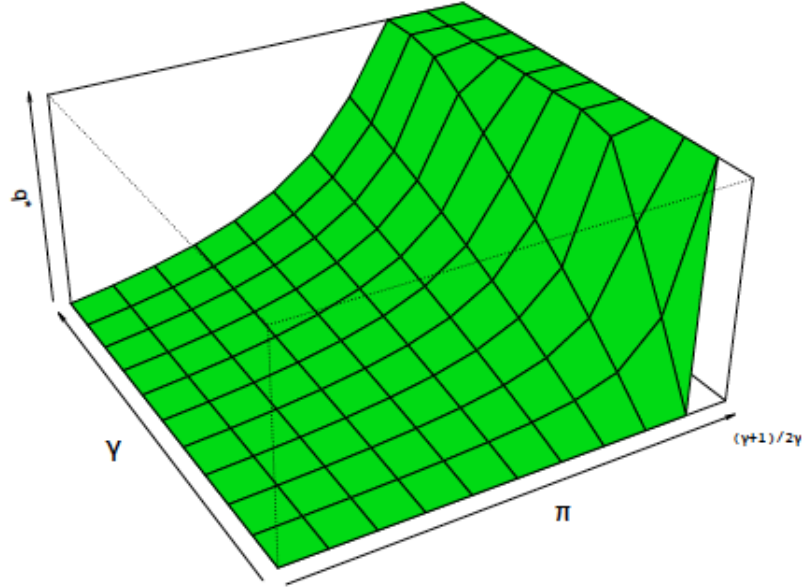
Next, looking at the pooling equilibrium (Proposition 2) yields interesting insight since in this case the Agency always offers its preferred unconstrained policy. The third hypothesis lays out this expectation:

Proposal Hypothesis 3. When the Politician's prior belief that public support is liberal is sufficiently high and reputation benefits are low compared to ideological distance, the Agency will always propose an unconstrained policy.

In this case, the Agency is free to do what it wants because interest groups can't provide enough of an incentive to offer a constrained policy when public support is liberal. Additionally, the Politician is convinced that group support is liberal, and so it cannot credibly veto an unconstrained policy. The Agency takes advantage of this belief and always proposes its preferred policy.

Finally, in the hybrid equilibrium (Proposition 3), we also gain an understanding of when the Agency will propose an unconstrained rule, given a conservative level of group

Figure 3.3: Unconstrained Agency Proposals under Proposition 3



Note: This figure depicts the parameter space for q^* in Proposition 3. The shaded area shows the probability that the Agency proposes its preferred unconstrained rule, given that group support is conservative ($\Omega = \neg L$).

support. Here, the Agency will have to sometimes give the Politician her more preferred constrained rule in order to convince the Politician to sometimes accept unconstrained rules in this circumstance.

Figure 3.3 presents the Agency's mixing probability q^* graphically. This figure reveals that the Agency is more likely to propose an unconstrained rule as the Politician's prior belief that group support is liberal (subject to the constraint that $\pi < \frac{\gamma+1}{2\gamma}$) and the Politician's electoral rewards increase. This leads to the next hypothesis, which holds when reputation

benefits are low compared to ideological distance:

Proposal Hypothesis 4. When group support is conservative, the Agency will offer both constrained and unconstrained rules.

In sum, in equilibrium the Agency proposes both constrained and unconstrained rules; however unconstrained rules figure prominently in Propositions 2 and 3. In the pooling equilibrium (Proposition 2) the Agency only proposes unconstrained rules, while in the hybrid equilibrium (Proposition 3) unconstrained rules are offered in both pure and mixing strategies. Taken together, this suggests that agencies offer their preferred policies quite often, an expectation that contrasts with the notion that agencies advance rules that do not represent their preferred policies (Shapiro, 2007; Wiseman, 2009). What this model shows is that agencies *do* propose policies that represent their best case policy, and occasionally offer policies that include concessions to satisfy political principals.

3.7 CONCLUSION

This signaling model shows that agencies offer their preferred (unconstrained) policies with some frequency, and that political principals only rarely veto these rules. This suggests that with respect to rule proposals, agencies may operate with a relatively free hand. Returning to the e-cigarettes case referred to in the introduction, the implication is that there is a very good chance that the FDA will be able to select whichever category—vapor product, alternative nicotine product, or tobacco product—that agency officials prefer in terms of implementation and policy concerns.

From the perspective of the larger dissertation, this model establishes a key point; it shows how agencies act strategically when selecting which policies to offer when they propose a rule in order to avoid a regulatory veto. Sometimes they offer their first-best unconstrained policy and at other points in time they will offer a second-best constrained policy to appease political principals. (And when they do propose a constrained policy, they have virtual certainty that it will not succumb to a political veto.) In sum, the model shows that more often not, proposed rules represent the agencies desired policy, but that agency's are savvy enough not to always show their hand.

Of course, the signaling model presented in this chapter is a simplification of reality. In the real world, agencies choose among a multitude of policy alternatives—not merely two—and rarely, if ever, do they have perfect information about how interest groups are disposed to a policy change. Further, the rewards to the Politician of approving or vetoing a policy proposal are more often than not highly nuanced and specific to particular policy areas, rather than the simple payoffs presented here.

However, not all of the critiques that can be lobbed at the model are equally valid. For instance, one criticism of the model is that it is a “one-shot” game, presuming that the Agency-Politician interaction is a one-time event rather than an exchange that occurs with some regularity. Yet, the analysis of the political parameters δ and γ dissipates some of the concern on this point. The notion that both agencies and political overseers think about how constituencies will perceive their policy choices suggests that there are longer-term costs to the game. These are exactly the types of effects that matter most in repeated play.

In addition, while the model is highly stylized, it has introduced analytical rigor by explicitly stipulating the assumptions underlying the theory and yielded a series of testable

hypotheses. In addition, the framework allows us to understand how agencies select proposed rules from available alternatives. This is at its core an unobservable decision; we can never empirically observe the counterfactual of what an agency would have proposed under different political circumstances. While this complicates the empirical testing in the next chapter, it alters our understanding of rulemaking as a fundamentally political activity.

3.8 APPENDIX: A NOTE ON THE STATUS QUO

The signaling model presented in this chapter is *not* a spatial model and, as a result, many features of traditional spatial models of delegation and accommodation are not relevant (e.g., Bendor, Glazer and Hammond, 2001; Epstein and O’Halloran, 1999; Huber and Shipan, 2002; Volden, 2002). Although I have taken an agnostic approach to the status quo, some of the assumptions that I make have implications about its location. In this section, I unpack these assumptions in order to provide more intuition about the model.

To begin, the Politician’s preferences over policy outcomes are set up such that she prefers a constrained policy to no policy, and no policy to an unconstrained one. Here “no policy” means that the Politician vetoes the policy proposed by the Agency and policy remains at the status quo. Specifically, she receives a payoff of 1, 0, and -1 for each of these respective outcomes. In a traditional spatial model, this payoff structure would imply that $A < SQ < P$. This presumes that the Politician would rather have no rule put forward than have the Agency lock in a rule with which she disagrees.

As indicated in Footnote 17 there is an empirical basis for setting up the Politician’s payoffs in this way; rules are durable policy instruments and are costly for political overseers to undo once they are finalized. An alternate case is possible where the Politician’s payoff structure is set up so as to imply that $SQ < A < P$, but it is easy to see that this case would predict no regulatory vetoes, and would therefore be uninteresting.

Meanwhile, the Agency’s payoffs are set up such that he receives 0 for a vetoed rule, b_c for a constrained rule, and b_u for an unconstrained rule (where $b_c < b_u$). This implies that $SQ < P < A$. In this case, the Agency would rather make incremental policy than do nothing. This accords with the basic notion that agencies seek out tasks to accrue autonomy

(Carpenter, 2001, 2010). An alternate case is possible where the Agency prefers the status quo to the constrained policy ($P < SQ < A$), yet this case implies that agencies might actively seek out a veto (presuming that they have to issue a rule), or choose not to issue the rule altogether. While this is an interesting case, it is one I leave for future research to unpack.

The contradictory implications about the spatial location of the actors in the model presented here would not be possible in a traditional one-dimensional spatial model. Yet, here they are not problematic because the policy benefits associated with rulemaking are necessarily multidimensional.²² For instance, agency bureaucrats likely trade off over pure policy preferences (i.e., those policies they prefer from a personal perspective) and implementation preferences (i.e., those policies that their agency can effectively implement). Meanwhile, OIRA desk officers (for example), trade off over pure policy preferences, goals of the current presidential administration, and reaching an agreement with the agency that does not cause them to extend their review time past the allotted 90 days (see Bolton, Potter and Thrower, 2014).

²²In one sense, I have segregated one dimension of the policy that I consider especially important – the political benefit – into a separate parameter for each actor (δ and γ). The other dimensions are lumped together into a catchall policy benefit parameter.

3.9 APPENDIX: PROOFS

Proof of Proposition 1. Suppose that **A** plays a separating strategy, s.t. $S_A = \{u|\Omega = L; c|\Omega = \neg L\}$. **P**'s posterior beliefs are given by $Pr(\Omega = L|x = u) = 1$ and $Pr(\Omega = \neg L|x = c) = 1$. **P**'s expected utility from playing $d = \neg v$ upon observing $x = c$ is $[Pr(\Omega = \neg L|x = c) \cdot (\gamma + 1)] + [(1 - Pr(\Omega = \neg L|x = c)) \cdot 1] = \gamma + 1$, while her expected utility from playing $d = v$ in this case is $[Pr(\Omega = \neg L|x = c) \cdot 0] + [(1 - Pr(\Omega = \neg L|x = c)) \cdot \gamma] = 0$. So, **P** strictly prefers to play $\neg v$ when $x = c$.

Upon observing $x = u$, **P**'s expected utility from playing $d = \neg v$ is $[Pr(\Omega = L|x = u) \cdot (1\gamma - 1)] + [(1 - Pr(\Omega = L|x = u)) \cdot (-1)] = \gamma - 1$, while her expected utility from playing $d = v$ in this case is $[Pr(\Omega = L|x = u) \cdot 0] + [(1 - Pr(\Omega = L|x = u)) \cdot \gamma] = 0$. So, **P** strictly prefers to play $\neg v$ when $x = u$.

Now consider whether **A** would unilaterally deviate from this separating strategy. If $\Omega = L$, **P** will play $\neg v$ and **A** will receive $b_u + \delta$ for selecting an unconstrained rule. If **A** instead plays $x = c$ following $\Omega = L$, he receives b_c . Therefore **A** has no incentive to deviate, since $b_u + \delta$ is strictly greater than b_c by construction. If $\Omega = \neg L$, **P** will play $\neg v$ and **A** will receive $b_c + \delta$ for selecting a constrained rule. If **A** instead plays $x = u$ following $\Omega = \neg L$, she receives b_u . It follows then that if $\delta > b_u - b_c$, **A** will have no incentive to deviate and this is a PBE. ■

Proof of Proposition 2. Suppose that $\pi > \frac{\gamma+1}{2\gamma}$. Let **A** play a pooling strategy s.t. $s_A = u$. **P**'s expected utility of playing $\neg v$ is $EU_P(\neg v) = (\gamma - 1)(\pi) + (-1)(1 - \pi) = \gamma\pi - 1$, while her expected utility of vetoing is $EU_P(v) = (0)(\pi) + \gamma(1 - \pi) = \gamma - \gamma\pi$. It follows that since

$\pi > \frac{\gamma+1}{2\gamma}$, **P** prefers not to veto **A**'s unconstrained proposal ($d = \neg v$).

To see that **A** will not deviate and offer a constrained rule, consider the case where $\Omega = \neg L$. Here, **A** receives b_u from an unconstrained rule, and would receive $b_c + \delta$ from switching and offering a constrained rule. However, if we assume that $b_u - b_c > \delta$ this becomes a suboptimal move for **A** and so he does not make it. In the case where $\Omega = L$, **A** receives $b_u + \delta$ from an unconstrained rule and b_c from a constrained rule. By construction $b_u > b_c$ and $\delta > 0$, so **A** does not deviate and offer a constrained rule in this situation. ■

Proof of Proposition 3. Let **A** play a semi-pooling strategy where he offers an unconstrained policy whenever support is liberal and mixes between a constrained and unconstrained rule whenever support is conservative, $S_A = \{x = u | \Omega = L; x = q | \Omega = \neg L\}$. Let q be his mixing strategy s.t. $q = Pr(x = u | \Omega = \neg L)$.

Following Bayes' rule, we see **P**'s posterior beliefs are given by $Pr(\Omega = L | x = u) = \frac{\pi}{\pi + q - q\pi}$. Using this quantity, we can compare **P**'s expected utility of not vetoing a rule to her expected utility of vetoing a rule.

$$\begin{aligned} EU_P(\neg v | u) &= \frac{\pi}{\pi + q - q\pi}(\gamma - 1) + \left(1 - \frac{\pi}{\pi + q - q\pi}\right)(-1) \\ &= \frac{\gamma\pi}{\pi + q - q\pi} - 1 \end{aligned}$$

$$\begin{aligned} EU_P(v | u) &= \frac{\pi}{\pi + q - q\pi}(0) + \left(1 - \frac{\pi}{\pi + q - q\pi}\right)(\gamma) \\ &= \gamma - \frac{\gamma\pi}{\pi + q - q\pi} \end{aligned}$$

Setting these quantities equal, we see that after observing an unconstrained proposal, **P** will mix between v and $\neg v$ with probability q^* :

$$\begin{aligned} EU_P(\neg v|u) &= EU_P(v|u) \\ \frac{\gamma\pi}{\pi + q - q\pi} - 1 &= \gamma - \frac{\gamma\pi}{\pi + q - q\pi} \\ q^* &= \frac{\gamma\pi - \pi}{\gamma - \gamma\pi - \pi + 1} \end{aligned}$$

This implies that $\pi > 0$. Now I show that **A** mixes with positive probability $\alpha = Pr(d = v|x = u)$ when he observes a conservative level of group support ($\Omega = \neg L$).

$$\begin{aligned} EU_{A,conservative}(u) &= \alpha(0) + (1 - \alpha)(b_u) \\ &= b_u - \alpha b_u \end{aligned}$$

Observe that if **A** offers a constrained rule, **P** will always play $\neg v$ since he knows with certainty that the level of support is conservative (i.e., $Pr(\Omega = \neg L|x = c) = 1$), suggesting that $EU_{A,conservative}(c) = b_c + \delta$.

$$\begin{aligned} EU_{A,conservative}(u) &= EU_{A,conservative}(c) \\ b_u - \alpha b_u &= b_c + \delta \\ \alpha^* &= \frac{b_u - b_c - \delta}{b_u} \end{aligned}$$

This implies that $b_u - b_c \geq \delta$. To confirm that this is an equilibrium, it is necessary to show that when group support is liberal **A** will not deviate and propose a constrained rule.

In this case the expected utility from staying (and proposing an unconstrained rule) must be greater than the expected utility from deviating (and proposing a constrained rule).

$$\begin{aligned}
EU_{A,liberal}(u) &> EU_{A,liberal}(c) \\
\alpha\delta + (1 - \alpha)(b_u + \delta) &> b_c \\
b_u - \frac{b_u - b_c - \delta}{b_u}(b_u) + \delta &> b_c \\
\delta &> 0
\end{aligned}$$

But, $\delta > 0$ is true by construction, showing that this is indeed a PBE. To see why $\pi < \frac{\gamma+1}{2\gamma}$, note that the constraint $\delta < b_u - b_c$ from this equilibrium is also shared by the pooling equilibrium. When that constraint binds and $\pi > \frac{\gamma+1}{2\gamma}$, the pooling equilibrium holds. So it must be the case that when $\delta < b_u - b_c$ binds and $\pi < \frac{\gamma+1}{2\gamma}$, this semi-separating equilibrium obtains. ■

Chapter 4

Demystifying the Regulatory Veto: Empirical Tests of the Model

Federal agencies issue hundreds of proposed rules each year. Like bills introduced in Congress, however, many rules never reach the final rule stage. While this attenuation can be attributed to many causes (e.g., a proposed rule may become less of a priority if a new administration takes office), regulatory vetoes account for a non-negligible portion of the fall off. Vetoes from the president and Congress come in different guises, as I explain in this chapter.

The central argument in this dissertation is that because agencies invest so much in their proposed rules, they behave strategically in order to help them succeed. The first and second chapters laid out a theoretical framework for thinking about how agencies do this and why it matters. The third chapter developed that argument by way of a signaling model that highlighted how agencies select which types of rules to propose. In this chapter, I empirically test the regulatory veto implications that flow from that model.

This chapter proceeds in several parts. I begin by summarizing and restating the theoretical expectations from Chapter 3 with regard to regulatory vetoes. I then describe the nature of regulatory vetoes by the president and test the expectations on a new dataset of vetoes by the Office of Information and Regulatory Affairs (OIRA). The next section explains

how congressional regulatory vetoes function in practice, and explores how the model might be tested in that context. The final section concludes with a discussion of the implications of the results for the broader argument advanced in the dissertation.

4.1 THEORETICAL EXPECTATIONS

The signaling model offers two types of empirical predictions: 1) predictions about the type of rule the agency will propose (a less desirable constrained rule or a more desirable unconstrained rule); and 2) predictions about when political principals will issue regulatory vetoes. In this chapter, I test the second class of hypotheses about regulatory vetoes. Regulatory vetoes have a clear empirical application, as it is possible to observe rules that are successfully promulgated and those that are vetoed by political principals.

Below I restate the veto hypotheses from Chapter 3 for the reader's convenience. Notably, I reframe the hypotheses in terms of the veto rate, since that is the basis of the empirical tests that follow.

Veto Hypothesis 2. The veto rate will increase as the ideological distance between the Agency and the Politician increases.

Veto Hypothesis 3. The veto rate will decrease when the Politician's electoral payoffs are high.

Veto Hypothesis 4a. When ideological distance is high, the veto rate will decrease as political payoffs increase.

Veto Hypothesis 4b. When ideological distance is low, the veto rate will have no relationship with political payoffs.

Veto Hypothesis 4c. At low levels of political payoffs, high distance will have a greater veto rate than low distance.

Veto Hypothesis 5. The veto rate will increase and then decrease as the Politician's prior belief that group support is liberal increases.

The keen reader has no doubt observed that this list omits Veto Hypothesis 1, which relates to the relative incidence of vetoes for unconstrained and constrained rules. I exclude this hypothesis from the tests in this chapter, because it is not possible to observe the degree of extremity of a policy proposal (i.e., whether it is constrained or unconstrained). The policy alternatives that agencies consider when drafting a new proposed rule are rarely, if ever, made explicit. Even in the e-cigarettes example from Chapter 3, where we know that the FDA at least nominally considered categorizing e-cigarettes as a “vapor product,” an “alternative nicotine product,” or a “tobacco product,” it is entirely possible that the FDA will select a fourth policy alternative that differs from these defined alternatives. Put differently, the implicit nature of policy alternatives means that they are essentially *unobserved counterfactuals*, meaning that we do not know exactly what the agency would have proposed had they not proposed the policy that they did propose.

This limitation also prevents me from testing the agency proposal hypotheses from Chapter 3. This is unfortunate because, in terms of developing the theoretical argument for this project, that set of hypotheses is substantively quite interesting; it is indicative of *how* an agency strategically selects which rule to propose, which, in turn, informs our

understanding of proposed rule investments. While the model still provides value from a theoretical standpoint with respect to this set of hypotheses, in practice empirical tests are limited since one cannot gather data and make inferences about policy alternatives that never materialized and are fundamentally unobservable. Testing all of the implications of any formal model is, in a sense, a quixotic pursuit as most models have implications far beyond what the original research envisioned (Morton, 1999, 282). In this case, while the evaluation of only one set of implications from the model is not dispositive, showing that the model's implications have empirical support serves to enhance the overall validity of the model.

In the sections that follow, I apply the veto hypotheses to a new dataset of regulatory vetoes by the president (via OIRA), and discuss how the hypotheses might be tested in the context of regulatory vetoes issued by Congress.

4.2 WHITE HOUSE VETOES OF AGENCY RULES

OIRA's review process ultimately concludes with a decision: approve (or, in the lingo of OIRA desk officers, "clear" the rule) or veto the rule. Rejections can come in two forms. Most directly, OIRA can return the rule to the agency for further consideration (a euphemism for rejecting the rule). Although this veto power has existed since OIRA was first created in 1981, the tool took on a more public role at the start of the Bush administration. At that point, OIRA, under the leadership of Administrator John Graham, began posting "return letters" to its website. These letters, which recount in some detail the reason(s) that OIRA found the rule to be deficient, serve as a public shaming to the agency and their high visibility virtually ensures that they are rare events; since 2001, only 27 returns letters have

been issued.¹

However, return letters are not the only avenue for a presidential veto of an agency's proposed rule. In cases where OIRA credibly threatens to return a proposed rule to the agency, the agency can voluntarily "withdraw" the rule from consideration *before* OIRA officially returns the rule. Indeed, according to former OIRA Administrator Cass Sunstein (2013*a*, 1847), "because many rules are withdrawn and many change as a result of OIRA review, it is misleading to focus on the number of return letters as a measure of OIRA's impact."

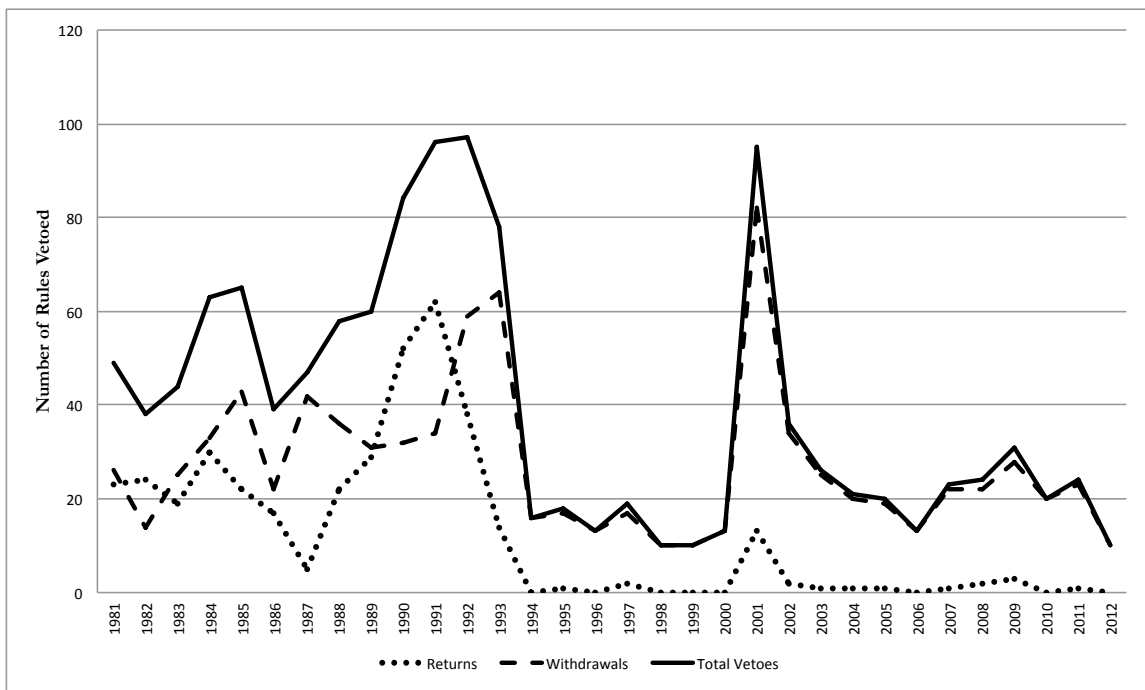
Withdrawals essentially function as a quiet veto of the agency's proposal; OIRA stops the rulemaking process from proceeding, and the agency does not have to endure the humiliation of a return letter. While this strategy is less conspicuous than a return, withdrawals have not gone without notice. For instance, one observer recently suggested that under President Obama OIRA has encouraged agencies to withdraw rules in order to "unceremoniously dispose of long-overdue OIRA reviews involving important safeguards that are vigorously opposed by industry" (Goodwin, 2013).

As illustrated in Figure 4.1, when OIRA vetoes are calculated to include both withdrawals and formal returns (solid black line), vetoes are actually a relatively common occurrence. Based on the number of rules reviewed by OIRA each year, considering vetoes in this manner results in an average annual veto rate of 7.4% for proposed rules (compared to an average annual veto rate of about 1.4% for proposed rules when withdrawals are excluded).²

¹Return letters are available on OIRA's website: <http://www.reginfo.gov/public/do/eoReturnLetters>.

²Although this chapter focuses on vetoes of proposed rules, vetoes of agency rules can also occur at the final rule stage. Empirically speaking, vetoes at this late stage are much rarer, with a veto rate of approximately 4.9% (including withdrawals) and 0.7% (excluding withdrawals). This may be explained that by the fact that most final rules were already reviewed and approved by OIRA at the proposed rule stage (so if OIRA was going to veto the rule, it would have already done so). Also, it may be more politically costly for OIRA

Figure 4.1: OIRA Vetoes of Agency Rules, 1981–2012



Note: Data compiled by the author from OIRA records (available at www.reginfo.gov). The drop in vetoes from 1994 onward can likely be attributed to the signing of E.O. 12866 in September of 1993. That order precipitated a number of changes to the regulatory review process, including a significant reduction in the volume of rules that OIRA reviews each year.

Further, Figure 4.1 shows that withdrawals and returns generally follow the same patterns, peaking during the administration of President George H. W. Bush and again at the start of George W. Bush’s administration. This implies that withdrawals and returns are both influenced by the same political factors, perhaps even serving as a continuum, with agencies withdrawing rules when OIRA review is consonant, and OIRA returning rules when review is more contentious. Sunstein (2013a, 1847) suggests as much, stating that

to intervene and overturn a rule at the final rule stage than at the proposed rule stage.

return letters are only issued when there is consensus within the Executive Office of the President that the rule is not viable (politically or practically). However, he also notes that withdrawals can occur for many reasons (including the agency's unprompted request to withdraw), and OIRA pressure is just one of these reasons. This means that including withdrawals in calculations of OIRA's veto rate *overcounts* the number of vetoes, while focusing solely on official returns *undercounts* the number of vetoes. This essentially reduces to a tradeoff between making Type I and Type II errors in a statistical analysis of OIRA vetoes. In light of this, I include consideration of vetoes with and without withdrawals in the regression analyses in this chapter.

OIRA Veto Data

To translate the model to data, I first determine the rate at which OIRA vetoes agency rules. To calculate the veto rate, for each agency I identified all rules that OIRA reviewed in a given year.³ This figure serves as the veto rate denominator. I offer three versions of the numerator. The first version *Return Rate* includes only rules that OIRA returned to the agency for reconsideration. *Withdraw Rate*, the second version, includes only rules that the agency withdrew from consideration. The third version, *Total Rate*, pools both returns and withdrawals to create the most comprehensive portrait of vetoes.

The dependent variables, *Return Rate*, *Withdraw Rate*, and *Total Rate*, are thus agency-year proportions, with values closer to one indicating a higher rate of vetoes by OIRA. The dataset includes 19 agencies⁴ and span from 1981 to 2012. The level of analysis

³These data come from the official government website for OIRA review data, www.reginfo.gov. I exclude from the analysis any rule that did not undergo a meaningful review; these are rules that are marked by OIRA as either "improperly submitted" or "exempt from review under the Executive Order."

⁴See Table 2.2 in the Appendix to Chapter 2 for a list of the agencies included in the analysis.

is the agency-year.

Testing the model's hypotheses requires the operationalization of several parameters. First, to capture the ideological distance between the agency and OIRA ($b_u - b_c$), I rely on estimates of agency ideology developed by Bertelli and Grose (2011).⁵ These scores are based on statements about legislation made by agency heads during congressional testimony. Bertelli and Grose code these statements and then use a scaling technique to place these agency heads on the same dimension as presidents and legislators. As detailed in Section 2.5 of Chapter 2, Bertelli and Grose's estimates capture agency ideology at the highest level and are appropriate to address political decisions, like writing an extreme rule (or vetoing it). Their estimates are scaled from -1 to 1, with negative (positive) values indicating a more liberal (conservative) agency. To get the distance between the actors, I take the absolute value of the ideological distance between the agency and the president using these scores. As stated in Veto Hypothesis 2, *Ideological Distance* should have a positive relationship with the veto rate, indicating that the veto rate increases when the president and the agency are ideologically discordant.

Next, I create a measure of the political payoffs for OIRA (γ). This parameter captures the idea that OIRA (or the president) receives political rewards for getting certain policies right (i.e., setting policy that accords with the true level of public support). To operationalize this, I consider whether the policy area that the agency oversees is an area of particular importance to the president. Those areas that are high on the president's agenda should provide greater political rewards for setting policy accurately. To measure this, I use data from presidential State of the Union (SOTU) addresses, coded by the Policy Agendas

⁵See the Appendix to Chapter 2 for further discussion of how these estimates were created, and how they compare to other estimates of agency ideology.

Project (“Policy Agendas”).⁶ These addresses are coded by sentence and categorized into a set of predefined topic areas. I then match these topic areas to the agencies in the dataset according to the crosswalk provided in Table 4.1. The variable *SOTU Mentions* is a count of the number of times the agency’s policy area was mentioned by the president in that year’s SOTU address. Consistent with Veto Hypothesis 3, I expect *SOTU Mentions* to have a negative relationship with veto rates.

The variable *Policy Mood* approximates OIRA’s prior belief about the level of public support for a policy change. To create a measure of public opinion by policy area I draw from policy-specific mood measures of public opinion from the Policy Agendas Project. The idea of a policy mood, first developed by Stimson (1991), involves amassing hundreds of survey data responses to create aggregate measures of the “liberalness” of the population at a given point in time. Following Stimson’s methodology, Atkinson et al. (2011) extend policy moods to specific policy areas, such as transportation and education, by first categorizing survey questions according to their policy area and then creating aggregate mood measures. This generates longitudinal measures of the liberalness of public opinion in specific policy domains on an annual basis. From there, I match *Policy Mood* with agencies according to their Policy Agendas policy area (see Table 4.1). Higher values of *Policy Mood* indicate a more liberal mood towards a policy area. In order to approximate the inverted U-shape indicated in Veto Hypothesis 5, I square this variable and multiply it by -1 . I expect this transformation of *Policy Mood* to have a positive relationship with each dependent variable.

The next variable, *Divided*, is a dummy variable that takes on a value of 0 if both chambers of Congress and the White House are controlled by the same party, and 1 otherwise.

⁶These data are available at <http://www.policyagendas.org/>.

Table 4.1: Agency-Policy Agendas (PA) Crosswalk

Agency Name	Policy Agendas Topic
Dept of Commerce	Banking, Finance, & Domestic Commerce (15)
Dept of Defense	Defense (16)
Dept of Education	Education (6)
Dept of Energy	Energy (8)
Dept of Health & Human Services	Health (3)
Dept of Homeland Security	Defense (16)
Dept of Housing & Urban Development	Community Development & Housing Issues (14)
Dept of Justice	Law, Crime, and Family Issues (12)
Dept of Labor	Labor, Employment, & Immigration (5)
Dept of Transportation	Transportation (10)
Dept of Veterans Affairs	Defense (16)
Dept of the Interior	Public Lands & Water Management (21)
Dept of the Treasury	Macroeconomics (1)
Environmental Protection Agency	Environment (7)
Fed Emergency Mgmt Agency	Banking, Finance, & Domestic Commerce (15)
General Services Administration	Government Operations (20)
Office of Personnel Management	Government Operations (20)
Small Business Administration	Banking, Finance, & Domestic Commerce (15)
Social Security Administration	Social Welfare (13)

Note: This table lists the agencies included in the analysis and the corresponding policy topic in the Policy Agendas (PA) codebook. The mapping from agencies to topics was done by the author based on the correspondence between the policy areas addressed by the agency and the substance of the PA topic area. In almost all cases, the agency name is listed in the PA codebook.

I include this variable to account for the possibility that OIRA may view a congressional veto as a substitute for its own veto. So during periods of unified government, OIRA has a “fall back”—if it does not veto the agency’s rule, Congress may do so instead. During periods of divided government, I expect the veto rate to increase, as the president cannot rely on Congress to share in the workload of checking agency rules. This suggests a positive sign for this variable in the regression analyses that follow.

Table 4.2: Descriptive Statistics for OIRA Veto Data

Variable name	mean	s.d.	min	max
Return Rate	0.50	2.06	0	16.00
Withdraw Rate	7.44	11.34	0	58.82
Total Rate	7.94	11.72	0	58.82
Ideological Distance	0.50	0.17	0.13	0.89
SOTU Mentions	18.03	20.06	0	106
Policy Mood	-0.41	0.19	-0.82	-0.08
Divided	0.59	0.49	0	1
Total Review	16.84	21.94	0	184

Finally, I include a control variable *Total Review* that is a count of the number of rules that the agency submitted to OIRA for review in that year (i.e., the denominator for *Return Rate*, *Withdraw Rate* and *Total Rate*). This variable addresses the possibility that veto rates may be artificially higher (lower) for agencies that submit very few (many) rules for review each year. See Table 4.2 for descriptive statistics of the variables used in the analysis.

Results

Table 4.3 presents the results of OLS models that test the theoretical implications of the signaling model using the OIRA veto data described above. OLS provides the most straightforward way to analyze these data, although I use an alternative estimation technique later as a robustness check. To ease the interpretation of the coefficients, I multiply each of the dependent variables by 100, so that the values are bounded on the [0,100] interval, rather than the [0,1] interval. The models include fixed effects for each presidential administration, with George W. Bush as the omitted case. Robust standard errors clustered on the agency

are in parentheses.

The results provide support for the hypotheses that follow from the signaling model. To begin, Veto Hypothesis 2 indicates that *Ideological Distance* should have a positive relationship with the veto rate. To test this hypothesis, I examine the effect of this variable with all other variables (including the interaction term) held constant at their means. I find statistically significant support for the hypothesis. Moving from the minimum to the maximum value of *Ideological Distance* results in an increase of 1.42 vetoes for *Return Rate*, which is approximately double the mean value of these veto rates. For *Withdraw Rate* and *Total Rate* the effect is positive, but not significant at conventional levels.

Turning to the role of electoral rewards in veto decisions, the models do not provide statistically significant support for the political payoff hypotheses. Specifically, Veto Hypothesis 3 predicts that as political rewards increase, the veto rate will diminish. While the models do not support this hypothesis, there is support for the interactive effect of *SOTU Mentions*, at least with respect to *Return Rate*.⁷ Figure 4.2 presents a graphical depiction of the results of the interaction that tests Veto Hypotheses 4a-4c for *Return Rate*. Consistent with H4a, for high values of distance (dark gray line), vetoes decrease as *SOTU Mentions* increase. While the regression line for low values of distance (light gray) is slightly increasing, the lower confidence interval never exceeds zero, suggesting that, as predicted in H4b, *SOTU Mentions* is not meaningfully modified by ideological distance. In addition, at low values of *SOTU Mentions*, there is a statistically significant difference between high and low values of distance, with high distance values having a higher veto rate. Again, this is consistent with

⁷Notably, although not statistically significant at conventional levels, the sign for the interaction coefficients for *Withdraw Rate* and *Total Rate* are in the expected direction and the empirical pattern shown in Figure 4.2 holds for these models as well.

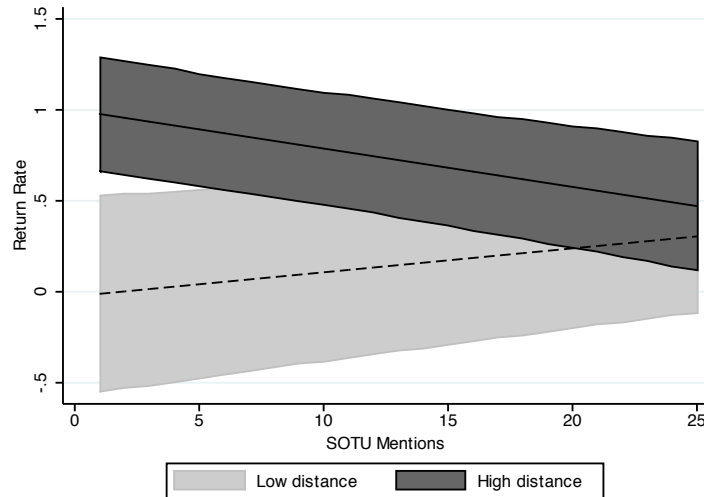
Table 4.3: OIRA Veto Rate Models, 1991-2004

	(1)	(2)	(3)
	Return Rate	Withdraw Rate	Total Rate
	β/se	β/se	β/se
Ideological Distance	2.046*** (0.627)	12.761 (10.773)	14.806 (10.784)
SOTU Mentions	0.027*** (0.009)	-0.045 (0.179)	-0.018 (0.183)
Id Dist x SOTU	-0.068*** (0.019)	-0.195 (0.377)	-0.263 (0.383)
Policy Mood	-0.802 (1.316)	14.029* (7.592)	13.228 (7.543)
Total Review	0.004 (0.005)	0.080** (0.037)	0.084** (0.038)
Divided	0.237 (0.231)	3.130* (1.554)	3.366* (1.642)
Bush I	4.178** (1.633)	-15.620*** (3.230)	-11.442** (3.976)
Clinton	-0.880 (0.744)	-3.121 (2.781)	-4.001 (2.899)
Constant	-0.555 (0.349)	8.631 (6.500)	8.076 (6.661)
R-squared	0.208	0.089	0.092
N	116	116	116

* $p < .10$, ** $p < 0.05$, *** $p < .01$

Note: OLS models with robust standard errors clustered on the agency in parentheses. *Return Rate* excludes rule withdrawals, while *Total Rate* includes both rule returns and withdrawals. Ideology scores are from Bertelli and Grose (2011).

Figure 4.2: Marginal Effect of *Ideological Distance* \times *SOTU Mentions*



Note: Graph shows predicted values for high and low values of *Ideological Distance* across the range of values for *SOTU Mentions* for *Return Rate*. Shaded areas represent 90% confidence intervals. Low values of distance calculated at the 10th percentile of *Ideological Distance*, while high values are calculated at the 90th percentile.

the prediction in H4c.

The data provide some support for Veto Hypothesis 5, which predicts that *Policy Mood* will have a positive relationship with the veto rate. This relationship holds at a statistically significant level for *Withdraw Rate* (Model 2), and approaches a statistically significant threshold in Model 3 (*Total Rate*). Because this variable is specified in a concave manner, its interpretation is nuanced; moving the mean *Policy Mood* value to a one-standard deviation increase results in a 4% increase in the veto rate, which is considerable in light of the fact that the mean withdraw rate is about 7.4%.

Turning to the control variables, *Total Review* is positive and statistically significant in

Models 2 and 3, suggesting that agencies that issue more rules (generally speaking, regulatory agencies) are more likely to incur a veto. This is not surprising since many of the most contentious rules come from regulatory agencies for whom regulation is the primary vehicle to drive policy change. As expected *Divided Government* is positive and significant for the *Withdraw Rate* and *Total Rate* models. This indicates that under divided government, agencies are more likely to withdraw or have their rules vetoed. The coefficients for *Bush I* are negative for Models 2 and 3, but positive for Model 1. This suggests that, compared with the George W. Bush administration, the first Bush administration was less likely to issue withdrawals and more likely to use formal returns instead.

Overall, we observe different patterns for *Return Rate* and *Withdraw Rate*. Model 1 (*Return Rate*) provides support for Veto Hypotheses 2 and 4a-c, while Model 2 (*Withdraw Rate*) provides support for Veto Hypothesis 5. Ideally, one model would provide conclusive empirical support for all of the veto hypotheses, yet this is a high bar for any model of real world phenomena.

Robustness

One potential issue with the estimation of these models is that, because the dependent variable is bounded between 1 and 100, OLS yields impossible predictions that lie outside of this interval. As a robustness check, I transform the dependent variables into a proportion (i.e., divide them by 100 so that they are bounded on $[0,1]$) and reestimate the models using a fractional logit technique (Papke and Wooldridge, 1996; Kieschnick and McCullough, 2003). This quasi-maximum likelihood approach is a modification of the traditional logit model that allows the dependent variable to be a (bounded) fraction, rather than binary. Table

4.4 presents the results of these models. Notably, the results from the main models do not meaningfully change when this alternate specification is used: the signs are unaffected and the effect sizes are approximately the same as those from the OLS models.

Finally, because the model's observations are agency-year, autocorrelation is a potential issue. To address this concern, I reestimated the models using year fixed effects (rather than presidential administration fixed effects) and also using a polynomial time trend (i.e., time and time squared). The results from both of these estimation strategies (not shown) are substantively unchanged from those presented in Table 4.3.

4.3 DISCUSSION AND CONCLUSION

The regulatory veto is no great secret to agencies. The fact that OIRA can—and does—veto agency rules is well-known to executive agencies that are subject to regulatory oversight by that office. Unsurprisingly, then, vetoes are rare events because agencies anticipate them and respond accordingly. When vetoes do occur, the signaling model suggests that they happen because the agency has been ambitious (i.e., proposed an unconstrained rule) and the political payoffs for political overseers and the agency trump policy concerns.

The regression analyses presented in this chapter provide some empirical corroboration for the veto conditions outlined in the signaling model. As predicted, vetoes increase in the ideological distance between the president and the agency, but decrease when a policy area is more frequently mentioned in the SOTU or when the public's mood about that policy area becomes more liberal. Further, as expected, when the agency and OIRA are ideologically distant, the veto rate decreases the more that a policy area is mentioned in the SOTU. Overall, this patterns holds for *Return Rate*, and the results are suggestive for

Table 4.4: Fractional Logit Models of OIRA Veto Rate, 1991-2004

	(4)	(5)	(6)
	Return Rate	With Rate	Total Rate
	β/se	β/se	β/se
Ideological Distance	11.183*	1.261	1.409
	(5.940)	(1.101)	(1.107)
SOTU Mentions	0.177	-0.038	-0.036
	(0.148)	(0.032)	(0.033)
Id Dist x SOTU	-0.539*	0.002	-0.004
	(0.312)	(0.064)	(0.066)
Policy Mood	-4.009	2.423**	2.249**
	(4.436)	(1.022)	(0.997)
Total Review	0.012	0.011***	0.011***
	(0.019)	(0.004)	(0.004)
Divided	0.253	0.447**	0.454**
	(0.511)	(0.217)	(0.212)
Bush I	3.236*	-3.255***	-1.567***
	(1.948)	(0.648)	(0.395)
Clinton	-4.799	-0.316	-0.409
	(3.161)	(0.374)	(0.374)
Constant	-12.938**	-1.894**	-1.939**
	(5.261)	(0.846)	(0.857)
N	116	116	116

* $p < .10$, ** $p < 0.05$, *** $p < .01$

Note: Fractional logit models with robust standard errors clustered on the agency in parentheses. Ideological distance estimates come from Bertelli and Grose's (2011) data.

Withdraw Rate.

These results are suggestive. The signaling model lays out a plausible theory of how agencies and political overseers approach rule-writing and the veto process. The data lend support to this theory, suggesting that the theory actually applies in the real world. While, as explained earlier, this empirical analysis is not dispositive (meaning that it does not allow us to conclude that the model is “right”), the data indicate that the signaling model speaks meaningfully to the empirical reality surrounding agency proposals and regulatory vetoes.

Of course, OIRA’s regulatory veto is only one part of the story. In addition to the empirical findings presented in this chapter, the model naturally extends to congressional use of the regulatory veto (recall that the Politician from Chapter 3 was generically defined as either the President or Congress) and extending the analysis to cover Congress would serve as additional support for the theory advanced by the signaling model.⁸ Congress can take one of three actions to veto an agency’s rule: pass a new law that overwrites or otherwise prohibits the agency’s rule, nullify the rule through powers enumerated in the Congressional Review Act (CRA), or attach a limitation rider barring the rule to another bill at the final passage stage. Each of these paths achieves the same end (a veto), yet each path presents different challenges for members of Congress and has different implications for agencies on the receiving end.

With respect to regulatory vetoes issued through new legislation, there is very little by way of empirical data that addresses the frequency with which this occurs. Anecdotally, it appears that Members of Congress (MCs) frequently introduce bills aimed at stopping

⁸I do not explicitly test the model on congressional vetoes here, given some of the complications associated with that data (discussed below). In future work, I hope to explore congressional vetoes and “agency-curbing” in more detail.

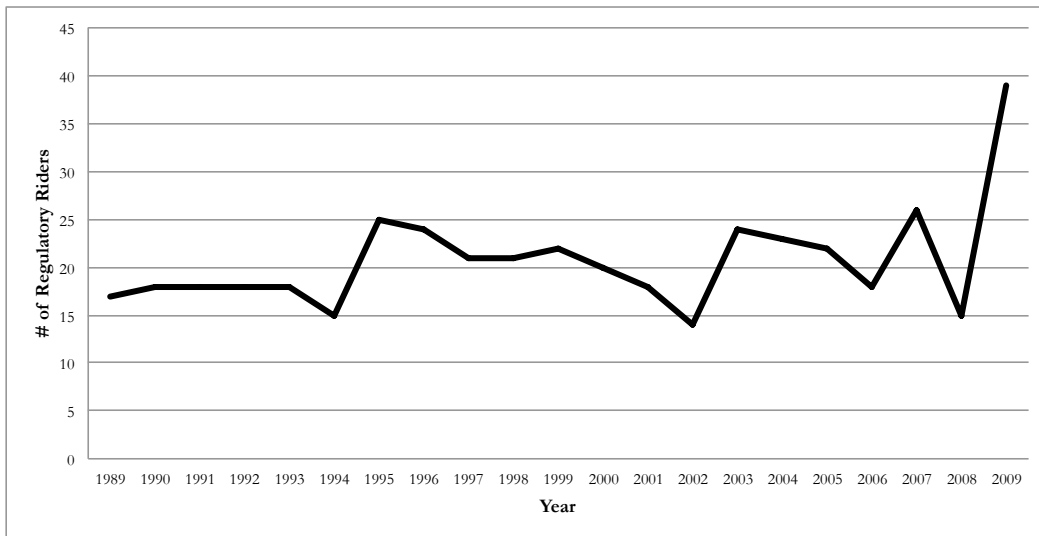
agencies from completing certain rules.⁹ Yet, it is unclear how many of these bills actually become law or whether their introduction is merely a form of constituency work (Fiorina, 1989) or credit-claiming (Mayhew, 1974) for MCs. For instance, at least four bills that would thwart the FDA’s menu-labeling proposed rule (see Chapter 6) were introduced in the 112th and 113th Congresses. All of those bills died at the committee stage. Given the collective action problems associated with passage of any law (Cox and McCubbins, 1993), it would seem that the majority of rule-curbing bills serve some other purpose, like posturing or warning the agency, rather than directly impeding the agency’s action.

The second congressional veto outlet, the CRA, is very similar to the power to annul a rule through passage of a new law. To use the CRA, both chambers must pass a joint resolution which then must be signed by the president. As a result, the CRA path is still subject to all of the same collective action and coordination problems previously cited. It is unsurprising then the CRA has been successfully deployed exactly once; in 2001 Congress overturned a final rule from the Occupational Safety and Health Administration (OSHA) that enacted broad ergonomics standards for workplaces. The rule was issued at the tail end of the Clinton administration and overturned by a Republican Congress at the commencement of the Bush administration. The rule itself was extremely controversial and is considered to be an atypical rulemaking case (Rosenberg, 2008; Shapiro, 2007).¹⁰ However, as Copeland and Beth (2008) point out, if Congress can overcome its collective action problem and actually

⁹This is similar to Clark’s (2009) argument about “court curbing” bills introduced by MCs to keep the court in line. Clark argues that such bills can be an informative signal to the courts about public opinion on a particular issue. “Agency curbing” bills may serve a similar function in that they inform agencies about public opinion and the political salience of particular rules.

¹⁰However, Rosenberg (2008) reports that from 1996 to 2008, 47 resolutions of disapproval relating to 35 rules were introduced under the CRA. Although only one passed, three were approved by one chamber and not the other.

Figure 4.3: Regulatory Limitation Riders, Fiscal Year (FY) 1989-2009



Note: The line indicates the number of congressional regulatory vetoes issued via limitation riders from FY1989 - 2009. The data pool riders issued for proposed rules, final rules, and “preemptive” vetoes for rules that do not yet exist. Data are from MacDonald (2010).

deploy the CRA, it comes with an additional punch: it prevents the agency from issuing the rule (or a “substantially similar” version of the rule) at any point in the future.¹¹

Finally, regulatory limitation riders may be the most accessible way for MCs to veto an agency’s rule. As MacDonald (2010) explains, these riders are attached to appropriations bills and bar agencies from spending money to issue or implement specific regulations. Because appropriations bills are considered “must pass” legislation,¹² from an MC’s perspective this is close to a unilateral veto power. Figure 4.3 shows the annual incidence of regulatory limitation riders using MacDonald’s (2010) dataset.

¹¹Copeland and Beth (2008) also note that the CRA is a useful tool for a new congress because it grants them the opportunity to overturn last-minute rules issued during the waning days of the previous congress (or administration).

¹²That is, outside of the recent political context where annual appropriations laws have been few and far between.

The figure demonstrates that limitation riders are used to veto agency rules with some regularity (although they occur less frequently than OIRA vetoes). However, plotting limitation riders in the same way as OIRA vetoes (see Figure 4.1) masks a key nuance of these data. Importantly, limitation riders are often used *preemptively* to prevent agencies from issuing rules in new areas. For example, of the 512 riders in MacDonald’s dataset, 22 (4.3%) were issued to prevent agencies from writing rules to implement the Kyoto Protocol. These vetoes occurred even though no agency had started working on a rule to implement the treaty. While other riders address specific proposed or final rules, preemptive vetoes such as these are very different from the theoretical argument about vetoes offered in this dissertation. This raises an important point about congressional use of the regulatory veto, as the preemptive veto is also likely to be included in the type of regulatory vetoes contained in bills and legislation previously discussed.

This suggests that, while an empirical study of congressional regulatory vetoes is promising, careful attention should be paid to the details associated with these vetoes, as they may be symbolic, preemptive, or even may address different substantive issues than those raised here. So, while the argument advanced here is likely applicable to these data, empirical and theoretical modifications may be necessary. In addition, to get a comprehensive sense of how these vetoes work, it appears necessary to consider all three veto paths in tandem, as MCs may treat them as substitutes and studying one path would paint an incomplete portrait.¹³

To conclude, regulatory vetoes—issued by both OIRA and by Congress—critically shape how agencies write rules. In the next chapter, I take this observation to the next

¹³Of course, as discussed earlier, OIRA vetoes and congressional vetoes may also serve as substitutes particularly under unified government.

stage and examine how agency strategy continues once an agency has effectively dodged a regulatory veto for a proposed rule.

Chapter 5

Commandeering the Public Comment Period

The model of agency behavior put forth in this dissertation is one of strategic bureaucrats responding to the incentives created by the notice-and-comment process. I argue that this incentive structure leads bureaucrats to become entrenched in a policy early in the process and then work to defend it as the process unfolds. In the preceding chapters, I developed a formal model to show how an agency strategically selects the type of rule to propose in order to avoid a regulatory veto, and then tested the empirical implications of that model on a new dataset of regulatory vetoes. In this chapter, I continue on to the next step of the process and examine agency behavior after the proposed rule is drafted. Specifically, I ask how do agencies strategically approach the public comment period in order to protect their investment in the proposed rule?

The public comment period is a critical stage of the notice-and-comment process. During this mandatory part of the process,¹ the agency takes the proposed rule to the public

¹The public comment period is not technically mandatory, as there are procedural options, such as issuing an interim final rule, that allow the agency to bypass this step. Additionally, most rules themselves are discretionary and not issued as the result of a specific mandate (West and Raso, 2013). So if an agency really wanted to avoid a public comment period, it could not write a rule in the first place. That said, federal agencies promulgate hundreds of rules each year, the majority of which follow the traditional notice-and-comment route and include a public comment period.

and allows stakeholders to weigh in on the policy. If stakeholders sound the “fire alarm” (McCubbins and Schwartz, 1984), they can activate political overseers who can then put the kibosh on the proposed rule. The agency’s investment in that proposed rule is then squandered. To guard against this outcome, I argue that agencies can manipulate the public comment period in strategic ways.

In this chapter, I situate this behavior in the context of congressional oversight of rulemaking. I focus on Congress for two reasons. First, from the broader perspective of the project, the argument I make is about the strategic behavior of agencies in response to political oversight from both Congress and the president. In the previous chapter (Chapter 4) I focused on regulatory vetoes by OIRA (i.e., presidential vetoes), so it is only fitting to balance the argument by focusing on Congress here. Second, from a practical perspective, it is difficult to observe agency manipulation of the public comment period with respect to OIRA, since much of this happens under the shroud of OIRA review and out of the public eye.²

The remainder of this chapter proceeds in several sections. I begin by identifying the discretion that agencies have with respect to the development of proposed rules and offer a theory of how agencies use these tools to fend off (anticipated) congressional interventions. The third section tests the hypotheses I develop about strategic preemption on a new dataset of agency rulemaking activity. After presenting the empirical results, the chapter concludes with a discussion of the implications of these findings for a broader understanding of administrative rulemaking and this project.

²OIRA reviews draft proposed rules before they are sent to the *Federal Register* for publication. Thus, the agency’s strategic behavior with respect to public comment periods and OIRA is likely different than the case I make in this chapter since OIRA can privately negotiate the details of the public comment period with an agency.

5.1 PROCEDURAL DISCRETION AND CONGRESSIONAL OVERSIGHT

For any particular rule, the agency issuing the rule has considerable discretion when it comes to the procedural decisions that govern how the notice-and-comment process actually unfolds. For instance, agency bureaucrats decide how long to set the public comment period and when to publish the proposed rule. They also choose whether to publish a pre-rule (formally known as an Advanced Notice of Proposed Rulemaking or ANPRM), to host public hearings during the public comment period, to extend the initial public comment period or reopen the rule for a secondary comment period, and to restrict the format of comments accepted into a rule's docket,³ amongst myriad other decisions.

Although this procedural discretion is rarely (if ever) recognized by scholars, it has an important implication. Theoretically speaking, it means that administrative procedures are not self-executing. This is important because scholars have long argued that by instituting administrative procedures political principals assert control over an agency's choices (Bawn, 1995; McCubbins, Noll and Weingast, 1987, 1989). While scholars have noted that agencies still have discretion in the context of administrative procedures (Epstein and O'Halloran, 1999; Potoski, 1999), this discretion is always defined in terms of policy discretion, rather than procedural discretion.⁴ Yet, when it comes to notice-and-comment, *the administrative procedures themselves are implemented by the very agency bureaucrats whose behavior they are designed to constrain*. This suggests that agencies may be able to use procedures to

³Agencies must specifically identify the formats (mail, e-mail, web, etc.) in which they will accept comments for a particular rule. Although advances in e-government are rapidly making this less of an issue, in one infamous 2008 midnight rule, the Department of Interior declined to accept comments submitted via email, resulting in numerous comments criticizing the agency.

⁴The distinction between policy and procedural discretion is important, since the latter may magnify the former.

subvert the oversight that the process was intended to provide. This potential becomes more plausible when one considers that agencies churn out dozens of rules each year, enabling bureaucrats to familiarize themselves with the nuances of these procedural decisions and how they tend to play out for their agency.

In this chapter, I examine how bureaucrats leverage this insider knowledge, along with their administrative discretion, to steer the notice-and-comment rulemaking process in their preferred direction. Specifically, I argue that agency bureaucrats manipulate the administrative process in ways that make it more difficult for members of Congress to interfere with a rulemaking. As explained in Chapters 3 and 4, the regulatory veto gives agencies good reason to be leery of Congress when engaging in the rulemaking process. The repercussions for promulgating an unfavorable rule do not stop there though. Several studies have shown that as preferences between Congress and the agency diverge, Congress is more likely to punish the agency in other ways, including reducing the agency's discretion by writing more specific statutes, strengthening administrative procedures, or increasing the level of monitoring (see, e.g., Epstein and O'Halloran, 1999; Huber and Shipan, 2002; McCubbins, Noll and Weingast, 1987). Thus, as a starting point, we might suspect that agencies are more likely to be cautious when they are ideologically distant from the controlling powers in Congress (and therefore more susceptible to congressional sanctions).

Theories of a responsive bureaucracy (e.g., Weingast and Moran, 1983; Wood, 1988; Wood and Anderson, 1993; Wood and Waterman, 1991) would suggest that agencies should alter the content of their proposed rules or issue fewer proposals under such circumstances. However, this is not the only possible strategy for an agency. After all, the negative consequences that flow from congressional intervention in an agency's rulemaking are not auto-

matic. Instead, they are conditioned on two factors. First, the relevant parties in Congress must be made aware of the agency's infraction (i.e., the rule in question). Members of Congress are busy and, as a matter of course, do not routinely follow the rulemaking activities of agencies. Therefore, some aggrieved party must inform the powers that be of the agency's rule. Second, upon learning of the infraction, Congress must be willing to intervene in the rulemaking process. That is, the benefits of weighing in against an agency's rule must outweigh the costs of doing so.

Crucial to the argument that I make here is the observation that agencies are the first movers in the notice-and-comment process. That is, they propose a policy (i.e., a proposed rule) and only then does Congress get a chance to respond. While agencies could propose fewer policies or policies that congressional interests are more likely to agree with, if we believe that bureaucrats have their own policy preferences this may be a suboptimal result. Another route would be to propose a policy that more closely aligns with their own preferences and then employ strategies that reduce the likelihood that members of Congress will hear about the infraction or find it worthwhile to punish the agency. The argument in this chapter is that the procedural decisions that accompany notice-and-comment afford agency bureaucrats exactly this opportunity. And agencies use these procedures strategically to lower the profile of their insubordination and raise the costs of intervening in the rulemaking process for members of Congress. In other words, they preempt the possibility that members of Congress will embroil themselves in the agency's regulatory policymaking, rather than respond to congressional preferences.

In the sections that follow, I outline how agencies use their procedural discretion in the public comment period to stave off congressional incursion. First, I show how agencies

use stakeholder engagement to build coalitions. This strategy builds support for an agency's proposed rule and makes intervention more costly since members of Congress will be less likely to intervene when doing so requires them to confront entrenched stakeholders who support the policy. Second, agencies can time the public comment periods associated with their proposed rules to make it less likely that members of Congress learn about the proposal and also make it more costly for them to respond when they do. Although these strategies are divergent, they are flip sides of the same coin, both serving to preempt congressional incursions into agency rulemaking.

Engaging External Stakeholders Through the Public Comment Period

Broadly speaking, many of the procedural decisions surrounding the notice-and-comment process structure how (and how much) the agency interacts with external stakeholders on any particular rulemaking. From the agency's perspective, engaging with external stakeholders involves a tradeoff between the benefits of coalition-building and the costs involved with stakeholder management.

There are myriad substantive benefits to engaging with groups outside the agency. For instance, Carpenter (2001) uses an historical approach to show how agencies build support coalitions with key interest group allies. By building a reputation with these groups for reliability and efficacy, agencies create an environment in which they can operate with (relatively) greater autonomy. In more recent work Moffitt (2010) shows how the Food and Drug Administration (FDA) strategically consults with advisory committees in order to publicly demonstrate the risk and uncertainty associated with particular drugs. By engaging externally and having outsiders acknowledge a drug's inherent risks, the FDA "can demon-

strate that any failure associated with the policy is inherent to the policy itself and not attributable to (lack of) agency expertise.” She argues that this external consultation serves as a reputation-enhancing tool for the FDA. Other scholars have argued that by consulting with external stakeholders, agencies can co-opt potential opponents (Selznick, 1949), gather information (Kaufman, 1981; Sunstein, 2013*b*), and facilitate policy implementation (Meier and O’Toole, 2006).

By inviting many groups to participate on a proposed rule, the agency can tap into a group of allies that supports the policy (see Nou, 2013). It is then more costly for congressional overseers to swoop in after the coalition is in place and thwart the agency’s efforts without raising the ire of the invested stakeholders. The power of the coalition-building strategy is evident when agencies are forced to defend their proposed rules. For example, one EPA deputy administrator pointed to the agency’s support coalition when called to testify before the House during 112th Congress, stating: “There is tremendous public support for moving forward with these rules. For instance, since March, we have received over 800,000 comments from across the country in support of regulatory mercury emission controls from power plants” (Perciasepe, July 26, 2011).

Yet, greater external engagement is not costless. There can be negative consequences when an agency turns outward. First, although it may seem an obvious point, stakeholder engagement takes time. The more time spent formally interacting with stakeholders at the proposed rule stage, the longer it will take the agency to move on to the final rule stage.⁵ Delay in rulemaking is a serious consideration; the average time to bring a proposed

⁵For instance, longer comment periods enable interest groups to organize mass mailing campaigns, wherein an interest group mobilizes hundreds or thousands of its members to submit near-identical comments in support of or in opposition to a proposed rule. Such campaigns are not likely to add substance to an agency’s deliberations (FR Advisor, April 15, 2013), but managing the response to these campaigns does

rule to the final rule stage already takes between 8 and 25 months (O’Connell, 2008). In addition, stakeholder management consumes resources, and agency rulemaking resources are scarce (West, 2009). Most agencies have a significant backlog in the rules that they plan to complete. As a result, time spent dealing with each additional comment or group comes at the direct expense of other projects.

Turning outward also invites more risk vis-à-vis the courts. For instance, the longer a rule is open for comment, the greater the opportunity for groups to submit a comment. Not all groups that enter the fold will be pleased with the agency’s decision and, now empowered with stakeholder status, these groups may seek recourse with the courts. While the agency is under no obligation to accommodate group demands in the final rule, submitting a comment or testifying at a hearing can be part of a broader group strategy. Groups may not even expect that agencies will make the changes they request in the final rule, but instead may be laying the groundwork for future litigation (Schmidt, 2002). Engaging externally opens this pathway to groups.⁶

When do agencies invest resources in engaging externally on their proposed rules? I argue that agencies are more likely to do this when their rules are at the greatest risk of congressional overturn or congressional intervention - in other words, when the agency and Congress are ideologically distant. When the agency and Congress are ideologically predisposed to agree on policy (i.e., they are proximate on the ideological spectrum), the agency can expect less oversight and scrutiny of its actions. Further, when agencies and

soak up agency resources.

⁶This view is consistent with recent work by Woods (2009) who finds, in a survey of bureaucrats responsible for rulemaking in state agencies, that increasing the opportunities for public involvement (e.g., through a longer comment period) in a rulemaking is associated with greater perceived influence of the courts in the rulemaking process.

their political overseers are ideologically concordant, outside groups are of little utility as the information they provide only serves to highlight disagreements between the groups and policymakers (Gailmard and Patty, 2013). As a result, agencies will work to protect their polices more as this distance increases, as laid out in the first hypothesis:

External Engagement Hypothesis. As the ideological distance between the agency and Congress increases, agencies will increase the level of engagement with external stakeholders by holding longer public comment periods.

Judiciously Timing the Public Comment Period

The take-all-comers nature of notice-and-comment means that when an agency mobilizes stakeholders outside of the agency it may activate those groups that agree with it, but also those that disagree with it. In other words, agencies must be careful about what the groups mobilized by external engagement strategies actually do. These disaffected groups represent a potential threat to the agency because they can pull fire alarms and provide ammunition to inimical interests in Congress (Hall and Miler, 2008).

Yet external engagement is not the only way that agencies can preempt congressional action. That is, although agencies cannot eliminate the possibility that an alarm will be pulled, they do have some administrative discretion that affects the likelihood that members of Congress respond to the alarm. Specifically, they can manipulate the timing of the release of the proposed rule (i.e., when the proposed rule is published in the *Federal Register*) - and, importantly, when the comment period occurs - to coincide with periods when Congress is less likely to respond. In other words, the agency can make sure the comment period, the time when interest groups are empowered to pull fire alarms, comes at an inopportune time

for Congress.

Others have established the judicious use of timing by agencies in a variety of contexts. For instance, Muehlenbachs, Sinha and Sinha (2011) show how the EPA 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 part of an implicit 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.

Agencies have considerable leeway with respect to the timing of the publication of proposed rules and, if they are leery of potential fire alarms, may seek to enfeeble the congressional response to those alarms. Publishing the proposed rule so that the comment period overlaps with a congressional recess may provide just such an opportunity. During recesses, members of Congress focus on activities in their home districts and are less attuned to issues in Washington (Fenno, 1978). From a member’s perspective, Washington business (including responding to agency rules) has essentially been “put on hold” until the session resumes. This means that it may be more difficult for a member of Congress to learn about a rule or to respond to the rule when they do.

While some staff members remain available to attend to group complaints, many staffers schedule their vacations around recess periods (Beam, August 26, 2009). Thus, while publishing during a recess period does not mean that the fire alarm will not be heard,

it may decrease the likelihood that it will engender a substantial response. Gersen and O’Connell (2009, 1183) summarize this strategy in the following way: “if Congress is out of session, all else equal, the costs of mobilizing a political response to an unpopular policy should rise.”

Since members of Congress are ill-disposed to agency proposals when they are ideologically distant, agencies may seek to avoid scrutiny by publishing proposed rules during recesses in these cases. Thus, as the distance between the two actors increases, we can expect agencies to publish more covertly, as laid out in the second hypothesis:

Strategic Publication Hypothesis. As the ideological distance between the agency and Congress increases, agencies are more likely to publish proposed rules so that the comment period overlaps with a congressional recess.

5.2 TESTING THE EXTERNAL ENGAGEMENT HYPOTHESIS

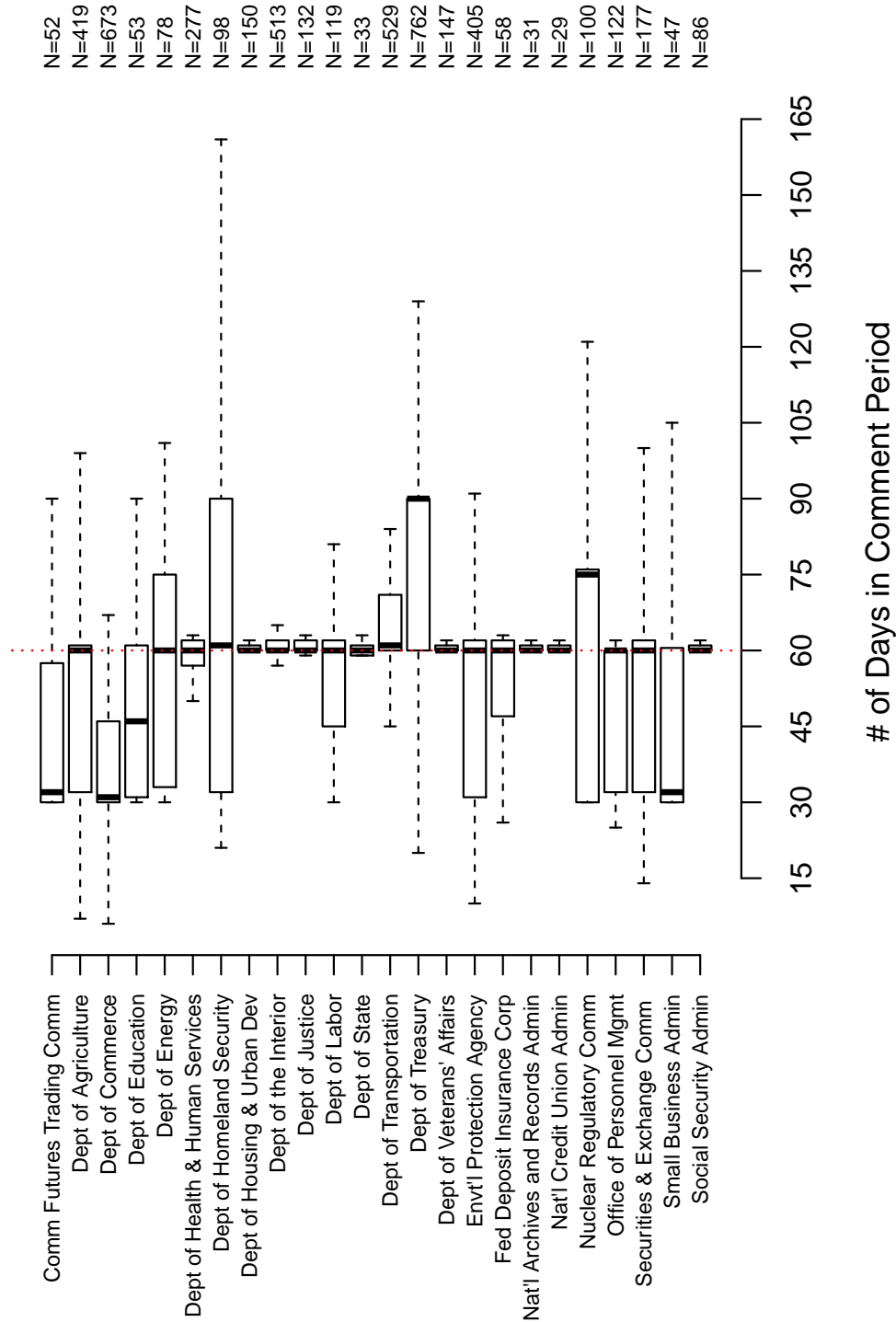
Turning to the analysis, I begin with an examination of the external engagement hypothesis. Agencies engage with the public in numerous ways in the process of creating a new rule, yet not all of these decisions are suitable for testing this hypothesis. Public hearings, for example, provide an opportunity for individuals to come before the agency and testify about a proposed policy. While hearings are a common way for agencies to receive feedback from stakeholders on the policy impacts of a proposed rule, their implementation varies considerably (and somewhat systematically) across agencies. For instance, some agencies like the Occupational Safety and Health Administration (OSHA), a component of the Department of Labor, routinely schedule hearings at the same time that they publish a proposed rule.

Other agencies offer to host hearings only if commenters specifically request a hearing to be held. Others are required to hold hearings when issuing rules under certain statutory authorities. Finally, a few agencies rarely, if ever, hold hearings. The net result of this variation is that, across agencies, it is difficult to systematically study and infer meaning from the presence or absence of a public hearing.

The length of the public comment period is notably different, as it is a decision that all agencies must make with respect to each proposed rule. The APA does not specify how long the public comment period on a proposed rule need be, leaving this decision to the agency's discretion.⁷ In 1993, the Clinton administration clarified that agencies should provide a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days (E.O. 12866). In practice, however, the 60-day standard established in Clinton's executive order is not closely followed. Figure 5.2 shows that while 60 days is the modal number of comment days, there is considerable variation in the length of comment periods across the agencies in this study. For instance, variance at the Department of Homeland Security is considerably larger than at the Department of Housing and Urban Development, which issued nearly one and a half times as many rules.

⁷As Lubbers (2006) notes, "A common misconception is that the APA prescribes a 30-day minimum comment period, a belief that may derive from the APA's requirement that final rules be published 30 days prior to their effective date" (278).

Figure 5.1: Length of Comment Periods for Agency Proposed Rules, 2000-2010



Note: Boxes show the upper and lower quartiles of the observed data. The bolded lines represent the agency median. The dotted line indicates the 60-day mark. The total number of proposed rules for each agency is indicated on the right axis.

The dependent variable, *Comment Days*, is the number of days that a proposed rule was open for public comment.⁸ As previously noted, longer comment periods are associated with a greater volume of comments from a more diverse set of interests, because “it takes time to assemble the essential information needed to evaluate and then respond to what can be highly technical and complex rules. In the contemporary political environment, time allows people to get organized, to build coalitions, and to orchestrate a response to the agency’s proposals” (Kerwin and Furlong, 2011, p. 67). This is, of course, precisely the sort of coalition-building that agencies can use to bolster their position vis-à-vis congressional overseers. Moreover, submission of a comment during the formal comment period matters because the comments received constitute a docket that is the basis of the legal record that reviewing courts rely on. Agencies are only required to respond to those comments that are in the docket.

In order to empirically test the first hypothesis, I collected data on the number of comment days for 5,090 proposed rules from 24 executive branch and independent agencies (see Table 2.2 in the Appendix to Chapter 2 for a list of the agencies) from 2000 - 2010. This constitutes the universe of rules that were proposed during this time period according to the *Unified Agenda of Regulatory and Deregulatory Action* (“Unified Agenda”), a semi-annual accounting of agency rulemaking activity.⁹

In the analyses, I focus on two sets of rules: all proposed rules and proposed rules that

⁸This analysis focuses on the length of the comment period as specified in the agency’s proposed rule. Occasionally, agencies will extend a comment period (or reopen it if it has already closed). I do not include these additional days in the counts of comment days for two reasons. First, extensions of the comment period occur only at the explicit request of commenters (and subsequent consent of the agency). Thus, including extension days in the analysis introduces a selection problem. Second, the original choice of comment days represents a strategic, anticipatory choice by the agency, whereas the observed number of days does not.

⁹See the Appendix to this chapter (Section 5.5) for a description of how the dataset was constructed.

are deemed to be significant. Agencies issue thousands of rules each year, but only a fraction of them have meaningful policy importance. While previous studies have relied on agency self-reports of a rules significance (as listed in the Unified Agenda), agencies may have an incentive to underreport the significance of their rules (see Potter and Shipan, 2013) and, further, the standard for significance may vary across agencies. Instead, I count a proposed rule as significant if it was reviewed by the Office of Information and Regulatory Affairs (OIRA), the White House arm responsible for centralized review of agency rules. Under the authority of Executive Order 12,866 (September 30, 1993), OIRA can review any rule that has novel legal or policy implications or an annual impact on the economy of \$100 million or more. This external review essentially serves to separate the significant rules from the less important ones in a way that is consistent across agencies.¹⁰ Approximately 37% (1,884) of the proposed rules in the dataset are significant; to the extent that there is any strategic behavior occurring with respect to the comment period, I expect to see it magnified in this subset of rules.

My key explanatory variable is the ideological distance between the agency and Congress. In recent years, a veritable cottage industry has emerged with the explicit goal of measuring agency ideology (Bertelli and Grose, 2009, 2011; Bonica, Chen and Johnson, 2012; Chen, 2010; Clinton and Lewis, 2008; Clinton et al., 2012; Nixon, 2004).¹¹ I begin the analysis with ideological scores developed by Poole and Rosenthal (1997) and modified by Chen (2010) and Chen and Johnson (2014), but use an alternate measure of ideology as a robustness check.

¹⁰One limitation of using OIRA review as a marker of significance is that, with the exception of the Social Security Administration, OIRA's purview excludes the independent agencies in the dataset.

¹¹See the Appendix to Chapter 2 of this dissertation for a discussion of the role of ideology and its measurement in this project.

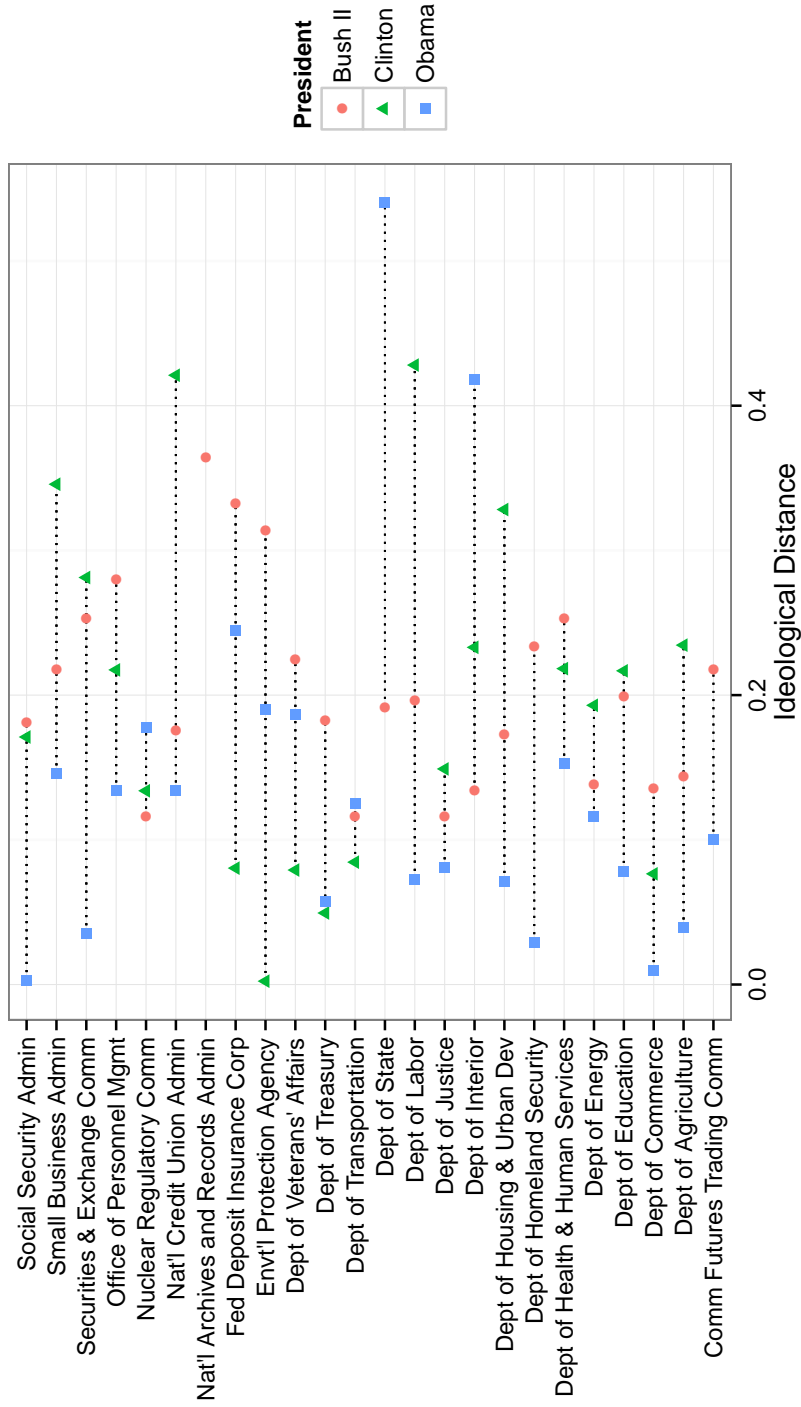
These scores, called Common Space DW-NOMINATE (“Common Space”), use roll call votes to uncover legislators’ underlying ideological predispositions on a left-right continuum. Scores closer to -1 indicate a more liberal legislator (e.g., Senator Barbara Boxer) and those closer to 1 indicate a more conservative legislator (e.g., Senator Tom Coburn). Chen (2010) develops an innovative method of extending Common Space scores to agencies by relying on bureaucrats’ (both careerists and appointees) campaign contributions to legislators. The key assumption here is that individuals give money to those legislators that best represent their true preferences (Bonica, 2013). To develop an aggregate estimate of an agency’s Common Space score, Chen (2010) and Chen and Johnson (2014) use the mean score among those legislators that received contributions from the agency’s employees, weighted by the dollar amount of contributions. This weighting scheme places more emphasis on larger contributions, which tend to come from higher-earning employees (i.e., political appointees).

When it comes to measuring the distance between the agency and Congress using these scores, there are a number of feasible options. For instance, one could measure the distance between the agency and its oversight committee, the distance between the agency and the congressional median, or the distance between the agency and the median of one chamber of Congress (e.g., the chamber that is ideologically closest or farthest from the agency). Each of these options suggests a different model of congressional oversight. Using the agency’s congressional oversight committee implies that agencies are concerned with the types of oversight that such committees can provide (increasing the number of hearings, budget cuts, etc.). However, not only is the identification of the agency’s primary oversight

committee a tricky task empirically,¹² it also suggests that rule-specific oversight operates only through oversight committees. Instead I argue that members of Congress will respond to issues as they learn of them, whether that be from committee-related tasks or from constituents. This suggests the need for a more general model of congressional oversight. Thus, for the variable *Ideological Distance*, I employ the congressional floor median as the key representative, which offers a general sense of the broader disposition of Congress. (In the next chapter, I discuss the appropriateness of this assumption in greater depth.) Figure 5.2 plots the Common Space distance measures for each agency and each congress.

¹²Agencies have not one, but many, oversight committees and it is not obvious which committees provide oversight at which times. In a survey of agency careerists and appointees, Clinton, Lewis and Selin (2014) find that most respondents identified 3 - 4 oversight committees for their agency. However, there was significant variation among agencies. For instance, the reported average for the Department of Homeland Security was 4.70, compared to 2.40 for the Bureau of Labor Statistics. While this study is helpful in illuminating the nature of committee oversight of agencies, it covers a small sample of agencies in one congress and does not vary over time. This makes it difficult to use for identification of oversight committees for the time period and agencies included in this study.

Figure 5.2: Distance to the Congressional Median by Agency and Administration



Note: Symbols represent the absolute value of the distance between the agency and the congressional floor median for each presidential administration. Chen and Johnson's (2014) Common Space agency scores vary by presidential administration, which allows the measure to vary by congress (since the floor median changes within each congress). Values represent the average value for each presidential administration.

While the focus of this chapter is the politics surrounding the use of the public comment period, this period ostensibly serves the more practical function of information exchange between the agency and regulated parties. In other words, politics aside, agencies may need longer comment periods for more complex rules. Scholars are increasingly skeptical that agencies use the public comment period for this purpose (see, e.g., Elliott, 1992, likening the process to Japanese kabuki theater), with many suggesting that agencies gather the relevant information in advance (Yackee, 2012). Nonetheless, to control for this possibility, I count the (logged) number of words (in hundreds) that the agency proposed to add to the *Code of Federal Regulations* (CFR), the regulatory equivalent of the U.S. code.¹³ Here I argue that the longer a rule's text, the greater its complexity. That is, a longer rule tackles more issues and gives more specific instructions on how the regulated community should comply with the agency's wishes. I expect the variable *Log CFR words* to have a positive relationship with the length of the public comment period.

Next, I include two dichotomous variables that relate to the legal status of the proposed rule.¹⁴ The first, *Statutory Deadline*, takes on a value of "1" if the proposed rule has an associated deadline in a statute, and "0" otherwise. Similarly, the second variable, *Judicial Deadline*, represents whether the court has imposed a deadline for the rule or not. Although judicial deadlines are more infrequent than statutory ones (Gersen and O'Connell, 2008), both tools are used to compel agencies to quicken the pace with respect to the completion of a particular rule. As such, I expect that the imposition of either type of deadline will be

¹³The CFR text in a proposed rule is the "meat" of the rule; it is the text that binds regulated parties. This operationalization is similar to Huber and Shipan's (2002) use of the number of words in a statute as a proxy measure for legislative constraint on an agency. There, the authors count the number of words in Medicaid statutes across the 50 states and find that "longer statutes are longer because they provide more details about the policy to be implemented" (75).

¹⁴Data for both of these attributes originate from the Unified Agenda.

associated with a shorter comment period, as agencies hasten to accommodate these political demands (Gersen and O’Connell, 2008; Kerwin and Furlong, 2011; Yackee and Yackee, 2010).

Next, I include a dummy variable *Midnight* that takes on a value of “1” if the proposed rule was published during the last quarter of a presidential administration and “0” otherwise.¹⁵ Although the tactic has been heavily criticized for normative reasons, midnight rules are rules that an outgoing administration issues on its way out the door (O’Connell, 2008). These rules often contain controversial policies that a lame-duck administration pushes quickly through the rulemaking process. Discussions of midnight rules tend to (rightly) focus on the publication of the final rule (since this entrenches the policy in the CFR), but since midnight final rules must (generally) first be proposed rules, they are relevant to this study. I expect that *Midnight* will have a negative relationship with the number of comment days, as agencies shorten the comment period in an attempt to finalize these last-minutes rules posthaste.

Finally, I include *Bush* and *Obama*, dummies for presidential administration in order to control for the possibility that agencies behave differently under different administrations.¹⁶ Descriptive statistics for the variables in the analysis are provided in Table 5.1.

¹⁵Technically, this variable is coded “1” if the proposed rule was published between October 1st and December 31st of 2000, 2004 or 2008, and “0” otherwise. I focus on this timeframe since it is the period in which a proposed rule must be published in order to secure the possibility of finalizing the rule before the new administration takes control in January of the following year (Gersen and O’Connell, 2009).

¹⁶Clinton is the omitted category.

Table 5.1: Descriptive Statistics for Variables in the Models

Variable	Mean	Std. Dev.	Min	Max
Comment Days	58.01	23.091	6	211
Recess Publication	0.441	0.232	0	1
Ideological Distance	0.172	0.143	0.001	0.569
Log CFR words	2.787	1.448	0.039	7.565
Statutory Deadline	0.096	0.296	0	1
Judicial Deadline	0.059	0.236	0	1
Midnight	0.074	0.262	0	1
Bush	0.534	0.499	0	1
Obama	0.102	0.302	0	1

Analysis & Results

The results from the statistical models testing the external engagement hypothesis are presented in Table 5.2. Because the dependent variable *Comment Days* is a count and exhibits evidence of overdispersion, I rely on negative binomial models. Accordingly, the coefficients presented in the table are maximum likelihood estimates. I also include agency fixed effects to account for unmodeled agency specific factors.

The models support the hypothesis that as the distance between Congress and the agency grows, agencies increase the length of the comment periods on their proposed rules. Substantively, moving from the minimum observed value to the maximum observed value results in an increase of 3.2 comment days (a 5.7% increase) for all proposed rules, and an additional 5.2 comment days for significant rules (a 9.0% increase).¹⁷ Figure 5.3 provides a graphical representation of the substantive findings related to the external engagement hypothesis. This figure shows the changes in predicted values of comment days as the

¹⁷All changes in predicted values are reported as the change between the minimum and maximum observed values (for continuous variables) with all other variables held at their means. Binary variables are based on change in values moving from 0 to 1, with all other variables held at their means.

Table 5.2: Negative Binomial Models of *Comment Days* for Proposed Rules, 2000-2010

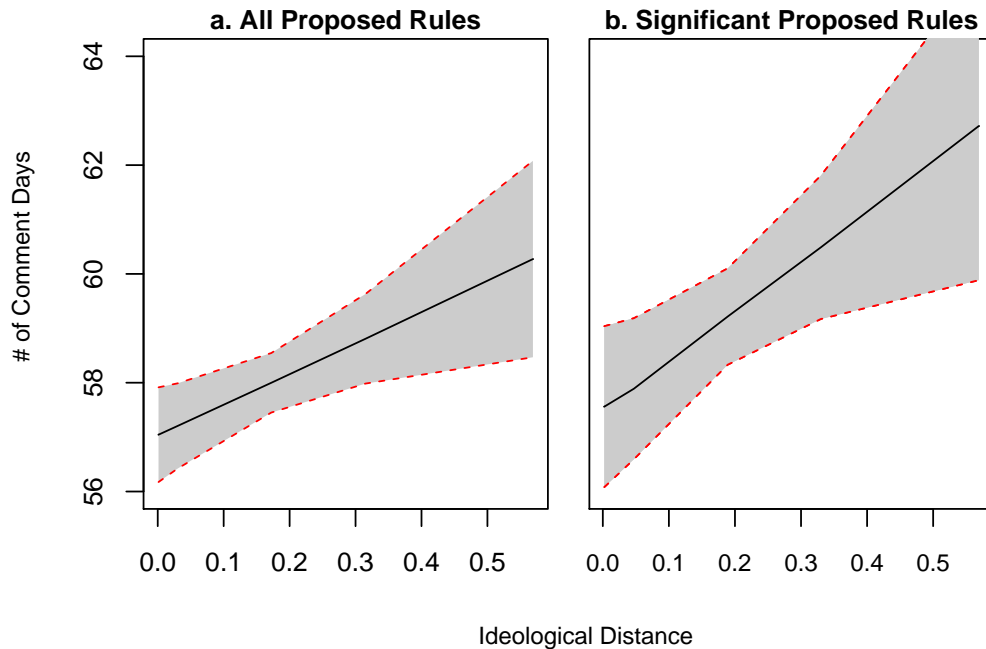
	(1)	(2)
	All Rules	Significant Rules
	β/se	β/se
Ideological Distance	0.097** (0.044)	0.151*** (0.058)
Log CFR Words	0.039*** (0.012)	0.037*** (0.013)
Statutory Deadline	-0.125*** (0.043)	-0.131*** (0.027)
Judicial Deadline	0.095*** (0.033)	-0.012 (0.036)
Midnight	-0.058*** (0.017)	-0.081** (0.032)
Bush	-0.096*** (0.035)	-0.076*** (0.026)
Obama	-0.102*** (0.023)	-0.113*** (0.042)
Constant	3.971*** (0.050)	4.033*** (0.036)
Ln α	-2.258*** (0.111)	-2.418*** (0.136)
Agency Fixed Effects	Yes	Yes
N	5090	1884

* $p < .10$, ** $p < 0.05$, *** $p < .01$

Note: Table entries are maximum likelihood coefficients (standard errors clustered on the agency are in parentheses). The proposed rule is the unit of analysis.

distance between the agency and Congress increases, for all rules (see 5.3a) and for significant rules (see 5.3b). Shaded areas indicate 95% confidence intervals. While the effect sizes are not large in absolute terms, it is surprising to find any effect whatsoever for an activity so routine as the number of days that a rule is open for public comment. Indeed it is

Figure 5.3: Change in Predicted Values for *Comment Days*



particularly noteworthy since agencies must exercise caution in manipulating the number of days lest they call attention to their strategic behavior. As a result, this strategy is likely exercised judiciously in combination with other procedural tactics.

Crucially, these findings indicate that even with the political use of comment days, there is strong support for the information-gathering function of rulemaking. As the logged number of CFR words in a proposed rule increases, agencies increase the length of the comment period; moving from the minimum to the maximum of this variable results in an average increase of 18 days for all rules and 17 days for significant rules.

In addition, the models also reveal interesting patterns with respect to the deadline control variables. Notably, the sign for the judicial deadline variable is unexpectedly positive

and significant for all proposed rules, suggesting that when rules have a judicial deadline agencies increase, rather than decrease, the length of a proposed rule's comment period (5.8 more days for all rules). This contrasts with the negative and statistically significant sign for the statutory deadlines variable, indicating a decrease in the number of comment days associated with the instance of a statutory deadline (6.9 fewer days for all rules and 7.4 fewer days for significant rules). These findings may speak to the substantive difference between statutory and judicial deadlines. Congress is concerned with having the agency complete the rule quickly, whereas courts are much more concerned with procedural fairness and equity (suggesting a longer comment period so all groups have the opportunity to participate).

The *Midnight* variable performs as expected. Agencies set shorter comment periods at the end of an outgoing president's administration: 3.3 fewer days for all rules and 4.6 fewer days for significant rules. Finally, it appears that the number of comment days decreased under more recent presidential administrations, as compared to the Clinton administration. The difference between the Bush and Obama administrations, however, is insignificant.

Robustness Checks for Comment Days Models

As a robustness check, I reestimate the models in Table 5.2 under a variety of different empirical specifications and operationalizations. First, I run the models using two different estimation techniques in order to demonstrate that the findings are not contingent upon any one distributional assumption. Models 3 and 4 (Table 5.3) replicate the results using OLS. Models 5 and 6 provide the same replication using an ordered probit model. This specification breaks the *Comment Days* variable into rough 15-day increments (1 = 22 days or less; 2 = 23 – 37 days; 3 = 38 – 52 days; 4 = 53 – 67 days; 5 = 68 – 82 days; 6 = 83 days

or more). This estimation technique puts less emphasis on deviations between individual days (e.g., the difference between, say, 34 comment days and 35 comment days), and more emphasis on the general category (or bucket) that the rule’s comment period falls into. The results from these analyses are substantively unchanged from those presented in Table 5.2. Specifically, as the distance between the agency and Congress increases, agencies increase the length of the public comment period associated with a proposed rule.

Next, I employ alternate estimates of agency ideology to evaluate the level of disagreement between the agency and Congress in order to show that these findings do not rest upon any unique aspect of the Common Space ideological measures. Models 7 and 8 (Table 5.4) present the results using Clinton and Lewis’s (2008) measures of agency ideology, which are based on surveys where experts were asked to rate the ideological position. The scores are time-invariant making a temporal measure (like the one I create here) admittedly crude. Specifically, I create a dummy variable that is coded “1” if the agency is liberal (conservative) and both chambers of Congress are controlled by the Republican (Democratic) party and “0” otherwise. Following O’Connell (2011) I consider an agency to be liberal if its Clinton-Lewis score is negative, conservative if its score is positive, and moderate if the 95% confidence interval includes zero. Because the theory speaks to strong ideological divergences, I exclude moderate agencies from the analysis, which limits the size of the sample. Because moderate agencies do not have clear partisan affiliations in this construction of the measure (and would result in panels of all zeroes), excluding these agencies was also necessary for identification in a model that included fixed effects. In spite of the roughness of this measure, we still observe a positive and statistically significant finding for the distance measure: agencies increase the length of the comment period when they are ideologically distant.

Table 5.3: OLS and Ordered Probit Estimates of *Comment Days* for Proposed Rules

	(3)	(4)	(5)	(6)
	All Rules	Significant Rules	All Rules	Significant Rules
	β/se	β/se	β/se	β/se
Ideological Distance	5.233** (2.486)	8.583** (3.483)	0.251* (0.145)	0.453** (0.225)
Log CFR Words	2.223*** (0.647)	2.286*** (0.791)	0.126*** (0.032)	0.137*** (0.041)
Statutory Deadline	-7.594** (2.714)	-8.041*** (1.644)	-0.414*** (0.151)	-0.401*** (0.105)
Judicial Deadline	4.920*** (1.547)	-1.231 (2.041)	0.281*** (0.077)	-0.031 (0.117)
Midnight	-3.443*** (0.968)	-4.812** (1.889)	-0.212*** (0.072)	-0.298** (0.122)
Bush	-6.171** (2.424)	-4.794** (1.701)	-0.303** (0.146)	-0.212** (0.085)
Obama	-6.530*** (1.622)	-6.991** (2.492)	-0.326*** (0.094)	-0.359*** (0.134)
Constant	53.821*** (2.966)	56.595*** (2.123)		
Cut 1			-1.991*** (0.169)	-2.299*** (0.201)
Cut 2			-0.513*** (0.160)	-0.736*** (0.143)
Cut 3			-0.251 (0.168)	-0.494*** (0.163)
Cut 4			1.303*** (0.219)	1.375*** (0.125)
Cut 5			1.430*** (0.232)	1.457*** (0.118)
Agency Fixed Effects	Yes	Yes	Yes	Yes
N	5090	1884	5090	1884

* $p < .10$, ** $p < 0.05$, *** $p < .01$

Note: Table entries are OLS (Models 3 and 4) and maximum likelihood coefficients (Models 5 and 6). Standard errors clustered on the agency are in parentheses. The proposed rule is the unit of analysis.

Table 5.4: Negative Binomial Models of *Comment Days* using Alternate Ideology Measures

	(7)	(8)	(9)	(10)
	All Rules	Significant Rules	All Rules	Significant Rules
	β/se	β/se	β/se	β/se
Clinton-Lewis Id Dist	0.042*** (0.011)	0.040* (0.016)		
Agency-House Distance			0.102* (0.047)	0.168** (0.056)
Log CFR Words	0.033** (0.012)	0.037* (0.015)	0.039*** (0.012)	0.037** (0.013)
Statutory Deadline	-0.117* (0.052)	-0.129*** (0.036)	-0.125** (0.043)	-0.130*** (0.027)
Judicial Deadline	0.107** (0.036)	-0.005 (0.040)	0.095** (0.033)	-0.012 (0.036)
Midnight	-0.077*** (0.023)	-0.091* (0.040)	-0.058*** (0.017)	-0.080* (0.032)
Bush	-0.089 (0.050)	-0.035 (0.026)	-0.097** (0.035)	-0.077** (0.026)
Obama	-0.107** (0.033)	-0.094 (0.053)	-0.101*** (0.023)	-0.111** (0.042)
Constant	4.031*** (0.066)	3.983*** (0.042)	3.971*** (0.050)	4.032*** (0.036)
Ln α	-2.232*** (0.143)	-2.350*** (0.175)	-2.258*** (0.111)	-2.418*** (0.136)
Agency Fixed Effects	Yes	Yes	Yes	Yes
N	3789	1290	5090	1884

* $p < .10$, ** $p < 0.05$, *** $p < .01$

Note: Table entries are maximum likelihood coefficients (standard errors clustered on the agency are in parentheses). The proposed rule is the unit of analysis.

Finally, Models 9 and 10 in Table 5.4 show the same results using the distance between the agency and the House chamber median (rather than the congressional floor median), in response to the popular notion that the House provides more careful scrutiny of agency activities (including rulemaking), while the Senate dedicates itself to the “bigger picture” issues. The substantive findings remain unaffected. This suggests that there is something deeper about the distance between the agency and those that oversee it that drives choices about external engagement.

5.3 TESTING THE STRATEGIC PUBLICATION HYPOTHESIS

To test the strategic publication hypothesis, I create the dependent variable *Recess Publication*. This variable is the number of comment days that were in a congressional recess divided by the total number of comments days.¹⁸ In the analysis I include the variables from the previous models with two exceptions. First, I exclude the variables for deadlines and midnight publication, as the former are not theoretically relevant to recess publication and the latter is entirely predictive.¹⁹ Second, I add the variable *Comment Days* to the model, to account for the possibility that proposed rules with longer comment periods may have greater overlap with congressional recesses by virtue of their increased duration. Put another way, this variable controls for the possibility that a rule with a 120-day comment period has a greater opportunity to overlap with a congressional recess by chance than a rule with a 30-day comment period.

¹⁸Following Gersen and O’Connell (2009), I focus on House recess dates in this analysis.

¹⁹Given the nature of the election cycle, rules that are published during the midnight period are published at the end of the calendar year. Congressional recesses also occur at the end of the calendar year with some regularity. Thus, these variables are systematically linked in a way that is unrelated to my theory.

Table 5.5 below presents the results. Models 11 and 12 present coefficients estimated using OLS. I provide OLS results since they are intuitive and easy to interpret. However, because the dependent variable is a proportion and bounded between zero and one, OLS does not yield predicted values that are guaranteed to fall within this interval. Therefore, following the approach from Chapter 4, Models 13 and 14 estimate the models using a fractional logit technique (Papke and Wooldridge, 1996; Kieschnick and McCullough, 2003). This quasi-maximum likelihood approach is a modification of the traditional logit model that allows the dependent variable to be a (bounded) fraction, rather than binary. All models include agency fixed effects to account for agency-level variation. Robust standard errors are in parentheses.

These results provide support for the expectation that agencies tend to publish rules during congressional recesses when they are ideologically distant from Congress. Substantively, moving from the minimum to the maximum observed distance of *Ideological Distance* results in a 9.54% increase in the proportion of days in the congressional recess for all proposed rules, and a 10.84% increase for significant rules. Figure 5.4 shows these effects graphically.

The variable *Log CFR words* is positive and statistically significant in the third model, reflecting that as rule complexity increases, agencies are more likely to publish rules to coincide with congressional recesses. However, this variable does not achieve statistical significance in the fourth model of significant rules. Finally, the *Comment Days* variable is not statistically significant in either model. This suggests that the length of the public comment period does not have a meaningful effect on the dependent variable.

Table 5.5: OLS and Fractional Logit Models of *Recess Publication* of Proposed Rules

	(11)	(12)	(13)	(14)
	All Rules	Significant Rules	All Rules	Significant Rules
	β/se	β/se	β/se	β/se
Ideological Distance	0.168*** (0.029)	0.192*** (0.042)	0.683*** (0.116)	0.780*** (0.168)
Log CFR Words	0.006** (0.003)	0.005 (0.004)	0.026** (0.010)	0.020 (0.016)
Comment Days	-0.000* (0.000)	-0.000 (0.000)	-0.001* (0.001)	-0.002 (0.001)
Bush	-0.014** (0.005)	-0.012 (0.014)	-0.058*** (0.021)	-0.047 (0.058)
Obama	-0.094*** (0.011)	-0.074*** (0.018)	-0.395*** (0.045)	-0.308*** (0.074)
Constant	0.429*** (0.016)	0.451*** (0.026)	-0.285*** (0.066)	-0.194* (0.107)
Agency Fixed Effects	Yes	Yes	Yes	Yes
N	5090	1884	5090	1884

* $p < .10$, ** $p < 0.05$, *** $p < .01$

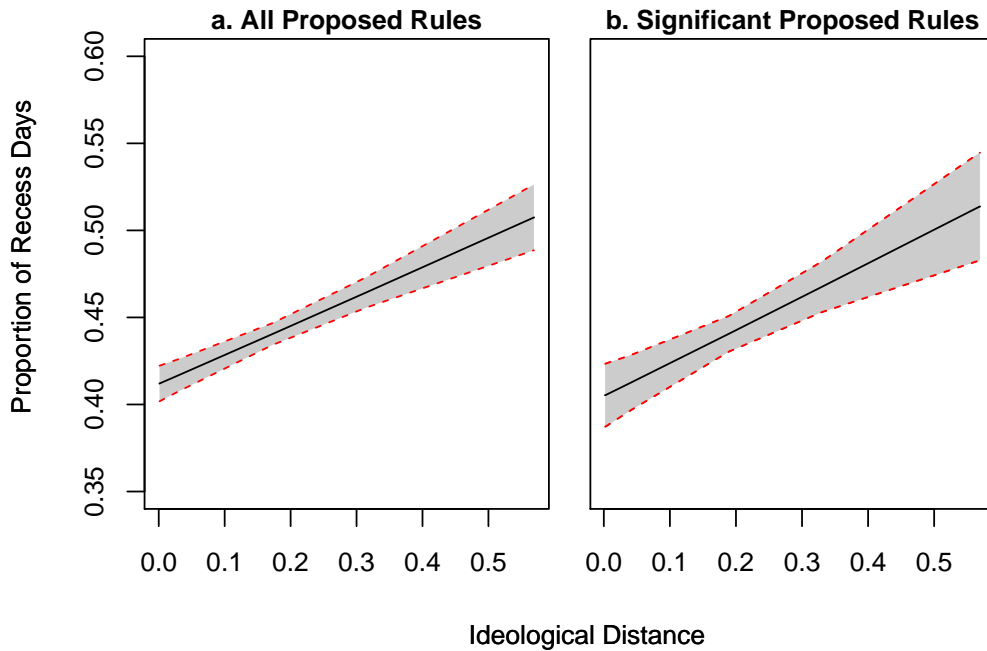
Note: Table entries are OLS coefficients (Models 11 and 12) quasi-likelihood coefficients (Models 13 and 14). Standard errors clustered on the agency are in parentheses. The proposed rule is the unit of analysis.

Robustness Checks for Recess Proportion Models

Again, the findings from these models are robust to a number of alternative specifications, including substituting alternate ideology scores in place of the Common Space scores and using the House median rather than the congressional median (see Table 5.6).

Models 15 and 16 display the results using Clinton and Lewis’s (2008) agency scores. In spite of the roughness of this measure, we still observe a positive coefficient for ideological distance. Although this effect is not significant at traditional levels of statistical significance,

Figure 5.4: Change in Predicted Values for *Recess Proportion*



it nonetheless indicates that agencies are more likely to publish during a recess when they are ideologically distant, as the theory suggests.

Finally, Models 17 and 18 replicate the main findings using the distance from the agency to the House floor median rather than the distance between the agency and the congressional floor median. Again, we see that the results are substantively quite similar to Table 5.5 moving from the minimum to the maximum observed proportion results in an increase in the proportion of comment days in a congressional recess of 9.8% for all rules, and a 11.3% for significant proposed rules.

Table 5.6: OLS Models of *Recess Publication* using Alternate Ideology Measures

	(15)	(16)	(17)	(18)
	All Rules	Significant Rules	All Rules	Significant Rules
	β/se	β/se	β/se	β/se
Clinton-Lewis Id Dist	0.011 (0.011)	0.030 (0.018)		
Agency-House Distance			0.169*** (0.029)	0.196*** (0.040)
Log CFR Words	0.004 (0.003)	0.003 (0.003)	0.006* (0.003)	0.005 (0.004)
Comment Days	-0.000 (0.000)	-0.000 (0.000)	-0.000 (0.000)	-0.000 (0.000)
Bush	-0.015 (0.008)	-0.015 (0.020)	-0.014* (0.005)	-0.012 (0.014)
Obama	-0.106*** (0.011)	-0.079** (0.023)	-0.094*** (0.011)	-0.073*** (0.018)
Constant	0.502*** (0.017)	0.523*** (0.033)	0.430*** (0.016)	0.453*** (0.027)
Agency Fixed Effects	Yes	Yes	Yes	Yes
N	3778	1290	5090	1884

* $p < .10$, ** $p < 0.05$, *** $p < .01$

Note: Table entries are quasi-likelihood coefficients (standard errors clustered on the agency are in parentheses). The proposed rule is the unit of analysis.

5.4 CONCLUSION

The study of politics is replete with examples of how the details matter: for instance, in their seminal paper Baron and Ferejohn (1989) show how the selection of an open or closed floor rule can fundamentally alter bargaining outcomes in a legislature. The results presented in this chapter provide evidence indicating that agencies are strategic when making decisions about the public comment period, a seemingly mundane aspect of the notice-and-comment process. Specifically, I have shown that agency's public comment periods vary systematically

in length and timing according to the agency’s ideological proximity to Congress.

This finding is important from a theoretical perspective. Starting with the work of Weingast and Moran (1983), agencies have been deemed “responsive” to congressional control efforts, including administrative procedures (like those instituted by the APA with respect to rulemaking). Yet this chapter has argued—with empirical support—that the institution of administrative procedures is not the end of the story. That is, agencies can work within these procedures (and even manipulate them) to steer policy in their preferred direction. Thus, rather than exclusively responding to congressional demands, agencies can preempt congressional intervention. This suggests that administrative procedures may be less effective tools of political control than previously thought. Further, the evidence of strategic use of the comment period and publication timing presented here suggests a different take on the notice-and-comment process than the traditional view of agency learning or capture often advanced in the rulemaking literature.

On their own, the effect sizes for any individual result presented here are not enormous, but this should not be taken as evidence that the factors that I have identified are immaterial. There are two reasons for this. First, the tactics are necessarily nuanced; agencies cannot be too heavy-handed in their exercise of them lest they call attention to the strategies themselves. Second, the results are indicative of a larger pattern of agency behavior. That is, this chapter has examined two specific choices that agencies must make with respect to notice-and-comment process: the length of the public comment period and the timing of the proposed rule’s publication. However, as previously discussed, these are but two of many procedural choices that agencies make when managing the rulemaking process, and taken in aggregate these procedures have the potential to pack a powerful punch. The

nuances of how these additional choices in the rulemaking process - be it publication of a pre-rule (ANPRM), hosting a hearing, engaging in the “negotiated rulemaking” process, reopening or extending the public comment period, or restricting the format of comments included in the docket - can be used to an agency’s strategic advantage is a fruitful avenue for scholars to explore.

In the next chapter, I further deconstruct the details of the notice-and-comment process by focusing in-depth on one particular rulemaking case. This approach demonstrates the validity of several assumptions of the project to this point (including a key assumption from this chapter), and also shows how the mechanisms I identify work in the context of one particular rule.

5.5 APPENDIX: DESCRIPTION OF THE DATA

The dataset used in this chapter was constructed according to the following process. First, I identified a list of all proposed rules that were issued from 2000 - 2010 (inclusive),²⁰ according to the Unified Agenda,²¹ an accounting of each agency's rulemaking activity that is published semi-annually in the *Federal Register*. I then matched each proposed rule listing with its text, as published in the *Federal Register*.²² The purpose of this matching exercise was twofold: first, to confirm the length of the comment period (much of this data is missing or incorrect in the Unified Agenda); and, second to obtain the data for the variable *log CFR words*. I used the proposed rule's Regulatory Identification Number (RIN) to match the text to its Unified Agenda listing. This was an imperfect matching strategy, as a rule's RIN can occasionally change from the time that it is listed in the Unified Agenda to the time it is published in the *Federal Register*. Less frequently, but equally problematic, a proposed rule was published without listing any RIN whatsoever. I made every effort to recover each observation that suffered from one of these matching errors, including searching for missing RINs on the Internet and constructing a list of alias RINs for each unmatched case. Nonetheless, I was unable to find convincing matches for approximately 300 proposed rules; accordingly, those cases are not included in the dataset.

Finally, I excluded the rulemaking activity of any agency that produced very few rules during this timeframe (i.e., less than 50) or for which the relevant ideological scores were unavailable. This resulted in the exclusion of ten agencies from the dataset: the Agency

²⁰The range of the data was limited by the availability of the *Federal Register* texts in a structured XML format.

²¹The Unified Agenda data were compiled and shared by Anne Joseph O'Connell and follow the conventions laid out in O'Connell (2011).

²²This data is available online at: <https://www.federalregister.gov/developers/api/v1>.

for International Development, the Equal Employment Opportunity Commission, the Federal Crop Insurance Corporation, the Federal Emergency Management Agency (prior to its incorporation into the Department of Homeland Security), the Federal Energy Regulatory Commission, the Federal Maritime Commission, the Federal Trade Commission, the General Services Administration, the National Aeronautics and Space Administration, and the Pension Benefit Guaranty Corporation. The resulting dataset includes 5,090 proposed rules from the 24 agencies listed in Table 2.2 in Chapter 2 of this dissertation.

Chapter 6

The FDA and the Case of Menu Labeling

To this point in the dissertation, the arguments have operated at a fairly macro level, showing how decisions are made at the agency level to help proposed rules survive. In Chapter 3, I developed a formal model that showed how agencies write proposed rules in the shadow of veto threats by Congress and OIRA. In order to dodge the regulatory veto, agencies sometimes write a less desirable rule that is more palatable to political principals, although this concessionary behavior happens less frequently than previous scholars have posited. At other times, agencies offer proposed rules that represent their own preferences. Chapter 4 provided empirical corroboration for this theory using a new dataset of OIRA vetoes. And in Chapter 5, I showed how agencies work to protect to their proposed rule “investments” after the writing is done through strategic use of the public comment period.

In this chapter, I use a case study to demonstrate how some of the key assumptions undergirding my argument function with respect to individual rules. The purpose of this analysis is to provide support for some of the theory’s foundational assumptions and also to demonstrate how an agency invested in one particular rulemaking. The case in question is a proposed rule on menu labeling written by the Food and Drug Administration (FDA) in response to a mandate in the Patient Protection and Affordable Care Act of 2010 (ACA,

P.L. 111-148). The proposed rule was controversial, and therefore required the FDA to be extremely conscientious in drafting it.

I use the case to demonstrate three key aspects of the broader theory. First, I consider whether the FDA had an informational advantage with respect to OIRA and Congress. In the signaling model in Chapter 3, I assume that agencies gather policy and political information from stakeholders *before* they issue the proposed rule (this is the “signal” that the agency privately receives). Although there are numerous studies that make this assumption defensible, in this chapter I give the assumption additional credence by showing all of the ways that the FDA went out and gathered information from menu labeling stakeholders before the proposed rule ever made it to the *Federal Register*.

Second, I explain why the FDA’s congressional oversight committees were not the only sources of congressional oversight with respect to this proposed rule. Many studies of congressional control over bureaucratic agencies focus on how agencies change their behavior with respect to shifts in the ideological composition of the oversight committees (e.g., Weingast and Moran, 1983; Shipan, 2004). Yet, as I argue in Chapter 5, because rules affect such a broad number of stakeholders agencies must consider a greater number of congressional actors than just those members of the oversight committee. In light of this fact, in that chapter I consider the congressional floor median and the House median as key pivot points for agencies, instead of the oversight committee median. In this chapter, I demonstrate the types of oversight that members outside of the oversight committee provided in the case of the menu labeling rule.

And, finally, I show how the proposed rule can be considered an investment for the FDA, an idea that goes to the crux of the argument in this dissertation (see Chapter 2).

In the case of menu labeling, the FDA had taken numerous steps before the proposed rule actually made it out the door, including multiple *Federal Register* notices, meetings with external stakeholders, and obtaining buy-in from stakeholders within the agency. This all occurred with a looming congressional deadline to issue the proposed rule, and the explicit threat of lawsuits by affected interest groups. This evidence converges to suggest that the proposed rule was a substantial investment that the FDA then worked to protect.

The nucleus of this chapter is a demonstration of these two assumptions and the investment principle using a variety of primary source materials (*Federal Register* notices, newspaper articles, and documents from the rulemaking docket) and interviews with officials involved in the menu labeling proposed rule. The chapter begins with a discussion of case selection and background on menu labeling and the political context in which the FDA drafted the proposed rule. I then discuss how the FDA gathered information before writing the rule, how congressional oversight on menu labeling has worked in practice, and how many resources were devoted to the development of the proposed rule. The chapter concludes with a discussion of other aspects of the argument that the case speaks to, as well as the generalizability of menu labeling to rulemaking by other agencies and in other policy areas.

6.1 CASE SELECTION

I selected the menu labeling rule for three reasons. First, the proposed rule was high-profile and attracted a lot of attention from the media and interest groups. While I argue that the mechanisms in this dissertation apply to a wide swath of rules, they are most applicable to important rules that meaningfully change public policy (because those are the rules that will involve a more substantial investment by the agency). Second, the

rule was proposed by the FDA, a regulatory agency which is frequently the subject of studies of regulation. Including an FDA rule here allows for comparisons with other studies of the FDA to be drawn. Lastly, the rule is recent enough that key documents are electronically available and interview subjects have reliable recall of the events and issues surrounding the proposed rule.¹

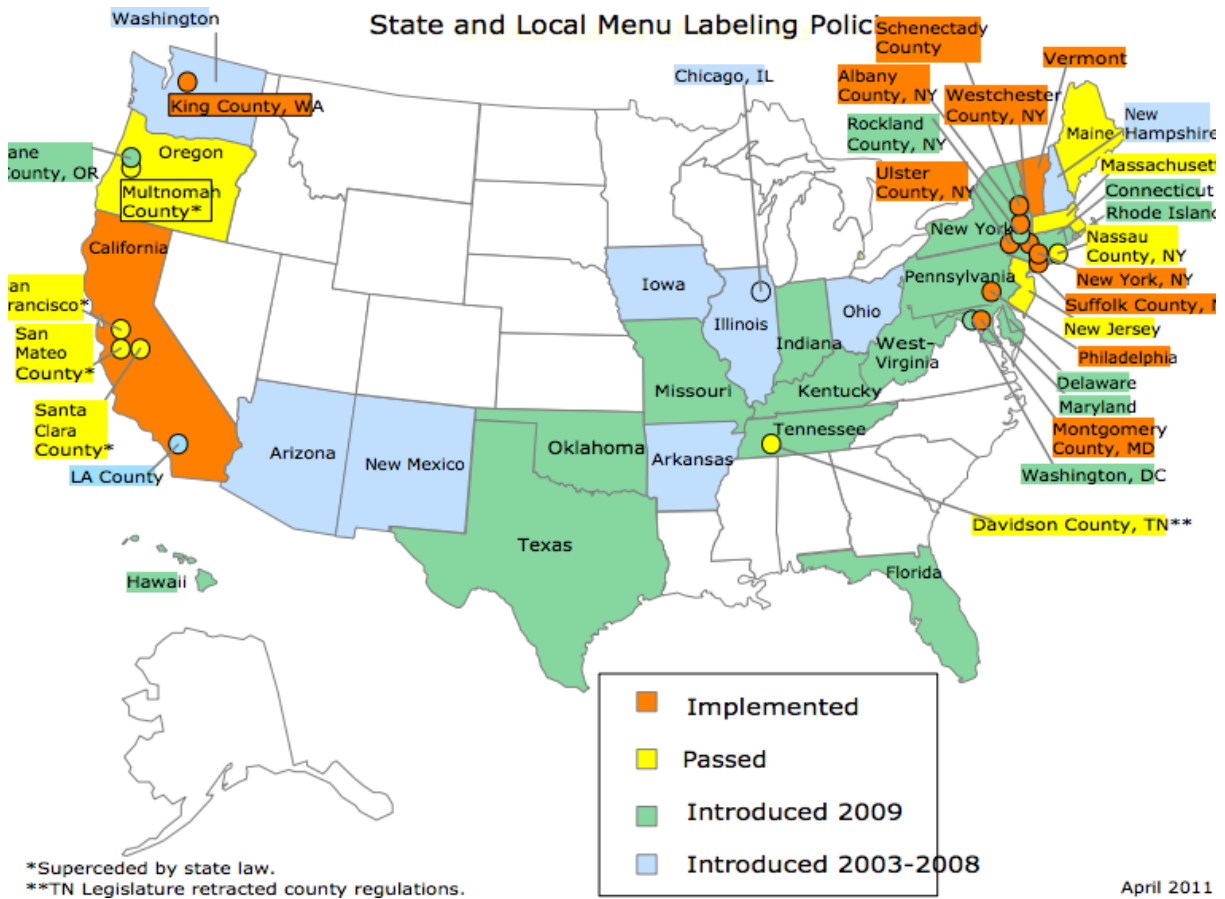
6.2 BACKGROUND: MENU LABELING IN CONTEXT

At the dawn of the new millennium, obesity in the United States had reached crisis proportions, to the point that more than one-third of American adults were obese (CDC, 2014). To address this public health epidemic, policymakers across the country implemented a panoply of programs, ranging from banning vending machines in schools to a requirement that packaged foods disclose the amount of trans fat included. At the state and local level, numerous jurisdictions began instituting requirements that restaurants provide nutrition information on their menus on the theory that providing consumers with information about nutritional content (calories, fat grams, etc.) would encourage consumers to choose healthier options.²

¹However, this last requirement on recency has proven to be a bit of a stumbling block. In spite of the fact that the mandate for the rule was issued over four years ago and the proposed rule was issued over three years ago, as of this writing (July 18, 2014) the proposed rule has yet to be finalized by the FDA. Although this was not an outcome that I anticipated when the case was initially selected, it does not impede my ability to analyze the project's core arguments. My argument focuses on the early phases of the process, including the process of drafting the rule and the publication of the proposed rule, and these phases have already been completed for this rule.

²This approach is based on the behavioral economics theory of “nudging” consumers to make better choices (Sunstein, 2013*b*; Thaler and Sunstein, 2008) and can be traced back to ideas about using information disclosure as a form of regulation, particularly in environmental, health, and finance arenas (see e.g., Kraft, Stephan and Abel, 2011; Sage, 1999). However, research on the effectiveness of menu labeling remains decidedly mixed (see e.g., Burton et al., 2006; Downs et al., 2013; Elbel et al., 2009; Gerend, 2009; Krieger et al., 2013).

Figure 6.1: Map of State and Local Menu Labeling Policies as of April 2011



Source: Center for Science in the Public Interest, 2011

The first large city to adopt a menu labeling ordinance was New York City in 2006, but other cities and states followed suit in fairly short order as the policy idea diffused across the country. See Figure 6.1 for a map of state and localities that had adopted menu labeling policies as of April of 2011.

Since each locale tailored its menu labeling policy, restaurants with a national presence rapidly began running into compliance problems. For instance, the State of California

requires chain restaurants with 20 or more locations to display calorie information, but not other nutritional facts. The state's menu labeling law excludes alcoholic beverages and self-service buffet items. Meanwhile, Philadelphia, which is considered to have the toughest menu labeling law in the country, applies menu labeling to a lower threshold (15 or more establishments). The city's policy covers alcohol and buffet items, and requires disclosure of nutritional information beyond calories (saturated fat, trans fat, carbohydrates, and sodium).³ As one food industry official interviewed for this project summarized the problem:

We can't keep up with the patchwork of 17 different laws and have 17 different versions of calorie labeled menu boards. This is ridiculous. We all agree that chain restaurants should be disclosing nutrition information to customers. Let's get a federal law out there that says all chain restaurants, 20 units or more, have to provide nutrition information to their customers (Interview with industry official, April 2013).⁴

Because of the costs associated with complying with so many different laws, restaurants and other food groups began lobbying Congress to enact a national menu labeling standard that would preempt state and local laws.⁵ Meanwhile, at the same time that menu labeling was becoming an issue at the federal level, a larger debate over how to reform America's broken health care system was taking place on the national stage.⁶ While the exact process that married these two issues together is beyond the scope of this discussion,⁷ when the ACA was signed into law in March of 2010, it specifically directed the FDA to issue rules

³Menu labeling facts from CSPI (2011).

⁴To protect the anonymity of subjects interviewed for this case study, I provide only the most general identification of the subject's organizational affiliation and the month in which the interview was conducted.

⁵By some accounts, the National Restaurant Association (NRA) led the charge in lobbying Congress to get a national standard for menu labeling enacted (Pickett, 2013).

⁶For a thorough discussion of the debates surrounding health care reform in the lead-up to the passage of Obamacare, see Jacobs and Skocpol (2012); Washington Post Staff (2010).

⁷But see Schulman (2010) and Stein (2011) for a background on menu labeling prior to the ACA.

to set a national menu labeling standard to supplant the existing patchwork of state and local laws.⁸

The legislative language in the ACA stipulated that the menu labeling rule should apply to all chain restaurants with 20 or more establishments, should require restaurants to disclose nutrition information on their menu boards (including drive-thru menu boards), and that restaurants should determine calorie counts should be based on the FDA’s existing “reasonable basis” standard for determining nutrition information.⁹ However, aside from these broad mandates, the law directed the FDA to specify how menu labeling would work in practice—and the law stated further that the agency must issue a proposed rule accomplishing this within one year of the law’s passage and that the agency must provide quarterly updates to Congress on their progress in completing the rulemaking process.

This was a sizable task; as FDA Commissioner Hamburg would later say, it was one of the thornier issues the agency had ever encountered (Associated Press, 2013). Menu labeling represented a new foray for the FDA, as the agency does not typically regulate restaurants. Further, the law was silent on a number of issues that would prove to be considerable sticking points with powerful interests. For example, how would the agency handle the variability associated with different types of food establishments, such as pizza delivery restaurants, bowling alleys, carnivals and airplanes? Would the FDA extend its current honor system approach for package labeling to menu labeling or would there be a more formal enforcement

⁸The ACA was a landmark legislative enactment and menu labeling was one of only one of dozens of issues addressed in the law; only 9 of the 2,409 pages of the enrolled bill dealt with menu labeling.

⁹See Section 6.5 of this chapter for the text of Section 4205 of the ACA directing the FDA to develop menu labeling standards. Notably, this section also directs the FDA to issue rules on labeling for vending machines. Although menu labeling and vending machine labeling were issued as separate proposed rules, much of the FDA’s work on vending machine labeling overlaps with its work on menu labeling. I focus on menu labeling here because it is a much bigger and more contentious issue than vending machine labeling.

mechanism? How much flexibility would the agency allow restaurants with respect to the presentation of nutrition information? Would alternate forms of compliance (e.g., posting nutrition information on an interactive tool next to the menu board) satisfy the requirement?

When the agency eventually published the proposed rule in April of 2011 (76 FR 19192, April 6, 2011)—nearly three weeks after the statutory deadline for issuing the NPRM—it had taken a position on all of these issues. The proposed rule followed the basic honor system framework associated with package labeling, meaning that the FDA would establish regulatory standards for menu labeling but would not validate the quality of the nutritional information provided (Neistat, 2013). Further, the proposed rule excluded establishments whose “primary purpose,” defined according to whether 50% or more of a retailer’s floor space is devoted to food sale or whether the establishment presented itself publicly (e.g., in marketing materials) as a restaurant, was something other than food sales. The proposed definition excluded movie theaters, bowling alleys, carnivals, airplanes, but included the sale of prepared food at supermarkets. To address the issue of custom orders, the agency would allow restaurants to provide calorie ranges with lower and upper bounds for all possible variations of a particular order. Finally, the information would have to be printed on the menu board; websites, smartphone apps, and other technologies would not be acceptable substitutes.

In response to the proposed rule, the FDA received more than 900 written comments, not an unusually high volume of comments for the agency.¹⁰ The real pushback, however, came from those industries that felt the proposed rule would treat them unfairly, namely the pizza industry and grocery stores.

¹⁰It was actually less than some agency officials had expected (Interview with FDA official, May 2013).

The pizza industry took the position that the proposed rule's one-size-fits-all approach to listing nutrition information on menu boards unfairly burdened their industry. Because there are more than 34 million different combinations of pizza orders (including toppings, crust, pizza size, etc.) (ElBoghdady, 2013), the FDA's proposal to include ranges for menu items was essentially meaningless since ranges might well vary by thousands of calories.¹¹ Figure 6.2 displays a mock-up of a menu board with wide calorie ranges that one pizza company provided to the FDA prior to the publication of the proposed rule. The sample menu shows ranges approaching 2,000 calories, the daily recommended caloric intake for some adults.

¹¹Furthermore, compliance would be costly for the industry; one Domino's pizza official stated that the proposed rule would cost their franchise owners \$4,800 per year per store (Armour, 2013).

Figure 6.2: Mock-Up of Pizza Menu Board with Calorie Ranges

Pizza Store • Create Your Own

The Crust	Classic Hand Tossed	Ultimate Deep Dish				Crunchy Thin Crust	Brooklyn Style
		S	M	L	XL		
The Size	Cheese: Thin Crust, Hand Tossed or Brooklyn + sauce + cheese	\$7.99	\$9.99	\$11.99	\$13.99		
	Calories (whole pizza)	600-1260	1120-1760	1500-2400	2080-3120		
	Deep Dish: Deep Dish + sauce + cheese	\$1.39	\$1.59	\$1.79	\$1.99		
	Calories (whole pizza)	1840-2160	2640-3040				
	Added Toppings	\$1.39	\$1.59	\$1.79	\$1.99		
	Calories (each topping)	20-240	20-360	40-640	40-880		
	Specialty Pizza	\$11.99	\$13.99	\$16.49	\$17.49		
	Calories (whole pizza)	800-1800	1360-2800	1840-4000	2480-4400		
	Favorite Pizza	\$11.99	\$13.99	\$16.49	\$17.49		
	Calories (whole pizza)	1040-1800	1480-2880	1800-4000	2720-4400		
	Everything Pizza	\$11.99	\$13.99	\$16.49	\$17.49		
	Calories (whole pizza)	1360-1860	1920-2960	2340-4080	3440-4480		

Ranges up to 2,000 calories wide are coming to customers!

The Toppings

Italian Sausage	Hot Banana Peppers	Green Peppers	Roasted Red Pepp
Salami	Chicken	Philly Meat	Black Olives
Provolone	Cheddar	Extra Cheese	Feta Cheese
			Parmesan Cheese
Favorite Pizzas			
America's Favorite	Deluxe	Everything	BBQ Chicken
Bacon Cheeseburger	All Meat	All Pepperoni	Buffalo Chicken
			Veggie
			Chicken Bacon Ranch
			Hawaiian
			Philly Cheese Steak

Note: The FDA's proposed rule would require restaurants to list the range of calories associated with different menu items. This mocked-up menu board includes calorie ranges for different pizza combinations. A national pizza chain presented this menu board to the FDA.

To advocate for alternate compliance methods (including web-based calorie calculators and smartphone apps), a group of large national pizza companies banded together and formed a new industry association, the American Pizza Community (APC). The APC was launched in January 2012 with the *specific goal of combatting the FDA’s approach to menu labeling*.¹² The organization has been extremely active in lobbying against the menu labeling rule. In addition to submitting comments and meeting numerous times with the FDA and OIRA, APC launched an ambitious program to lobby Congress. In June of 2012, 2013, and 2014, the group launched a “fly-in,” bringing pizza franchise owners to Capitol Hill to meet with lawmakers.

Grocery stores were similarly miffed by the proposed rule, although their concerns stemmed not from the content of the proposed rule, but from the fact that it applied to them in the first place. After all, the legislative text of Section 4205 of the ACA did not mention grocery stores, so their inclusion owed entirely to the discretion of FDA bureaucrats. The Food Marketing Institute, the chief lobbyist for grocery stores, indicated that the proposal would cost the industry \$1 billion in the first year, and Kroger, the largest grocery chain in the country, indicated that its costs would amount to \$15 million in upfront costs and \$4 million in annual compliance costs (Armour, 2013). The grocers followed a similar strategy to the pizza industry, including submitting comments and lobbying the FDA, the White House, and Congress.

By some accounts, these opposition groups were successful (Kliff, 2013). The release of a final rule has been considerably delayed and the FDA publicly pushed back the release

¹²The APC includes more than 20 national pizza firms, representing more than 20,000 restaurants nationwide. Since its creation, the organization has taken on new issues common to the pizza industry (e.g., agricultural policy, minimum wage policy), but menu labeling remains its core issue.

date for the final rule numerous times. In addition, efforts to lobby Congress have yielded the introduction of at least two bills in the House and two in the Senate (see Table 6.1 for a timeline of these bills and other key events in the rule's promulgation). The proposed rule was not without its champions, however. For example, the NRA, the organization that originally lobbied Congress for an unified federal standard, supported the FDA's rule and actually encouraged the agency to include a broader number of establishments under the menu labeling rubric (Vinson and DeFife, 2011).¹³

¹³The NRA also requested more flexibility and a longer lead time for restaurants to implement the rule's requirements. However, as some commentators have noted (Thatcher, 2014) the NRA's intent may be to level the playing field between its clientele, restaurants, and competitors such as convenience stores and supermarkets. Groups lobbying for regulation to protect an industry's competitive interest is not an uncommon story. Shipan (1997) discusses a similar case where commercial broadcasters, led by the National Association of Broadcasters, lobbied the Federal Radio Commission to maintain barriers to obtaining radio licenses and to prevent new stations from being created.

Table 6.1: Timeline for Menu Labeling Rulemaking

Mar 23, 2010	Affordable Care Act signed into law. Section 4205 of the law directs FDA to take up menu labeling.
July 7, 2010	FDA publishes a <i>FR</i> notice establishing an open docket for interested parties to submit comments.
July 23, 2010	FDA publishes <i>FR</i> notice (required by the ACA) stating how voluntary registration will work.
Aug 25, 2010	FDA publishes draft guidance explaining how firms can comply with menu labeling in advance of binding rules.
Jan 25, 2011	FDA repeals draft guidance from August.
Mar 23, 2011	FDA misses the statutory deadline for the proposed rule.
Apr 6, 2011	Menu labeling proposed rule is published in the <i>FR</i> .
Jan 2012	American Pizza Community formed to combat menu labeling.
July 24, 2012	Common Sense Nutrition Disclosure Act of 2012 (H.R. 6174) introduced in the House.
Sep 19, 2012	Common Sense Nutrition Disclosure Act of 2012 (S. 3574) introduced in the Senate.
Mar 19, 2013	Common Sense Nutrition Disclosure Act of 2013 (H.R. 1249) introduced in the House.
Nov 21, 2013	Common Sense Nutrition Disclosure Act of 2013 (S.1756) introduced in the Senate
Feb 2014	FDA misses self-imposed deadline to issue the final rule.
Apr 3, 2014	FDA submits draft final rule to OIRA for review.

In sum, the proposed rule set the stage for an epic fight between powerful interests with the FDA wedged in the middle. While it is too soon to say how this fight will play out (as of this writing, the final rule is under review at OIRA and is not publicly available), the details of how the proposed rule was written—and defended—by the FDA serve as an important case to illustrate many of the critical assumptions from the previous chapters. It is to this task that I now turn.

6.3 PARSING THE MENU LABELING CASE

The menu labeling proposed rule presents an interesting real world laboratory to study the theory advanced in this dissertation. The proposed rule was carefully followed by the media—and the (forthcoming) final rule has the potential to impact the business practices of thousand of restaurants and the menu choices of millions of Americans. In the sections that follow, I consider how the FDA gathered policy and political information from stakeholders in advance of publishing the proposed rule, a key assumption of the formal model from Chapter 3. I then evaluate which congressional actors actually provided oversight on the menu labeling proposal, and also consider the FDA’s expectations about oversight on this rulemaking (see Chapter 5). Finally, I lay out an argument for how the FDA has treated the menu labeling proposed rule as an investment (see Chapter 2).

Frontloading the Proposed Rule?

A core assumption underlying the signaling model I presented in Chapter 2 is that agencies gather critical policy and political intelligence *prior to the publication of the proposed rule*. The result of this front-loading is that the public comment period becomes less of a

learning exercise and more perfunctory from the agency’s perspective. In the menu labeling instance, this assumption can be illustrated in practice by examining the timing of the stakeholder outreach that the FDA conducted when drafting the proposed rule.¹⁴

Following the passage of the ACA in March of 2010, the FDA took over a year to draft and publish the menu labeling proposed rule.¹⁵ In that span of that time, the FDA did its homework, conducting extensive outreach with industry,

To begin, in July of 2010, less than four months after the ACA was signed by President Obama, the FDA published a notice in the *Federal Register* (75 FR 39026, July 7, 2010). The three-page notice, which was entirely voluntary on the FDA’s part,¹⁶ established an open docket where interested parties could submit comments on 26 open-ended questions posed by the FDA on how to implement menu labeling. The notice was intended to give the agency a lay of the land vis-à-vis menu labeling. As one FDA official put it, the agency opened the docket in order to “ask basic questions about things because quite frankly we haven’t really worked with restaurants that much either so this was somewhat new to us on how they do things” (Interview with FDA Official, May 2013). In response to this open-ended call, the

¹⁴I focus in this discussion on formal outreach conducted by the FDA on menu labeling (publication of notices, etc.). However, the FDA almost certainly conducted informal outreach on the rule as well (e.g., chatting with stakeholders at a conference). I limit myself to formal outreach as it is possible to get a fuller portrait of the agency’s behavior in this domain, whereas, definitionally, informal outreach is less systematic and also less observable. However, this limitation is not particularly consequential, as it leads me to *understate* the FDA’s outreach efforts, in essence making this a harder case.

¹⁵Of course, the FDA certainly could have begun planning for menu labeling prior to the passage of the ACA. Given the uncertainty and haggling associated with the passage of that landmark law, for the purposes of this analysis I assume that the FDA began planning to implement menu labeling immediately after the law was passed in March of 2010.

¹⁶Section 4205 did require the FDA to publish a notice within 120 days of passage that included instructions for how firms not subject to menu labeling could voluntarily comply with the law and register with the FDA. This requirement was fulfilled through a separate *Federal Register* notice published on July 23rd (75 FR 43182).

agency received 875 comments.¹⁷

Meanwhile, in addition to the establishing an open docket, the FDA began to hold informal “listening meetings” with stakeholders. These meetings included regulated entities (i.e., food establishments) and consumer interest groups, as well as some state and localities that had already gone through the process of implementing menu labeling. The FDA took a take-all-comers approach to these meetings, meaning that they met with any group that requested a meeting, but did not explicitly seek out meetings on the agency’s behalf. Almost all of the parties that participated in these informal meetings went on to submit comments when the proposed rule was published in April of 2011 (Interview with FDA Official, May 2013).

As the FDA was working to draft its proposed rules based on all of this feedback, it was concurrently working on a guidance document to explain how firms could comply with menu labeling before the binding final rule was completed. After all, Section 4205 took effect immediately upon passage of the ACA, and the FDA needed to clarify to which establishments the law applied and whether the agency would conduct any enforcement prior to completing the rulemaking process. The FDA published draft guidance in August 2010, indicating that the law would apply to a broad set of entities (e.g., movie theaters, grocery stores, airplanes) and that the agency would publish final guidance in December of 2010. That final guidance never came, as in January of 2011 the FDA withdrew the draft guidance, stating that they would not finalize any guidance and would instead proceed apace with the notice-and-comment rulemaking process. The agency cited “extensive comments on the draft guidance” and the need to “minimize uncertainty and confusion among all interested

¹⁷It is worth noting that this is approximately the same number of comments that the FDA later received on the proposed rule.

persons” as reasons for abandoning the use of a guidance document in this case (76 FR 4360, January 25, 2011).

Finally, in March of 2011 the FDA submitted a draft proposed rule on menu labeling to OIRA for review. During the 23 days that the rule was under review at OIRA, the FDA got even more feedback from stakeholders as OIRA hosted two heavy-hitting meetings. As shown in Table 6.2, one meeting was with restaurant industry officials and the other was with public health advocates. While this was the first time that OIRA sat down with stakeholders, it was far from the FDA’s first encounter with these groups. In fact, one industry official present at the meeting with OIRA indicated that it was her organization’s third time meeting face-to-face with the FDA to discuss menu-labeling (Interview with industry official, April 2013).

In sum, by the time the FDA published the menu labeling proposed rule in April of 2011, the agency had ample opportunity to learn how stakeholders lined up with respect to a variety of menu labeling policy alternatives. The agency had received written comments on a notice and on a draft guidance document. Additionally, the agency had met with dozens of stakeholders in informal listening sessions and again when the draft proposed rule was submitted to OIRA for preclearance. As a result of these interactions, the agency developed a sense not only of how different options would affect different stakeholders, but also what their political reaction might be. For instance, the draft guidance published in August would have applied to a larger swath of food establishments (e.g., movie theaters, planes, trains) than the proposed rule ultimately covered. In other words, between August of 2010 and April 2011 the FDA had a considerable change of heart regarding the scope of applicability for menu labeling. Given the extent of input received from external stakeholders during this

Table 6.2: OIRA-Sponsored Stakeholder Meetings on Menu Labeling Proposed Rule

Meeting 1 Restaurant Industry 3/15/2011	Meeting 2 Public Health Advocates 3/18/2011
<p><i>Government Officials:</i> Food and Drug Administration (3) Office of Management and Budget (4) White House Domestic Policy Council (1)</p> <p><i>Outside Attendees:</i> Brinker Intl (Maggiano’s & Chili’s) (1) Domino’s Pizza (1) Dunkin’ Brands (1) National Council of Chain Restaurants (1) National Restaurant Association (1) Yum! Brands (1)</p>	<p><i>Government Officials:</i> Food and Drug Administration (1) Office of Management and Budget (3) White House Domestic Policy Council (2)</p> <p><i>Outside Attendees:</i> American Academy of Pediatrics (2) American Diabetes Assn (1) American Heart Assn (1) American Public Health Assn (1) Assn of State/Territorial Health Officials (1) Center for Science in the Public Interest (1) Nemours Foundation (1)</p>

Source: Data is from OIRA’s records, <http://www.whitehouse.gov/omb/>.

Note: Figures in parentheses indicate the number of individuals from each organization in attendance at the meeting.

period, it is reasonable to conclude that this input played a role in the FDA’s decision to change course.

The information that the FDA gathered prior to issuing its proposed rule was not shared with members of Congress or OIRA. As West (2009, 577) notes, “outside participation in prenotice rulemaking tends to be informal and idiosyncratic. As such, it is not usually constrained by institutional assurances of inclusiveness and transparency.” This statement certainly applies to the development of the menu labeling proposed rule, in that even though the fact that the FDA conducted outreach is public, the substance of that outreach is not.¹⁸

¹⁸For instance, in the course of conducting this research, I requested copies of FDA’s logs so that I could

This suggests that it would have taken considerable effort for congressional or OIRA staffers to become as educated on the nuances of the proposed rule as FDA staff. Further, even though OIRA participated in meetings with outside stakeholders on the proposed rule, these meetings came at the tail-end of the process, and FDA staff were certainly able to anticipate the types of concerns that OIRA staff might bring up at that late stage in the game.

Taken together, these facts suggest that the FDA had an informational advantage over its congressional overseers and OIRA. The extensive informal and formal outreach that the FDA conducted allowed the agency to gather critical policy-relevant intelligence from stakeholders in advance of the publication of the proposed rule.

Whence the Congressional Hammer?

Another important assumption arises in Chapter 4, where I argue that the congressional oversight on rulemaking does not necessarily originate from oversight committees. Instead, I argue that rulemaking can create a variety of constituencies and that this encourages oversight from various parts of the House and the Senate. Notably, this assumption does not imply that congressional oversight committees do not matter to agencies, rather it implies that other actors in Congress, in addition to oversight committee members, also matter. In light of this, in the empirical analyses in that chapter I consider the floor median (rather than the oversight committee median) as the agency's focal point in Congress.

To demonstrate the validity of this assumption, I show how it would have been difficult for the FDA to predict who in Congress would weigh in on menu labeling. Although the

see which groups attended the informal stakeholder listening meetings. I was told that those records would only be made available to me after filing a Freedom of Information Act (FOIA) request, even though such records are technically part of the public docket for the rulemaking. Similarly, the public comments submitted on the agency's draft guidance document have been removed from the public docket on www.regulations.gov, even though the public comments on the proposed rule are posted there.

FDA’s primary oversight committees have traditionally been thought to be the House Energy and Commerce committee and the Senate Health, Education, Labor and Pensions (HELP) committee (Shipan, 2004), the FDA could not count on oversight to be restricted to the membership of these two committees because of a lack of partisan cues, and because of the broad applicability of the policy.

The FDA could not rely on partisan cues to predict who might provide oversight on menu labeling due to two unrelated factors. The first factor had to do with the broader political environment at the time the FDA was drafting the menu labeling NPRM. The ACA was passed in March 2010 under a unified Democratic government.¹⁹ In the ensuing months, as the FDA consulted and drafted, the political landscape in Washington changed dramatically. In November 2010, Tea Party Republicans won more than 60 seats and took control of the House. This major upset led to a change in the leadership in the House committees, but not in the Senate (where Democrats still maintained control). Thus, political power looked quite different in March of 2010 (passage of the menu labeling mandate) than it did in April of 2011 (FDA’s promulgation of the menu labeling proposed rule). While some have argued that agencies do best when responding to the *current* Congress, the agency only got to write one rule and the current congress changed during that time. Further, even after the new Congress took office in January of 2011, because the chambers were split, pleasing the Republicans in the House could come at the price of aggravating Democrats in the Senate.

The shift in the political landscape was further complicated by the fact that key stakeholders on menu labeling had connections to both Democrats and Republicans. Table 6.3 lists several key stakeholders and shows that, not only are these groups “regulars” on the

¹⁹Indeed, perhaps the most striking aspect of the law’s passage was that it received not a single vote from a Republican.

Table 6.3: Key Menu Labeling Stakeholders and Campaign Contributions

Organization Name	2012 Campaign \$	% to Dems	2013 Lobbying \$
<i>Industry Stakeholders:</i>			
Brinker Intl (Maggiano's & Chili's)	\$230,787	21%	-
Domino's Pizza	\$12,568	16%	\$160,000
Dunkin' Brands	\$108,316	37%	\$950,000
National Restaurant Association	\$1,038,781	19%	\$2,238,691
Yum! Brands	\$318,930	26%	\$690,000
<i>Public Health Stakeholders:</i>			
American Academy of Pediatrics	\$4,000	100%	\$338,049
American Diabetes Assn	\$3,510	93%	\$933,000
American Heart Assn	\$10,172	81%	\$621,752
American Public Health Assn	\$4,165	100%	\$523,373
Center for Science in the Public Interest,	-	-	\$87,998
Nemours Foundation	\$1,350	44%	\$402,404

Source: Center for Responsive Politics (CRP).

Note: I include the stakeholders from Table 6.2 in this table only as illustrative cases. I exclude the Association of State and Territorial Health Officials and the National Council of Chain Restaurants because, according to CRP's data, they did not contribute to congressional campaigns in the 2012 election cycle or spend money on lobbying in 2013.

Washington scene (i.e., regularly providing campaign contributions and lobbying), but they also have ties to both Republican and Democrats.²⁰ Given that the opposing sides of the issue both had strong Washington connections, even if the FDA was sure which party was in control in Washington, it is not clear whether it would have behooved the agency to pander to Republicans over Democrats (or vice versa). All of this political and partisan uncertainty, made it unclear which parties, much less which committees would provide oversight.

In addition to the lack of partisan cues, the broad applicability of the proposed rule

²⁰Perhaps unsurprisingly public health groups appear to be tilted towards Democrats, while industry groups favor Republicans.

created constituencies well beyond the oversight committees. That is, the proposed rule had the potential to impact tens of thousands of chain restaurants, movie theaters, grocery stores, airlines, and other venues that served food. These are the types of entities that are present in *every* congressional district.

Consequently, members of Congress not on the key oversight committees were compelled to provide oversight on the FDA's menu labeling proposal. In July of 2012, Rep. John Carter (R-TX) introduced the Common Sense Nutrition Disclosure Act of 2012 (H.R. 6174), a bill that was designed to water down the FDA's proposal for menu labeling. Only 9 of the bill's 48 cosponsors (19%) were members of the House Energy and Commerce Committee. Later that year, Sen. Blunt (R-GA) introduced a companion Senate bill (S. 3574), which included only 3 cosponsors (23%) from the Senate HELP Committee.²¹ A similar pattern followed for mirror bills introduced in the House (H.R. 1249) and the Senate (S. 1756) in the next congress. Only 11% of cosponsors of the Senate bill (again sponsored by Sen. Blunt) hailed from the HELP committee. The House bill, however, was sponsored by a member of the Energy and Commerce (Rep. Cathy McMorris-Rodgers (R-WA)), but only included 15% of cosponsors from that committee. Even though these bills did not proceed beyond the committee stage, the FDA certainly took note of their introduction.

In addition to introducing and cosponsoring bills, some members took the extra step of writing letters to the FDA. Table 6.4 lists the members submitting letters, their partisan affiliation and whether or not they belonged to the key FDA oversight committees (i.e., House Energy and Commerce committee or Senate HELP committee). Upon examination, the table reveals that less than a third (28%) of the letter writers were members of the two committees

²¹Neither Senator Blunt nor Representative Carter is a member of the FDA's main oversight committees.

in question. Additionally, with two exceptions, all of the letter writers were Republicans.

In sum, in terms of oversight provided via bill sponsorship and co-sponsorship and letters submitted to the rulemaking docket, many members outside of the FDA's oversight committees participated. And, in fact, in these alternate forms of oversight those not on the oversight committee were *more* likely to weigh in than the members of the oversight committees. In a sense, this is unsurprising since members of the Energy and Commerce and HELP committee members had other oversight tools at their disposal and did not need to avail themselves of these ancillary forms of oversight.²² Yet, the fact that the FDA received so much input from those *outside* of its key oversight committees suggests that there was a need for the agency to be more expansive in its view of where oversight might come from on menu labeling.

Further, from the FDA's perspective, it was not predictable in advance which members of Congress might weigh in on the rule. While participation was skewed toward Republicans, the changing political landscape in the House at the time of the rule's promulgation, made it unclear at the outset of the rulemaking process which party would obtain control of Congress and what the partisan fall-out with respect to food labeling might be. As a result, when considering who mattered in Congress, the FDA had to consider a wider set of preferences than just the preferences of the oversight committee. Accordingly, it is reasonable to assume that the FDA applied more general heuristics (such as the floor median).

²²As far as I'm aware, these committees did not hold any hearings specifically on menu labeling. However, the subject of the menu labeling rule did come briefly in other hearings in which FDA Commissioner Hamburg testified, such as the FY14 budget hearing.

Table 6.4: Members of Congress that Sent Letters to the FDA on Menu Labeling

<i>Member Name</i>	<i>Party</i>	<i>Member of Key Committee?</i>
Sen. John Cornyn	R	No
Sen. Jerry Moran	R	No
Sen. Marco Rubio	R	No
Rep. Lou Barletta*	R	No
Rep. Dennis Cardoza	D	No
Rep. Steve Chabot*	R	No
Rep. John J. Duncan Jr.*	R	No
Rep. Stephen Fincher*	R	No
Rep. Cory Gardner†	R	Yes
Rep. Bob Gibbs*	R	No
Rep. Bob Goodlatte*	R	No
Rep. Sam Graves†	R	No
Rep. Bill Huizenga*	R	No
Rep. Walter B. Jones*	R	No
Rep. Leonard Lance*	R	Yes
Rep. Tom Latham*	R	No
Rep. Robert E. Latta*	R	Yes
Rep. Blaine Luetkemeyer†	R	No
Rep. Cathy McMorris-Rodgers*	R	Yes
Rep. Sue Myrick	R	Yes
Rep. Richard Nugent*	R	No
Rep. Alan Nunnelee*	R	No
Rep. Joseph R. Pitts*	R	Yes
Rep. Mike Pompeo*	R	Yes
Rep. Tom Rooney*	R	No
Rep. Mike Ross*	D	Yes
Rep. Austin Scott*	R	No
Rep. Jean Schmidt*†	R	No
Rep. Aaron Schock	R	No
Rep. Cliff Stearns*	R	Yes
Rep. Steve Stivers*	R	No
Rep. Tim Walberg	R	No

Source: Menu Labeling Rulemaking Docket (RIN 0910-AG57), www.regulations.gov

Note: Two letters in the menu labeling docket had multiple signatures. Co-signers of these letters are indicated with a † and * for each letter.

Menu Labeling as an Investment?

Lastly, the menu labeling case helps to illustrate how agencies regard the proposed rule as an investment. While not quite an assumption (like the previous two sections), this idea is foundational to the dissertation. As elaborated in Chapter 2, the idea of an investment is that drafting a proposed rule involves considerable resources and also that stakeholders become psychologically wedded to the policy offered in the proposed rule. While the lesson of sunk costs suggests that an agency might better be served by walking away from the proposal (e.g., ditching the proposed rule and starting again), agency bureaucrats instead work to protect their investment on the proposed rule.

Drafting the menu labeling proposed rule was extremely resource-intensive for the FDA. In the year following the passage of the ACA, the FDA issued two notices, a draft guidance document, and a proposed rule. The agency received more than 2,000 comments²³ from affected stakeholders and held dozens of meetings with outside groups. This all occurred in a fairly short timespan (under a statutorily-imposed deadline), with the additional hurdle that the FDA does not usually regulate restaurants (so this was a new policy domain for the agency). All this suggests that a lot of resources went into creating the proposed rule that was published in April of 2011. And even after the proposed rule was published the agency continued to direct resources towards the proposed rule, combing through public comments and conducting research.²⁴

²³The FDA received 875 comments on the July 2010 *Federal Register* notice, 80 comments on the draft guidance from August of 2010, and approximately 900 comments on the proposed rule from April of 2011.

²⁴For instance, in the text of the proposed rule, the FDA indicated that following the publication of the NPRM, the agency planned to “conduct consumer research to evaluate how well consumers understand the caloric information presented in each of the formats and whether mixed formats on a single menu or menu board might be confusing to consumers” (76 FR 19209, April 11, 2011). The agency also promised to conduct research on how consumers responded to statements about recommended daily calorie intake (76 FR 19210). The FDA promised to make the results of their research publicly available prior to the

Not only did the FDA invest a lot of resources in the proposed rule, but there was a strong incentive for the agency to “get it right the first time” (West, 2009) despite the tight turnaround. Because of the moneyed interests with a stake in the rule, the FDA simply could not afford to take the proposed rule as cheap talk. The threat of lawsuits, which would put the investment at risk of overturn and potentially send the agency back to the drawing board, was ever present.

For instance, even though the NRA was broadly supportive of the FDA’s efforts to apply menu labeling to a broad class of food venues, the association disagreed with the strict standard the agency proposed for calculating nutrition values on menu items. The FDA proposed to apply the so-called “80-120” rule that it uses for packaged foods to menu labeling. Broadly, this standard states that certain listed “good” nutrients (protein, dietary fiber, total carbohydrates, etc.) must be present in at least 80% of the stated amount, while other “bad” nutrients (calories, sugars, trans fat, etc.) cannot exceed the stated amount by 120%. In its public comment on the proposed rule, the NRA accused the agency of overstepping the authority granted in the ACA:

The plain language of the statute sets forth a compliance standard that is clear on its face... The Proposed Rule would place the judgment of FDA above that of Congress, an outcome that would not withstand judicial review. We have not attempted an exhaustive discussion, but would be pleased to discuss further with FDA the additional legal infirmities of its proposed standard as judged against the Administrative Procedure Act and the Constitution (Vinson and DeFife, 2011, 11).

In this statement, the NRA offers a not-so-veiled threat to sue the FDA if it did not change its approach to the 80-120 policy in the final rule. However, the FDA had met with

publication of the final rule, but to my knowledge that information is not yet available.

the NRA (and other like-minded stakeholders) prior to drafting the proposed rule (including during the draft proposed rule's tenure at OIRA) and was certainly aware of the association's opposition to this policy in advance of issuing the proposed rule. The FDA's decision to apply the 80-120 rule to menu labeling was thus a conscious choice, and the decision to proceed was almost certainly discussed within the agency and with legal counsel before the rule was released. As a result, the agency must have made every effort to make sure they were careful in their writing and discussion of this particular point.²⁵

The menu labeling case is a good illustration of the investment idea because the proposed rule was so controversial and faced so much opposition from entrenched interests. Arguably, the FDA would have been better off by scrapping the proposed rule and starting all over again. Yet, this is clearly not the path the agency has pursued. The agency has pushed on in spite of the controversy.

6.4 DISCUSSION AND CONCLUSION

The menu labeling case illustrates two assumptions and a guiding principle of this dissertation. First, the case demonstrates the ways in which an agency can "do its homework" by gathering information well in advance of the publication of the proposed rule. While many of the channels I highlighted were *formal* routes of information-gathering, the agency most likely engaged in (harder to observe) informal information gathering as well. Second, the case demonstrates that an agency serves many masters in Congress, and that oversight on rulemaking need not be limited to the agency's oversight committee. Finally, through a

²⁵The third pillar of the investment idea is that the agency becomes psychologically wedded to the proposed policy. This is only observable if agency personnel are willing to admit as much, which few self-aware bureaucrats are wont to do. Accordingly, I cannot show definitively that the FDA became psychologically entrenched in its the menu labeling proposed policy, although it seems likely.

discussion of the resources involved in the creation of the proposed rule and the explicit incentives for the FDA to “get it right,” the case substantiates the idea of the proposed rule as an investment.

The case also serves to illustrate several other aspects of the arguments made in this dissertation. A key tenet of the signaling model in Chapter 3 is that agencies consider multiple avenues to accomplish a policy goal. An examination of the documents associated with the menu labeling case reveals that the FDA considered multiple policy alternatives in lieu of the set of policies contained in the proposed rule. Evidence of the FDA’s contemplation of various policy alternatives can be found in examining the differences between the proposed guidance document from August 2010 and the proposed rule from April of 2011 (76 FR 19192). For instance, the guidance document states that “alcoholic beverages are considered food as defined in the [Federal Food, Drug, and Cosmetic Act]... Therefore, the nutrition disclosure requirements in section 4205 apply in cases where these foods are listed on a menu or menu board.” However, eight months later, the FDA took a completely different stance on alcohol in the proposed rule, stating that:

It is not clear that Congress intended for the nutrition information disclosures required by section 4205 to apply to alcohol beverages, given that the labels of the majority of alcohol beverages are regulated by [the Department of Treasury]. For the purposes of this proposal, FDA tentatively concludes that the new menu labeling requirements do not apply to alcohol beverages (76 FR 19203).

This suggests that there was no one preordained way that the FDA approached menu labeling and that the agency considered multiple policy alternatives when preparing the proposed rule.²⁶

²⁶Another example of this behavior discussed earlier in this chapter is that the guidance document would have covered airlines, trains, and movie theaters, while the proposed rule specifically excluded these types

Additionally, the congressional bills discussed in this chapter—which would, if passed, force the FDA to water down or altogether abandon the proposed policy—are illustrative of the issues surrounding Congress’s regulatory veto discussed in Chapter 4. In that chapter I explain how the congressional veto can be preemptive, meaning that Congress can issue the veto before the agency has started writing a rule. In this case, the veto threats came before the agency issued the proposed rule (but after the FDA had begun drafting it). Although no veto has ever been issued, the introduction of these bills suggests that agency-curbing bills may serve as an informative signal to agencies about congressional preferences (for a related argument, see Clark, 2009), an argument that future work would do well to consider.

In many ways, the menu labeling rule is an exception. The rule was promulgated as the result of an explicit legislative mandate (which included a promulgation deadline for the proposed rule) and at a peculiar moment in the American political landscape. And the rule was very controversial and generated a considerable amount of interest and lobbying on the part of interest groups and attracted the attention of Congress and the media. Not all agency proposed rules merit this same level of attention. Finally, the proposed rule was written by the FDA, a regulatory agency with a lot of experience promulgating rules and dealing with intense public scrutiny.

Yet, these caveats are not as limiting as they may seem. Many rules are issued based on mandates from Congress, and many of these include statutorily-fixed deadlines. Of the 17,566 proposed and 21,841 final rules reviewed by OIRA between 1981 and 2013, 7.6% of proposed rules and 7.8% of final rules included a statutory deadline. Further, the unique political configuration at the time of the ACA’s passage and the subsequent Tea Party

of establishments from the menu labeling requirement.

takeover of the House, is not actually all that unique to the menu labeling case. In 2010 and 2011, the years during which the FDA drafted and released the menu labeling proposed rule, 577 proposed and 494 final rules were published by federal agencies, suggesting that a lot of other agencies were in the same boat as the FDA at the time. Further, House elections occur every two years, suggesting a near constant potential for shifting oversight for agencies.

And while not every rule rises to the same level of public attention as the menu labeling proposed rule, those that do not perhaps require less effort from the agency to protect their investment. In other words, the menu labeling case may be an easy case in that it is exactly the type of rulemaking in which we might expect strategic agency behavior to occur. When a rule is less controversial or issued by a less experienced agency, the need for such behavior is reduced.²⁷

Nevertheless, we can learn a lot from the lessons of this case, not least because the menu labeling case is exactly the type of rule that has substantial public policy implications and thus has broad normative appeal. In this sense, the menu labeling case helps to shed light on the substantive implications of the rulemaking process.

²⁷These are the hard cases, where it is more difficult to observe the expected behavior because the agency faces less opposition or is not cognizant of all of the strategies available.

6.5 APPENDIX: ACA TEXT ON MENU LABELING

SEC. 4205. NUTRITION LABELING OF STANDARD MENU ITEMS AT CHAIN RESTAURANTS.

(a) Technical Amendments.—Section 403(q)(5)(A) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)(A)) is amended—

(1) in subitem (i), by inserting at the beginning “except as provided in clause (H)(ii)(III),”;
and

(2) in subitem (ii), by inserting at the beginning “except as provided in clause (H)(ii)(III),”.

(b) Labeling Requirements.—Section 403(q)(5) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)) is amended by adding at the end the following:

(H) Restaurants, Retail Food Establishments, and Vending Machines.—

(i) General requirements for restaurants and similar retail food establishments.—
Except for food described in subclause (vii), in the case of food that is a standard menu item that is offered for sale in a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items, the restaurant or similar retail food establishment shall disclose the information described in subclauses (ii) and (iii).

(ii) Information required to be disclosed by restaurants and retail food establishments.—

Except as provided in subclause (vii), the restaurant or similar retail food establishment shall disclose in a clear and conspicuous manner—

(I)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu listing the item for sale, the number of calories contained in the standard menu item, as usually prepared and offered for sale; and

(bb) a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu and designed to enable the public to understand, in the context of a total daily diet, the significance of the caloric information that is provided on the menu;

(II)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu board, including a drive-through menu board, the number of calories contained in the standard menu item, as usually prepared and offered for sale; and

(bb) a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu board, designed to enable the public to understand, in the context of a total daily diet, the significance of the nutrition information that is provided on the menu board;

- (III) in a written form, available on the premises of the restaurant or similar retail establishment and to the consumer upon request, the nutrition information required under clauses (C) and (D) of subparagraph (1); and
- (IV) on the menu or menu board, a prominent, clear, and conspicuous statement regarding the availability of the information described in item (III).
- (iii) Self-service food and food on display.—Except as provided in subclause (vii), in the case of food sold at a salad bar, buffet line, cafeteria line, or similar self-service facility, and for self-service beverages or food that is on display and that is visible to customers, a restaurant or similar retail food establishment shall place adjacent to each food offered a sign that lists calories per displayed food item or per serving.
- (iv) Reasonable basis.—For the purposes of this clause, a restaurant or similar retail food establishment shall have a reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory analyses, and other reasonable means, as described in section 101.10 of title 21, Code of Federal Regulations (or any successor regulation) or in a related guidance of the Food and Drug Administration.
- (v) Menu variability and combination meals.—The Secretary shall establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children’s combination meals, through means determined by the Secretary, including ranges, averages, or other methods.

(vi) Additional information.—If the Secretary determines that a nutrient, other than a nutrient required under subclause (ii)(III), should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, disclosure of such nutrient in the written form required under subclause (ii)(III).

(vii) Nonapplicability to certain food.—

(I) In general.—Subclauses (i) through (vi) do not apply to—

(aa) items that are not listed on a menu or menu board (such as condiments and other items placed on the table or counter for general use);

(bb) daily specials, temporary menu items appearing on the menu for less than 60 days per calendar year, or custom orders; or

(cc) such other food that is part of a customary market test appearing on the menu for less than 90 days, under terms and conditions established by the Secretary.

(II) Written forms.—Subparagraph (5)(C) shall apply to any regulations promulgated under subclauses (ii)(III) and (vi).

(viii) Vending machines.—

(I) In general.—In the case of an article of food sold from a vending machine that—

(aa) does not permit a prospective purchaser to examine the Nutrition Facts Panel before purchasing the article or does not otherwise provide visible nutrition information at the point of purchase; and

(bb) is operated by a person who is engaged in the business of owning or operating 20 or more vending machines, the vending machine operator shall provide a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article.

(ix) Voluntary provision of nutrition information.—

(I) In general.—An authorized official of any restaurant or similar retail food establishment or vending machine operator not subject to the requirements of this clause may elect to be subject to the requirements of such clause, by registering biannually the name and address of such restaurant or similar retail food establishment or vending machine operator with the Secretary, as specified by the Secretary by regulation.

(II) Registration.—Within 120 days of enactment of this clause, the Secretary shall publish a notice in the Federal Register specifying the terms and conditions for implementation of item (I), pending promulgation of regulations.

(III) Rule of construction.—Nothing in this subclause shall be construed to authorize the Secretary to require an application, review, or licensing process for any entity to register with the Secretary, as described in such item.

(x) Regulations.—

(I) Proposed regulation.—Not later than 1 year after the date of enactment of this clause, the Secretary shall promulgate proposed regulations to carry

out this clause.

(II) Contents.—In promulgating regulations, the Secretary shall—

(aa) consider standardization of recipes and methods of preparation, reasonable variation in serving size and formulation of menu items, space on menus and menu boards, inadvertent human error, training of food service workers, variations in ingredients, and other factors, as the Secretary determines; and

(bb) specify the format and manner of the nutrient content disclosure requirements under this subclause.

(III) Reporting.—The Secretary shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives a quarterly report that describes the Secretary’s progress toward promulgating final regulations under this subparagraph.

(xi) Definition.—In this clause, the term ‘menu’ or ‘menu board’ means the primary writing of the restaurant or other similar retail food establishment from which a consumer makes an order selection.

(c) National Uniformity.—Section 403A(a)(4) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343-1(a)(4)) is amended by striking “except a requirement for nutrition labeling of food which is exempt under subclause (i) or (ii) of section 403(q)(5)(A)” and inserting “except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of

ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under section 403(q)(5)(H)(ix)".

(d) Rule of Construction.—Nothing in the amendments made by this section shall be construed—

- (1)** to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b)) and is expressly preempted under subsection (a)(4) of such section;
- (2)** to apply to any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food; or
- (3)** except as provided in section 403(q)(5)(H)(ix) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b)), to apply to any restaurant or similar retail food establishment other than a restaurant or similar retail food establishment described in section 403(q)(5)(H)(i) of such Act.

Chapter 7

Conclusion

Notice-and-comment rulemaking has become a fixture of the modern bureaucracy. Government agencies use the process to do everything from regulate the size of holes in Swiss cheese (Skrzycki, 2003) to set out the standards for purchasing new F-14s. Once the process is completed and a final rule is issued, the resulting policy carries the full force and effect of law. This dissertation project has built upon two observations about this process. First, rulemaking is carried out by unelected bureaucrats. These bureaucrats, including both political appointees and career civil servants, are human beings with their own preferences over the types of rules that their agency writes and, ultimately, enforces. While sometimes bureaucrats' preferences align with those of their political overseers in Congress and the White House, often they do not. Within this space of disagreement, bureaucrats can exercise their discretion to get their preferred policies enacted.

Second, if bureaucrats want to see their preferred policy enacted into law, they cannot dally. Even though notice and comment affords an ostensible period for the agency to deliberate and make changes to the policies contained in a proposed rule (i.e., the time after the public comment period, before the final rule), agencies do not necessarily use this period for its intended purpose. Rather, agencies face a set of incentives to “get it right” early on

(West, 2009; Wagner, Barnes and Peters, 2011) and treat the proposed rule as if it were the final, binding policy, not the starting point for negotiations. Counterintuitively, the actual comment periods are then used to bolster this preferred position. These incentives stem from the fact that the rulemaking process is resource-intensive and subject to considerable litigation. In addition, psychological factors lead agency rule-writers to become wedded to the proposed policy.

Neither of these observations is novel in its own right, as both have been recognized in one way or another by previous scholars. The contribution I make in this dissertation is to marry the two observations together and then unpack the implications. Specifically, I have argued that because agencies treat proposed rules as “investments,” they act strategically to defend them so that they can reach the binding final rule stage. To support this argument, I have identified a number of strategies that agencies can employ early in the process to help their favored policies eventually become law.

In Chapter 3, I consider how agencies strategically write proposed rules so as to avoid a regulatory veto from OIRA or Congress (a necessary, but not sufficient, condition for a proposed rule to become a final rule). I examine how the regulatory veto shapes the agency’s decision to draft a proposed rule that accurately represents their policy preferences, versus when they scale the proposal back to a policy that is more acceptable to political principals. To rigorously assess this relationship, I formalize the interaction between the agency and a politician (a generic representation of either Congress or OIRA) in a signaling model. Overall, the model suggests that the regulatory veto is not a strong constraint on agencies; the equilibrium results show that agencies frequently propose policies that are representative of their true preferences. When vetoes do occur, they are targeted at what

I call “unconstrained” proposed rules, meaning those rules that lean toward the agency’s preferences, rather than those of its political overseers.

To test the veto hypotheses that emerge from the model, in Chapter 4 I develop a dataset of regulatory vetoes of proposed rules by OIRA from 1981–2013. The dataset includes both “explicit vetoes” issued by OIRA via return letters and “quiet vetoes” where the agency withdraws the rule from consideration before OIRA can make a decision on its rule. Using these data, I show in a series of regression analyses that OIRA is more likely to veto rules from agencies with whom it is ideologically distant and when the rule’s policy area is less of a priority for the president. While these findings are not surprising on their own, I show that interacting these factors results in an interesting outcome: a decreasing rate of vetoes for ideologically distant agencies as a policy area becomes more of a priority for the president. This effect does not hold for ideologically proximate agencies, for whom presidential priorities are not an important moderating factor. In addition, the models show that OIRA’s vetoes initially increase as public opinion in a policy area becomes more liberal, and then decrease as opinion becomes more and more liberal.

These results offer strong empirical support for the model’s implications for regulatory vetoes and, as I show in the chapter, they are robust to a number of alternate specifications. Although I do not test the model on regulatory vetoes issued by Congress, I conclude the chapter by sketching out a framework for what such tests might look like.

Chapter 5 extends the argument beyond the proposal-writing stage by exploring how agencies actually implement the administrative procedures associated with the public comment period for proposed rules. I argue that agencies anticipate and strategically preempt congressional incursions into rulemaking during the public comment period. Somewhat iron-

ically, they accomplish this using the very administrative procedures that were implemented to ensure responsiveness. I identify two ways that agencies do this. First, I show that agencies use the length of the public comment period strategically in order to engage with stakeholders and build coalitions outside the agency. Second, I show that agencies time the publication of their proposed rules to coincide with congressional recesses so as to make intervention more costly for members of Congress. The net result of these tactics is that, rather than responding to congressional demands by changing the volume or content of their regulatory activity, agencies stave off congressional oversight as part of the process of creating a new rule and secure policy gains along the way.

Finally, in Chapter 6, I use an in-depth case study of the FDA's menu labeling rule-making to demonstrate the validity of a number of the project's key assumptions. Specifically, I show how the FDA gathered key policy and political information from stakeholders well in advance of the publication of the proposed rule, the primary assumption in the formal model in Chapter 3 (and also a foundation of the idea of the proposed rule as an "investment"). I also demonstrate how congressional oversight in this case came from a much broader set of congressional actors than those on the FDA's traditional oversight committees. This is an important component of the empirical tests in Chapter 5. Finally, I show the intensity and resources involved in drafting the proposed rule from the FDA's perspective. This helps to demonstrate the likelihood that FDA bureaucrats became invested in the proposed policy. While the case illustrates a number of other aspects of the argument, primarily it serves to demonstrate how the processes identified in the broader dissertation operate on the individual rule level and offers a real world validity check.

7.1 CONTRIBUTIONS

This project makes several contributions to our understanding of the regulatory process. First, I have shown that the institution of mechanisms of political control, like OIRA review of draft regulations and the procedural steps associated with notice-and-comment, is not the end of the story. The agency responds to those instruments of political control. The account that I have given presents the agent (in the principal-agent model) as a coequal strategic actor and the relationship between the two parties as a dynamic one. This approach pushes the field to consider political control of the bureaucracy as a dynamic and ongoing problem, not one that can be “solved” by the institution of control mechanisms, because agencies will respond to those control mechanisms.

Second, I have deconstructed the rulemaking process and examined the details—how an agency selects the type of policy to write, how long it sets the public comment period for, etc. This allows me to develop a nuanced and *bottom-up* account of agency behavior that focuses on particular mechanisms. The approach I take stands in contrast to the traditional top-down view of rulemaking and political control taken in much of the political science literature.

Finally, from an empirical perspective, the project offers many advances. Although scholars have shown a renewed interest in rulemaking, few studies cover more than a handful of agencies. The data used in this project span the rulemaking activity many agencies, including both executive branch agencies and independent agencies, over a broad time period. These data are matched with a set of cutting-edge agency ideal point estimates that have yet to be widely adopted in studies of agency behavior. The net effect is that the argument speaks to broad effects that exist outside of the narrow context of one agency or a small

sample of rules.

7.2 DIRECTIONS FOR FUTURE RESEARCH

This research introduces a number of interesting avenues for future research. First and foremost, this project has identified a number of strategic actions that agencies can take to protect their investments (proposed rules),¹ but it has not examined the *effectiveness* of those strategies. Rather, I have assumed that agencies would not engage in this strategic behavior if they did not perceive it to be effective. Yet, this perception may not be borne out in practice. It could well be the case that agencies misperceive the effectiveness of their actions and engage in strategic behavior that does not enhance the prospects of their proposed rules.

This suggests that an interesting direction for future empirical work would be to explore the effectiveness of these (and other) strategies in advancing proposed rules to the final rule stage. This research is more complicated than it may initially seem, however, since the effects of strategic behavior are often difficult to observe. A parallel can be drawn to the campaign spending literature here. In that case, scholars struggle to make sense of the effects of campaign spending on election outcomes, as the data routinely (and robustly) show that the more incumbents spend on an election, the more likely they are to *lose* the election (see Jacobson, 1990). This counterintuitive result can be attributed to a selection effect: candidates tend to spend more in close elections than in non-competitive elections.² As a result,

¹The strategies I identify are illustrative and are by no means exhaustive of all agency strategies with respect to proposed rule drafting or the public comment period.

²Jacobson (1990, 334) explains that incumbents “spend more the more strongly they are challenged, and the stronger the challenge, the worse the incumbent does.” There has been spirited debate over the appropriate method to determine whether this empirical puzzle can be interpreted to mean that campaign spending does not matter (Ansolabehere and Gerber, 1994; Jacobson, 1978; Levitt, 1994; Erikson and Palfrey, 1998;

it is not reasonable to compare campaign spending from competitive and non-competitive elections to find the effect of campaign spending. Rather, the appropriate counterfactual is to compare a competitive election with high levels of spending to that same election with low levels of spending. Unfortunately, it is not possible to observe both outcomes in the same case, but clever econometric techniques can help to identify the effects in such cases (see Angrist and Pischke, 2008). Similarly, with rulemaking it may be the case that agencies only employ the strategies I have identified for those rules that are more ambitious or are in some way “at risk.” Accordingly, it is perhaps not appropriate to pool all rules in analyzing the effectiveness of these strategies, and future work on effectiveness should proceed with caution in light of this causal inference issue.

Second, this project has focused broadly on tactics that are available to all agencies, without detailed consideration of the specifics of the agencies themselves or the availability of different strategies across time.³ While this approach has been instructive as a first step, it invites the question of variability across agencies. For instance, setting aside the causal issues associated with rule finalization discussed above, Table 7.1 shows the rate at which agencies finalize the proposed rules that they issue. Some agencies have higher “batting averages” than others, meaning that they finalize a greater proportion of the rules they propose. Independent agencies seem to be quite good at this, whereas regulatory agencies seem to be no better than non-regulatory ones at getting rules from the proposed stage to the final stage. While this high-level analysis masks important nuances of this process (like whether some agencies are more cautious about issuing proposed rules in the first place),

Gerber, 1998).

³However, a key variable in my argument is the ideological distance between the agency and key political principals, which is time-varying and agency-specific.

there is clearly interesting agency-level variation here that wants for explanation.

Finally, by focusing on the proposed rule stage, the project falls short of creating a unified theory of the entire notice-and-comment process. This leaves room for future work to extend this project's logic to other stages of the rulemaking process. As discussed in Chapter 3, much of the action with respect to congressional vetoes of rulemaking—both in terms of invoking the CRA or introducing an agency-curbing bill—happens at other stages of the process, either preemptively (before the agency has even initiated the rulemaking process) or even after the agency has issued a final rule. Additionally, my focus on the initial stages neglects the fact that agencies frequently do make changes to proposed rules at the final rule stage, after the public comment period. While many scholars have addressed this stage of the process empirically, a formal model that addressed this late-stage behavior from the agency's perspective would be a welcome addition. My hope is that this dissertation begins a research agenda on how agencies behave strategically with respect to notice-and-comment.

7.3 NORMATIVE IMPLICATIONS

In closing, I draw several lessons from this project. I have repeatedly pointed to the power and first-mover advantages that bureaucrats enjoy in the rulemaking process. From a normative perspective, many observers have decried this as an abdication of the responsibility of elected officials and the rise of an Orwellian administrative state. Yet, such alarmist conclusions are not necessarily appropriate.

Bureaucratic discretion in rulemaking is not accidental, but the result of a design choice. After all, rules not only address important policy areas, they often also address difficult or complex policy problems, problems that legislators often do not have the time or

Table 7.1: Agency Rulemaking “Batting Averages,” 2000-2010

Agency Name	Agency Type	Regulatory?	Batting Avg	Avg # of Rules
Envntl Protection Agency	Executive	Yes	61.2%	14.7
Small Business Admin	Executive	Yes	68.2%	37.0
Office of Personnel Mgmt	Executive	Yes	69.0%	12.3
Nat’l Archives & Records Admin	Executive	Yes	77.0%	12.6
Dept of Justice	Cabinet	Yes	77.3%	15.4
Dept of Treasury	Cabinet	Yes	80.1%	28.7
Dept of Labor	Cabinet	Yes	80.4%	23.1
Dept of Veterans’ Affairs	Cabinet		81.7%	10.2
Dept of Health & Human Svcs	Cabinet	Yes	81.7%	57.4
Dept of Transportation	Cabinet		82.0%	58.9
Dept of Agriculture	Cabinet	Yes	82.6%	46.1
Dept of Housing & Urban Dev	Cabinet		84.1%	8.7
Dept of State	Cabinet		84.5%	15.4
Dept of the Interior	Cabinet		84.6%	5.1
Dept of Education	Cabinet	Yes	85.1%	7.0
Dept of Energy	Cabinet		85.8%	59.0
Dept of Homeland Security	Cabinet		87.2%	7.7
Dept of Commerce	Cabinet	Yes	88.5%	9.5
Nuclear Regulatory Comm	Independent		88.9%	12.2
Securities & Exchange Comm	Independent	Yes	89.4%	8.1
Social Security Admin	Independent	Yes	90.9%	8.5
Fed Deposit Insurance Corp	Independent	Yes	91.2%	13.2
Cmdty Futures Trading Comm	Independent	Yes	93.0%	68.3
Nat’l Credit Union Admin	Independent		94.6%	5.4

Note: Author’s analysis of data from Chapter 5. The second “Type” column indicates whether the agency is a Cabinet-level agency, a non-Cabinet executive agency, or an independent agency. The third column “Regulatory” indicates whether or not the agency’s core function is regulation (i.e., it is a regulatory agency). Data for these two columns are from Lewis and Selin (2012). The fourth and fifth columns indicate, respectively, the proportion of proposed rules that were eventually finalized and the average annual number of proposed rules issued by that agency each year.

expertise to tackle themselves. In fact, bureaucratic expertise and knowledge are key *benefits* of the rulemaking process (Harter, 1982), and we should think about how to harness and direct this power, rather than circumscribe it.

Concerns about excessive bureaucratic power connote the image of anonymous, malevolent bureaucrats making decisions that are at odds with the public interest. Yet, research suggests that bureaucrats tend to have fairly mainstream perspectives on politics (Waterman, Rouse and Wright, 2004) and also tend to be motivated by a public service ethos (Golden, 2000; Dilulio, 1994). Thus, it is worth stating that this may not be worrying from a normative perspective; just because bureaucrats have power and employ it strategically does not mean they are producing bad or ill-conceived rules. Rather, since there is no direct electoral mechanism to ensure the rules produced align with the public's preferences, we must carefully evaluate the whether the rules produced (or not produced) are too moderate or too extreme.

Lastly, bureaucrats are not doing anything wrong per se by responding to the incentive structure with which they are presented. As the last three decades of work in political science suggests, human beings respond to incentives created by the political process. Thus, to the extent that we are concerned about the future direction of the rulemaking process, we should pay careful attention to the incentives generated by the process, as I discuss in the next section.

7.4 POLICY IMPLICATIONS FOR NOTICE-AND-COMMENT

The findings of this dissertation also have policy implications for the notice-and-comment rulemaking process itself. In order to check bureaucrats' power, numerous regu-

latory reform ideas have been bandied about Washington. These proposals include a call to increase the scope of OIRA's review to include independent agencies,⁴ a requirement that Congress approve all major regulations,⁵ suggestions to increase the staff and resources of OIRA (Wallach, 2014; Sunstein, 2013*a*; Copeland, 2013), appeals for more rigorous implementation of cost-benefit analysis (Carrigan and Shapiro, 2013; Wallach, 2014), and a proposal to create a new office that would give Congress the ability to independently assess the quality of regulations (Wallach, 2014).

Each of these reform proposals is predicated on the idea that increasing congressional or presidential oversight will counterbalance agency power in rulemaking. They do not involve changes to the basic structure of notice-and-comment process itself and, importantly, they do not address the incentives that cause agencies to invest (and make decisions) prior to the issuance of the proposed rule. In fact, by creating more *ex post* oversight, these reforms may actually serve to reinforce the incentive structure that leads agencies to entrench early on and often behind closed doors.

Other reforms with the potential to address the incentive problem seem unlikely to gain traction, either because they are not on the policy agenda or because they lack broad political appeal. For instance, regulatory negotiation, or "reg neg," the process whereby agencies formally negotiate a proposed rule with a set of nominated stakeholders *prior to the proposed rule's publication*, was a popular reform initiative in the 1990s, but has faded into relative obscurity. Although reg neg is not without its critics (Rose-Ackerman, 1994;

⁴Bills to expand OIRA review to independent agencies were introduced in both the 112th (Independent Agencies Regulatory Analysis Act of 2012) and 113th (Independent Agencies Regulatory Analysis Act of 2013) Congresses. Both were referred to committee and no further action was taken.

⁵This idea traces to a bill introduced in the 112th Congress called the Regulations from the Executive in Need of Scrutiny (REINS) Act which would require Congress to vote affirmatively any before any major final rule (\$100 million or more in annual impact) could take effect (Sonmez, 2014).

Coglianesse, 1997), it does formalize the opportunity for agencies to consult with stakeholders in the rulemaking process (Langbein and Kerwin, 2000). It also reduces the potential for eventual litigation by hostile groups (Harter, 1982), which in turn reduces the agency's incentive to get entrenched in a policy at the outset. In a law review article Gersen and O'Connell (2009) offer a different reform proposal with the potential to address the incentive problem by reducing agency discretion with regard to administrative procedures. They suggest that in order to prevent agencies from strategically gaming the release of their rules, agencies should "batch release" rules at predetermined times.

Fortunately, there are some promising incentive-related reforms on the horizon. Recently, the Administrative Conference of the United States (ACUS), the advisory board that provides guidance on how to improve the rulemaking process, released a report suggesting that agencies increase transparency regarding *ex parte* communications (ACUS, 2014). The ACUS recommended that agencies develop their own written policies about what constitutes *ex parte* communication and how they will disclose such contacts. Interestingly, the report encouraged agencies to continue to consult with stakeholders while drafting a proposed rule, but suggested that agencies should be more transparent and even-handed about such contacts. The report's findings align with a recommendation from Wagner, Barnes and Peters (2011, 43), who suggest that agencies be required to publicly disclose information about which stakeholders they meet with about a rule before the proposed rule is published and after the final rule is published. Adding sunlight to the preliminary stages of the process is not the perfect disinfectant, but it may lead agencies to be more egalitarian in their pre-proposal contacts, which in turn may influence the representativeness of the policy choices that agencies make.

No single policy reform is a panacea to the problems endemic to the current iteration of the regulatory state. However, future reformers would do well to consider the incentives facing agencies with respect to notice-and-comment. It may well be that altering the incentive structure is a more efficient and effective way to reform the rulemaking process.

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