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The Politics of Rulemaking in the United States

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Abstract

Rulemaking is a critical part of American government and governance. This article reviews the political underpinnings of modern rulemaking. Specifically, it highlights the process and impact of agency regulations, as well as the key tools used by the legislature, elected executive, and courts to oversee the rulemaking process. The article also reviews who participates in the rulemaking process, as well as who influences regulatory content. Finally, new directions in regulatory policymaking are explored, including data collection advancements, as well as the potential role for guidance documents as replacements for more traditionally issued notice and comment regulations.

INTRODUCTION

The conservative Wisconsin Institute for Law and Liberty (WILL) filed a lawsuit in late 2017 with the Wisconsin Supreme Court. The suit argued that the Wisconsin Department of Public Instruction had been issuing agency regulations without the permission of the Wisconsin Department of Administration (DOA) and the Wisconsin governor. The State Superintendent of Public Instruction is a nonpartisan elected official; however, the holder of that office at the time, State Superintendent Tony Evers, had recently announced his intention to run for governor as a Democrat against the sitting Republican. WILL's lawsuit mentioned new legislation passed by the Wisconsin State Legislature that provided greater regulatory oversight powers to the governor and, thus, forced a re-examination. As the news reporting suggested, "Requiring permission from DOA and the governor before agencies can start writing them [i.e., rules] essentially gives the governor oversight of every major move the agency makes," and, "If WILL prevails, he [State Superintendent Evers] wouldn't be able to launch any education initiatives without DOA and [Governor] Walker's say-so" (Richmond 2017).

This vignette suggests why students of political science ought to pay attention to rulemaking in the United States. Here we see all three constitutionally prescribed branches of government—the courts, legislature, and elected executive—influence a key public policy domain, education. However, interestingly, the courts, legislature, and elected executive are not the primary policymakers during rulemaking. Instead, as the vignette suggests, the key policymaker is another entity: a public sector agency. Note, as well, the important role played by an interest group organization, as well as hints at the partisan tenor that undergirds much of the debate about rulemaking generally. As we will see below, interest group politics and partisanship are both important to discussions of rulemaking. Finally, this example suggests how regulatory reforms may be used to consolidate political and policymaking power, as well as to increase accountability. In short, as exemplified above, there is a great deal of politics in rulemaking.

Yet, despite its importance, rulemaking remains a facet of modern society that few appreciate. As evidence, take the 2017 New Hampshire Public Radio podcast *Civics 101*, which provides primers on governance topics that citizens should have learned in school, but didn't: Rulemaking was the third topic it covered (New Hampshire Public Radio 2017). In fact, many people have only a foggy understanding of what a government rule actually is. In this article, I follow the definition in the 1946 Administrative Procedure Act (APA), which includes any "agency statement of general or particular applicability and future effect designed to…interpret, or prescribe law or policy" [U.S.C. §551(4) (1994)]. Specifically, I concentrate on so-called notice and comment rules, which I refer to as both rules and regulations interchangeably. My focus reflects the fact that notice and comment rulemaking dominates the literature and is believed to be the most common form of rulemaking (West 1995, Yackee 2006a, Yackee & Yackee 2010, Kerwin & Furlong 2011). However, I also discuss agency regulatory policy creation through the issuance of guidance documents, which represents an area of policy and practice largely unknown to the political science discipline.

I review several recurring themes in the rulemaking literature. To begin, I provide contextual, background, and further definitional information on rulemaking. I then draw highlights from the literature across two major themes: political accountability and public participation. Most of my examples are drawn from the national level; however, I close by emphasizing where the field ought to go in the future, including a greater emphasis on regulation in the American states.

REGULATORY CONTEXT

Americans have a complicated relationship with regulation. A 2014 Gallup poll found that almost 50% of Americans believe that there is too much government regulation of business

(Newport 2014), and a 2012 Pew poll found that 52% of Americans say that government regulation of business usually does more harm than good (Pew Research Center 2012). These public attitudes are powerful, but they conceal a good deal of variation. Republicans, for instance, are much more likely to hold a negative impression of business regulation than Democrats (Newport 2014). Additionally, when survey questions move away from the generic effects of regulation, both Republicans and Democrats become more sympathetic to strengthening or at least maintaining government regulations in targeted areas, including the regulation of food, the environment, prescription drugs, and the workplace (Pew Research Center 2012). That said, the overall negative sentiment attached to "government regulation" is hard to deny; regulatory overreach was one of the most popular messages of President Trump's campaign (Kaufman 2016).

Impact

Government regulations set the standards for almost every aspect of American life, and, as Rosenbloom (2014, p. 64) concludes, "The scope of federal rulemaking is astounding." Each year, US agencies issue rules governing such critical policy topics as air quality, financial markets, highways, foreign aid, food stamps, power production, and toxic chemicals. As an example of their scope, the US Food and Drug Administration (FDA) regulates in the areas of medical devices, cosmetics, animal testing, tobacco, and nutrition labeling. Its reach is so broad that FDA-regulated products account for about 20 cents of every dollar spent by American consumers (US FDA 2011). Across all federal agencies, Crews (2016a) estimates the total costs of regulation at about $15,000 per US household in 2015, which is almost as much as the average US household spends on food and transportation combined. Of course, concentrating on the costs of regulation without a similar focus on the public and personal benefits of, for instance, clean water, a safe food supply, or a stable banking system, is problematic, especially if one desires an assessment of citizen and societal trade-offs across burdens and benefits.

Given the pervasiveness of rulemaking, US public policymaking may be better conceived of as chiefly regulatory, rather than chiefly legislative. As Pierce (1985, p. 481) concludes, "[A]dministrative agencies today have enormous power to make fundamental policy decisions that the Constitution assigns to Congress as the branch of government most representative of the majority's views." Eavey & Miller (1984, p. 720) write, "More and more legislation has been originating with the executive branch of government." Indeed, as early as the 1970s, some warned of "delegation as abdication," where "[c]ritics of the administrative state argued that an unaccountable and headless fourth branch of government—the bureaucrats—had come to run American politics" (Berry & Gersen 2017, p. 1010). Yet, despite these concerns, legislative delegation of regulatory authority to agencies continues today, with the result that modern governance relies heavily on the public policy decisions generated during government rulemaking. Or, as Mashaw (1997, p. 106) puts it, "Much public law is legislative in origin but administrative in content."

Consequently, regulations are not only substantively meaningful but also numerous. For instance, Warren (2010) estimates that public administrators, not elected legislators, issue over 90% of the laws that govern American life. Federal agencies in 2015 issued 3,410 new notice and comment rules, which equates to approximately 30 rules for every piece of congressionally passed legislation that year (Crews 2016b). And, until recently, the federal regulatory state had been growing at a fast clip; the total number of legally binding regulatory restrictions increased from 830,000 in 1997 to one million in 2012 (Al-Ubaydli & McLaughlin 2017). In fact, by one estimate, it would take a person 3 years, 177 days, and 10 hours to read all of the federal regulations currently in place (McLaughlin et al. 2017). Moreover, research suggests that many thousand more rules are issued by state agencies each year (Boushey & McGrath 2017). Given all of this activity, it is no surprise

when some observers conclude that "rulemaking has become the most common and instrumental form of lawmaking" (Kerwin & Furlong 1992, p. 114). That said, as I discuss below, the election of President Trump has called some of these trends into question, with the president's first two years in office suggesting his desire to reduce the total number of regulations and to slow the pace of regulatory policy creation generally.

Process

The writing of government rules is a key step in the public policymaking process. It is at this stage when public agency officials "fill up the details," in the words of the Supreme Court (*United States v. Grimaud* 1911), of what may be incomplete or even purposefully vague statutes passed by Congress and signed by the president. Agencies must have—and specifically, must reference in their regulation—the substantive legal authority that allows them to issue a rule (Rossi 1997, Funk 2001).

Agencies also must follow the appropriate process when issuing rules. In 1946, Congress passed the APA, which provided a framework for agencies to write regulations. Before that time, select agencies were issuing rule-like standards as a means to implement congressionally passed policy; however, the APA regularized and made transparent these agency policymaking efforts (West 1995, Rosenbloom 2014). Interestingly, every American state now has its own version of an APA in place, as well (Jensen & McGrath 2011).

Section 553 of the federal APA requires that agencies publicly announce a draft version of their proposed regulation. While in the past draft rules were short and vague, today they are often fully formed policy documents (West 2005, Yackee 2012). Draft rules begin with a preamble, which details an agency's legal authority and its reasoning and evidence, before providing the proposed regulatory changes (which may be additions to or subtractions from the current regulatory code). Draft rules—which are formally called Notices of Proposed Rulemaking (NPRMs)—must also be open for public feedback during a notice and comment period. During that prescribed timeframe, any concerned individual, group, or political entity may provide written comments regarding the proposed rule. This generally takes the form of an email or letter to the agency that provides information regarding a commenter's opinions, preferences, concerns, and/or suggested changes. Occasionally these contacts simply state their support for the agency's efforts.

After reviewing the comments (if any are submitted), an agency typically issues a Final Rule, which is legally binding on the public in a similar manner as legislatively passed public laws (Lubbers 2006). Final Rules may or may not differ from the NPRM, as there is no specific requirement that an agency alter the NPRM to reflect the concerns raised by the commenters (Yackee 2006a, Kerwin & Furlong 2011). In other words, current law provides the public the right to participate in—but not the right to influence—rulemaking. However, as we shall see below, the public participation rights and transparency provided by the APA have not shielded rulemaking from politics.

POLITICAL ACCOUNTABILITY AND PUBLIC PARTICIPATION

Agency policy decision making is often idealized as providing technocratic, scientific, and/or expert-based solutions to policy problems (Hill 1991). In fact, one of the primary reasons—if not the primary reason—why legislatures delegate policymaking authority to administrative agencies is to harness agency expertise in addressing complex policy topics (Weingast 1984, Bawn 1995, Huber & Shipan 2002, Carpenter et al. 2012). Yet, agency policymaking also takes place within a political context. Below I highlight two themes—political accountability and public participation—attached to rulemaking. I focus specifically on how rulemaking provides entry

points for politics (Haeder & Yackee 2015), as well as how these entry points may suggest gaps in current research.

Political Accountability

The agency rulemaking process set up in the federal APA of 1946 has evolved significantly over time (Croley 1998). In particular, the president and the legislature have passed reforms that require additional analysis of select rules before they can be promulgated, while the courts—through a variety of rulings—have heightened the scrutiny on agency decision making across the rulemaking process (Potter 2017). When taken together, these efforts by political principals have complicated the relatively straightforward notice and comment process set up in 1946 and have opened up rulemaking to new accountability mechanisms. As Rossi (1999, p. 317) summarizes, for many reformers, these "efforts to restrict the power of agency regulatory authority hold [the] promise to enhance legitimacy and accountability in the regulatory process." However, for others, these additional accountability steps are seen as holding negative spillover effects (for a summary, see Yackee & Yackee 2010). Below I detail the major ways in which the president, Congress, and the courts shape agency rulemaking.

President. Pasachoff (2016) finds that more than a thousand published articles have cited the president's key accountability tool during the notice and comment process: OIRA review.

Presidents—working through the Office of Information and Regulatory Affairs (OIRA)—influence administrative agencies by reviewing and, at times, directing agencies to modify their regulatory policy proposals before finalization (Haeder & Yackee 2015). While presidents infrequently intercede directly during the rulemaking process, OIRA is seen as working on the president's behalf (Shapiro 2005, West 2005, Gailmard & Patty 2013; but see Bressman & Vandenbergh 2006). OIRA is organizationally close to the president—it is situated within the Executive Office of the President—and is led by a presidential appointee (Wiseman 2009). This has led close observers to conclude that OIRA is a "delegate" of the president during the regulatory review process (DeMuth & Ginsburg 1986, p. 1085). As West (2006, p. 441) describes it, OIRA review "is the furthest extension of direct, centralized, and systematic presidential influence over agency policymaking to date," while Golden (2000) suggests that OIRA works to align rule content with the president's priorities and therefore serves as a check on the rulemaking efforts of career agency officials, who may have differing policy goals.

OIRA has been called the "most powerful federal agency that most people have never heard of" (Notes: OIRA Avoidance 2011, p. 994). President Reagan established modern OIRA review in Executive Order 12291 in the early 1980s (Miller 2011, Rosenbloom 2011). The order required that agencies submit major NPRMs and Final Rules to OIRA for review before the agencies publicly announced those regulations. Presidents of both political parties have continued this practice, with President Clinton limiting OIRA review to significant regulations. Rules that have an annual effect on the economy of $100 million are considered economically significant and are thus reviewable; additionally, rules that create inconsistencies with the actions of other agencies, rules that have budgetary impacts on entitlements, grants, or similar programs, and rules that raise new legal or policy issues or impact the president's priorities may also be considered significant, according to Executive Order 12866. President Trump has left these OIRA review criteria unchanged. Notably, OIRA decides what rules are considered significant and therefore reviewable, not the agencies. Each year, OIRA routinely reviews hundreds of agency rules across a wide swath of policy topics (Yackee & Yackee 2009). OIRA does not, however, review rules written by independent regulatory agencies (Lubbers 2006).

OIRA review generally occurs at two formal points during the rulemaking process—before the promulgating agency issues its NPRM and before it issues its Final Rule. Rules may be reviewed at one or both of these stages, and OIRA officials may also provide informal feedback to agency regulators at other points during the process (Haeder & Yackee 2015, 2018). Economically significant rules must have a cost–benefit analysis performed, and much of the debate surrounding OIRA review has focused on the president's use of OIRA to interject cost–benefit considerations into the regulatory process (DeMuth & Ginsburg 1986, Cooper & West 1988, Shapiro 2011). However, Shapiro (2005) concludes that when cost–benefit considerations collide with presidential political factors, the latter almost always take precedence during OIRA review.

Following this review, there are three main outcomes. First, OIRA may send the agency's NPRM back with no suggested changes. Second, OIRA may send the agency's NPRM back with suggested changes—an outcome that, according to Haeder & Yackee (2018), occurs approximately 75% of the time in their data. Third, in more limited cases, the agency may choose to withdraw its NPRM entirely after OIRA review (West 2006).

Scholars have long believed OIRA review holds policy effects. Its influence has been called "determinative" (Copeland 2009, p. 1) and "substantial" (Wagner 2015, p. 2046). Moreover, agency compliance with OIRA's suggested changes is thought to be standard practice (Rosenbloom 2014). Haeder & Yackee (2015, 2018) provide one of the first assessments of rule change during OIRA review. They compare the text of Draft-Final Rules (i.e., fully formed policy documents delivered by the originating agency to OIRA for Final Rule review) to the text of Final Rules (i.e., legally binding government regulations promulgated in the *Federal Register*). For highly contentious rules, defined as those that receive some interest group lobbying during OIRA review, Haeder & Yackee (2018) find that rule content changed, on average, 18% during OIRA Final Rule review across the period of 2005–2011.

Given this high rate of rule change—which is especially notable given that it occurs at the end of the rulemaking process and right before the Final Rule is issued—it may come as no surprise that agency officials often suggest that the president's OIRA plays a pivotal role in rulemaking. Indeed, West (2009) argues OIRA has a much more important role than Congress, especially after rulemaking is under way. OIRA review, however, is not without its critics. The process is seen as opaque (Shapiro 2011, Wagner 2015), which is a criticism that has dogged OIRA review since its inception (DeMuth & Ginsburg 1986). Some have also suggested that agency rule writers may try to structure their rules to avoid attention from OIRA (Notes: OIRA Avoidance 2011, Nou 2013; but see Acs & Cameron 2013), while others object to the delay that may result from OIRA review (McGarity 1992; but see Yackee & Yackee 2010).

Presidents have tools beyond OIRA review to interject politics into rulemaking. For instance, we know that presidents make strategic appointments to head public agencies (Lewis 2008, Resh 2015), and shifts in presidential appointments are likely to affect regulatory decision making and content. However, there has been little large-scale empirical work exploring how presidential appointees at agencies affect the timing or content of draft regulations.

Congress. Congress employs various tools to heighten agency accountability and responsiveness during rulemaking. The many-pronged approach used by Congress suggests how important—and perhaps how difficult—it is to achieve accountability after Congress delegates policymaking authority. As MacDonald (2010, p. 766) summarizes, "Scholarship on the lawmaking system in the United States emphasizes that such delegation creates problems for the U.S. Congress when it comes to maintaining control over public policy." Specifically, I differentiate between two types of congressional influence: "statutory control provisions" and "oversight" tools (Bawn 1995, p. 102).

When thinking about the influence of statutes in rulemaking, scholars have divided statutes into two camps. The first camp provides the general governance architecture and reporting requirements across all rulemaking. Thus, these statutes work by structuring the process in which agencies make decisions (McCubbins et al. 1987, 1989). The APA—and its establishment of notice and comment rulemaking—is the premier example. As stated above, it creates in statute a regulatory process that legitimizes and systematizes agency rulemaking decisions (Kerwin & Furlong 2011). However, some scholars suggest that it also provides a mechanism for congressional accountability. "By structuring the rules of the game for the agency," write McCubbins et al. (1987, p. 255), "administrative procedures sequence agency activity, regulate its [the agency's] information collection and dissemination, limit its available choices, and define its strategic advantage." Specifically, McCubbins et al. (1987, 1989) write that the taking of public comments, which they consider an administrative procedure, allows affected interest groups to monitor agency policymaking activity and then alert Congress when an agency may be deviating from congressional priorities. This allows Congress to be a more passive actor during the writing of most rules, thereby decreasing the time and attention Congress must expend to hold agencies accountable.

Other congressional statutes also structure agency rulemaking writ large. Shapiro & Moran (2016) review several regulatory reform efforts—the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandate Act, the Small Business Regulatory Enforcement Act, and the Congressional Review Act (CRA)—to discern the degree to which they accomplish congressional goals. Many of these statutes require agencies to perform additional analyses before promulgating select rules—including, at times, additional reports on a rule's impact on small businesses or state and local governments. In theory, these administrative procedures should increase accountability. However, Shapiro & Moran (2016) are pessimistic, especially given the compliance discretion provided to agencies within most of these statutes. Yet, in one case—the CRA—recent activity "trumps" this conclusion. The CRA, which passed in 1996, provides an expedited process for Congress to overrule a regulation before it is implemented. Before 2017, it had only been used one time (Shapiro & Moran 2016). However, in his first four months in office, President Trump signed 16 congressional resolutions disapproving rules, and more are expected (GW Regul. Stud. Cent. 2018).

The second camp focuses on how the specific provisions in statutes affect rule content and thus congressional accountability. For instance, all rules must reference one or more statutes that officially delegate rulemaking authority to the agency (Rossi 1999, Funk 2001). This delegation decision is important, because, as Ferejohn & Shipan (1990, p. 2) suggest, "[w]hen Congress delegates authority to an agency, it permits the agency to make the first move: to establish a policy or course of action which, if it is not preempted…will be the policy that prevails." Of course, Congress can pass new legislation, but this can be hard to do (McCubbins 1999).

Moreover, not all delegation decisions are alike. West & Raso (2012) find that Congress can play a key role in establishing an agency's rulemaking agenda (by which they mean which rules are written and when), and they emphasize that this congressional accountability power is important both in an absolute sense and in relation to the president and the courts. However, the authors' findings are conditional. In short, Congress can play a key agenda-setting role, but it often does not. In fact, West & Raso's (2012, p. 495) empirical analysis suggests that less than half of the rules in their study were specifically mandated by congressional statute, which suggests that the remaining rules were "pursuant to statutes that authorized but did not require them to issue a rule."

Yackee & Yackee (2016) also distinguish between congressional statutes prescribing that an agency must write a rule and those stating that an agency may write a rule. These delegation distinctions hold important implications for congressional accountability. Yackee & Yackee (2016)

find, for instance, that if a congressional statute requires the writing of a rule, then there is an increased likelihood that a rule will actually be promulgated by an agency (in comparison to rules beginning with "may" authority). Moreover, Yackee (2006b) uncovers separate policy effects; her analysis of 40 agency rules and almost 1,500 public comments finds that agency responsiveness to interest groups during the notice and comment process decreases when congressional authorization is clear. This finding broadly matches West & Raso's (2012) point that rules not prompted directly by congressional statutes are usually initiated at the behest of other external interests, such as businesses and trade associations.

Some administrative procedures are found within statutes that enable rulemaking, and these can differentially affect agency responsiveness to Congress (Epstein & O'Halloran 1999, Potoski 2002). One striking example of this type of procedure is the statutory requirement that an agency write an NPRM, Final Rule, or both by a prescribed date. These congressional deadlines can be powerful tools (Carpenter et al. 2012). Indeed, Kerwin & Furlong (2011) conclude that deadlines are the most important indirect oversight mechanism in the congressional arsenal. Lavertu & Yackee (2014) estimate the effect of statutory deadlines on the probability of NPRMs being finalized, as well as on the ability of agency officials to meet their target dates for rule promulgation. They find that agencies are more likely to finalize NPRMs when a deadline is in place but that deadlines do not improve an agency's overall estimate as to when a Final Rule will be issued. Similarly, Yackee & Yackee (2010) find that statutory deadlines decrease the overall time between NPRMs and Final Rules—suggesting that they speed up the rulemaking process.

For those statutes without deadlines, which are the majority of statutes providing rulemaking authority, another distinction becomes important: Some agencies employ their statutory authority quickly to write rules, while others may rely, for their rules' legal basis, on statutes that are decades old (Yackee & Yackee 2016). When old statutes are used to deal with new problems, there can be important implications for congressional accountability (Freeman & Spence 2014; see also Callander & Krehbiel 2014). As Freeman & Spence (2014, p. 11) write, "Over time, circumstances change, the preferences of voters, regulatory agencies, and successive Congresses may diverge from those of the enacting Congress, while agencies continue to operate under the legislative mandate established by the enacting Congress." After all, many agencies are currently implementing laws passed decades ago, and the policy preferences of today's Members of Congress differ considerably; this suggests a weakness attached to Congress's use of statutes to control agency rulemaking (Yaver 2015).

Congress has numerous tools beyond statutory control to affect rulemaking. Its general oversight tools include setting agency budgets, holding oversight hearings, structural choices about how agencies will function, and the power to approve the appointments of many cabinet-level officials (Yackee 2006b). These tools are undoubtedly important in terms of the oversight environment for agencies generally, even when they do not specifically reference agency rulemaking activity.

Courts. Similar to the executive and legislative branches, the courts have formal and informal powers over agencies. However, with reference to rulemaking, the courts' ability to review the development of agency rules is, arguably, their key accountability tool. Indeed, agency officials are frequently portrayed as strategic actors during rulemaking—cognizant of the risk that their regulatory actions may be "overturned in the courts" and acting accordingly (Freeman & Spence 2014, p. 3).

Croley (1998) places special emphasis on how changing judicial review standards have shaped agency rulemaking over time. While court approval has served to legitimize agency regulatory policymaking (Meazell 2011), it has also been a moving target for agency compliance. Many of these

shifts began in the 1970s, when the federal courts began reinterpreting the notice and comment requirements in ways that provided new meaning to several words and phrases in the APA (Croley 1998). For instance, the courts held that adequate "notice" must be provided within NPRMs to the potential policy changes contemplated by the agency, thereby allowing affected parties the opportunity to comment (Funk et al. 1997). The courts also held that agencies must fully explain their decision-making process in the preamble of Final Rules in order to better explicate their reasoning (Yackee & Yackee 2010).

Kagan (2001, p. 2267) argues that these shifts occurred, in part, "to ensure that all affected interests could participate meaningfully in the rulemaking process." In short, judicial review of rules adds incentive for agencies to take public comments seriously, or as Yackee & Yackee (2010, p. 265) conclude, "[A]gencies that failed to give proper consideration or justification would risk seeing their rules overturned in court." Even broader, courts were thereafter seen as more likely to overturn rules when an agency did not respond meaningfully to public comments (Funk et al. 1997), and Wagner (1995, p. 1655) goes one step farther, suggesting that "[i]f the validity of the final regulation is challenged in court, the court's review will be based in significant part on how well the agency responded to the public's comments."

Courts have also insisted that agency decisions be based on "substantial evidence," or at least not be "arbitrary [and] capricious" (Wagner 1995, p. 1661), and "consider the record that was before the agency at the time it made its decision" (Meazell 2011, p. 734). These shifts increased the transparency attached to regulatory decision making. However, they also required agencies to produce much larger rulemaking records and to spend more time justifying their rules (Radin 2015). This led some prominent observers to suggest that rulemaking has become procedurally overburdened (McGarity 1992; but see Yackee & Yackee 2010, 2012). That said, agencies are practiced at persuading the reviewing courts that they have considered the issues raised in the public comments (Jasanoff 1987), and the courts generally defer to the agency's interpretation of scientific and technical determinations (Meazell 2011). These facts suggest that agencies retain some discretion during the rulemaking process, especially with regard to deciding when and how to change their draft NPRMs in response to public comments.

Public Participation

The public participation component of notice and comment rulemaking has been heralded by some observers as a transparent way to open lawmaking to public scrutiny and by others as a way to address the "democratic deficit" (Bignami 1999, p. 451) that is often attached to policymaking by unelected bureaucrats. After all, agency rulemaking makes questions of democratic legitimacy more complicated because agency policymakers, who are not typically elected officials, are primarily responsible (Rose-Ackerman 2018). Moreover, across American history, there has been great skepticism attached to "expert" decision making, particularly with regard to government policy (Radin 2015). In part, the ability of the public to participate directly during the formation of agency policies is seen as a way to mitigate—albeit incompletely—these concerns (Kerwin & Furlong 2011).

Interest groups. The fact that agencies must share their draft policy proposals with the public appears—at first blush—to open government agencies to a high degree of public feedback. However, in reality, representatives of interest group organizations are the main "public" participants to most rules (Golden 1998, West 2004, Yackee 2006a, Epstein et al. 2014). Two factors help to drive this relationship. First, regulatory participation, itself, is costly. Rossi (1997), for instance, suggests that few Americans have the expertise to monitor bureaucratic policymaking, while Kerwin

& Furlong (2011) point out that a citizen must know not only that a regulation is being formulated but also how and when to participate. This is a high bar for most Americans. Second, to be influential during rulemaking, commenters may require resources and technical expertise. As Epstein et al. (2014) suggest, agency rule-writers—who are often chosen because of their technical or policy-specific expertise—privilege the type of data-driven arguments and reasoning that are not common to citizen comments.

When taken together, these factors suggest why interest group lobbying may occur at a higher rate than citizen lobbying. In short, interest groups are better able to afford the costs of regulatory participation (Yackee 2006a). This may come as no surprise to students of interest group politics, who have long known the difficulty of collective action across citizens (Olson 1965), as well as the problems associated with mobilizing citizen groups, who have no ready-made constituency and no easy sources of political funding (Walker 1991). These factors, as I elaborate below, begin to explain why agency officials may be more likely to heed the arguments made by certain types of groups over others.

We have known for years that interest groups lobby to achieve their policy preferences during rulemaking, but scholars have only recently begun to measure the impact of this lobbying quantitatively. This lack of attention is surprising. After all, survey results demonstrate that interest groups believe their participation in rulemaking to be important—in fact, as important as their lobbying of Congress, and more important than engaging in litigation, grassroots lobbying, or political contributions (Furlong & Kerwin 2005). Moreover, Furlong (1998) finds that agency officials often perceive themselves to be responsive to interest group feedback during rulemaking.

The feedback provided by interest groups during rulemaking generally takes the form of comments submitted to NPRMs. Young et al. (2017, p. 349) conclude, "While the comment letter responses certainly do not represent the only mechanism available for advocacy, the existing literature regards these responses as nevertheless providing a relatively systematic 'trace' of interest group mobilization." Moreover, Chubb (1983; see also Lubbers 2006) finds that interest groups often submit written comments during rulemakings to register their views "on the record," and thus, to provide documentation if they later desire to appeal an agency's rulemaking action within the courts.

Moreover, there are reasons why agencies may strategically court interest groups (Moffitt 2010, Carpenter & Krause 2012) or even find it advantageous to be responsive to group lobbying. As Rourke (1984, p. 56) writes, "One major advantage that the support of interest groups has for an executive department is that such groups can often do for a department things that it cannot easily do for itself." Interest groups may, for instance, assist agencies in building political coalitions (Carpenter 2002), transmit information (Rourke 1984), or increase public awareness over budgetary issues facing agencies (Hrebenar 1997).

Despite these rationales, a robust scholarly debate concerns the importance of lobbying during the notice and comment process. Some have argued that few, if any, major changes occur during the notice and comment period (Golden 1998, West 2004), and interest groups rarely achieve all of their requested changes in Final Rules (Kerwin & Furlong 2011). Some work downplays the importance of the notice and comment period and instead suggests that lobbying influence during the pre-NPRM stage of rulemaking is more impactful (Harter 1982, Chubb 1983, West 2004). For example, Magat et al. (1986) suggest that agencies try to balance the demands of different interest groups to minimize the conflict and criticism the agencies receive, and they are especially good at doing so during the pre-NPRM stage.

In contrast, Yackee's research implies that interest group influence may occur across the rulemaking process: early (during rule development), late (during the notice and comment period), and really late (during OIRA Final Rule review). For example, Yackee and colleagues (Naughton

et al. 2009, Nelson & Yackee 2012, Yackee 2012) uncover suggestive evidence of interest group influence during rule development. They focus on 36 US Department of Transportation rules and a sample of almost 500 comments, and they employ both quantitative and qualitative methods to study pre-NPRM group influence. Each of these rules began with an Advance Notice of Proposed Rulemaking procedure, which allows for the tracking of formal participation by interest groups during rule development. The authors find a strong agenda-setting role for early commenters—suggesting influence on the content of NPRMs and, importantly, thwarting unwanted regulations early in the process. Using survey evidence from early participants, Yackee (2012) builds on these findings by exploring how ex parte lobbying—i.e., "off the public record" conversations between lobbyists and regulators, which are common before the NPRM is issued—may influence regulatory content, finding that this type of early lobbying appears to play both "agenda building" and "agenda blocking" roles during the rule development stage. Yackee (2015b) explores the rule formation stage in one American state by gathering data from government records, a survey of interest groups lobbying on a sample of rules, and interviews with the agency rule-writers. Yackee concludes that those interest groups who have the resources to lobby broadly—by, for example, providing formal comments and holding ex parte conversations with agency officials—seem to be the most successful in driving state regulatory policy change.

During the notice and comment process, Yackee also finds suggestive support for interest group influence across a number of studies. In one article, Yackee (2006a; see also Yackee 2006b, McKay & Yackee 2007) focuses on a sample of 40 regulations drawn from four federal agencies, which produced almost 1,500 public comments. Human coders assessed each comment, as well the draft and final regulations—coding the overall regulatory change that took place during the notice and comment process, as well as agency responsiveness to the top policy changes requested by commenters. Yackee (2006a; see also Yackee 2014) finds a strong correspondence between the regulatory direction signaled in the public comments and the policy change that took place during the notice and comment period, as well as evidence that the specific policy recommendations made in the interest group comments often made their way into Final Rules. Haeder & Yackee (2015) explore the possibility of interest group influence during the OIRA Final Rule review process. They find that, for those rules with OIRA lobbying, more interest group activity is associated with more policy change during OIRA review.

Business interests. Not all interest groups are created equal, and this may be especially true during agency rulemaking. Most rules hold broad benefits for society; however, the costs of rule compliance are often narrowly focused on particular industries (see Wilson 1989). This suggests that affected interests—often business interests—will participate at higher rates during the comment submission process, and this is, in fact, documented in several studies (e.g., Yackee & Yackee 2006). It is also true that business interests often bring more specialized knowledge to their public comments, which may increase their relative impact. In fact, Yackee (2015a) finds, using evidence drawn from a survey experiment, that rulemaking participants believe public agencies to be more responsive to the concerns raised by business interests than to those of ordinary citizens.

Jewel & Bero's (2007) work provides one rationale; it suggests that agency officials provide more attention to abstract and technical arguments, such as those often produced by larger and more sophisticated business interests, while minimizing moral and personal arguments, such as those often found in citizen comments. Pagliari & Young (2016), for example, study the degree to which voices outside of affected businesses are mobilized during the writing of financial rules. They find that fewer types of participants are present when the technical complexity of a rule increases. Furthermore, given the complexity and technical knowledge attached to some regulatory fields, individuals may cycle in and out of government work and industry, creating connections and

increasing influence. Young et al. (2017), using network analysis techniques, study how "close" select business organizations are to the US Securities and Exchange Commission (SEC). They focus on employment ties and find that when there are greater direct and indirect ties between an organization's employees and the SEC, those organizations have a greater likelihood of submitting public comments to the SEC.

Select research also suggests that business interests may be more influential during the notice and comment period, especially when other participant types do not counter business voices. For instance, Yackee & Yackee (2006) find a bias toward business commenters, while Haeder & Yackee (2015) find more regulatory policy movement when business interests dominate other types of lobbying entities. However, this does not necessarily imply that business interests have "captured" agency rulemaking (Yackee & Yackee 2006; see also Nixon et al. 2002, Carpenter & Moss 2014). Yackee's (2014) study of 36 US Department of Transportation rules across the rulemaking process—including rule development and the notice and comment process—theoretically distinguishes between influence and capture before going on to demonstrate that business interests participate at high rate and appear to hold influence over some rules. Yet, the results do not suggest domination. Moreover, Yackee concludes that, in this sample of rules, the participation of subnational government officials may have provided a hedge against capture by diversifying the information provided to agency officials during the commenting process.

FUTURE RESEARCH DIRECTIONS

The concentration of this article on quantitative studies of notice and comment rulemaking, and how it may provide points of entry for political factors—especially presidential, congressional, and court accountability, as well as interest group influence—suggests many complementary opportunities for future scholarly research and inquiry. I suggest three below.

Agency Autonomy

Future rulemaking research ought to explore how agency autonomy influences rulemaking processes, outputs, and outcomes. Within political science, there is a growing literature measuring the policy preferences of public sector agencies, as well as the officials who occupy them (Nixon 2004, Clinton & Lewis 2008, Bertelli & Grose 2011, Clinton et al. 2012), and scholars have begun to assess what preference differentiation between agency officials and their political principals may mean for policy (Golden 2000). Moving forward, rulemaking scholars must build on this literature, and in doing so, they will uncover new insights into how the political preferences of agencies and agency officials may affect the timing, process, and type of rules that are promulgated. We also know that agency autonomy is a dynamic construct (Hammond & Knott 1996); thus, we need new, over-time studies of the conditions that affect autonomy and how these conditions may affect the key tool of agency policymakers: rulemaking.

Such studies ought to build on existing knowledge. As Yackee & Yackee (2010, p. 266; see also Yackee & Yackee 2012) write, much of the present literature, particularly within the political science tradition, "ignores the possibility that agencies may successfully resist or undermine efforts to restrict their procedural and substantive autonomy and discretion." Spence (1999) and Hamilton (1996) provide concrete examples of how government agencies may successfully fend off unwelcomed advances by political principals. West & Raso (2012) also demonstrate that agencies have a great deal of discretion regarding which rules to write and when, while Yackee & Yackee (2010) suggest that agencies may be able to shift resources around to accomplish goals. Such findings—as well as new research on this important topic—will provide additional answers to

the numerous scholars who worry about excessive political accountability (McGarity 1992, Pierce 1985, Seindenfeld 1997) during rulemaking and spillover effects that may result in poor performance or bureaucratic apathy (Mashaw 1994).

To move this literature forward, scholars ought to consider a greater emphasis on empirical research conducted on and across the American states. As Palus & Yackee (2016) demonstrate, old theories—in their case, an investigation of autonomy and an ultimate questioning of the so-called "allied principal"—can often be assessed with a richer set of contextual factors when looking across the states and over time. A greater emphasis on subnational governments will allow future researchers to include variation on the institutional structures, as well as partisan configurations, to add to our understanding of how such political arrangements may or may not affect agency autonomy.

Data and Methods

Future rulemaking research ought to push new data collection boundaries to advance our empirical understanding of rulemaking as well. Most of the quantitative research on rulemaking thus far uses observational data to study patterns and correlates. This has made definitive statements on causality and interpretation difficult. However, as Carpenter (2010, p. 29) states, "The problem is that political life…does not often produce experimental data." Future scholars ought to wrestle with how to better use observational data—as well as to employ experimental approaches, such as survey experiments (e.g., Yackee 2015a) and appropriate field or lab experiments—to better understand the mechanisms at play during rulemaking. It is also true, however, that scholars routinely study many rules, agencies, and years in their analyses now (e.g., Yackee & Yackee 2010, Haeder & Yackee 2015)—a somewhat recent advance. Moreover, new advances in text analysis software are likely to pay large dividends in terms of our understanding of over-time rulemaking trends in the near future.

Agency Guidance Documents

Future quantitative research ought to explore the use of agency guidance documents in an effort to increase our systematic understanding of agency policymaking tools. We already know that agency guidance documents are major regulatory instruments that impact millions of Americans daily. We also know that the use of guidance documents across federal agencies is believed to be "massive" and in some agencies, such as the FDA, outweighs the use of notice and comment rules (Mendleson 2007). However, at present, there is no definitive tabulation of agency guidance across the government. Moreover, guidance documents are universally unknown to political scientists (in contrast to administrative law scholars) and almost never studied empirically (but see Hamilton 1996). We need to expand beyond notice and comment rulemaking to better understand the potential trade-offs between legally binding agency rules and other agency policy tools, especially agency guidance statements (McGarity 1992, Yackee & Yackee 2010, 2016). We also need to understand how the accountability tools used by political principals to influence notice and comment rulemaking perform during guidance development, as well as whether, how, and to what effect interest group lobbying during guidance development affects agency regulatory outputs.

CONCLUSION

We ask nonelected agency officials to do political things during rulemaking. We ask agencies to protect the environment but not to damage the economy; to review the safety of medical devices

but not to take too long; to promote citizen wellbeing in transportation but not at high costs; and to ensure a secure banking system but not to make it overly complex. These trade-offs suggest why the issuance of legally binding public policy decisions by administrative officials—who, generally speaking, receive their positions due to their technical, policy, and/or scientific expertise—can be such inherently controversial actions. In short, there is a great deal of politics in rulemaking.

Take for example President Trump's Executive Order 13777, titled "Enforcing the Regulatory Reform Agenda," which was issued on January 30, 2017. It leaves the president's key tool of OIRA review in place while adding the requirement that for every one new significant rule issued by an agency, at least two prior rules must be identified for elimination. The focus here is on regulatory costs—largely to the exclusion of regulatory benefits—with the goal being that the total costs of the new rule ought to be equal to or less than the costs of the repealed rules. However, exceptions are built in, including that independent regulatory agencies are not covered by the order and significant agency guidance documents are covered only on a case-by-case basis. Perhaps more importantly, the Director of the Office of Management and Budget, who is a presidential appointee and supervises OIRA, has broad powers to waive the 1-in-2-out requirements (and it will be interesting to watch whether such waivers appear to be used on rules that the president supports). Additionally, all rules that are required by law, including those with congressional or court-imposed deadlines, may proceed. Although at the time of this article's writing the full implications of the order remain unclear, it may increase the use of cost–benefit and policy evaluation tools in the regulatory state. However, it may also reduce the regulatory agenda-setting powers of nonindependent agencies—powers that such agencies often used to further their mission—because nonrequired significant rules will become much more difficult for agencies to promulgate without presidential support.

It may seem as if rulemaking is becoming more political, not less—indeed, the vignette on state-level rulemaking that began this article seems to suggest as much. In that example, a political interest group petitions the courts to address a grievance of the legislature and the elected executive with regard to the rulemaking powers of a public sector agency. However, to be fair, rulemaking has been political since the passage of the APA in 1946 (West 1995, Rosenbloom 2014). Given this history and its importance to governance, public policy, business, and modern society, we need more research—especially quantitative research that employs the diverse approaches common to political science—to unpack and to understand the politics of rulemaking in the United States.

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