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Does Process Matter: Regulatory Procedure and Regulatory Output in the States

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“If you have ten thousand regulations you destroy all respect for the law.”
Winston Churchill, 1931

Introduction

Perhaps Winston Churchill overstated the effect of thousands of regulations yet rulemaking in the states now exceeds this threshold. Fortunately it also offers scholars the opportunity to gain greater insight about regulatory outcomes and the regulatory process. In 2007, the number of rules adopted topped 8900 in 28 states across the nation. If one were to extrapolate this level of activity to the remaining states, the number of rules adopted would be close to 16,000.

The sheer volume of activity suggests that rulemaking in the states has become much more widespread than it was when many state legislatures began to pass their administrative procedures acts more than 40 years ago. At the same time, states have gone through significant revisions of their administrative procedures. Some have gone to great lengths to conduct numerous analyses of their regulations in order to more accurately assess and presumably mitigate the effect rules would have on the public and regulated communities. Finally, many states have embedded legislative and executive oversight provisions in their state constitutions or statutes in an attempt to imbue the regulatory process with greater democratic accountability.

Such a wide diversity of rulemaking procedures presents a natural laboratory in which to study several questions that have long interested scholars of the regulatory process. Do regulatory procedures lead to fewer regulations? If so, which ones? Or do political factors play more of a role in regulatory outcomes? Some political scientists argue that procedures are a means by which elected officials control unelected bureaucrats. Our findings cast doubt on this argument and on the importance of some regulatory procedures. Moreover, our findings suggest that the level of rulemaking is more closely correlated to the lawmaking activity in the state rather than proceduralization which suggests no disrespect for the law as Churchill argued, but rather that the lawmakers themselves have given rise to the thousands of regulations in the states.

In this paper we examined data from 28 states that provided access to final regulations online. We collected data on the regulatory process for each state, including data on executive and legislative review, requirements for impact analyses, and the nature of the public comment process. We also collected data on all rules issued in 2007 in each state by agency and by topic. Finally we have data on political and demographic variables in each state.

Overall, we found that many of the regulatory procedures in a particular state did not affect the number of rules adopted. More to the point, states with more regulatory procedures *did not* issue fewer rules. The procedural provision that appeared to have the greatest effect on regulatory output was a requirement that agencies complete their rulemaking within a prescribed period of time. This requirement led to fewer rules being

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promulgated. Executive review appeared to deter rulemaking but only when the governor was a Republican. A combination of executive and legislative review may work to deter regulation.

What did seem to matter was politics, but not at all levels. States with Democratic legislatures promulgated an average of 475 rules while states with a split legislature promulgated an average of 360 rules; however, states with a Republican legislature only adopted 203 rules on average. The relationship continues when one eliminates budgetary and administrative regulations. There appears to be no real difference in the number of rules promulgated in 2007 based upon the party of the governor. These partisan demographics as well as the procedural variables examined are analyzed in more detail in Section IV.

This article proceeds as follows. The next section reviews the literature on the federal rulemaking process and the sparser literature on state rulemaking. Section III describes our data collection process, the variables studied and provides some definitions. In Section IV, we present our analysis. Section V discusses the results, offers conclusions and outlines future research planned.

Regulatory Procedures and Regulatory Output

The idea that procedures put in place by legislatures or executives were means of influencing agency decisions was most prominently put forth by McCubbins, Noll and Weingast (commonly referred to as McNollgast (1987, 1989)). They argued that enacting coalitions of political actors attempted to ensure that future agency actions comported with the enacting coalition's preference. The political actors did so by creating a procedural environment that would recreate the interest group environment faced by the enacting coalition. Such a procedural environment (called deck stacking by McNollgast) would lead to agency decisions that mirrored the preferences of the enacting coalition.

The McNollgast framework was expanded upon by numerous scholars (Lupia and McCubbins 1994; Ferejohn and Shipan 1990; Bawn 1995). Huber and Shipan (2002) acknowledge that "[s]cholars seem to agree that the use of procedural rather than policy details represent the most important way in which Congressional majorities use legislation to influence bureaucratic autonomy," McNollgast (1999) examined the Administrative Procedure Act and concluded that it fits well within their earlier description of procedural controls.

The usefulness of procedural controls as means of controlling bureaucratic discretion has its critics however. Horn and Shepsle (1989) argue that such controls limit agency drift (bureaucratic preferences that deviate from those of the enacting coalition) by empowering future political actors or existing coalitions. These later policymakers may have different preferences than the enacting coalition leading to "coalitional drift." In fact, the existing coalition may use the procedural controls put in place by the enacting coalition to achieve their own policy goals. West (1997) and Robinson (1989) cite other problems with the McNollgast framework.

Empirical studies of the role of procedures have focused on the federal rulemaking process. Procedures such as notice and comment (e.g. Golden 1998; Yackee 2006; West 2004) and cost-benefit analysis (e.g. Shapiro and Morrall 2011; Harrington, Heinzerling, and Morgenstern 2009) have been examined in the most detail. Executive review at the Office of Management and Budget has also received some empirical attention (Croley 2003). Because legislative review does not exist in a meaningful way at the federal level, it cannot be examined empirically using federal data.²

The empirical literature on the effect of procedural controls on the federal level is at best indeterminate. Researchers have found that agencies often try to make their key regulatory decisions before procedural controls kick in (West 2009). While each of these mechanisms (notice and comment, economic analysis, and executive

² The Congressional Review Act, the primary means for federal legislative review has been used once in its 15 years of existence (Finkel and Sullivan 2011)

review) can be shown to have an impact in particular circumstances, the literature on the federal level appears to indicate that they do not have systematic effects on agency decisionmaking. None of these procedures appear to ensure that the will of the enacting coalition that put the procedure in place is followed.

Recently there has been more work on state regulatory processes but still less examination than on the federal level. Rossi (2001) has called for greater attention to administrative law on the state level. Clingermayer and West (1992) tried to explain why certain states adopt certain procedures but found few discernible patterns. Renfrow, West, and Houston (1986) looked at the same question and found that professionalism of the legislature led to more procedures but professionalism at executive agencies led to fewer.

As for the actual application of administrative procedures and their influence on bureaucratic decisionmaking, Whisnant and De Cherry (1996) looked at the use of cost-benefit analysis in North Carolina and raised questions about its application there. Potoski (1999, 2002) found that legislatures use administrative procedures to manage uncertainty (both technical and political) and fewer procedures results in a greater range of choices for agency policymakers. Shapiro (2002) found that procedural controls have little impact on the development of child care licensing standards.

Several articles rely upon surveys of agency officials that asked about their perceptions of influence from the political branches of government and interest groups. This is different than measuring the actual influence but is still informative. In a 2004 article, Woods found that agency officials perceived gubernatorial oversight as more effective than legislative oversight. He followed this up in a 2005 article showing that stronger political branches led to decreased perceptions of interest group influence. Woods also used the survey data to conclude that provisions broadening access and notification to the rulemaking process increased the perception of influence of outside actors, particularly the courts and interest groups.

A number of articles have focused on legislative review on the state level (perhaps because such a procedure is absent at the federal level). The literature shows mixed results for the impact of legislative review. An article in the *Harvard Law Review* (2007) examined legislative review in Connecticut and Alaska and showed that it did result in changes of agency regulations. Ethridge (1984) examined legislative review in three states and found that stricter rules were more likely to be reviewed. Poggione and Reenock (forthcoming) examine the impacts that legislative review has on legislative preferences for oversight. Finally, Hahn (2000) examined both economic analysis and legislative review. He found many requirements but little evidence that the requirements had improved regulatory outcomes.

So the question of whether procedures affect policy remains unresolved in the regulatory context but the limited evidence suggests that the impact of procedures on policy is small. Our intent in this paper is to use the “laboratories of democracy” to examine cross-state variation in regulation. If regulatory procedures such as executive review, legislative review, and economic analysis have an impact on regulation, that impact should manifest itself in the volume of rulemaking. Legal scholars have argued that procedures deter agencies from engaging in rulemaking (McGarity 1992).³ If this is true, then we would expect states that have a rulemaking process with more steps to produce fewer regulations.

Do states with more procedures have more rules or fewer rules? If they have more rules, it argues that both those who claim that procedures will impact agency decision-making and that procedures will disincentivize agencies from regulating are less likely to be correct. It is true that an examination of regulatory substance would be a superior test of whether procedural controls are having their intended effect. However, the number of regulations is often conflated with regulatory stringency in the public mind and in political rhetoric (Crews 2007).

³ Some have even argued that deterring rulemaking is the intention of those who put administrative procedures in place.

The relationship between the volume of rulemaking and the stringency is unlikely to be perfect but it also strikes us that they are unlikely to be unrelated.

If there is no relationship between the presence of procedures and the level of rulemaking, then do other factors in the political environment explain rulemaking at the states? Are existing coalitions able to enforce their will over state agencies regardless of the procedural environment in which they operate? In the next section we describe our data before moving on to an examination of the hypotheses that procedures and politics affect the number of rule issued by a state.

Our Data

Dependent Variable – How Many Rules?

We collected data on all rules issued in 2007 from 28 states⁴ that put data about final regulations online. Although not a full examination of the 50 states, we believe the states we looked at provide a representative sample of rulemaking activity in 2007. The final rules we studied were collected from states in all four census regions of the country: nine states from the Midwest, five states from the Northeast, and seven states each from the South and the West regions. Within each region, the Census Bureau further stratifies states into divisions with two divisions in each region with the exception of the South which has three regions. The data was collected from states in all nine census divisions. Thus while we do not have California, Texas, and Florida in our database, we feel that the states we did examine are a representative sample of the nation.

While we report the total number of rules (which was 8961 rules in the 28 states), we do not feel that it serves well as a dependent variable for state regulatory activity. States use rulemaking in different ways. For example, most states use rulemaking to administer their Medicaid program with some states issuing more than 50 “Medicaid rules” in 2007. Some states do not use rulemaking for Medicaid however, meaning that the total number of rules means different things in different states.

To deal with this problem, we borrowed a concept from the Office of Information and Regulatory Affairs. We separated out rules with a real economic impact on society from “budgetary” rules which govern programs, like Medicaid, that merely disburse funds. We also eliminated administrative rules such as those setting the hunting season for various animals because the extent to which states use rulemaking for this purpose varies considerably between states. Finally we also eliminated regulations that set rules for the state government, not the public. This left us with a variable we called “economic rules” which totaled 5356 rules for the 28 states. The total for each state is in Table I. We feel this reflects an adequate measure of the regulatory activity in each state in 2007.

Table I: Rules Per State in 2007

State	Number of Total Rules	Number of Rules With Economic Impact
Arizona	145	93
Arkansas	298	131
Delaware	191	140

⁴Data was collected from 28 states: Arizona, Arkansas, Delaware, Idaho, Illinois, Indiana, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, Wisconsin, and Wyoming.

Idaho	229	145
Illinois	381	183
Indiana	218	85
Iowa	463	254
Kansas	113	62
Louisiana	542	219
Maine	418	246
Michigan	64	58
Minnesota	72	36
Missouri	184	126
Montana	160	70
Nevada	674	562
New Hampshire	324	197
New Jersey	474	371
New Mexico	546	319
New York	681	514
North Carolina	152	110
Oklahoma	508	274
Pennsylvania	77	44
South Dakota	78	45
Tennessee	281	172
Virginia	367	237
Washington	993	484
Wisconsin	134	99
Wyoming	194	80

Independent Variables: Procedural Controls

We collected data on the regulatory process for each state, including data on executive and legislative review, requirements for impact analyses, the nature of the public notice and public comment process, rulemaking deadlines and sunset provisions. During our data collection process, the Institute for Policy Integrity issued a detailed report on the role of executive and legislative review, impact analysis and sunset provisions in the states. This data was far more extensive than anything previously available and became the primary source for our data on these procedural controls.

For legislative review, executive review, and impact analysis, we developed ten point scales for the extent of the reach of each procedure in each state in our database. The ten point scale for each of these variables is detailed in Appendix I. Several scales on legislative review had been developed (prior to the issuance of the IPI report). Our scale has a correlation coefficient of 0.62 with Gerber, Maestas, and Dometrius's (2005) scale and a correlation coefficient of 0.63 with the scale developed by Grady and Simon (2002). Agreement with the executive review scale developed by Grady and Simon was less strong with a correlation coefficient of 0.47. However, detail on executive review before the IPI report was harder to access because much of it is informal (as opposed to legislative review which is often in statute) so we believe our data is the best available. We also collected dichotomous data on whether or not states required a written response to agency comments, whether agencies sunset their rules, and whether they place a deadline on rulemaking.

Independent Variables: Politics and Demographics

We collected data on political variables in each state in an effort to control for differences in political preferences for regulation. First, we measured for differences in political culture which was defined by the general election vote for President in the 2004 cycle. We also collected data on the partisan control of the governor's office and both chambers of the legislature in 2007; we further noted those instances where control of the legislature was divided. With the exception of two states, New Jersey and Virginia, state legislatures elect their members in even numbered years which means that the 2007 legislature was the first year of a new session for most states. Given the likelihood that some rules finalized in 2007 resulted from lawmaking in the prior session, we took a look at partisan control in 2006. While individual members may have changed, the partisan make-up of the states changed only slightly in 2007 as compared to 2006. In six states the partisan control shifted from a single party control to split control;⁵ only New Hampshire shifted from Republican control in 2006 to Democratic control in 2007.

Finally, we collected information on demographic variables that may affect the volume of rulemaking which are state population, state budgets measured in nominal dollars and the professionalism⁶ of the state legislatures. Regarding population ranking within the US, data was collected from states in each quartile; the count ranged from six to eight states in each quartile. As for total state budget expenditures (which consists of general funds, federal funds, other State funds and bonds) in Fiscal Year 2007, the states in the study accounted for one-half of all budget expenditures made.⁷ Again, the budgets of the sampled states were distributed proportionately within each quartile; the number of states in each quartile ranged from six to eight. Lastly, the professionalism of the

5 Of the six states that saw party shifts in the legislative chambers, Indiana, Michigan, Oklahoma and Wisconsin went from Republican control in 2006 to split partisan leadership of the chambers in 2007; Iowa and Minnesota went from Democratic control in 2006 to split control in 2007.

6 Professionalism in state legislatures is a variable used to distinguish those bodies that more closely mirror the inner workings of Congress in terms of resources and legislative scope (Squires 1988, 1992; Kousser 2005). This construct is operationalized differently than that used by Renfrow, West and Houston (1986).

7 Data for budget expenditures obtained from the 2008 State Expenditure Report published by the National Association of State Budget Officers (NASBO), published Fall 2009.

legislatures in the dataset was examined⁸ with 21% of states having professional legislatures; 54% having hybrid legislatures and 25% of the states having citizen legislatures.

Analysis

The central question we are evaluating is whether the presence of regulatory procedures influences the level of rulemaking. We are also interested in the impact of existing coalitions on rulemaking so we will compare our political variables with the volume of regulatory activity. This section is broken up by the categories of independent variables. First we discuss the role of procedures in regulatory output and then the role of politics.

With a sample size of 28 states, our ability to use multiple independent variables is limited. After the comparisons of individual variables, a third section below includes some simple multivariable analyses. Given the limited number of correlations found in the first two sections, the likelihood that significant relationships would be found in a multivariate analysis is limited. Still, multivariate analysis can only help to strengthen our understanding of these relationships and we strongly recommend further work in this area.

Administrative Procedures

McNollgast (1987, 1989) argued that administrative procedures were a means of control for enacting coalitions over future agency decision-making. McGarity (1992) bemoaned the role procedures played in giving agencies incentives to avoid rulemaking. The 28 states we examined provide a natural experiment on the role of administrative procedures. The use of procedures varies widely across states. In this section we describe the interaction between six types of procedures and rulemaking output. As described above, three of these variables are constructed as a ten point scale executive review, legislative review and economic analysis. The other three variables are yes/no variables, sunset requirements, deadlines for finalizing rules, and the requirement that agencies respond to comments.

Executive Review

As described in the appendix, the ten point scale for the executive review variable is made up of four components. These four are whether the review is required or optional, whether it is binding or non-binding, who conducts the review (the governor's office or another office in the executive branch), and the criteria for the review. The average score is a 5.5 and the median score is a 6. There was considerable clustering near the ends of the scale with ten states receiving a zero and six states receiving a ten.

The correlation coefficient for both total number of rules and for economic rules was negative but small and statistically insignificant (-0.19 and -0.16 respectively). The negative correlation is expected as executive review is criticized as one of the procedures that often deters rulemaking. The relatively small magnitude and statistical insignificance of the relationship seems to indicate that by itself, executive review does not dissuade agencies from engaging in rulemaking.

However, if one examines the six states that scored a ten in the Executive Review variable,⁹ a possible relationship emerges. The average number of economic rules in these six states was 98 rules but the average for the other 22 states was 216 rules (breaking out the ten states that scored zero showed no relationship with level of rulemaking). This difference was statistically significant and may show that in its most extreme forms executive review has an impact on the level of rulemaking.

Legislative Review

8 Professionalism is coded as a nominal variable with three categories: professional (1) depicting 20% of states; hybrid (2) depicting 56% of states; and citizen legislatures (3) depicting 24% of states (Kousser 2005).

9 The states are Idaho, Indiana, Louisiana, Michigan, Minnesota, and Pennsylvania.

Like the executive review component, the ten-point scale for the legislative review variable has several components. Review is considered more stringent if it is mandatory instead of voluntary, if legislatures actually have veto authority (without requiring a governor's signature, and if there are fewer restrictions on the legal grounds for legislative disapproval of a regulation. The average review score is a 5.5 and the median is a five. There are fewer extreme values for this variable than for the executive review variable with only three values of zero¹⁰ and two states with a "perfect" ten.¹¹

The strength of legislative review has no correlation with the volume of rulemaking in the state. Correlation coefficients were close to zero for both total rules and economic rules. Six out of thirteen states with a legislative review score below the median issued more than the median number of rules in 2007 while six out of fifteen states above the median level of legislative review issued more than the median number of rules.

Impact Analysis

The final of our three variables with a ten point scale was the stringency of impact analysis requirements in the states. States received a higher score based on the number of rules analysis which was required (intermediate scores were given for states that had a threshold for requiring analysis), for requiring analysis of all costs and benefits instead of just government impacts, and for the type and extent of review of the analysis. The mean and median scores were both six and three states scored a zero¹² while four states scored a ten.¹³

Like legislative review, economic analysis shows no relationship with the volume of rulemaking. The correlation coefficients for both total number of rules and rules with an economic effect are both nearly zero, and the level of rulemaking for states with below and above the median analysis score are virtually identical. It appears that both economic analysis and legislative review have no impact on the number of rules that agencies promulgate.

Other Procedures

All of the states have some form of notice and comment. Only 10 of the 28 states in the study however require that agencies actually publish responses to agency comments. We hypothesized that requiring an agency response might deter rulemaking but actually found the opposite (albeit in a non-statistically significant relationship). For both total number of rules and economic rules, more rules were promulgated in the ten states with required agency responses than in the eighteen states that allowed agencies to publish final rules without a response. The difference is small and not statistically significant however.

A number of states require agencies to finalize their rules within a certain period of time from the close of the public comment period. Sixteen states (out of our 28)¹⁴ have such deadlines and the deadlines vary from 75 days after the end of public comments to two years after the comment period is concluded. Theoretically such deadlines should cut down on the number of final rules since agencies may not be able to finalize all of their proposals within the prescribed time limits.

¹⁰The three states are Arizona, New Mexico and Delaware.

¹¹ These two are Tennessee and Illinois.

¹² Delaware, New Mexico, and Wyoming have no economic analysis of regulations.

¹³ New York, Virginia, Michigan and Pennsylvania all received scores of ten.

¹⁴ The 16 states that have a sunset provision include AZ, ID, IL, IN, IA, MA, MI, MN, MT, NV, NJ, NY, PA, SD, VA, WA and WI.

And indeed, this is one procedural control that works just as predicted. States with rulemaking deadlines promulgated an average of 233 rules and 139 economic rules. States without a deadline promulgated an average of 432 rules and 265 economic rules. The differences are economically significant for both variables at the 5% level. This is the clearest impact of any administrative procedures. Placing a deadline on agency rulemaking results in fewer final rules.

The final procedure we examined was a sunset provision. States with sunset provisions issue more rules than states without them. However this may be because states with sunset provisions have to undertake rulemaking to re-promulgate sun setting rules. This alone could drive up the level of rulemaking in these states (we were unable to separate out new rules from re-promulgated rules so we can merely hypothesize that this is what is happening here).

Political Variables

If enacting coalitions can have limited effects on future agency actions through procedural controls, what about existing coalitions? We compared the party control of the governor's office and the legislature to the level of regulatory output. The clearest impact was control of the legislature. We collected data on legislative control in both 2006 and 2007 because conceivably, agencies could be engaging in rulemaking to implement statutes passed either by the current legislature or the previous one. Democratic control of the legislature correlates with rulemaking volume regardless of the session of the legislature as shown in Table 2.

Table 2: Legislative Control and Regulatory Output

2006 Party Control of Legislature	Average # 2007 rules	Average 2007 Economic Rules	2007 Party Control of Legislature	Average # 2007 rules	Average 2007 Economic Rules
D (8)	475	258	D (11)	424	231
S (7)	360	250	S (9)	323	219
R (13)	203	119	R (8)	173	104

This speaks volumes to the issue of existing coalition power in state rulemaking. Democratic control of state legislatures likely compels rulemaking from agencies more often than Republican control. Note we are not measuring whether the substance of the rules comports with the intent of the legislature. Even without this data however, the level of rulemaking output is highly suggestive of existing coalition control.

The difference between Democratic and Republican control is statistically significant for both 2006 and 2007 and for both total number of rules and for economic rules. If one includes the cases where control of the legislature was split with those where Republicans were in control (in effect arguing that control of one house of the legislature is enough to prevent the passage of statutes that require regulation), the difference in total rules between Democratically controlled legislatures (in 2006 and 2007) and all other legislatures is statistically significant but not the difference in economic rules.

Interestingly, party control of the governor's office has little relationship to the level of rulemaking output. The 21 states with Democratic governors in 2007 issued an average of 310 rules (with 184 economic rules) compared to 350 (212 economic rules) for the seven states with Republican governors. The difference is not statistically significant and goes contrary to expectations.

Combinations of Variables

One could come up with a large number of hypotheses about how combinations of the variables described above could affect rulemaking output. While our sample size is too small to run regressions with large numbers of independent variables and get meaningful results, we can look in detail at combinations of two or three variables. Even restricting ourselves to such combinations leaves many possibilities however. We decided to focus on two types of combinations. First, we examined whether procedural controls operating together deterred rulemaking, a claim often voiced by opponents of such procedures (Vladeck and McGarity 1995). Second we examined party control of the legislature in combination with legislative review and party control of the governor's mansion with executive review to see if we could shed any light on the particular impacts of these controls.

Combinations of Procedures

The simplest way to examine the impact of the three main procedures studied (legislative review, executive review, and economic analysis), is to add them together. Since all three procedural variables were given a 0-10 scale, adding them together weights them equally. The correlation between the number of rules (total and economic) and the combined score for the three procedures is slightly negative and not statistically significant, casting further doubts on the argument that procedures deter rulemaking.

We then examined the various combinations of the three controls to see if any particular combination shows an impact on rulemaking. Table 3 shows the eight possible combinations (with the median for each procedural score used to differentiate between states that use the procedure and states that don't).

Table 3: Combinations of Procedures

Analysis Score Above 6	Governor Score Above 6	Legislative Score Above 5	Average Number of Economic Rules (and number of states with more than the median number of economic rules)
Below	Below	Below	235 (2/3 above)
Below	Below	Above	212 (2/7 above)
Below	Above	Below	91 (0/2 above)
Below	Above	Above	167 (1 of 2 above)
Above	Below	Below	306 (2 of 3 above)
Above	Below	Above	197 (1 of 1 above)
Above	Above	Below	197 (2 of 5 above)
Above	Above	Above	108 (1 of 5 above)

The most striking result in this table is that the two highest average regulatory outputs occur in the states with scores for executive and legislative review that are below the median and two of the three lowest outputs occur where they are both above the median. The sample sizes are small so appropriate caution should be taken here. That said, this pattern may indicate that a lack of political oversight from either political branch may lead to a greater output of regulations. No discernible pattern emerges regarding the use of economic analysis in combination with the other controls.

Politics and Procedures

Our final examination of this data involved combinations of the procedural control variables and political control of the branches of government. First we looked at executive review in combination with the party of the sitting governor. The results are in Table 4.

Table 4: Executive Review and Executive Control

Party Control	Review Score Above 6	Average Econ+Licensing Regs
D	Below	209 (5/10 above average)
D	Above	162 (4/11 above average)
R	Below	304 (2/4 above but 2 highest)
R	Above	89 (0/3 above average)

The result in the last line is the most interesting one. While executive review by itself seemed to show an impact on regulatory output only when it was at an extreme level (see discussion above), there does seem to be an important interaction with political control of the governor's office.

Specifically, in the three states where a Republican is governor and there is executive review, a far smaller number of regulations with an economic impact are issued. This difference is statistically significant from both the remaining 25 states (at the 1% level) and the four states with Republican governors and no executive review (at the 10% level). It is possible that executive review makes little difference if there is a Democratic governor but that a Republican governor can use it to stifle regulation.

A similar result occurs when examining legislative review in conjunction with party control of the legislature. The data is in Table 5.

Table 5: Legislative Control and Legislative Review

Party Control (2007)	Review Score Above 5	Average Econ+Licensing Regs
D	Below	355 regs (4/4 above)
D	Above	161 regs (3/7 above)
R	Below	167 regs (2/8 above)
R	Above	169 regs (2/9 above)

Here the difference occurs on the other end of the spectrum. States in which Democrats control the legislature and there is weak legislative review, tend to have a higher number of regulations. The difference between this group and the combination of the other three groups is significant at the 5% level.

So review by legislatures and executives may make a difference in regulatory output but only if the existing coalition uses the review function. On the executive side this means that executive review makes it easier for a Republican governor to dull regulatory output. Executive review may be necessary but not sufficient to deter rulemaking. On the legislative side this means that regulatory output could be restrained either by strong legislative review or by having a legislature controlled by Republicans. Legislative review may be sufficient but not necessary to deter regulation.

Conclusions and Directions for Further Research

This is the first examination of the volume of rulemaking across states. The first observation is that the number of regulations issued by state government is underappreciated. In our 28 states, there were nearly 9000 rules and 5300 of them had some economic impact. The extent of regulation on the state level on its own argues for more attention to the states. While there has been an uptick in research in recent years (Woods 2005; Woods 2009, Poggione and Reenock forthcoming), both administrative law scholars and political scientists would find the states a useful area for further examination.

In addition, these findings will be helpful for states considering regulatory reform. With the recent adoption of a new Model States Administrative Procedure Act,¹⁵ states will be faced with decisions about how to modify the way they write regulations. With the level of regulation an issue that has gained in political attention, states continue to evaluate ways to improve regulation. The work presented here can be used to think carefully about regulatory reforms before implementing them.

Our primary finding about the effectiveness of procedures is that many of them have little impact on the volume of rulemaking unless accompanied by the political will to enforce them. Legislative review and economic impact analysis requirements appear to have little effect on the amount of regulation. Executive review does appear to deter regulation but this effect is most pronounced when a Republican controls the governor's mansion. It is also possible that when a state has both legislative and executive review, agencies are less likely to pursue regulatory solutions to policy problems.

One procedure that has a clear effect on the pursuit of regulation is the requirement that agencies complete rulemaking within a prescribed timeframe. By putting a deadline on agencies, enacting coalitions can reduce the volume of agency rulemaking. While legislatures and governors should be careful that any such deadlines are realistic, these deadlines may both control agency decision-making, and lead to “good government” by not allowing agencies to linger over decisions for years.

While coalitions enacting procedural requirements appear to have limited influence over future agency decisions, all hope is not lost for those supporting political control of agency officials. Partisan control of the legislature had a clear effect on the volume of rulemaking. States with Democratic legislatures issued more regulations than states with Republican legislatures. Whether this is because Democrats pass more statutes requiring rulemaking or because Democratic legislatures create an environment more conducive to regulation (or both) is unclear. What is clear is that politics matters in regulatory decision-making.

The politics that matters the most however is the politics of the moment. Existing coalitions, either through their passing of statutes or their use of procedural controls put in place by prior coalitions, exhibit considerable impact on agency behavior. While we did not look at the substance of the 5000+ regulations

¹⁵ See http://www.law.upenn.edu/bll/archives/ulc/msapa/2010_final.htm last viewed October 22, 2010.

tabulated, the relationship between existing coalitions and the level of regulations is highly suggestive that governors and legislatures are both critical in the decisions made by agencies.

For those who have argued about the paralysis or ossification of the rulemaking process, our results are a mixed bag. Blind opposition to economic analysis or legislative review on the basis that such reforms would deter rulemaking finds no support from the data presented here. Executive review may discourage agencies from regulation, but supporters of regulation may better serve themselves by opposing politicians opposed to regulations than fighting over procedures. However, the fact that deadlines on rulemaking appear to deter rulemaking, may give some support to those arguing that the rulemaking process is ossified. It is possible, that the deadlines lead to fewer rules because it takes agencies time to navigate the procedural environment of rulemaking. More procedures coupled with a deadline may mean fewer rules.

Further research on the states can illuminate the role of politics and procedures in regulation. Examinations of rulemaking at particular departments in different states may be instructive. This would also allow for a greater examination of the effect of procedures and politics on the substance of rules. It may also allow for an increased sample size (while we could not get data on all rules in the 22 states that do not publish their regulations online, it may be possible to get the regulations issued by one department). This increased sample size would allow for greater examination of the interactions between procedural controls and the interaction between procedures and the political environment.

Detailed case studies of the workings of legislative and executive review could highlight if and when these controls make a difference. Similarly more detailed examinations of the public comment process could look at whether agencies change their rules in response to public comment and if so, in response to whose public comments. One study of New Jersey (Shapiro and Borie-Holtz 2011) argued that none of the regulatory procedures had a measurable impact on regulatory substance or volume.

As we write this article, the U.S. Congress is debating numerous bills on regulatory reform (most notably the REINS Act). This debate is heavy on rhetoric about the evils or benefits of regulations and very short on the empirical impact of regulatory reform. Numerous studies of the federal rulemaking process have made valuable contributions to debates on regulatory reform but questions about the efficacy of regulatory procedures remain and the degree to which enacting and existing coalitions of politicians control agency decisions remains open. We hope that this work helps to jump start the examination of state regulatory processes and use those conclusions to better inform regulatory debates in the states and in Washington DC.

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