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*In the Regulatory Weeds
of the Garden State:
Lessons From New Jersey's
Administrative Process*

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ABSTRACT

While numerous examinations of the rulemaking process have occurred at the federal level, there is a dearth of studies about the effects of the proceduralization of the rulemaking process on state regulations. Our examination focuses on regulations promulgated in New Jersey, both prior to and following, major procedural changes enacted in the state in 2001. By choosing distinct leadership periods, one governed by Democrats and one by Republicans, we attempt to control for differences in political preferences for regulation. During the study years, we collected data on 1,707 regulations on a wide array of variables from the type of rulemaking, rule page length, degree of public comment and agency response to comments. We also examined aggregate data from the initial notice of pre-proposal to the final adoption stages from 1998 to 2007. On the whole, we found that agencies are largely immune to the procedural requirements of the state's regulatory process. Among our findings, we found that substantive comments to agency proposals are rare, impact analyses are pro forma at best, negotiated rulemaking has never been used by the agencies, and the use of specifically designed procedural tools, such as pre-notices by agencies to "test the waters" and rule adoptions initiated by the public, are atypical.

I Introduction

Over the past two decades, the regulatory process in New Jersey has (on the surface) become increasingly complex. State agencies have been required to conduct numerous analyses of their regulations in the name of greater accountability and transparency. Requirements for legislative oversight have been strengthened. Negotiated rulemaking has been required in certain circumstances. All of this comes on top of the notice and comment process that is common to rulemaking in most states and at the federal level.

Have these procedural changes resulted in "better" regulations? Have they made the regulatory process so cumbersome that agencies have turned to alternative forms of

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policymaking?¹ Answers to these questions are important for New Jersey lawmakers and agency officials because they could lead to reforms of the administrative process in the state. They are important to officials in other states because they can provide guidance about the wisdom of procedural reforms to the regulatory process. Finally, these questions, which have been debated regarding the federal administrative process, have hardly ever been examined at the state level. A better understanding of state rulemaking may also facilitate an understanding of the federal rulemaking process.

In this paper we examined 1,707 regulations in New Jersey. The regulations came from two periods, 1998-1999, and 2006-2007. By including regulations promulgated both under a Republican Governor (Christie Todd Whitman) and a Democratic Governor (Jon Corzine) we hoped to control for differences in political preferences for regulation. For each of the cycles, the legislative leaders in both chambers shared the same party affiliation as the governor. We collected data on a number of variables capturing the administrative process in New Jersey. This data included the number of comments received from the public, the length of the rule, and the presence or absence of public hearings among other procedural requirements, agency response to comments, and repropoals triggered by substantive changes. We also did a more detailed examination of the impact analyses of the most controversial rules² issued in these four years.

We found that agencies are largely immune to the procedural requirements of the regulatory process in New Jersey. Substantive changes to agency proposals as a result of comments are rare. Impact analyses are pro forma at best. Legislative review has not been used by the New Jersey state legislature to invalidate an executive branch regulation since 1996.³ Negotiated rulemaking has also never been utilized over the past 20 years by an agency. The volume of rulemaking is largely unchanged over the past decade despite changes in administration and the addition of procedural requirements.

¹ Thomas McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 Duke Law Journal 1384 (1992).

² We measure controversy by the number of comments received.

³ Our analysis of legislative review in N.J. extended from 1996 to 2009, the period for which archived records of legislative sessions are readily available to the public. Legislative review became effective on December 3, 1992.

There are numerous examinations of the rulemaking process at the federal level.⁴ The debate over the proceduralization of the rulemaking process has been inconclusive. This examination of the administrative process in New Jersey supports the argument that many of these regulatory procedures are epiphenomenal; that is they have little impact on the substance of the regulations they are designed to affect. They also do little to discourage regulation or overly burden agencies.

This article proceeds as follows. The next section reviews the literature on the federal rulemaking process and the much sparser literature on state rulemaking. In Section III we review the recent history of rulemaking in New Jersey. Section IV describes our data collection process. In Section V, we present our analysis. Section VI discusses the results and offers conclusions.

II Studies of the Rulemaking Process

The regulatory process has been the subject of much research over the past few decades. This research has appeared in both law reviews and in political science journals. Much of this research has focused on the proceduralization of the rulemaking process. The requirement that agencies follow a notice and comment process when engaging in rulemaking can be seen as the oldest of these procedures. Participation by interested parties in rulemaking predates the notice and comment process adopted in the Administrative Procedure Act (APA), passed in 1946.⁵ Many states have since adopted versions of the APA.⁶

At the federal level, many subsequent procedures have been added to the regulatory process. In 1981, President Reagan issued Executive Order 12291⁷, requiring both that agencies conduct cost-benefit analyses of certain regulations and that the Office of Information and Regulatory Affairs (OIRA) review proposed and final regulations from agencies on behalf of the President prior to their issuance.⁸ The Unfunded Mandates

⁴ See Section II below for a detailed summary.

⁵ 5 U.S.C. § 551-559.

⁶ James Clingmayer & William West, Imposing Procedural Constraints on State Administrative Agencies: An Empirical Investigation of Competing Explanations, 11 Policy Studies Review 37 (1992).

⁷ Exec. Order No. 12291, 3 C.F.R. pt 127 Admin. Mat. 45025 (1982).

⁸ Exec. Order No. 12291 was eventually replaced by Executive Order No. 12866, which continued to require OIRA review and regulatory impact analyses.

Reform Act, passed in 1995, required consideration of state and local views in regulatory decisions⁹, and the Small Business Regulatory Enforcement Fairness Act (SBREFA) required the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene panels of small business representatives to review rules to ensure that they did not unfairly burden small businesses.¹⁰ Many of these procedures have been replicated on the state level but this varies from state to state.¹¹

The role of these procedures is the subject of considerable academic debate. McNollgast highlighted the role of procedures in political control of bureaucrats more than twenty years ago.¹² According to the theory articulated by McNollgast, when Congress creates or empowers a bureaucratic agency, it creates a certain procedural environment. This environment, Congress hopes, will ensure that the interests represented by the enacting coalition remain in a favorable position with respect to agency decisions. This “deck stacking” ensures that the bureaucracy implementing a statute faces the same environment as the coalition enacting the statute.¹³

The notion that procedural controls severely constrain the decisions of bureaucrats and future politicians has received a fair amount of criticism. Notably, Horn and Shepsle argue that those implementing procedural controls ignore the tradeoff between coalitional and bureaucratic drift.¹⁴ A control that will successfully stifle bureaucratic discretion will be unable to prevent changes in policy by a new legislative coalition and vice versa. In other words, enacting coalitions may be able to control bureaucrats but the mechanisms that these coalitions create to do so, will be in the hands of future political coalitions who may be hostile to the aims of those who created the procedures.

⁹ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ4.104.pdf.

¹⁰ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-21, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:s942es.txt.pdf.

¹¹ *Supra* Note 5.

¹² Matthew McCubbins, Roger Noll & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 Journal of Law Economics and Organization 243 (1987). See also *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control*, 75 Virginia Law Review 431 (1989). Kathleen Bawn, *Political Control vs. Expertise: Congressional Choices About Administrative Procedures*, 89 American Political Science Review 62 (1995). John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 Journal of Law Economics and Organization 1 (1990).

¹³ *Id.*

¹⁴ Murray Horn & Kenneth Shepsle, *Comment on McNollgast*, 75 Virginia Law Review 499 (1989).

Another outcome of the increased proceduralization of the regulatory process has been a debate over the “ossification” of rulemaking. In a seminal article, McGarity coined the term “ossification of the regulatory process” to refer to the purported impact of judicial-review and analysis requirements – making writing regulations so difficult that agencies were turning away from the regulatory process.¹⁵ McGarity built on work by Mashaw and Harfst, who described a “retreat from rulemaking” at the National Highway Traffic and Safety Administration (NHTSA).¹⁶

The empirical data on the role of procedures is mixed and almost exclusively examines the federal rulemaking process. The notice and comment process in the APA has received the most attention. Yackee argues that comments make a difference in low salience rulemakings or when commenters agree.¹⁷ Shapiro finds they make a difference in regulations dealing with technically complex issues.¹⁸ Others find limited influence in most circumstances.¹⁹

A few works also examine the effect of the requirement that cost-benefit analysis accompany economically significant regulations. Hahn argued that the reason was agencies’ failure actually to follow the analysis requirements of the executive orders. He noted that “[t]he RIA’s [regulatory impact analyses] typically do not provide enough information to enable regulatory agencies to make decisions that will maximize the efficiency or effectiveness of a rule.”²⁰ Similarly, Viscusi and Gayer concluded, “Health and safety regulations have fallen short of any reasonable measure of performance.”²¹ In

¹⁵ Thomas McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 Duke Law Journal 1384 (1992).

¹⁶ Jerry Mashaw & David Harfst, *The Struggle for Auto Safety*, Basic Books (1990).

¹⁷ Susan Webb Yackee, *Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking*, 26 Journal of Public Administration Research and Theory 103 (2006). See also Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 Journal of Public Administration Research and Theory 245 (1998) and Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 American Politics Research 336 (2007).

¹⁸ Stuart Shapiro, *Does Participation Matter? Public comments, agency responses and the time to finalize a regulation*, 41 Policy Sciences 33 (2008).

¹⁹ William West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 Public Administration Review 66 (2004).

²⁰ Robert Hahn, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply With Executive Order 12866*, 23 Harvard Journal of Law and Public Policy 859 (2000).

²¹ Kip Viscusi & Ted Gayer, *Safety at Any Price*, 25 Regulation 54 (2002).

addition, in every edition of the federal report on the costs and benefits of regulations, numerous rules had higher costs than benefits.²²

Finally, the assertion that procedural reforms lengthen the regulatory process has received very limited empirical attention.²³ Kerwin and Furlong examined a variety of factors that affect the time it takes to promulgate a rule. They describe their results as erratic and admit that "much remains to be explained."²⁴ Balla and Wright compare the amount of time it takes to complete rules developed through consensual processes with the time to complete other rules and find no discernible difference.²⁵

While empirical work on regulatory procedures at the federal level is limited, work on the regulatory process on the state level is downright scarce. Rossi has called for greater attention to administrative law on the state level.²⁶ Clingermayer and West tried to explain why certain states adopt certain procedures but found few discernible patterns.²⁷ Renfrow, West, and Houston looked at the same question and found that professionalism of the legislature led to more procedures but professionalism at executive agencies led to fewer.²⁸

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 examined legislative review in Connecticut and Alaska and showed that it did result in changes of

²² This does not mean that cost-benefit analysis had no effect on regulations but it certainly indicates that such analysis has fallen short of the hopes of its most ardent promoters who argue that cost-benefit analysis will lead to more economically efficient regulation.

²³ In NJ, a proposal must be resubmitted if it is not adopted within one year of filing; therefore, we did not examine the length of the regulatory process.

²⁴ Cornelius Kerwin & Scott Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 Journal of Public Administration Research and Theory 113 (1992).

²⁵ Steven J. Balla & John R. Wright, *Consensual Rule Making and the Time it Takes to Develop Rule*, In George A. Krause, and Kenneth J. Meier (eds.) *Politics, Policy, and Organizations: Frontiers in the Scientific Study of Bureaucracy* 187-206 (2003).

²⁶ Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 Administrative Law Review 551 (2001).

²⁷ James Clingermayer & William West, *Imposing Procedural Constraints on State Administrative Agencies: An Empirical Investigation of Competing Explanations*, 11 Policy Studies Review 37 (1992).

²⁸ Patty Renfrow, William West & David Houston, *Rulemaking Provisions in State Administrative Procedure Acts*, 9 Public Administration Quarterly 358 (1986).

agency regulations.²⁹ Woods compared gubernatorial and legislative review of regulations and found gubernatorial review to be much more effective at influencing agencies.³⁰ Ethridge examined legislative review in three states and found that stricter rules were more likely to be reviewed.³¹ Finally, Hahn examined both economic analysis and legislative review. He found many requirements but little evidence that the requirements had improved regulatory outcomes.³² From the literature on both the federal and on state rulemaking processes, the evidence that procedures make a difference in substantive outcomes is limited. Some scholars see public comment as being important.³³ Few have found that legislative review and economic analysis make a substantive difference. Yet these procedures continue to be implemented at the federal level³⁴ and on the state level. In this article we take an empirical and systematic look at one state (New Jersey) and try to understand whether regulations have been affected by the proceduralization of the rulemaking process at the state level.

III Recent History of Rulemaking in New Jersey

Since the NJ Administrative Procedure Act³⁵ was established 40 years ago, the regulatory process in New Jersey has received intermittent attention by public policy makers in the state. Of the half dozen statutory reforms enacted since its inception -- from impact analyses³⁶, broader public hearing and comment requirements to the initiation of rulemaking by petition³⁷ -- the lion's share of the procedural reforms have been added over

²⁹ *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 Harvard Law Review 613 (2007).

³⁰ Neal Woods, *Political Influence on Agency Rule Making: Examining the Effects of Legislative and Gubernatorial Rule Review Powers*, 36 State and Local Government Review 174 (2004).

³¹ Marcus Ethridge, *Consequences of Legislative Review of Agency Regulations in Three States*, 9 Legislative Studies Quarterly 161 (1984).

³² Robert Hahn, *Cost Benefit Analysis: Legal, Economic, and Philosophical Perspectives: State and Federal Regulatory Reform: A Comparative Analysis*, 29 Journal of Legal Studies 873 (2000).

³³ Yackee *supra* note 16 and Shapiro *supra* note 17.

³⁴ Stuart Shapiro, *An Evaluation of the Bush Administration Reforms to the Regulatory Process*, 37 Presidential Studies Quarterly 270 (2007).

³⁵ New Jersey Administrative Procedure Act of 1968, Pub. L. No.1968, NJ Laws ch.410, C. 52:14B-4.

³⁶ See New Jersey Regulatory Flexibility Act of 1986, Pub. L. No.1986, NJ Laws ch.169, C. 52:14B-19; See New Jersey Regulatory Flexibility Act of 1986, Pub. L. No.1986, NJ Laws ch.169, C. 52:14B-19; Pub. L. No.1995, NJ Laws ch.65, C. 52:14B-22-24; Pub. L. No.1995, NJ Laws ch.166, C. 52:14B-4(a) (2); and Pub. L. No.1998, NJ Laws ch.48, C. 52:14B-4(a) (2), see also 4:1C-10.3.

³⁷ Pub. L. No. 2001, NJ Laws ch.5, C. 52:14B-4(a) (3), 52:14B-4(g) and 52:14B-4(f).

the last 20 years. During the same period, one executive order³⁸ directed a comprehensive review of the State's regulatory system, yet no consequential action followed.

Overall the modifications that have occurred cannot be traced to partisan leadership. While four of the initiatives were signed into law by Republican governors, half the measures were advanced during sessions led by legislative leaders of the opposition party. The reforms also evolved through fits and starts rather than through broad mandates or public support. The first comprehensive effort to overhaul the rulemaking process³⁹ met with defeat during the 1990-91 lame duck session even though the legislative leadership and governor shared the same party affiliation.⁴⁰ In fact, provisions to make rulemaking more transparent and easier to discern through wider public notice, adherence to a rulemaking calendar, publication of public hearing transcripts and public comment summaries, as well as a "standard of clarity" in rulemaking would not be enacted for another decade until January, 2001.⁴¹

The kind of rulemaking changes made in the 1980s and 1990s attempted to minimize the effect of regulations on small businesses, farmers, the job market and the economy in general. Adding to existing proposed rule requirements (social and economic impact statements)⁴² was the inclusion of a Jobs Impact Statement, which quantifies the number of jobs lost or created by a proposed rule.⁴³ Moreover, for rules impacting businesses with fewer than 100 employees, a Regulatory Flexibility Analysis was required that describes any methods utilized to minimize the adverse economic impact on small businesses from recordkeeping, reporting or compliance requirements.⁴⁴ Another provision called for a Federal Standards Statement that requires an agency to address

³⁸ N.J. Exec. Order No. 97 (August 2, 1993). Exec. Order No. 97 directed the Chief Counsel to conduct a comprehensive review of the State's regulatory system and to identify recommendations designed to maximize efficiency, eliminate duplicative and inconsistent regulations, and provide the greatest degree of effective public participation in the rulemaking process.

³⁹ N.J. Assembly Committee Substitute (ACS) for Senate No. 3016 SCS and Assembly No. 3130, (1990-1991).

⁴⁰ The ACS for S-3016 and A-3130, sponsored by then Senate Majority Leader Daniel J. Dalton (D-4), passed the Senate and was posted on the board list for a full vote by the General Assembly on the last voting session of the legislative term. The bill was never called for a vote due to opposition voiced by counsel to Governor James J. Florio (NJ-D). Dalton did not seek reelection in the subsequent term, and the legislative leadership of both houses changed to Republican control during the final two years of the Florio Administration.

⁴¹ *Supra* Note 36.

⁴² The requirement to add "a description of the expected socio-economic impact of the rule" was enacted in 1981, see Pub. L. No.1981, NJ Laws ch.27.

⁴³ *Supra* Note 35 at Pub. L. No.1995, NJ Laws ch.166.

⁴⁴ *Supra* Note 35 at Pub. L. No.1986, NJ Laws ch.169.

whether a proposed rule exceeds federal standards. In the case when a federal standard will be exceeded, the agency must include a cost benefit analysis supporting its decision while asserting that the proposed state standard is achievable under the current technology.⁴⁵

At the same time that these analysis requirements were being put in place, attempts to establish enhanced oversight of regulatory agencies were also taking place. Over the last three decades, all presidents since Richard Nixon have attempted to imprint a regulatory oversight scheme that retains a centralized review of executive branch agency rulemakings.⁴⁶ Likewise, it is not surprising to find governors that advocate strong executive control of agencies. In terms of strength as measured by gubernatorial institutional powers, the office of the Governor in New Jersey ranks second nationally.⁴⁷ The legislative branch in New Jersey, by contrast, also enjoys strong constitutional powers; however, legislative veto authority over regulations was not included in the revisions made at the state's 1947 constitutional convention. (In 20 of the 50 states today, legislative review of administrative rules remains advisory only.)⁴⁸ The combination of two branches with strong constitutional powers along with a partisan divided government from the period of 1981 through 1992 set the stage for a rulemaking turf battle.

The 1981 bipartisan passage and subsequent override of then Governor Thomas Kean's veto of a measure⁴⁹ that authorized the legislature to approve or disapprove all rule proposals during his first term was both noteworthy and short lived. By March of 1981, the acting attorney general issued a formal opinion that the Act was inconsistent with the state constitution and further directed that all administrative agencies should essentially ignore

⁴⁵ Executive Order No. 4 (January 31, 2002) required a Smart Growth Impact Statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the State's Development and Redevelopment Plan (OAL Rulemaking Manual, 30), <http://www.state.nj.us/infobank/circular/eom4.htm>.

⁴⁶ Testimony of Sally Katzen, Adjunct Professor and Public Interest/Public Service Fellow University of Michigan Law School before the House Committee on Science and Technology, Subcommittee on Investigation & Oversight on February 13, 2007 on "Amending Executive Order 12866: Good Governance or Regulatory Usurpation?"

⁴⁷ The Governor's Institutional Power (GIP) index is calculated by Thad L. Beyle, Thomas J. Pearsall Professor of Political Science at The University of North Carolina at Chapel Hill. New Jersey is tied at second (4.1 on a 5 point scale) among the 50 states; Massachusetts ranks first (4.2). Index last accessed 1.20.08 at <http://www.unc.edu/~beyle/gubnewpwr.html>.

⁴⁸ *The Book of the States*, 38, 129-131 (2006).

⁴⁹ Pub. L. No.1981, NJ Laws ch.27.

its provisions.⁵⁰ By the summer of the following year, the state Supreme Court struck down the New Jersey Legislative Oversight Act as unconstitutional because it violated the separation of powers under the NJ Constitution.⁵¹

The legislature kept working to gain power in regulatory oversight. By means of a concurrent resolution, which does not require the signature of the governor, a measure was passed by the legislature to place a constitutional amendment authorizing legislative veto power over administrative rules on the general ballot during the fall of 1985. The measure failed to receive approval by the voters. Meanwhile, Governor Kean proposed creating a “Regulatory Czar” in his 1987 State of the State address that would have been empowered to keep ambiguous and unwieldy rules in check; the measure failed to pass the state Senate after approval in the General Assembly. Ultimately, a second ballot question granting legislative veto authority was again presented to the voters for approval in 1992 and passed by a wide margin. Despite the decade long effort by legislative leaders from both parties to secure legislative veto authority, the power has rarely been fully exercised since the constitutional amendment became effective on December 3, 1992.⁵²

The regulatory process in New Jersey was substantially revised in 2001 and incorporated many of the provisions embodied in the 1991 reform bill mentioned above. Still, not all the former proposed procedural reforms were incorporated into the law.⁵³ Among the key components that were included were, increased transparency, including the publication of all agencies fees, penalties, deadlines and processing times, as well as a more widely disseminated public notice requirement and required agency compliance to a quarterly rulemaking calendar.⁵⁴ The changes also broadened public hearing requirements

⁵⁰ N.J. Att’y Gen. Formal Op. No. 03 (March 10, 1981).

⁵¹ *The General Assembly of the State of NJ v. Byrne*, 90 N.J. S.Ct. 376; 448 A.2d 438; 1982 N.J. LEXIS 2165.

⁵² N.J. Const. art. V, sec. IV, paragraph 6 (December 3, 1992).

⁵³ The 1991 Senate Committee Substitute (SCS) proposed to strengthen the standards required for both the existing social and economic impact statements by requiring detailed information be submitted as to expected costs and revenues of a proposed rule, as well as how it would disproportionately affect parties and any economic mitigation factors considered or rejected by the agency in its deliberations. The SCS also included a provision allowing the challenge of proposed rule on the basis of inconsistency with another existing rule or statute, the rule did not substantially comply with the APA or if the rule was in excess or beyond the scope of the agency’s statutory authority.

⁵⁴ An agency must publish a quarterly notice of proposed rulemaking activities for the ensuing six month period. If a calendar is amended, an agency may take no action prior to 45 days of the published revision to schedule. Exceptions to the calendar requirement include state and Federal statutory authorization, imminent peril, a rule for

and allowed extensions to the comment period when sufficient public interest warrants. The law enhanced the petition process by setting strict deadlines for agencies to respond, limiting its discretion in the manner it responded and providing intervention by the Office of Administrative Law in the event the agency failed to comply.⁵⁵ Finally, a “standard of clarity” was applied to all rulemaking activity as well as a provision for a verbatim record of public hearings.

Since the 2001 law was enacted, no new changes to the regulatory process have been adopted. In the current Second Annual Session of the 213th Legislature, only two separate bills are pending that propose changes to the rulemaking process:⁵⁶ the first calls for an 18 month moratorium on rule adoptions⁵⁷ and the second would require agencies to solicit and publish a socio-economic statement prepared by a member of the regulated community.⁵⁸ None of the measures have advanced beyond the introduction stage. To reflect the present regulatory process in NJ, we have drawn a map that describes the five-step rulemaking process in the state. It is included as Appendix 1. The first step identifies how a rule is initiated, followed by the notice of notice of pre-proposal and formal rule proposal steps. Prior to a rule adoption, the fourth step, the public comment and hearing processes are described. The final step describes what occurs after rulemaking. In addition, major exceptions to the process such as initiation of a rule by petition, emergency rulemaking and veto of a rule by a concurrent resolution by the legislature are also described.

IV Our Data

In order to provide a contextual view of rulemaking activity over the past decade, we gathered aggregate data from 1998 through 2007. This annual calendar year data included all rulemaking activity subject to the APA from a notice of pre-proposal, notice of

which a notice of pre-proposal has been published or for a rule proposal which includes a comment period of at least 60 days, (OAL Rulemaking Manual, 16-18).

⁵⁵ Agencies must grant the petition, deny the petition or refer the petition for further deliberation within defined deadlines. See “Map of Rulemaking in New Jersey” for specified timeframes, Appendix 1.

⁵⁶ A keyword search query on administrative and rule-making terms revealed three measures are pending in the current legislative session, two bills are identical,. Date last retrieved May 12, 2009 at <http://www.njleg.state.nj.us/bills/BillsByKeyword.asp>.

⁵⁷ N.J. Assembly bill 3765 was introduced in February, 2009.

⁵⁸ N.J. Assembly bill 3395 (Senate bill 2208) was introduced in October, 2008.

proposal and notice of adoption. Of note, rule adoption notices⁵⁹ capture a wide array of procedural activities including a new rule⁶⁰, an adopted amendment⁶¹, adopted concurrent amendment⁶², adopted concurrent new rule, readoption⁶³, readoption with amendments⁶⁴, temporary adoption⁶⁵, and repeal⁶⁶ as well as a notice of administrative change/correction, a commission order, an executive order, waiver and public notice (i.e. grant announcement).

We also collected individual units of datum⁶⁷ on a number of rule adoption variables for the years 1997 to 1998 and 2006 to 2007. The variables measured included the type of rulemaking activity,⁶⁸ agency code,⁶⁹ whether full text was published,⁷⁰ page length of rule,⁷¹ public comment entered into the record,⁷² total number of individuals who submitted written comments or signed a petition (if individually recorded by the agency),

⁵⁹ All data in this study was collected through an electronic search of the NJ Register. For the search query termed “rule adoption”, this details the list, or as we describe, the type of rule adoption activity retrieved.

⁶⁰ A new rule represents the first time a rule is officially approved and authorized by an agency.

⁵⁸ An adopted amendment is the means used to “modify, alter, revise or suspend the operative effect of a previously promulgated rule” (OAL Rulemaking Manual, 8).

⁵⁹ A concurrent action may be a concurrent new rule or a concurrent adopted amendment in which identical language is adopted by two or more agencies who share jurisdiction in an area (OAL Rulemaking Manual, 13).

⁶¹ A readoption is used to continue the effect of the provisions of an emergency rule or a rule that is set to expired due to the sunset provision (OAL Rulemaking Manual, 11).

⁶² A readoption with amendment seeks to continue the effect of a previously promulgated rule with a proposed amendment (OAL Rulemaking Manual, 39).

⁶³ A temporary adoption is a rule that is effective for 60 days, unless extended, and is the mechanism which allows an agency to adopt a rule without prior notice if “the agency finds that an imminent peril to the public health, safety or welfare exists which warrants suspension of prior notice” (OAL Rulemaking Manual, 66).

⁶⁶ A repeal means to “void a rule, the effect of which is to terminate the legal effect of such rule prospectively only” (OAL Rulemaking Manual, 12).

⁶⁷ Each observation is identified by the Proposal Notice New Jersey Register (NJR) Citation which is assigned by the OAL. The NJR Citation is the Register page number where that proposal was published.

⁶⁸ A rule adoption is defined by the OAL Rulemaking Manual; however for our purposes, an electronic rule adoption that included more than one type of rulemaking activity was coded as “mixed” (i.e. repeal of a rule, new rule proposal and amendment to an existing rule) and an activity that did not substantively or permanently impact a proposed rule or adopted rule were recorded as “other” (includes waiver of sunset provisions, executive orders, public notices, etc.). In all, ten types of rule adoptions were identified.

⁶⁹ Twenty four agencies were identified. In addition to cabinet levels departments, independent agencies and commissions were recorded separately. Most authorities were categorized together with the exception the Casino Control Commission (CCC), which generates significant rulemaking activity due to the regulated gambling industry housed in Atlantic City, and the HEC, ELEC and OAL. A dual department rulemaking submission was recorded as Joint; however, there were limited activities of this kind.

⁷⁰ If the full text of the proposal was included, the observation was coded as 1. A readopted rule, without change, is not required to include the full text of the rule. This distinction was made in order to measure the significance of a rule as measured by page length.

⁷¹ Page length of rule was calculated based upon the electronic version of the NJ Register.

⁷² Two variables were coded; if comments were received, the observation was coded as 1. The second measured the total number of comments received per rule adoption. Neither variable captured oral or written testimony presented at a public hearing to avoid duplication by individuals.

whether a public hearing was held as part of the public comment period, and if a hearing was held, the number of individuals who attended.⁷³ Finally, total public participation⁷⁴ was calculated⁷⁵ and the agency response was recorded.⁷⁶ The unit of analysis was the year of adoption and each observation was coded by the rule reference.⁷⁷ We also did a more detailed examination of the impact analyses of the most controversial rules⁷⁸ issued in these four years.

The four years for which we gathered longitudinal data represented a two-year period during a Republican led-administration (Christine Todd Whitman) and a Democrat-led (Jon Corzine) administration. For each of the cycles, the legislative leaders in both chambers shared the same party affiliation as the governor. While trying to control for differences in political preferences for regulation, the years studied also occurred closely *before* and *after* the enactment of the substantial procedural reforms adopted in 2001. We hoped this would help us measure the effect, if any, changes to the procedural requirements have had on the regulatory process in New Jersey.

These variables were selected in order to capture the types of rules that were issued in New Jersey in the years in question, the amount of participation that rules engendered, the complexity of the rules (page length is our proxy for complexity), and how state agencies responded to procedures. To assess the role of other procedures such as impact analyses, we did a more detailed examination of those rules with the most comments, expecting that rules with the greatest impacts would lead to the most comments and that therefore we would expect the largest role of impact analysis to occur in these rules.

In our analysis we include only those rules that make a change to policy. This means that we exclude what are called readopted amendments, which make no change to an existing rule. Agencies do not publish the full text of these rules in the notice of proposal or

⁷³ Note: Not all attendees provided testimony, either written or oral into the record.

⁷⁴ To the extent practical, if a participant testified at a public hearing and submitted written comments during the formal comment period, the latter was not counted in the total of written comments received.

⁷⁵ Total public participation was calculated as the sum of all individual public comments received and the total number of attendees if a public hearing was held.

⁷⁶ A "Summary of Public Comments and Agency Responses" is required as part of the notice of adoption process. According to the OAL Rulemaking Manual, such response may take the form of a "Summary of Agency Initiated Changes", a "Summary of Changes Upon Adoption" and/or a "Response to a Comment." Controlling for duplications, if any of these change were included in a rule adoption, the observation was coded as 1.

⁷⁷ The NJR Citation was used as the Rule Reference.

⁷⁸ Controversy was measured by the number of comments received.

adoption in the NJ Register. This approach was selected because it exclusively looks at permanent changes made to existing rules or added new rules.⁷⁹ Also excluded were notices of administrative change/correction and temporary amendments as well as other public notices.

V Our Findings

A historical overview of the last 10 years (1998-2007) reveals the volume of rulemaking activity has remained relatively unchanged in New Jersey. On average, annual rulemaking activity over the period is 1350 rules/year (Table 1). It is difficult to distinguish any party preference for regulations based upon the summary data. The average number of rules proposed and adopted under a Republican administration (1998-2001) closely track that of two Democratic administrations (2002-2007).⁸⁰ Although rule adoptions appear to have spiked in 1998, the number results from a high proportion of new rules that were triggered by expired regulations, and one-time processes such as traffic control signalizations and drug formulary additions and deletions. A more detailed analysis is described below for a comparison of the more substantive rule adoptions.

⁷⁹ The rule adoption activity excluded from Model 2 represents less than .02 percent of the total public participation received over the study period. Of the total 936 rules that received comments in the full model, only 44 rules were excluded in Model 2.

⁸⁰ On average, 535 rules were proposed and 565 adopted (1998-2002) compared to 524 proposed and 535 adopted (2003-2007).

| Table 1: All Calendar year Rulemaking Activity (1998-2007) | | | |
|---|---|-----------------------|-----------------------|
| Year | All Rulemaking Activity⁸¹ | Rule Adoptions | Rule Proposals |
| 1998 | 1502 | 640 | 613 |
| 1999 | 1259 | 508 | 521 |
| 2000 | 1223 | 572 | 478 |
| 2001 | 1396 | 543 | 529 |
| 2002 | 1290 | 466 | 490 |
| 2003 | 1430 | 587 | 551 |
| 2004 | 1432 | 593 | 528 |
| 2005 | 1397 | 549 | 537 |
| 2006 | 1345 | 563 | 475 |
| 2007 | 1230 | 480 | 431 |
| 10 Yr. Avg. | 1350 | 550 | 529 |

Moreover, the adoption rate signals no long-term trends to indicate rulemaking is on an increase or a decline.

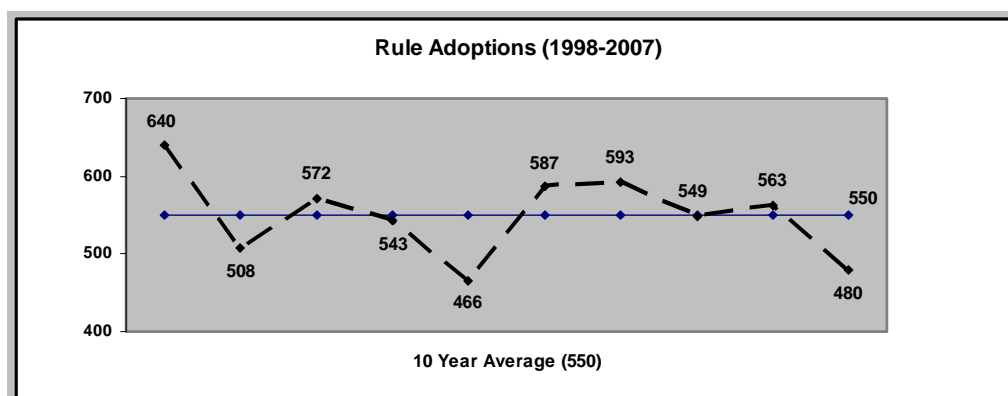


Figure 1

As discussed above we looked at four calendar years in greater detail. We chose 1998-99 and 2006-07 in order to examine two years when New Jersey was under Republican leadership and two years when it was under Democratic leadership. We then

⁸¹ Beginning with the March 7, 2005 issue, two rulemaking activities became electronically available via the NJ Register: the “Register Index of Rule Proposals and Adoptions” and the “Rulemaking in this Issue” notice. These additions slightly overstate the annual amount of rulemaking activity, including notices of proposals and adoptions. As such, the totals for both these types of notices were removed from the counts for 2005, 2006 and 2007.

culled the dataset (as described above) to include only those final rules that made substantive changes to public policy. The number of these rules is shown in Table 2.

| Table 2: Substantive Rules Adopted (1998-1999 and 2006-2007) | |
|---|------------------------|
| Year | Number of Rules |
| 1998 | 550 |
| 1999 | 405 |
| 2006 | 399 |
| 2007 | 353 |
| Total | 1,707 |

As discussed above, there were a greater number of rules in 1998 because of two departments that had increased new rule adoption activity and adopted amendments, namely the Department of Transportation (DOT) and the Department of Health and Senior Services (HSS). For the DOT, 17 new rules were adopted in 1998, of which 10 were tied to new traffic signalization devices, which often are requested by local and county agencies rather than initiated at the department level. By comparison, the HSS actually had increased new rule adoptions in both 1998 and 1999 both of which were triggered by the expiration of existing rules. In 1998 specifically, seven of the 15 new rules adopted by the agency replaced rules that had expired due to the sunset provision. In most cases, an agency readopts a rule *before* it sunsets; because the majority of readoptions make no change to public policy, we did not include them in our model. Another five of the new rules came from a review of again existing rules, which the department categorized as a periodic comprehensive examination.

The spike in 1998 is even greater in the category of adopted amendments for the same two departments: DOT (60) and HHS (40). For DOT, three-quarters of the rules dealt with traffic signalizations and 60 percent of the HHS rules covered drug formularies. This type of rulemaking, traffic operations and drug utilization reviews, were not found in any

significant number in the 2006 and 2007 years further explaining the atypical volume in 1998.

Once this anomaly is corrected, it becomes clear that the volume of rulemaking is nearly identical under Democratic and Republican leadership and before and after the 2001 procedural changes. We then examined which agencies did the most regulating during these years. The cabinet level agencies were among the most prolific rule makers. Of the 22 agencies examined, which included independent authorities and commissions, 10 agencies accounted for more than three-quarter (81.1%) of all rules adopted on average over the four-year study period.⁸² Rulemaking activity remained consistent with very little shift in annual ranking among the agencies.

| Table 3: Percentage of Rules Adopted | |
|---|-------------------|
| Top 10 Ranked Agencies | 4 Yr. Avg. |
| Law & Public Safety (DLPS) | 13.47% |
| Health & Senior Services (HSS) | 9.43% |
| Human Services (DHS) | 9.31% |
| Treasury (TRES) | 8.44% |
| Transportation (DOT) | 7.73% |
| Community Affairs (DCA) | 7.73% |
| Banking & Insurance (B&I) | 7.21% |
| Casino Control Commission (CCC) | 6.68% |
| Environmental Protection (DEP) | 6.56% |
| Labor (DOL) | 4.51% |

If the volume of rulemaking did not change much, how about the substantive effects of the various rulemaking procedures? At the very center of all rulemaking activity is the public participation process; yet the volume of input *and* output as measured by public participation during the comment period and by those agency changes made after a rule proposal suggests a modest impact on the overall process. To begin, half of the 1,707 rules adopted (51%) received public comments during the study period. For 1998, 49% of

⁸² The number of cabinet level agencies is capped at 20 by the state constitution; however the number varies slightly from administration to administration. For the most part, authorities and commissions were grouped together; the more prolific of these organizations were characterized individually, namely the CCC, HEC, ELEC and OAL. Joint departmental rule adoptions were also listed separately.

adopted rules were commented on by the public, 50% in 1999, and 52% in both 2006 and 2007.

A total of 17,409 written comments were aimed at 868 of the total 1,707 rules during the study years. The number of comments received ranged from 1 to 1,624; about half of the rules (53%) received two comments or less. The mean comment received per rule was 20.06; however, this average is misleading due to a skewed distribution (median is 2.25). Thirty rules received over 100 comments, which amounted to 68% (11,809) of the total comments submitted. If you adjust for this skew (by eliminating those 30 rules that received 100 or more comments), the average number of comments received on the most significant rules adopted were just slightly more than three comments per rule (3.34); the median was 0. This difference between the mean and median also occurs at the federal level and reflects the tendency of a few rules to generate most of the comments from the public.⁸³

Another method intended to increase access to the rulemaking process is the public hearing requirement. For the 1,707 rules adopted, 275 public hearings were held during the study period; however, the overall number of hearings held on rules adopted steadily declined over the period from 95 hearings in 1998, 74 in 1999, 60 in 2006 and 46 in 2007. A total of 633 individuals attended the public hearings; although, participation did not always mean an attendee offered comments into the record. While it appears, on average, as if two members of the public participated in each hearing, in actuality, only about a quarter of all public hearings (28%) were attended by members of the public. Attendance by the public numbered as few as 1 to a high of 42; the mean was 8.12, the median attendance was 3 and the mode was 1 attendee for the 78 hearings in which the public participated.

On its face, the amount of public participation generated both oral and written, is limited for the entire study period; however, we also wanted to examine if participation increased after the procedural reforms became effective in July 2001. Recall, the key components included a more widely disseminated public notice requirement, agency compliance to a regular quarterly rulemaking calendar, extended public comment periods

⁸³ Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 *Journal of Law and Politics* 393 (2007).

and a public hearing requirement, when and if, sufficient public interest warranted, as well as the maintenance of a verbatim record of the public hearing.

As discussed above, the number of rules that received comments was nearly identical in the four years. It appears that participation, as measured by the number of comments either written or oral, actually declined slightly between 1998 (5228) and 2007 (4762) of the study period as displayed in Figure 2. Still, if this number is divided by the number of rules adopted, participation/rule increased from 9.51 in 1998 to 13.49 in 2007 (Figure 3). No change in format submission has occurred to explain the percentage increase; all comments must still be submitted to the regulating agency in writing rather than electronically. What has changed is the publication and distribution of the rulemaking calendar, which raises the question as to impact of the 2001 proceduralization changes related to the expanded notification requirements.

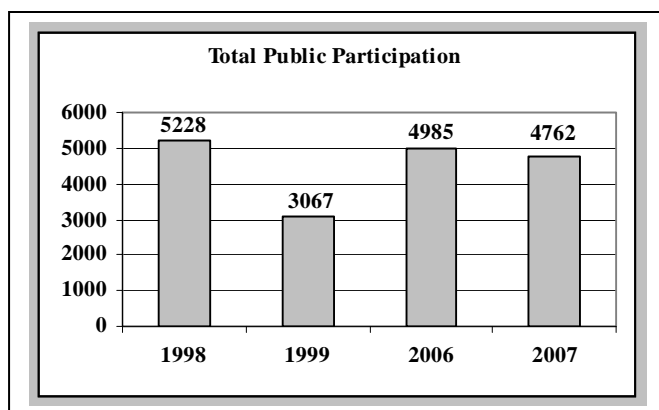


Figure 2

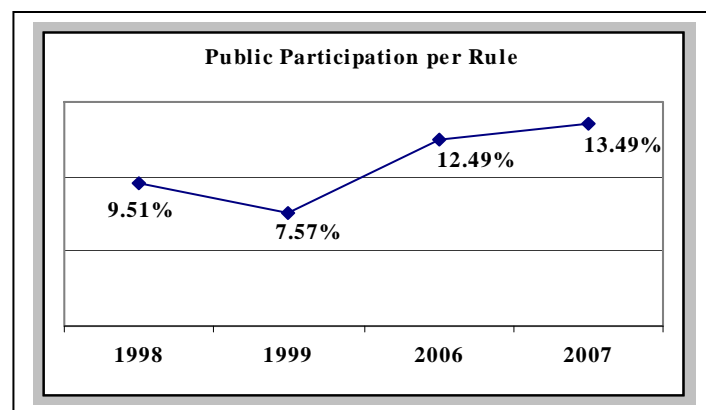


Figure 3

The 2001 reforms may be responsible for the increase in the number of comments per rule. It is also possible that due to the proliferation of email, interest groups have become more capable in terms of organizing their membership during the public participation process. Additionally, while the mean number of comments has increased, the median remains 1 for all study years, as shown in Table 4. This indicates that the increased participation per rule is due to a small number of rules. Because our ability to examine the affiliation of commenters is limited, we cannot determine the extent to which the increase in comments is due to increased interest group mobilization.

| Table 4: Public Comment Participation | | | | | |
|--|--------------|-------------|-------------|-------------|-------------|
| | Total | 1998 | 1999 | 2006 | 2007 |
| Total Rules (n) | 1,707 | 550 | 405 | 399 | 353 |
| Rules Receiving Comments (n) | 893 | 288 | 211 | 208 | 186 |
| Total Participation (n) | 18,042 | 5,228 | 3,067 | 4,985 | 4,762 |
| Mean | 10.57 | 9.52 | 7.57 | 12.49 | 13.49 |
| Median | 1 | 1 | 1 | 1 | 1 |
| Minimum | 0 | 0 | 0 | 0 | 0 |
| Maximum | 1,624 | 1,152 | 417 | 1,624 | 1,103 |

We also assessed the end of the rule adoption process to determine the impact public participation had on rules. As noted earlier, all rules have to be adopted within a year of the proposal publication; if not a proposed rule will expire. Additionally, if substantive changes are proposed, the rule needs to be repropose. We examined the number of notices of repropose for the entire ten year period.⁸⁴ Here too we found less than two percent of all rule proposals were substantively changed requiring a repropose. The mean for the 10 year period was 8.3 and the median was 8, with a range of 5 to 16. Once again the data indicates a limited impact for public comments and a limited change over the time period examined.

| Table 5: Reproposed Amendments due to Substantive Changes | | | | | | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Year | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
| Notice of Reproposed Amendments | 9 | 16 | 9 | 8 | 10 | 7 | 8 | 5 | 5 | 6 |

Still, changes can be made to a rule without a repropose if the changes do not “...effectively enlarge or curtail the original proposal, change its effect or those who will be affected...”⁸⁵ Two kinds of changes, substantive and technical, must be recorded by an

⁸⁴ A repropose may be in response to issued raised by commenters or changes generated after further staff review. The notice of repropose must reflect, “to a significant degree”, the original notice of proposal. (See OAL Rulemaking Manual, 45).

⁸⁵ Language as contained in N.J.A.C. 1:30-6.3.

agency as part of the adoption notice; changes may take the form of a "Summary of Agency Initiated Changes", a "Summary of Changes Upon Adoption and/or a "Response to a Comment."⁸⁶ Of the total rules modeled (1707), only about one-third (35%) received any form of public comment. As displayed in Table 6, only 477 rules (28%) were changed by the agency after the rule was proposed. By comparison, there was also a slight decrease in the percentage of agency changes made in the latter study years, despite the procedural changes implemented in 2001 to broaden public participation. Of the total number of rules changed, 29% were made in 1998 and 30% in 1999 as compared to 25% in 2006 and 27% in 2007. We have no hypotheses explaining this decrease but it is interesting that after the changes to broaden participation in 2001, agencies changed rules less frequently.

| Table 6: Summary of Agency Rule Changes Prior to Adoption | | | | |
|--|-------------|-------------|-------------|-------------|
| | 1998 | 1999 | 2006 | 2007 |
| Agency Initiated Changes | 112 | 96 | 82 | 75 |
| Changes upon Adoption | 65 | 30 | 26 | 22 |
| Response to a Comment | 4 | 1 | 5 | 10 |
| Total Number of Rules Changed⁸⁷ | 160 | 120 | 101 | 96 |

Given the small percentage of changes made following the public participation period, we did a more detailed examination of the agencies responses to comments in the most controversial rules⁸⁸ issued in these four years. In the 30 rules in these four years on which agencies received 100 or more comments, there were only three rules on which agencies seemed to make meaningful changes.⁸⁹ This small percentage further indicates that the effect of public comments is likely limited.

⁸⁶ According to an OAL regulatory expert we consulted: "There are two types of changes made upon adoption, substantive and technical. See N.J.A.C. 1:30-6.3. A rule may Substantive changes must be described and justified in a notice of adoption in either: a Response to a Comment; in a "Summary of Agency-Initiated Changes"; or in a "Summary of Changes Upon Adoption." The third of these venues for substantive change discussion is uncommon, as such changes are usually the result of a comment or further agency review of the proposal, thus giving rise to discussion of the change occurring most readily in the first two venues. Technical changes upon adoption should, but often need not be, discussed in one of these venues."

⁸⁷ The total does not reflect the sum of the rows because a rule change may occur in more than one category.

⁸⁸ As measured by the number of comments received.

⁸⁹ N.J. Register Vol. 30 No. 3, Division of Consumer Affairs, Orthotics and Prosthetics Board of Examiners, "Rules of Practice" (February 2, 1998). N.J. Register Vol. 30 No. 13, State Board of Education, "Special Education" (July

As discussed above, debates over the role of impact analysis in rulemaking have occurred at the federal level. In New Jersey agencies have been required to conduct some form of impact analyses on their rules since 1981. As with our analysis of agency changes to rules we examined the impact statements of those rules with at least 100 comments. We believed that those rules with the largest impacts would be the most likely rules to generate a lot of comments.

Of the 30 rules with more than 100 comments, only four had impact statements that contained actual numbers to describe the economic impact of the regulation. Both rules were issued by the Department of Environmental Protection. One on protecting highlands water⁹⁰ had a detailed analysis of the economic impact. A second rule protecting horseshoe crabs⁹¹ had information on fish catches and the tourism industry but did not have a conclusion about the economic impact. A third rule on a surcharge on goods sold in prisons described the total revenue that the agency expected to generate (not an impact per se).⁹² Finally a rule on Medicaid reimbursements for nursing homes similarly totaled the expected budgetary effects without a meaningful assessment of economic impacts.⁹³

The remaining rules either had a brief qualitative discussion of economic impacts or simply asserted that there would be no impact. An example of a qualitative discussion could be found in a rule prohibiting certain trucks from certain state roads.⁹⁴

Double-trailer truck combinations and 102-inch wide standard trucks not doing business in New Jersey will be prohibited from using state highways and county roads as through routes or short cuts. This may have a negative impact on those truckers and shippers since it may take longer to arrive at their destinations, thus

6, 1998). N.J. Register Vol. 30 No. 11, Division of Motor Vehicles, "Standards For Motor Vehicles With Elevated Chassis Height" (June 1, 1998).

⁹⁰ N.J. Register Vol. 38 No. 23, Department of Environmental Protection, "Highlands Water Protection and Planning Act Rules" (December 4, 2006).

⁹¹ N.J. Register Volume 38 No. 10, Department of Environmental Protection, "Horseshoe Crabs" (May 15, 2006).

⁹² N.J. Register Volume 31 No. 8, Department of Corrections, "Deposits And Deductions Commissary" April 19, 1999.

⁹³ N.J. Register Volume 31 No. 5, Department of Human Services, "Long Term Care Services Manual" (March 1, 1999).

⁹⁴ N.J. Register Volume 31 No. 19, Department of Transportation, "Truck Access" (October 4, 1999).

making it more costly, or it could cost more in tolls compared to some parallel routes.

With such cursory attention given to economic impacts, it is hard to argue that the requirement for an impact analysis has had much of an effect in New Jersey.⁹⁵ Instead the pattern seems to be an even starker example of what some scholars have said occurs at the federal level. Impact analyses seem to be written after the rule to justify the rule rather than used to influence the regulatory decision being made.⁹⁶

We also looked at parts of the rulemaking process outside of the standard notice and comment procedure. Utilization of the procedural tool known as the "notice of pre-proposal" allowing agencies to "test the waters"⁹⁷ before engaging in formal rulemaking on complex and controversial matters has also failed to gain traction with policy makers of either party. Of the 54 pre-proposals filed over the 10 year period, only the Department of Education made use of the process with any consistency for a total of 16 notices, led primarily by its policy making arm, the State Board of Education. Notices of pre-proposal ranged from a low of one in 1999 to a high of 12 in 2002.

| Table 7: Notice of Pre-Proposals | | | | | | | | | | |
|---|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Year | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
| Rule Proposal | 613 | 521 | 478 | 529 | 490 | 551 | 528 | 575 | 523 | 479 |
| Notice of Pre-Proposal | 6 | 1 | 4 | 9 | 12 | 4 | 6 | 7 | 3 | 2 |

An additional process available to agencies interested in gathering feedback on a contemplated rule is to request OAL to conduct a preliminary, non-adversarial proceeding on the proposal. This process however, referred to as "negotiating a rule" has not been

⁹⁵ If the intention of these impact statements is to lessen the economic burden on regulated entities, it is hard to argue from this data that they have had such an effect.

⁹⁶ Robert Hahn, Jason K. Burnett, Yee-Ho I. Chan, Elizabeth A. Mader & Petrea R. Moyle, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply With Executive Order 12,866*, 23 Harvard Journal of Law & Public Policy 859 (2000).

⁹⁷ As characterized in the OAL Rulemaking Manual, (12).

utilized according to one OAL administrator familiar with the rulemaking procedures in the state since 1986.

Another procedural change, made in 2001, was the requirement establishing stricter deadlines for agencies to respond to rules initiated by petition. In addition to the deadlines, an agency must grant the petition, deny the petition or refer the petition for further deliberation. After the procedural modifications, it does not appear that rules initiated by the public were advanced by the agency at a higher rate.

| Table 8: Rules Initiated by Petition | | | | | | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Year | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
| Notice of Petition for Rulemaking | 28 | 11 | 10 | 21 | 31 | 51 | 31 | 26 | 37 | 30 |
| Notice of Action on Petition for Rulemaking | 23 | 11 | 8 | 22 | 26 | 39 | 42 | 34 | 32 | 34 |
| Petition Granted | 2 | 3 | 0 | 3 | 3 | 6 | 0 | 3 | 5 | 8 |
| Petition Referred for Further Deliberations | 5 | 2 | 4 | 8 | 4 | 7 | 8 | 8 | 12 | 12 |
| Petition Denied | 6 | 3 | 1 | 9 | 16 | 16 | 25 | 17 | 5 | 10 |

During the period from 1998 to 2007, approximately 277 notices of petition for rulemaking were received by agencies, which raise the question about who is initiating the rule by petition procedure.⁹⁸ For the four study years examined in greater detail, there were 106 rule petitions received. Of those, the agencies receiving the most requests were Independent Authorities (37)⁹⁹; the Department of Law and Public Safety (21)¹⁰⁰ and the Department of Environmental Protection (12). Overall, the background of the petitioners

⁹⁸ Query searches were done for each calendar year using the terms “Notice of Petition for Rulemaking” and “Notice of Action on Petition for Rulemaking”. In a few instances, the query returned a petition for a year outside the search criteria which were deleted from the numbers reported in Table 8. Row 1 and 2 of the table also do not match since action may have occurred in a different calendar year.

⁹⁴ An Independent Authority is an organization established by the state for the expressed purpose of carrying out specific functions funded outside the general revenues of the state. In most instances, authorities are led by an appointed board which may include representation by a department official whose role may include serving as a voting member or may only be advisory in nature. In most cases, the Governor holds veto power over the minutes of an authority.

¹⁰⁰ DLPS is the state agency that houses many of the state’s licensing and certification boards.

can be described as advocacy groups or attorneys/professionals representing an organization/entity/company.

We also found that agencies do have rulemaking seasons, which may produce a spike in activity in any given calendar year. The most frequent triggers to rulemaking activity include new legislation and rules expiring due to sunset provisions. We did not find increased rulemaking activity in the first years of a gubernatorial term as compared to the prior year; however, we did find increased activity during the final year of a sitting governor's term (2001, 2005).¹⁰¹ This transition in power may represent another reason for an annual increase in rulemaking activity.¹⁰²

In terms of complexity,¹⁰³ our comparison of the study years leaves open the question as to whether there is an increase in the substance of the rules adopted. The average page length per rule increased from 11.97 in 1998 and 14.33 in 1999 to 17.2 in 2006 and 16.8 in 2007. At the same time, the total number of pages published in each year was 6,585 in 1998, 5,805 in 1999, 6,864 in 2006 and 5,932 in 2007. Page length generally correlates both with complexity of a rule¹⁰⁴ and with the number of comments an agency receives, particularly due to the APA requirement that each distinct comment must be responded to by the agency. We are unable to differentiate between these causes.

The procedural change with the potential to have the greatest impact on rulemaking for all years emanates from the state's constitutional provision that grants legislative oversight. Although the legislature has had veto authority over rules for the past 16 years, it has rarely exercised the power. On occasion, concurrent resolutions have been sponsored by members of the legislature, but the number introduced has averaged around 13 per session over the last 12 years.¹⁰⁵ During that timeframe, three concurrent resolutions were passed by both chambers, which served 30 days notice on the agency to

¹⁰¹ This agrees with O'Connell's work on the federal government. She found that federal rulemaking spiked during a President's final year in office. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Virginia Law Review 889 (2008).

¹⁰² Both 2001 and 2005 were not within the study years we examined. Total rulemaking activity can be found in Table 1. A change in party also occurred along with the administration in 2001, but not in 2005.

¹⁰³ As measured by page length.

¹⁰⁴ *Supra* Note 17.

¹⁰⁵ A keyword search of the term "legislative intent" was conducted for each of the session years for which the Office of Legislative Services maintains a publicly accessed archive of legislation, beginning with the 1996-1997 session.

amend or withdraw the existing or proposed rule or regulation. In each case, a second concurrent resolution invalidating or prohibiting the rule or regulation did not follow.¹⁰⁶

VI Discussion

The data on the New Jersey rulemaking process all reinforce the theme of consistency through procedural and political changes. Agencies march on, writing regulations regardless of their political or procedural environment. Political changes in the governor's office and in the state legislature have seemed to have little effect on the pace of regulation. There may have been substantive effects (regulations may have been deregulatory under Republican administrations) but the consistency in which agencies are regulating and a brief scan of the titles of the regulations suggest that even these were minimal.¹⁰⁷

For administrative law scholars, the limited effect of regulatory procedures may be of even greater interest. Most notable are the limited circumstances in which agencies change their proposals as a result of public comments. Fewer than two percent of all rules are repropounded, the most significant category of changes. Of the remaining rules, very few have anything but the most minor changes. This is true even in those rules receiving more than 100 comments.

Requirements for various types of analysis also appear to be epiphenomenal. Of the analyses examined in this dataset, very few had actual numbers and even fewer (one by the estimation of these authors) measures true economic impact. The impact of economic analysis requirements appears to be even more limited than similar requirements at the federal level. In fact, the impact analyses appear to be little more than superficial window dressing in the regulatory preamble.

Other regulatory procedures are similarly limited. Legislative review has resulted in only two/three rules being challenged over the last 12 years. Petitions for rulemaking are routinely dismissed by agencies. The one change that may have had an impact is the

¹⁰⁶ Further action may not have been warranted if the agency withdrew or amended its rule proposal.

¹⁰⁷ It is true that ideological swings over the past decade have been greater at the federal government than in New Jersey where Christie Todd Whitman was not a particularly conservative Republican. See Christie Todd Whitman *It's My Party Too: The Battle for the Future of the G.O.P. and the Heart of America*, Penguin Press (2005).

2001 efforts to increase participation. But even this change, had large effects only on the most controversial rules and may be due to more effective interest group mobilization rather than the change in regulatory procedures.

Regulatory reformers at the state and federal levels should take note. Procedural control of bureaucratic agencies is unlikely to be particularly effective, if the New Jersey example is representative. Indeed political control of agencies may even be particularly challenging. Delegations of rulemaking authority to unelected officials, once given, are hard to rescind or control afterwards.

Map of Rulemaking in New Jersey

