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# Exploring the Relationship Between Regulatory Reform in the States and State Regulatory Output

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# EXPLORING THE RELATIONSHIP BETWEEN REGULATORY REFORM IN THE STATES AND STATE REGULATORY OUTPUT\*

*Stuart Shapiro<sup>†</sup> and Debra Borie-Holtz<sup>‡†</sup>*

## ABSTRACT

The rhetoric surrounding regulatory reform has long been heated. Supporters talk about making regulation more efficient and regulators more accountable to the public. Opponents blame regulatory reforms for crippling the regulatory process and inhibiting the production of regulations that will protect public health. This Article uses a data set of regulations and regulatory reforms in twenty-eight states to question both of these positions. We find that reforms such as executive review of regulations, legislative review of regulations, and economic analysis have no relationship with regulatory output. Instead, political factors, particularly the control of the state legislature, are a much better predictor of the volume of regulation in a state. If a legislature passes laws that require regulations, there will be more regulations regardless of the procedural hurdles that regulatory agencies face when engaging in the regulatory process.

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INTRODUCTION

The 113th Congress has considered nearly three-dozen bills that would change the federal regulatory process.<sup>1</sup> The fifty states have been extremely active in passing similar bills, particularly since the onset of the Great Recession.<sup>2</sup> Many of these bills add requirements that agencies must follow when promulgating a regulation. These bills, often described as “regulatory reforms,” are largely a response to claims that regulatory agencies are stifling the economy by promulgating too many regulations that kill jobs and hurt the economy.

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1. Regulatory Studies Ctr., *Regulatory Reform Bills, 113th Congress*, GEO. WASH. U., <http://research.columbian.gwu.edu/regulatorystudies/regreform> (last visited Feb. 23, 2014) [hereinafter Regulatory Studies Ctr.].

2. See generally JASON A. SCHWARTZ, INST. FOR POL’Y INTEGRITY, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKINGS (2010) (surveying the regulatory practices of all 50 states).

But do the regulatory reforms work? What does it even mean for regulatory reforms to “work”? At the most basic level, we would expect regulatory reforms to have a substantive impact on policy decisions made by regulating agencies. By raising the cost faced by agencies to create regulations, regulatory reforms should also dampen the output of regulations. Indeed, opponents of regulatory reforms have made this argument repeatedly.<sup>3</sup> If these reforms perform neither of these functions, then they may serve a political purpose, ensuring that political officeholders pay attention to particular regulations that create dissatisfaction for affected constituencies.<sup>4</sup> Finally, reforms may play a symbolic role imbuing the regulatory process with values such as public participation, democratic oversight, or economic efficiency.

Determining which of these roles are played by regulatory reforms is increasingly important. As legislators and executives enact more and more regulatory reforms, they justify them by arguing that they have a substantive impact on regulations or that they will reduce regulatory volume.<sup>5</sup> This rhetoric is often particularly heated regarding environmental regulations. Once put into place, new regulatory procedures are rarely repealed. If some regulatory reforms are working to curb regulation and others are not, then this will inform the debate over new reforms. If they are instead playing only a political and/or symbolic role, then this should raise questions about their continual appeal.

In this article, we use a unique data set that contains information on the volume of regulation and the varying levels of regulatory procedures in twenty-eight states. The states have been underutilized in the empirical examination of the regulatory process. Much of the extant literature focuses on the federal regulatory process. This

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3. See, e.g., Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (arguing that increasingly burdensome requirements are slowing and rigidifying agency rulemaking).
  4. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987) [hereinafter McCubbins et al., *Administrative Procedures*]; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440–43 (1989) [hereinafter McCubbins et al., *Structure and Process*].
  5. See, e.g., Charles S. Clark, *House Backs Bill to Rein in Regulations*, GOV’T EXECUTIVE, (Aug. 2, 2013), <http://www.govexec.com/oversight/2013/08/house-backs-bill-rein-regulations/68018/?oref=river> (explaining that Rep. Sam Graves, R-MO, cited the cost of regulations as justification for the REINS Act, which imposes more requirements on regulatory agencies).

literature raises serious questions about the role of regulatory reforms (often called “procedural controls”). However, since there is always just one political context at the federal level, determining the relationship between politics, procedures, and regulatory output is challenging. By looking across twenty-eight states, we hope to cast new insight on how regulatory reforms function in practice.

We find that much of the skepticism about the effectiveness of regulatory reform is warranted and much of the rhetoric (on both sides of the political spectrum) is overblown. The presence of regulatory procedures appears to have no correlation with the volume of regulation. Instead, one can predict regulatory volume (and likely the content of regulations) much more accurately by seeing who has power at any given time. Democratic legislatures pass statutes that require more regulations than legislatures controlled by Republicans. These regulations then get issued regardless of the procedural environment. Regulatory reforms may facilitate control of regulatory agencies by existing coalitions of political leaders, but they are unlikely necessary to ensure this control.

This Article will proceed as follows. In the next Part, we review both the theoretical claims advanced to explain regulatory reforms and the empirical examinations of their actual role. In Part III, we describe our data set. We present the analysis of the data from the twenty-eight states in Part IV. Finally, in Part V, we ruminate on the implications of these findings for future debates on regulatory reform and for political control of the administrative state.

## I. THE INTENT(S) OF REGULATORY REFORM

The idea of manipulating the regulatory process in order to affect regulatory decisions is as old as the administrative state itself.<sup>6</sup> The Administrative Procedure Act<sup>7</sup> was passed in 1946, in part, as a response to the growth in power of the executive branch during the New Deal.<sup>8</sup> The proceduralization of the rulemaking process picked up steam as a reaction to the boom in social regulation in the late 1960s and 1970s.<sup>9</sup>

The procedures put in place for agencies to follow when promulgating a regulation were regularly justified with high-minded

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6. MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* 10 (2d ed. 2000).
  7. 5 U.S.C. §§ 551–559 (2012).
  8. CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 10–13, 49–50 (4th ed. 2010).
  9. EISNER, *supra* note 6, at 118–30.

rhetoric and substantive goals. Notice-and-comment rulemaking (requiring an agency to publish a proposed rule, accept public comments, and respond to those comments) was put in place to ensure that bureaucratic decisions would be influenced by public input.<sup>10</sup> Requirements for presidential or congressional oversight were meant to further democratic governance of bureaucratic agencies otherwise sheltered from it.<sup>11</sup> The demand that agencies perform economic analysis on their regulations with large economic impacts was accompanied by rhetoric about the need to make regulation more efficient.<sup>12</sup> Particular interests, especially small businesses, were given procedures all their own in order to make up for disadvantages not mitigated by other procedures.<sup>13</sup>

Those implementing regulatory reforms, however, may have goals that are more political than substantive. The idea that procedures put in place by legislatures or executives were means of securing lasting political influence for the coalition that enacted them was most prominently put forth by McCubbins, Noll, and Weingast (commonly referred to as “McNollgast”).<sup>14</sup> 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.<sup>15</sup> The McNollgast framework was expanded upon by numerous scholars.<sup>16</sup> Huber and Shipan

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10. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65–66 (1969).
  11. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255, 2332 (2001).
  12. *See, e.g.*, Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?*, 22 J. ECON. PERSP. 67, 79–80 (2008) (arguing that even though the authors found that economic analyses have little effect on regulations, such analyses should still be performed because of the potential to make more economically efficient policy decisions).
  13. Stuart Shapiro, *Defragmenting the Regulatory Process*, 31 RISK ANALYSIS 893, 897–98 (2011).
  14. McCubbins et al., *Administrative Procedures*, *supra* note 4, at 246.
  15. *Id.* at 261–63.
  16. *See, e.g.*, John D. Huber, Charles R. Shipan & Madelaine Pfahler, *Legislatures and Statutory Control of Bureaucracy*, 45 AM. J. POL. SCI. 330 (2001); Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91 (1994).

acknowledge that “scholars seem to agree that the use of procedural rather than policy details represents the most important way in which congressional majorities use legislation to influence bureaucratic autonomy.”<sup>17</sup>

The usefulness of procedural controls as a means of controlling bureaucratic discretion has its critics however. Most relevantly, Horn and Shepsle 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.<sup>18</sup>

Legal scholars have posited another impact and possible intent of regulatory reforms. McGarity popularized the theory that regulatory procedures, coupled with “hard look” judicial review of agency regulations, has ossified the regulatory process.<sup>19</sup> Regulatory procedures have raised the costs of agency rulemaking to such an extent that agencies were avoiding issuing regulations and turning to other less burdensome means of setting policy that were free of such constraints (such as enforcement actions or guidance documents).<sup>20</sup> McGarity leaves unanswered the question of whether crippling the regulatory process is the goal of those implementing regulatory reform, but others have made this claim explicit, dubbing the phenomena “[p]aralysis by [a]nalysis.”<sup>21</sup>

In a study of the notice-and-comment process, West noted the work of other scholars who have placed the possible impacts of procedures required of agencies issuing regulations into three categories.<sup>22</sup> Procedures can have the substantive impacts with which

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17. JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 35 (2002).
  18. Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”: Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 501–04 (1989).
  19. McGarity, *supra* note 3, at 1396–1436.
  20. *Id.* at 1436–43.
  21. David C. Vladeck & Thomas O. McGarity, *Paralysis by Analysis: How Conservatives Plan to Kill Popular Regulation*, AM. PROSPECT, Summer 1995, at 78.
  22. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 67–68 (2004).

they are justified (more efficient regulations, greater responsiveness to public preferences, favoring particular constituencies).<sup>23</sup> Procedures can have a political impact facilitating the influence of political officeholders<sup>24</sup> (although this could be divided into two categories: the influence of the enacting coalitions that put the procedures in place<sup>25</sup> or the existing coalition that oversees their use<sup>26</sup>). Or finally, they can have a merely symbolic impact, giving support to the values they are said to embody but having little impact on policy.<sup>27</sup>

Which of these roles have regulatory reforms played? Once a backwater of political science and administrative law research,<sup>28</sup> empirical work on the regulatory process has flowered over the past decade. Much of this work has focused on the federal regulatory process. There have been examinations of the public comment process, the role of cost-benefit analysis, and executive review. Below, we briefly summarize the empirical literature that looks at the role procedural constraints play in regulatory decision-making.<sup>29</sup> After a discussion of the various studies of the different constraints on the federal regulatory process, we turn to the much sparser literature on the regulatory process in the states.

#### A. *Public Participation*

The area of the regulatory process that has received the most attention is the oldest regulatory reform: the notice-and-comment process. While participation requirements go as far back as regulations, notice-and-comment in its modern form was created by the Administrative Procedure Act in 1946.<sup>30</sup> Agencies are required to propose their regulations publicly, provide time for public comment, and then respond to the comments in the preamble to their final

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23. *Id.*

24. *Id.*

25. See McCubbins et al., *Administrative Procedures*, *supra* note 4, at 253–55 (discussing how politicians can use administrative procedure to affect outcomes and induce bureaucratic compliance).

26. See Horn & Shepsle, *supra* note 18, at 499 (discussing both the potential for bureaucratic drift and “the influence of subsequent political coalitions on the development and administration of the law”).

27. West, *supra* note 22, at 67–68.

28. See Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002) (detailing the growing use of empirical analysis in administrative law and advocating for its use).

29. Each of the discussions on the individual procedural controls below is by necessity a brief summary. A literature review of each type of procedure could take up an article length discussion on its own.

30. 5 U.S.C. §§ 551–559 (2012).



rules.<sup>31</sup> Courts have required the responses by agencies to be non-dismissive, but agencies are in no way bound to adopt the suggestions of commenters.

Studies of agency responsiveness to comments have found that agencies are likely to respond to comments submitted by the public only in certain limited circumstances. Golden found that agencies were not likely to modify their proposals except when commenters with opposing perspectives agreed on an issue.<sup>32</sup> West studied forty-two rulemakings and concluded that the primary role of the public comment process was to highlight issues for political overseers—confirming, to some degree, the McNollgast view—but even this was limited in its impact.<sup>33</sup> Yackee concluded that “interest group comments can and often do affect the content of final government regulations.”<sup>34</sup>

One form of participation that has garnered a fair amount of academic attention is regulatory negotiation. Reg-neg, as it is often called, requires agencies to sit down with the parties affected by a regulation and negotiate the contents of the rule. Considerable dispute exists about the effectiveness of reg-neg. Advocates of the process, such as Harter, argue that the process saves time and reduces litigation over regulation.<sup>35</sup> Coglianese, in an empirical assessment, examined a series of regulatory negotiations and found that the purported benefits of the process have not materialized.<sup>36</sup>

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31. *Id.*

32. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 259–62 (1998).

33. West, *supra* note 22, at 73; see also Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 671–732 (1998) (concluding that the Health Care Financing Administration disfavored comments from the physicians that the reform was intended to help).

34. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 119 (2005).

35. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 32–45 (2000); Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise?*, 3 ENVTL. IMPACT ASSESSMENT REV. 75, 80–84 (1982).

36. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1334–36 (1997) (stating that the EPA, the agency that has used the process the most, did not see time savings and still finds the negotiated rules challenged in court); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 445–47 (2001)

*B. Legislative and Executive Review*

Because of the Supreme Court decision *INS v. Chadha*,<sup>37</sup> which overturned the one-house congressional veto, legislative review of agency regulatory decisions is nearly non-existent at the federal level. The Congressional Review Act was passed in 1996<sup>38</sup> as a replacement, but because it requires a presidential signature, and a president is very unlikely to agree to veto a regulation issued by his own administration, the CRA has been used only one time. That instance—a regulation promulgated at the end of one administration with a succeeding Congress and president of the opposing party—will very rarely be repeated.<sup>39</sup>

Executive review at the federal level is justifiably the subject of much more attention. Schultz Bressman and Vandenberg surveyed employees of the Environmental Protection Agency (EPA) and used their survey results to argue that review by the president's staff—including but not limited to the Office of Management and Budget (OMB)—has been experienced by EPA employees as interference in their pursuit of policy goals.<sup>40</sup> This agrees with earlier criticisms of review by the Office of Information and Regulatory Affairs (OIRA) as biased in an anti-regulatory direction.<sup>41</sup> Most of the criticisms of executive oversight, however, are based on individual case studies.

Justice Kagan, drawing on her experience at the Domestic Policy Council under President Clinton, argued that presidential control helped in coordination of executive branch activities, and to overcome

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(responding to Philip Harter's criticism of the author's research and further explaining the downsides of negotiated rulemaking).

37. 462 U.S. 919, 959 (1983).
38. Pub. L. No. 104-121, § 251, 110 Stat. 847, 868 (1996) (codified at 5 U.S.C. §§ 801-808 (2012)).
39. Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 724-30 (2011).
40. See Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 91-99 (2006) (detailing problems with transparency, a lack of unification of review, selectivity in the rules chosen, poor timing, and a misplaced focus on costs).
41. See, e.g., Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-71 (1986) (claiming that the system of review "places the ultimate rule-making decisions in the hands of OMB personnel" and that the "Executive Order allows OMB to cut off all investigations before they even begin, making it nearly impossible to attack OMB's decision").

bureaucratic pathologies, such as devotion to mission or torpor.<sup>42</sup> Demuth, a former OIRA Administrator, argues that OIRA's influence has been overstated and that its impact has been minimal.<sup>43</sup> The most detailed empirical study was by Croley, who examined data on OMB review and concluded that the White House used the review process to have a greater influence over agency rulemaking, focusing on fewer rules over the years while requiring a change in a greater percentage, though in an apparently evenhanded way that did not work to the advantage of certain types of interests.<sup>44</sup>

*C. Economic Analysis*

Closely tied (at least on the federal level) to executive review is the requirement that federal agencies engage in a form of cost-benefit analysis for a certain subsection of their regulations.<sup>45</sup> Many agency regulatory decisions are also subject to requirements that they examine the economic impact of their decision on particular constituencies such as small businesses. Opponents of cost-benefit analysis have argued that it has weakened regulations, although such arguments are usually theoretical rather than empirical.<sup>46</sup> Wagner uses an EPA analysis to argue that Regulatory Impact Analyses (RIAs)

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42. See Kagan, *supra* note 11, at 2334–45 (discussing how the Reagan and Clinton Administrations adeptly “used their administrative control to drive a resistant bureaucracy and political system”).
43. See Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 15, 20 (2011) (stating that “the result of these thirty years of skirmishing has been only marginal improvements in regulatory policy”).
44. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 851, 882–83 (2003) (noting that the “Clinton OIRA focused on fewer rules” yet “required a change in a much higher percentage of the rules it reviewed” and that “the White House clearly has used rulemaking review to put its own mark on particular agency rules,” but it has done so in an “evenhanded way”).
45. Executive Order 12866 requires agencies to perform a Regulatory Impact Analysis (RIA) on all regulations with an economic impact of more than \$100 million in any year. Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
46. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8 (2004) (“The new trend toward economic critique of health and environmental protection has caught on in every branch of the federal government—within the White House, in Congress, and even in the courts. Environmental advocates, decision makers, and citizens concerned about the environment often find themselves on the defensive, without an effective response to the arcane arguments and imposing data offered to show why, when it comes to protective regulation, less is better.”).

are used to justify regulations more often than influence the policy decisions embedded in the regulation.<sup>47</sup> This comports with an analysis by Shapiro, which argues that the requirement for cost-benefit analysis, because it is tied to executive review, has always taken a back seat to the political needs of the president.<sup>48</sup>

Shapiro and Morrall analyzed a series of rules and their underlying analyses and found no appreciable relationship between the extent of the information provided in the analysis and the net benefits of the rule. On the other hand, they found that political factors such as the salience of the rule and whether it was a midnight regulation did correlate with net benefits. This finding (and the others above on cost-benefit analysis) cast doubt on the ability of regulatory analysis to have the effects that many proponents expect.<sup>49</sup>

#### *D. Deadlines and Delay*

The use of deadlines to constrain bureaucratic discretion has received much less attention than other types of regulatory reforms. The one significant analysis is by Gersen and O'Connell. They found that deadlines do shorten the amount of time it takes to complete a rule for an agency but also that deadlines lead to reductions in public participation and that agencies frequently miss deadlines—thereby calling into question whether the deadlines are effective.<sup>50</sup>

The McGarity argument that regulatory reforms and judicial review have combined to cripple agency regulators and deter them from issuing regulations has recently received increased empirical attention.<sup>51</sup> McGarity himself relied on a case study of the National Highway Traffic and Safety Administration (NHTSA) that indicated that the agency had moved away from rulemaking and instead was

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47. Wendy E. Wagner, *The CAIR RIA: Advocacy Dressed Up as Policy Analysis*, in *RESOURCES FOR THE FUTURE, REFORMING REGULATORY IMPACT ANALYSIS* 56–82 (Winston Harrington, Lisa Heinzerling & Richard D. Morgenstern eds., 2009).
  48. Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 *ENVTL. L. REP.* 10433–44 (2005); see also Donald R. Arbuckle, *The Role of Analysis on the 17 Most Political Acres on the Face of the Earth*, 31 *RISK ANALYSIS* 884–92 (2011).
  49. Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit–Cost Analysis and Political Salience*, 6 *REG. & GOVERNANCE* 189 (2012).
  50. Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 *U. PA. L. REV.* 923, 945–46, 956–59 (2008) (discussing how deadlines may shorten the length of time needed to complete a proposed law, but those effects are sometimes outweighed by the deterrent to public participation).
  51. McGarity, *supra* note 3.

relying upon recalls of cars to implement policy.<sup>52</sup> Other occasional case studies and accounts in the popular press have cited examples of regulations that have taken years to complete.<sup>53</sup>

Non-academic studies of the numbers of rules and academic empirical analyses have been arrayed against the ossification argument. In the former category are annual studies by the Competitive Enterprise Institute that show that the number of regulations issued by the federal government has been steady or even increasing despite the increased proceduralization of the regulatory process.<sup>54</sup> Kerwin and Furlong analyzed EPA regulations and found that the time to complete a regulation varied considerably and unpredictably.<sup>55</sup> More recently, Coglianese cast doubt on the original analysis of NHTSA,<sup>56</sup> and Johnson argued that ossification has not been a problem at EPA.<sup>57</sup> In the most detailed analysis of the time it takes agencies to complete a rule, Yackee and Yackee showed that for a data set composed of rules across agencies, those regulations that

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52. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 165–71 (1990).
53. *See, e.g.*, Thomas McGarity, *Two Years Later, OSHA’s Rule to Protect Workers from Deadly Silica Still in White House Review*, CPR BLOG (Feb. 14, 2013), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=D913A772-BAB5-697D-6638AEC1CF3053DB> (discussing the importance of and the length of time to complete the OSHA proposed rule “requiring employers in the mining, manufacturing and construction industries to protect their employees from silica dust particles as they engage in such activities as sandblasting, cutting rocks and concrete, and jackhammering”).
54. *See* CLYDE WAYNE CREWS JR., *COMPETITIVE ENTERPRISE INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE REGULATORY STATE* 43–45 (2012), *available at* [http://cei.org/sites/default/files/Wayne%20Crews%20-%202010,000%20Commandments%202012\\_0.pdf](http://cei.org/sites/default/files/Wayne%20Crews%20-%202010,000%20Commandments%202012_0.pdf) 2012 (last viewed Feb. 26, 2014) (providing annual Federal Register page histories and detailing the number of final and proposed rules in each volume).
55. *See generally* Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 116 (1992) (discussing the time it takes to complete rules, suggesting generally “that the time it takes to write rules is a function of variations in both the complexity of the subject matter and the effects of legal, bureaucratic, and political variables on the rulemaking process”).
56. Cary Coglianese, *Has Judiicial Review Caused a Rulemaking Retreat?*, Presentation at The Law and Society Conference (May 25, 2009).
57. Stephen M. Johnson, *Ossification’s Demise?: An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008).

had to go through certain procedures (such as OIRA review) actually were completed more quickly than rules that did not.<sup>58</sup>

*E. Studies of the States*

The foregoing studies all examine regulation on the federal level. There are good reasons that scholars have focused on the federal government. Federal regulations have extremely large impacts, with some reaching costs and benefits in billions of dollars. The federal government has largely been at the forefront of reforming the regulatory process with ideas filtering down to the states rather than bubbling up from them. And finally, with the Federal Register and Unified Agenda online for more than a decade (and public comments available through regulations.gov), and regular reports to Congress on the impacts of regulation, data on the federal regulatory process has been far more plentiful than data in the states.

But in the past several years, a number of studies of state regulations have begun to surface. With a much greater variety of regulatory processes and political climates, the states are potentially fertile ground for researchers attempting to better understand the effect of regulatory procedures. And while federal regulations are individually more significant than any state regulation, collectively, states regulate twenty percent of the U.S. economy<sup>59</sup>—arguing for better understanding of how state regulations are created.

Several of the studies echo the results on the federal level that cast doubt about the influence of regulatory reforms on regulatory decisions. Whisnant and DeWitt Cherry looked at the use of cost-benefit analysis in North Carolina and raised questions about its application there.<sup>60</sup> They speculated that limited capacity and commitment restricted the ability of states to use analysis to influence regulations. Shapiro found that procedural controls had little impact on the development of child care licensing standards in eight states.<sup>61</sup> Shapiro and Borie-Holtz, in a case study on regulatory reform in New

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58. Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making “Ossified”?* 20 J. PUB. ADMIN. RES. & THEORY 261 (2009).

59. PAUL TESKE, REGULATION IN THE STATES 9 (2004).

60. Richard Whisnant & Diane DeWitt Cherry, *Economic Analysis of Rules: Devolution, Evolution, and Realism*, 31 WAKE FOREST L. REV. 693 (1996).

61. See generally Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change*, 12 J. PUB. ADMIN. RES. & THEORY 29 (2002) (discussing how in eight states, the regulation of child care was affected much more heavily by interest groups, legislators, and executives than by procedural controls).

Jersey, also found limited effects for many different regulatory procedures.<sup>62</sup>

On the other hand, Teske argued that “much of the evidence here, consistent with the findings of other studies of state regulation, demonstrates that government regulatory institutions do shape state regulatory policy outcomes in important ways.”<sup>63</sup> This is to some degree supported by several works relying upon surveys of state officials about the *perceived* influence of the political branches of government. Perceived influence is of course distinct from actual influence but is still informative. In a 2004 article, Woods found that agency officials perceived gubernatorial oversight as more effective than legislative review.<sup>64</sup> He followed up in a 2005 article showing that stronger political branches led to decreased perceptions of interest group influence.<sup>65</sup> Woods also concluded that provisions broadening access and notification to the rulemaking process increased the perception of influence of outside actors, particularly the courts and interest groups. Also using survey data, Dometrius looked at gubernatorial oversight and concluded that oversight (or at least what bureaucrats perceived as oversight) was effective when the governor had higher approval ratings.<sup>66</sup>

Legislative influence has been of particular interest on the state level, perhaps because meaningful legislative review is absent on the federal level. Teske says that “[l]egislatures play an important role when they are directly making regulatory policy themselves or when they are overseeing regulatory policies that are largely developed (via

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62. Stuart Shapiro & Deborah Borie-Holtz, *Lessons from New Jersey: What Are the Effects of “Administrative Procedures” Regulatory Reform?*, REG. Spring 2011, at 14–19.

63. TESKE, *supra* note 59, at 29–30.

64. See Neal D. Woods, *Political Influence on Agency Rule Making: Examining the Effects of Legislative and Gubernatorial Rule Review Powers*, 36 ST. & LOC. GOV'T REV. 174, 182 (2004) (concluding that “while gubernatorial rule review powers significantly increase the reported influence of the governor, all else constant, legislative rule review powers do not have a significant effect”).

65. See Neal D. Woods, *Interest Group Influence on State Administrative Rule Making: The Impact of Rule Review*, 35 AM. REV. PUB. ADMIN. 402, 403 (2005) (concluding that “greater legislative or gubernatorial rule review authority will reduce interest group influence by providing an institutional means to counteract subsystem politics”).

66. See Nelson C. Dometrius, *Gubernatorial Approval and Administrative Influence*, 2 ST. POL. & POL'Y Q. 251, 261 (2002) (concluding that “[a] governor’s approval rating does make a difference in how state agencies respond to him or her,” improving the effectiveness of gubernatorial oversight of rulemaking).

rule making) and implemented by state bureaucratic agencies.<sup>67</sup> The literature shows mixed results for the impact of legislative review.<sup>68</sup> An article in the Harvard Law Review examined legislative review in Connecticut and Alaska and showed that it did result in changes to agency regulations.<sup>69</sup> Ethridge examined legislative review in three states and found that stricter rules were more likely to be reviewed (but did not analyze the effect on the reviewed regulations).<sup>70</sup> Finally, Hahn examined both economic analysis and legislative review. He found many requirements but little evidence that the requirements had improved regulatory outcomes.<sup>71</sup>

The studies above do not give a definitive answer as to whether regulatory reforms have substantive impacts, play a role that facilitates political oversight, or are largely symbolic.<sup>72</sup> However, the balance of the studies cast the most severe doubt on the first of these three options. Few of the studies above showed procedures having a clear impact on policy decisions. Those that did measured the impacts as perceived by agency actors rather than changes in policy.<sup>73</sup> In what follows we try to use a database of regulatory reforms and regulatory outputs to help clarify the role of regulatory reforms. First, we should describe our data.

## II. DATA

We collected data on all rules issued in 2007 from the twenty-eight states<sup>74</sup> that put data about final regulations online.<sup>75</sup> Although

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67. TESKE, *supra* note 59, at 198.

68. *Id.*

69. Note, *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 HARV. L. REV. 613, 628, 630 (2007).

70. Marcus E. Ethridge, *A Political-Institutional Interpretation of Legislative Oversight Mechanisms and Behavior*, 17 POLITY 340, 356 (1984).

71. Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 884 (2000).

72. West, *supra* note 22, at 67.

73. See, e.g., Schultz Bressman & Vandenberg, *supra* note 40, at 99; Woods, *supra* note 64, at 179; Woods, *supra* note 65, at 408.

74. Data was collected from twenty-eight states for which regulations were available online at the time: Arizona, Arkansas, Delaware, Idaho, Illinois, 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.

75. A natural question is whether states that put their rules online differ in some meaningful way from states that do not. As described below, we



not a full examination of all fifty states, we tested for discernible bias and 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, putting 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, the states we did examine are a representative sample of the nation as a whole.

The states are also representative politically. The state legislature was governed by Democrats in eleven of the states in 2007, by Republicans in eight, and was split between the two parties in nine of the states in our data set. It was more lopsided in the governor's mansion where twenty-one of the twenty-eight states were governed by Democrats (the 2006 elections swept Democrats into statehouses nationwide). Eleven of the states voted for John Kerry for President in 2004 and seventeen of them voted for George W. Bush.

Finally, as for our key independent variable, the presence of procedures to control agency regulatory actions, our states represent an excellent cross section. As described below, in the discussions of the three key regulatory reforms, executive control of rulemaking, legislative control of rulemaking, and economic analysis requirements, all three variables have scores across our entire spectrum for the stringency of the control.<sup>76</sup>

#### A. *Dependent Variable—How Many Rules?*

Regulatory output is not a perfect proxy for the impact of regulations. However, there are a number of characteristics that make it a useful dependent variable. First, a central claim of those opposing regulatory reforms is that such reforms make it harder to regulate.<sup>77</sup> If the cost of writing a regulation has risen for agencies, then it follows that fewer regulations will be produced (unless agency resources are increasing but those cases are few and far between). Therefore,

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tested for discernible bias and could not find any meaningful differences between states in our sample and states not in it.

76. One possible difficulty is the existing regulatory base in the states. Some states may issue more regulations because they have issued fewer regulations in the past and are merely “catching up” with their peers. While we do not think this is the case, it is extremely difficult to test and therefore to rule out.

77. See, e.g., McGarity, *supra* note 3, at 1398.

examining the effect of regulatory reforms on regulatory output provides a direct test of the argument that reform dampens output and one side of the argument that reforms have a substantive impact on regulation.

As for the other side of the argument—whether reforms lead to more effective regulations—the connection between output and impact is less strong but still viable. Critics of regulation often cite the number of regulations and conflate it with regulatory stringency in the public mind and in political rhetoric.<sup>78</sup> Moreover, most regulations do impose a constraint on private action and hence the volume of regulatory activity has often served as a proxy for regulatory burden.<sup>79</sup> In addition, we find a statistically significant reverse correlation (-0.37) between the number of regulations in a state and the “regulatory freedom” in that state as measured by Sorens and Ruger.<sup>80</sup> This indicates that having more regulations does correlate with regulatory stringency and hence has some validity as a measure of stringency. The relationship between the volume of rulemaking and the stringency is unlikely to be perfect but it also strikes us that these two variables are likely to be related (more regulations are likely to indicate a more stringent regulatory regime).<sup>81</sup>

While we report the total number of rules (8961 rules in the twenty-eight states), this measure does not serve 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 fifty

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78. CREWS, *supra* note 54, at 40.

79. Indeed, rulemaking output at the federal level tends to increase in Democratic administrations and decrease in Republican administrations. This has so far not held for the Obama Administration. *Id.* at 39. Rulemaking output also increases in the last year of an administration when agencies tend to promulgate costly rules. See Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 352 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf>.

80. William P. Ruger & Jason Sorens, *Freedom in the 50 States 2013: Index of Personal and Economic Freedom*, STATEPOLICYINDEX, <http://www.statepolicyindex.com/freedom-in-the-50-states/> (last visited Sept. 23, 2013).

81. Recent work by Michael Mandel and Diana G. Carew has argued that the sheer number of regulations may have important deleterious effects apart from the impact of any individual regulation. Michael Mandel & Diana G. Carew, REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM 3–9 (2013), *available at* <http://www.progressivepolicy.org/2013/05/regulatory-improvement-commission-a-politically-viable-approach-to-u-s-regulatory-reform/>.

“Medicaid rules” in 2007. However, some states do not use rulemaking for Medicaid, 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 that govern programs, like Medicaid, which merely disburse funds. We also eliminated rules that set 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 purely administrative regulations that set rules for the state government, not the public. This left us with a variable we called “economic rules,” or rules that impose an economic constraint on private action, which totaled 5356 rules for the twenty-eight states. The total for each state is in Table 1. This reflects a more adequate measure of the regulatory activity in each state in 2007.

We note that our “economic rules” variable incorporates what scholars of regulation call “social regulations” (regulations designed to curb externalities or information asymmetries in order to improve public health) as well as “economic regulations” (regulations that restrict the price or quantity of goods or services). Both of these types of regulations restrict private behavior and hence have an economic effect.

**Table 1: Rules per State in 2007**

State	2007 Total Rules	Rules with an Economic Impact
Arizona	145	93
Arkansas	298	131
Delaware	191	140
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
<b>TOTAL</b>	<b>8961</b>	<b>5356</b>

While the procedures that we examine affect all regulations issued in a state, there is reason to believe that they will act differently in different policy areas. The politics surrounding an issue vary by policy area and, therefore, the role of regulatory reforms and of political actors may vary.<sup>82</sup> The very nature of certain procedures may lead to

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82. *See generally*, THE POLITICS OF REGULATION (James Q. Wilson ed., 1980) (discussing different areas in which the government regulates).

different impacts in different policy areas. Cost-benefit analysis is harder or easier depending on the nature of the question being analyzed. Deadlines are more relevant when the policy question being answered is more complicated.

There were five policy areas that were common to the vast majority of states we examined. These policy areas also made up a significant portion of total number of economic regulations that we used as our aggregate dependent variable. The five policy areas are environment, transportation, agriculture, insurance and banking, and education. For each of the analyses conducted below, we report the results in aggregate and then note if there are any differences in the five policy areas. If there is no mention of the specific policy areas, then the results were the same as the aggregate results.

*B. Independent Variables: Procedural Controls*

If there is no relationship between the presence of procedures and the level of regulatory output, then do other factors in the political environment explain regulatory output at the states? Horn and Shepsle argued that coalitions that put procedures in place to control bureaucratic drift leave themselves open to changes in who holds the political reins or “coalitional drift.”<sup>83</sup> Are existing coalitions able to enforce their will over state agencies, regardless of the procedural environment in which they operate?

We collected data on the regulatory process for each state, including data on executive and legislative review, requirements for impact analyses, rulemaking deadlines, and sunset provisions.<sup>84</sup> During our data collection process, the Institute for Policy Integrity (IPI) issued a detailed report on the role of executive and legislative review, impact analysis, and sunset provisions in the states. The IPI report was based on data collection and interviews in all fifty states. For each procedural requirement that they studied, they compared the legal requirements with the practice in each state.<sup>85</sup> This data was far more extensive than anything previously available and became the primary source for our data on these regulatory reforms.

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

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83. Horn & Shepsle, *supra* note 18, at 502–04.

84. Because each state requires a public comment period, there was little data to collect on this aspect of rulemaking. We did collect data on whether states require agencies to respond to comment but, as described below, found no significant relationship between that requirement and regulatory output.

85. SCHWARTZ, *supra* note 2, at 146–395.

of these variables is detailed in the Appendix. The scores were based on the descriptions in the IPI report.<sup>86</sup> 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' scale<sup>87</sup> and a correlation coefficient of 0.63 with the scale developed by Grady and Simon.<sup>88</sup> These correlation coefficients indicate that our legislative review scale possesses external validity.

Agreement with the executive review scale developed by Grady and Simon was less strong with a correlation coefficient of 0.47. This value is still statistically significant (using a two-tailed t-test at the five percent confidence level). Further, 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 (really, IPI's data) on executive review is the best available. We also collected dichotomous data on whether or not states require a written response to agency comments,<sup>89</sup> whether agencies sunset their rules, and whether they place a deadline on rulemaking.

### *C. Independent Variables: Politics*

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 and 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; therefore, 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 also 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

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86. *Id.* at 91–141.

87. Brian J. Gerber et al., *State Legislative Influence over Agency Rulemaking: The Utility of Ex Ante Review*, 5 ST. POL. & POL'Y Q. 24 (2005).

88. Dennis O. Grady & Kathleen M. Simon, *Political Restraints and Bureaucratic Discretion: The Case of State Government Rule Making*, 30 POL. & POL'Y 646 (2002).

89. All states require public comment, so there is no variation in this requirement, which makes it impossible to use as an independent variable. How well states respond to comment may vary, but collecting that data for this volume of regulations is impossible.

2006. In six states, the partisan control shifted from a single party control to split control;<sup>90</sup> only New Hampshire shifted from Republican control in 2006 to Democratic control in 2007.

### III. ANALYSIS

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 twenty-eight states, our ability to use multiple independent variables is limited. After the comparisons of individual variables, a third subsection 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.

#### A. *Administrative Procedures*

The twenty-eight states we examined provide considerable variation in their use of regulatory procedures, which allows for an examination of their effects that extends beyond what scholars have studied previously. In this Part, 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.

#### B. *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 (1) whether the review is required or optional, (2) whether it is binding or non-binding, (3) who conducts the review (the governor's office or another office in the executive branch), and (4) the criteria for the review. The average score for the twenty-eight states is a 5.5 and the median score is a six. 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 the total number of rules, for the number of economic rules, and for the number of rules in each of the

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90. 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.

five policy areas, with the level of executive review was negative but small and statistically insignificant<sup>91</sup> (-0.19 and -0.16 respectively for total rules and economic rules). The negative correlation is expected as executive review is criticized as one of the procedures that often deters rulemaking. The 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,<sup>92</sup> a possible relationship emerges. The average number of economic rules in these six states was ninety-eight rules, but the average for the other twenty-two states was 216 rules (breaking out the ten states that scored zero showed no relationship with the level of rulemaking). This difference was statistically significant at the five percent level<sup>93</sup> using a one-sided t-test and may show that, in its most extreme forms, executive review has an impact on the level of rulemaking. However, we should note that of these six states, three had Republican governors and two of the other three had legislatures controlled by Republicans. This may indicate that existing coalition control provides a more compelling explanation for rulemaking volume.

### *C. Legislative Review*

Like the executive review variable, 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 states with a value of zero<sup>94</sup> and two states with a "perfect" ten.<sup>95</sup>

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. This was also true for each of the five policy areas we examined. Six out of thirteen states

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91. Using a one sided t-test.

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

93. While the direction was the same for each policy area, the relationship was statistically significant for transportation regulation and insurance/banking regulation only.

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

95. These two are Tennessee and Illinois.



with a legislative review score below the median issued more than the median number of rules in 2007, while six out of fifteen states at or above the median level of legislative review issued more than the median number of rules.

#### *D. 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 for which analysis 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 zero,<sup>96</sup> while four states scored a ten.<sup>97</sup>

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

#### *E. Other Procedures*

All of the states have some form of notice and comment. Only ten of the twenty-eight states in the study require that agencies actually publish responses to agency comments. We hypothesized that requiring an agency response might deter rulemaking but actually found no statistically significant relationship. For both the 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 after the close of the public comment period. Sixteen states (out of our twenty-eight) have such deadlines, and the deadlines vary from seventy-five 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

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

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

rules because agencies may not be able to finalize all of their proposals within the prescribed time limits.

Indeed, this is one procedural control that works just as predicted. States with rulemaking completion 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 statistically significant for both variables at the five percent level. While all five policy areas showed higher levels of rulemaking in states without deadlines, the relationship was statistically significant in Education and Agriculture but not in the other three areas. Still, this is the clearest impact of any administrative procedure. Placing a deadline on the completion of agency rulemaking following a proposed rule 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 sunseting rules. This alone could drive up the level of rulemaking in these states.

Overall, looking at the relationship between a single regulatory reform and the number of economic regulations adopted in these twenty-eight states, only the requirement of a deadline for completion showed a moderate to strong and statistically significant relationship.

**Table 2. Correlations among Economic Rules and Regulatory Reforms**

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Number of Economic Rules (n=28 states)		
Oversight & Analysis	Correlation	p Value
Executive Review	-0.256	0.189
Legislative Review	0.100	0.613
Fiscal Oversight	-0.136	0.491
Time Deadlines	-0.465*	0.013
Sunset Provision	0.181	0.357
Response to Comments	0.295	0.128
Total Scale	-0.181	-0.181

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Note: p value is a two-tailed test.

\* Significant at 5% level of statistical significance

*F. Political Variables*

If enacting coalitions can have only very 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 3.

**Table 3. Legislative Control and Regulatory Output**

2006 Party Control of Legislature	2006 Average No. of Rules	2006 Average No. of Economic Rules	2007 Party Control of Legislature	2006 Average No. of Rules	2007 Average No. of 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, the level of rulemaking output is highly suggestive of existing coalition control.

The difference between Democratic and Republican control is statistically significant at the five percent level (using a one-sided t-test for a difference between the mean number of rules in Democratic states and Republican states) for legislative control in 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 Democratic-controlled legislatures (in 2006 and 2007) and all other legislatures is statistically significant (again using a one-sided t-test), but not the difference in economic rules.

All five policy areas exhibited higher levels of regulation under Democratic-controlled legislatures (both 2006 and 2007) than in Republican-controlled legislatures. The difference between states with Democratic and Republican legislatures was statistically significant for environment, education, and insurance/banking, but not for transportation or agriculture. If one includes the split legislatures on either side, the statistical significance disappears in all policy areas.

Why might legislative control be so important in determining regulatory volume? Regulations have their genesis in laws that authorize them. Laws are of course the creation of state legislatures. These results indicate that the control of these legislatures is a significant determinant of regulatory volume. Democratic legislatures

are more likely to pass regulatory laws and hence more likely to have agencies that produce high volumes of regulation.

Interestingly, party control of the governor's office has little relationship to the level of rulemaking output. The twenty-one 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.

#### *G. 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.<sup>98</sup> 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.

#### *H. 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 zero-to-ten 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 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 4 shows the eight possible combinations (with the median for each procedural score used to differentiate between states that use the procedure and states that do not).

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98. See, e.g., Vladeck & McGarity, *supra* note 21, at 78.

**Table 4. Aggregate State Totals by Analysis Scores**

Fiscal Analysis Score (Score Above 6)	Executive Review Score (Score Above 6)	Legislative Review (Score Above 5)	Average Number of Economic Rules (and no. of states with > median no. 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 Table 4 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. No discernible pattern emerges regarding the use of economic analysis in combination with the other controls.

We also tested the relationship between rulemaking output and the combination of deadlines and other controls. It is possible that deadlines are more of a constraint when agencies have to complete analyses and go through executive or legislative review as part of the regulatory process. We found a statistically significant difference (at the five percent level using a one-sided t-test) between the mean number of economic rules in states with stringent executive review and a deadline and states without stringent executive review or a

deadline.<sup>99</sup> States with a deadline and executive review produced fewer economic rules (92) than deadline states with a deadline and lax executive review (185). Legislative review and analysis showed differences in the same direction but did not rise to the level of statistical significance.

*I. Politics and Procedures*

Our final examination of this data involved combinations of the procedural control variables and political control of the branches of government.<sup>100</sup> First we looked at executive review in combination with the party of the sitting governor. The results are in Table 5.

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99. This relationship is also statistically significant for insurance/banking, education, and transportation. States with deadlines and stringent executive review also produce fewer environmental and agriculture regulations than states with deadlines and lax review, but the relationship is not statistically significant. *See supra* Table 4.

100. We also tested control of the executive and legislative branches in combination. We found no statistically significant results of interest, including no difference between divided government and unified government. *See infra* Table 5.

**Table 5. Gubernatorial Party Control and Executive Review**

Party Control	Executive Review Score (Score Above 6)	Average No. of Economic + Licensing Regulations (and no. of states with > median no. of economic rules)
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. While executive review by itself seems to show an impact on regulatory output only when it is 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 stringent executive review, a far smaller number of regulations with an economic impact are issued. This difference is statistically significant using a one-sided t-test, when comparing these states with the remaining twenty-five states (at the one percent level) or with the four states with Republican governors and no executive review (at the ten percent 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.

The situation looks similar but with some important differences when one examines the individual policy areas. Table 6 reproduces Table 5 by policy area. Each cell contains the average number of rules in that policy area.



**Table 6. Gubernatorial Party Control and Executive Review by Policy Area**

Party Control	D	D	R	R
Executive Review Score (Indicates Score Above/Below 6)	Below 6	Above 6	Below 6	Above 6
Environment	30	22	27	24
Agriculture	13	7	13	24
Insurance/Banking	16	11	18	8
Education	26	18	34	3
Transportation	7	6	21	8

As with the aggregate data, three of the five policy areas show the lowest volume of rulemaking when a Republican is governor and there is stringent executive review.<sup>101</sup> The opposite situation holds for agriculture, but there is only one state in this category for which we were able gather data on agricultural rulemaking. Interestingly, environmental rules, often seen as the most contentious area of regulation, show no relationship with this combination of gubernatorial variables.

We also examined legislative review in conjunction with party control of the legislature. The data is in Table 7.

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101. For education, the difference between the last row of the table and the other rows is significant at the five percent level using a one-sided t-test. For insurance/banking, it is significant at the ten percent level. *See supra* Table 6.

**Table 7. Legislative Review and Legislative Control**

Party Control (2007)	Legislative Review Score (Score Above 5)	Average No. of Economic + Licensing Regulations (and no. of states with > median no. of economic rules)
D	Below	355 (4/4 above)
D	Above	161 (3/7 above)
R	Below	167 (2/8 above)
R	Above	169 (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 using a one-sided t-test at the five percent level. Four of the five individual policy areas show the same pattern of highest rulemaking volume when Democrats control the legislature and legislative review is limited. The difference rises to statistical significance, however, only for insurance/banking.

It appears that 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 helpful 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 is not necessary to deter regulation.

#### CONCLUSION: DOES REGULATORY REFORM MATTER?

A great deal of rhetoric has gone into the debate over regulatory reform. When new regulatory reforms are passed, tax dollars must be spent implementing them. And proponents and opponents of regulatory reform certainly seem to believe that regulatory reforms matter a great deal; their passage regularly cheers those who believe

regulations are costly<sup>102</sup> and bureaucrats are “out of control,” and instills fear in those who believe that regulations are necessary to protect public health and that agency experts should be allowed to conduct their business unburdened by excessive political oversight.<sup>103</sup>

At the federal level, numerous academic studies have raised questions about the efficacy of changes to the regulatory process.<sup>104</sup> Furthermore the continual demand for more regulatory reforms (the 113th Congress is considering twenty-three such bills as this Article is being written)<sup>105</sup> should provide evidence that the existing procedures in place are not doing their job (why pass more regulatory reforms if the ones already in place are effective?). But, the federal government is essentially a single case study. The performance of regulatory reform at the federal level is suggestive but not necessarily generalizable. The fifty states provide a much broader spectrum in which to analyze the performance of regulatory reforms.

The data presented above from the states suggest that regulatory reforms do not fulfill the hopes of their advocates or realize the fears of their opponents. With one notable exception (deadlines to finalize a proposed rule), there appears to be little relationship between the presence of most reforms and the volume of rulemaking in the state. While volume is an imperfect measure of regulatory policy, the lack of a relationship contradicts the argument that regulatory procedures dampen output and casts doubt on the argument that such procedures will have a predictable substantive impact on future regulatory policy.

Using West’s typology of the roles of regulatory procedures<sup>106</sup> the data presented here would suggest that that regulatory reforms are unlikely to have substantive effects. Do they instead play a symbolic

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102. See, e.g., David Herszenhorn, *DeMint Wants Law to Rein in Regulations*, CAUCUS, (Sept. 22, 2010, 4:37 PM), <http://thecaucus.blogs.nytimes.com/2010/09/22/demint-wants-law-to-rein-in-regulations/> (noting that the Reins Act would “put a stop to the reckless and costly anti-free market regulations that are destroying jobs”).

103. See, e.g., Noah M. Sachs, *When It REINS, It Pours*, *New Republic* (Feb. 10, 2011), <http://www.newrepublic.com/article/politics/83195/reins-act-congress-veto-gop> (arguing that “U.S. administrative law has operated from the premise that agency action should be somewhat insulated from political pressure and horse trading” and that upsetting that balance would “do serious damage to American health and prosperity—stopping agencies from promulgating important rules that, among other things, would help prevent bank failures [and] ensure the safety of the food we eat”).

104. See *supra* notes 22–58 and accompanying text.

105. Regulatory Studies Ctr., *supra* note 1.

106. West, *supra* note 22.

or a political role? The data here does not speak definitively to this question, but it provides some tantalizing clues. Executive review appears as if it can be used by governors who are opposed to regulation to facilitate the dampening of regulatory output. Legislative review can be used similarly. Economic analysis appears to play a largely symbolic role.

But it is crucial to note that executive and legislative review at most facilitate control by those in power, not by those who enact them. In the words of Horn and Shepsle,<sup>107</sup> these controls are subject to coalitional drift. Thus, while they play a role in facilitating political oversight of regulatory agencies, that role is not predictable in its substantive direction. Governors who favor regulation may use executive review to enact their preferences. The same is true for legislators and legislative review.

Several scholars have noted that other powers possessed by the executive and the legislature, such as budgetary control and the appointment power, can be used quite effectively to control agency outputs.<sup>108</sup> If this is true, then regulatory reforms are little more than a luxury for executives and legislatures looking to control executive branch agencies. They are another arrow in a relatively full quiver of mechanisms of control, not the solution to a perceived problem of agencies issuing regulations willy-nilly.

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107. Horn & Shepsle, *supra* note 18, at 499.

108. See George A. Krause, *Federal Reserve Policy Decision Making: Political and Bureaucratic Influences*, 38 AM. J. POL. SCI. 124 (1994); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497 (1993); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991).

APPENDIX

Scales for Legislative Review, Executive Review, and Impact Analysis

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**Executive Review**

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**Who conducts the review?**

- No one (0)
- Within agency only (1)
- Outside agency if triggered (2)
- Mandatory outside agency (3)

**Is review binding?**

- No (0)
- Yes (1)

**Who is the outside reviewer?**

- No one (0)
- AG or independent agency (1)
- Governor's office (2)

**Criteria for review?**

- 1 point for each for:
    - Procedural
    - Legality
    - Economic
    - Others
- 

**Legislative Review**

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**Nature of review**

- None (0)
- Some regulations (1)
- All regulations (2)

**Nature of oversight**

- None (0)
- Advisory (1)
- Need full vote in both chambers to overturn (2)
- Need full vote in one chamber to overturn (3)
- Committee can overturn (4)

**Criteria for review**

- None (0)
- Violates state Administrative Procedure Act (1)
- Other legal problem or conflict (2)
- Impact on certain communities (3)
- Any policy reason (4)

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**Impact Analysis**

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**When is analysis done?**

- None (0)
- If requested by legislature or governor (1)
- If requested by public (2)
- If \$ threshold for effect on budget (3)
- If \$ threshold for effect on economy (4)
- All regulations (5)

**Types of impact analyzed**

- None (0)
- On governments (1)
- On private sector (2)

**Who reviews analysis?**

- Within agency (0)
- Independent review (1)

**Scope of review**

- None (0)
- Minimal (1)
- Comprehensive (2)