PROCEDURAL CONSTRAINTS ON AGENCY RULEMAKING: AN ANALYSIS OF POLITICAL CONTROL OF THE BUREAUCRACY

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ABSTRACT

The bureaucracy literature has long analyzed political control of administrative agencies. Such studies typically ask to what extent the president, the Congress, the courts, and interest groups influence the regulatory process? This dissertation analyzes an important but overlooked element of political control: statutory constraints on the rulemaking process such as the Administrative Procedures Act's notice and comment requirement. Almost all existing studies assume that such constraints are effective, or achieve the goals of their supporters. This assumption neglects the influence of politics, however.

This dissertation challenges the conventional wisdom by analyzing the impact of politics on the likelihood that a rulemaking process constraint will be effective. Chapter 1 explains the problem and reviews the literature, showing that many studies have incorrectly assumed that all rulemaking process constraints are effective. Chapter 2 argues that opponents of proposed constraints can win concessions that undermine the odds that a constraint will be effective. Chapter 3 tests this theory with case studies of the full universe of generally applicable statutory rulemaking constraints. The chapter also analyzes whether constraints increase the amount of time required to complete a rulemaking. Contrary to common expectations, some constraints are wildly ineffective. Chapter 4 discusses the implications. The results offer new evidence regarding the extent to which the administrative process responds to the Congress, president, and courts. The results also provide insight into the goals of Congress and the president with respect to administrative law. In concluding, Chapter 5 discusses future research directions.

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CHAPTER 1: INTRODUCTION

I. INTRODUCTION

The Congressional Review Act, created to enable Congress to better review and overturn agency regulations, was successfully invoked once in 14 years. Agencies exempted 11,997 out of 12,000 rules from the Unfunded Mandates Reform Act, which was supposed to prevent federal rules from imposing an additional burden on state and local governments. Government audits reported agency non-compliance with the Regulatory Flexibility Act (an initiative to reduce the burden of regulation on small businesses) for twelve consecutive years. These laws (termed "rulemaking constraints" in this dissertation) appear to be the victims of outright neglect by federal agencies. The scope of this neglect is large, spanning most of the roughly 4,000 rules[1] promulgated annually. What explains this result?

The answer is simple: political and policy considerations between proponents and opponents of rulemaking constraints led Congress and the president to enact compromise measures that were unlikely to achieve the objectives of the proponents. That is, such constraints were not designed to be "effective." The central argument in this dissertation is that politics influences the design of constraints. The House, Senate, and the president agree to pass constraints likely to be effective when broad support exists for the constraint. In the face of strong opposition to a constraint, they either enact a compromise that is likely to fail or decline to pass legislation altogether.

[1] "Rules" are the administrative equivalent of public laws passed by Congress. Like public laws, rules are legally binding, generally applicable, and non-retroactive (5 U.S.C. § 553).

This dissertation defines a "rulemaking constraint" as a procedure imposed by statute that an agency or set of agencies[2] must undertake during the rulemaking process. Examples of rulemaking constraints analyzed in this dissertation include the Congressional Review Act, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act. This definition encompasses a subset of the administrative procedural requirements termed "constraints" analyzed in Epstein and O'Halloran's (1999) prominent study of agency delegation.[3] The case studies in this dissertation analyze all of the "rulemaking constraints" as defined in this dissertation, however.

Many other administrative procedural requirements – deadlines, hammer provisions that create a harsh reversion point if the agency fails to establish a rule, spending limits, special congressional oversight provisions, and special appeals procedures – apply only to individual rules (Epstein and O'Halloran 1999). Evaluating effectiveness of such constraints (that is, whether the constraint affects agency policy decisions in the direction intended by its supporters) with only one data point is challenging because the rule outcome may have been a product of many different idiosyncratic factors. This dissertation therefore only evaluates the effectiveness of constraints that apply to multiple rules.

Many existing studies of administrative law and public bureaucracy have failed to recognize that: 1) constraints may not be designed to be effective; 2) some constraints are ineffective in practice. Instead, these studies assume that constraints are effective.

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[2] This dissertation defines the term "agency" expansively. "Agency" encompasses both "independent regulatory agencies" and cabinet-level departments and their associated sub-units. Examples of the former category include the Federal Communications Commission and the Federal Trade Commission. Examples of the later category include the Department of Treasury and the Department of Energy.

[3] Epstein and O'Halloran classify constraints into the following fourteen categories: appointment power limits, time limits, spending limits, requirements for legislative action, requirements for executive action, legislative veto, reporting requirements, consultation requirements, public hearings, appeals procedures, rule-making requirements, exemptions, compensations, and specification of direct oversight.

Studies in the legal literature typically assume that constraints further normative values such as due process, transparency, or efficiency (e.g., Mashaw 1990; Asimow 1994). Studies in political science either assume that rulemaking constraints favor particular interest groups (e.g., McNollGast 1987, 1989) or increase congressional control of agency decisionmaking (e.g., Epstein and O'Halloran 1999). These studies neglect the role of the president in enacting constraints (Moe 1989). Put differently, they neglect that political bargaining undermines the ability of politicians to control the bureaucracy. As a result, they miss the fact that some constraints are not designed to be effective.

This dissertation contributes to both the legal and political science literatures by examining the pervasive assumption that all constraints are effective. The dissertation proposes and then empirically tests a theory predicting when the political branches agree to impose constraints with a high probability of effectiveness. The theory predicts that constraints are more likely to be effective if they: 1) do not include broad exemptions; 2) empower early involvement of supportive interest groups; 3) enable judicial review; 4) charge an executive agency with enforcement responsibility; 5) create a dedicated enforcement process within the legislative branch. Congress and the president are more likely to enact constraints that have such characteristics when the constraint has broad political and policy support.

Why study procedural constraints on the agency rulemaking process? At first glance, they appear arcane and unworthy of study. Admittedly, almost no voters have even heard of constraints like the Regulatory Flexibility Act or the Congressional Review Act. The second portion of this statement is wrong, however. A number of important reasons exist to study rulemaking constraints.

Rulemaking constraints cut to the heart of a seminal question in the political science literature: who influences the bureaucracy? Existing studies have debated whether Congress, the president, the courts, or special interest groups have the greatest impact on agency behavior (e.g., Weingast and Moran 1983; Moe 1987). Each branch has unique advantages. Congress has budgetary authority and institutional capacity to conduct oversight via its committee structure and the Government Accountability Office. The president holds directive authority over Cabinet agencies, and monitors their behavior via the Office of Management and Budget. The judiciary can issue decisions that the Congress and president struggle to overturn. Finally, interest groups can offer both policy expertise and lucrative post-government employment opportunities to agency officials (Coglianese 2002). This dissertation explores whether ineffective rulemaking constraints systematically advantage or disadvantage any of these institutions in the struggle to influence the bureaucracy.

This dissertation also offers insight into the consequences of administrative procedures. Legal scholars and political scientists have long debated this issue (Moe 1989, 1990; McNollGast 1987, 1989; Mashaw 1990; Asimow 1994). Do administrative procedures serve political purposes such as favoring particular interest groups? Or, do they advance normative values such as transparency and due process? Evaluating the effectiveness of constraints provides a previously unexplored opportunity to gain leverage on this question.

This question also sheds light on the democratic accountability of the administrative process. This is no small issue, as political accountability is an oft-cited justification for delegation to administrative agencies. That is, delegating power to

unelected agency officials is more democratic if these officials are accountable to the Congress and president. Congress and the president must actually seek to control administrative agencies for this rationale to be valid, however. Constraints are commonly assumed to be one such control mechanism. This dissertation questions this assumption by showing that some constraints fail to control agencies.

Rulemaking constraints have important practical implications, as a great deal of policymaking occurs through the regulatory process. Agencies issue rules ten times more often than Congress passes legislation (Crews 2007). Some of these rules are minor, but many have important policy implications on issues ranging from airline safety to water quality to the price of cable television. During the 2000's, agencies issued 987 total rules expected to have an annual economic impact exceeding $100 million (GSA RegInfo). Understanding the effect of constraints on agency rulemaking is therefore important to understand the contemporary federal policymaking process. If some constraints are totally ineffective, this affects our understanding of the rulemaking process.

This dissertation also offers insight into whether rulemaking constraints contribute to the "ossification" of the rulemaking process. A substantial literature has debated whether the rulemaking process has become too slow and costly ("ossified"), encouraging agencies to formulate policy via alternative means such as adjudication or informal decisions (e.g., McGarity 1991; Eisner 1989; Mashaw and Harfst 1989; Pierce 1995). This dissertation tests the ossification thesis by analyzing whether rulemaking constraints increase the cost and time required to formulate rules. This analysis therefore contributes new empirical analysis to the long-running ossification debate.

Finally, the findings in this dissertation may supplement a narrow form of intentionalist judicial interpretation. That is, the results may allow an interpreter to better discern the intent of the legislature that enacted the constraint. For instance, a judge may determine whether a constraint was enacted as a compromise, meriting a less expansive interpretation. All else equal, the intentionalist interpreter may choose to interpret constraints with such features more expansively.

II. Previous Studies

A. Understanding Imposition of Constraints

1) Legal Perspective

The existing literature has divided into two major perspectives on the purpose of administrative law. The first perspective, primarily advanced by legal scholars, argues that administrative procedures such as rulemaking constraints further normative values such as expertise, transparency, deliberation, due process, efficiency, rationality, pluralistic participation, and the legitimacy of state action (e.g., Mashaw 1990). This literature has long debated the extent to which administrative law should further each of these values (e.g., Bressman 2003).

These accounts generally pay relatively little attention to how the separation of powers system influences agency behavior. Instead, these accounts assume without empirical justification that administrative procedures like rulemaking constraints actually advance goals like transparency or due process. This dissertation contributes to this debate by analyzing whether and when rulemaking constraints are even actually applied with sufficient frequency to potentially further such values.

2) Political Control Perspective

The second perspective, primarily formed by political scientists, views administrative procedures as a method of fostering political control of agencies (McNollGast 1987, 1990; Moe 1989, 1990; Epstein and O'Halloran 1999). McNollGast (1987, 1989) focused on congressional control of the bureaucracy. They argued that the enacting coalition within Congress (this implicitly encompassed the president) strategically imposes rulemaking constraints to encourage agencies to "stack the deck" in favor of its interest group allies. For instance, a constraint may require the agency to consult a particular set of interest groups before issuing a rule. A constraint may also ensure that supportive interest groups receive early information about a proposed agency policy.

Favored interest groups use the information and access afforded by such constraints to monitor agencies. They report back to Congress, which then uses this information to conduct oversight hearings, adjust agency budgets, and engage in other forms of ex post monitoring (Aberbach 1990). These ex post monitoring strategies would be less effective absent monitoring by favored interest groups. Favored interest groups reward members of the congressional enacting coalition by supporting their reelection efforts. Note that this account also assumes that constraints are effective because ineffective constraints would not advantage particular interest groups.

Moe (1989, 1990) differed from McNollGast in a number of important respects. Unlike McNollGast, who focused on Congress, Moe argued that political bargaining among the congressional enacting coalition and the president influences agency structure. Instead of assuming that Congress is unified in its effort to control the bureaucracy, Moe

argued that Congress itself is often divided. Divisions with the president further exacerbate this problem.

Moe's inclusion of the president in the bargaining process over agency structure had important implications. Presidential preferences obviously matter because presidents can veto legislation. Their consent is therefore necessary to create bureaucratic structures (unless Congress can override the president's veto). In addition, presidential preferences over bureaucratic structure may differ from members of Congress because presidents have unique institutional incentives to control and manage the executive branch (Moe 1989). Second, as head of the executive branch, presidents can exert unilateral influence over administrative structures after enactment of the legislation.

Unlike McNollGast, Moe analyzed the impact of bargaining within Congress on the design of bureaucratic structure. Moe argued that members of Congress bargain over bureaucratic structure to advance their policy preferences. Supporters of legislation seek to design agencies that increase the probability of achieving their policy goals. By contrast, opponents seek to cripple the agency by incorporating design elements that prevent the agency from achieving its goals. Agency structure is therefore the product of politics, not the wishes of a unified enacting coalition within Congress.

Moe argued that this political bargaining may result in agency structures that were not designed to be effective. Instead, these agency structures were designed for political purposes. This contrasted with McNollGast, whose analysis did not address the effectiveness of agency design. To take one example, Congress required the Occupational Health and Safety Commission to receive approval from another agency before proceeding with rulemakings (Moe 1989). Opponents of a strong OSHA fought to

impose this requirement because they did not want OSHA's rulemaking process to be effective. Supporters agreed to this requirement only out of political necessity. The result was a compromise structure that was not designed to be effective.

Moe's analysis also incorporated political uncertainty. Moe argued that the enacting coalition has strong incentives to protect its structural choices from being altered by future Congresses and presidents. Embedding detailed and burdensome structural constraints into the agency guards against such change because these features are costly for future congresses to alter (Moe 1989). This strategy of layering on detailed processes and constraints comes at the expense of undermining the agency's effectiveness, however.

3) Empirical Studies

Some empirical work has tested the political control account. In the only large-sample empirical analysis of constraints, Epstein and O'Halloran (1999) found a positive correlation between the total number of constraints imposed on particular laws and the number of delegating provisions in the law. They concluded that Congress uses procedural constraints to pursue multiple goals including controlling agencies and favoring particular interest groups (Epstein and O'Halloran 1999, 133). This account fails to consider that constraints may be created by a political compromise that may fail to achieve either of these goals, however. Like McNollGast, this is a result of neglecting the multiple principals problem by downplaying the president's role in enacting constraints.

Hamilton and Schroeder found that agencies often circumvent congressional constraints by making policy via informal channels such as guidance documents. This

strategy allowed agencies to make policy while avoiding constraints on the rulemaking process (Hamilton and Schroeder 1994). Balla (1998) analyzed whether Congress successfully used constraints to induce the Health Care Financing Administration to favor high-income specialist doctors. Balla found that Congress failed in this effort, but did not endorse a particular explanation for this result. Several legal studies have also concluded that individual constraints are ineffective (Hills 2001; Bermann 1997).

4) The Legal Perspective's Response

The political control account sparked a sharp response from legal scholars (e.g., Robinson 1989; Mashaw 1990; Asimow 1994). These responses generally argued that political scientists failed to appreciate the heterogeneity and complexity of administrative procedures. By generalizing, they mischaracterized the purpose underlying many administrative procedures. These responses also questioned the political logic of the political control account (Robinson 1989). For instance, why would Congress seek to permanently "stack the deck" in favor of interest groups, who could then safely decline to support their reelection? Similarly, the political control account does not explain why Congress frequently delegates authority to state agencies. Other responses noted that political control account failed to incorporate the president and devoted too much emphasis to Congress (Kagan 2001).

This dissertation does not purport to resolve this debate over the purpose of administrative procedures. The study instead contributes to this debate by analyzing the plausibility of these two accounts with respect to one important type of administrative procedure, rulemaking constraints. Political control is an unsatisfying explanation for ineffective constraints. Similarly, ineffective constraints are unlikely to further normative

values such as transparency and due process. This dissertation contributes to this debate by analyzing which constraints are sufficiently effective to support either the political control account or the legal account. If so, what political conditions induce Congress to impose such effective constraints?

B. Effectiveness of Rulemaking Constraints

A handful of studies have speculated that particular constraints are ineffective. These studies have not analyzed when Congress is likely to enact an effective constraint (e.g., Verkuil 1982; Funk 1996; Coglianese 2008). They also have not analyzed what institutional characteristics distinguish effective and ineffective constraints.

Some studies define effectiveness as furthering the goals of the enacting Congress and president. Shapiro (2007) analyzed the correlation between imposition of procedural constraints and broad outcomes from the rulemaking process such as: number of comments received on rules, average time required to complete rulemakings, and number of rules modified. Shapiro hypothesized that the Bush administration used constraints to further its anti-regulatory agenda by hindering the rulemaking process. The Bush administration was virtually identical to the Clinton administration, however.

Second, some other studies define effectiveness as merely affecting an agency's decisionmaking process in any manner. For instance, Yackee and Yackee (2009) analyzed whether constraints influence either the number of rules issued or the time required to complete a rulemaking. Surprisingly, they concluded that rules applying constraints such as the Regulatory Flexibility Act actually consumed less time.

None of the studies described here tests a theory predicting when constraints will be effective, however. Instead, such studies assume Congress or the president intend for

constraints to be effective (Balla 1998; Hill and Brazier 1991; Spence 1997, 1999; Nixon et. al. 2002) while agencies try to minimize compliance with constraints to increase their own autonomy (Moe 1989). These studies also do not analyze which institutional characteristics distinguish effective and ineffective constraints.

III. Plan of this Dissertation

The next chapter offers a theory predicting what institutional features distinguish effective and ineffective constraints. The theory predicts that constraints will be designed to be effective when no major opposition exists. When strong opposition forms against a constraint, the political branches either compromise to enact constraints that are likely to fail from the perspective of the constraint's strong supporters. In the case of extreme opposition, they simply fail to enact constraints altogether.

Chapter 3 then empirically tests this theory with a series of case studies and regression analysis. The results generally support the theory, showing that political agreement influences when the political branches enact constraints that are likely to be effective. The results also show that some constraints are very ineffective in practice. Chapter 4 discusses the implications of these results. The results offer new evidence regarding the extent to which the administrative process responds to the Congress, president, and courts. The results also provide insight into the goals of the political branches with respect to administrative law. Chapter 5 concludes with a discussion of future research directions.

CHAPTER 2: THEORY

I. OVERVIEW

This chapter argues that political incentives and policy preferences determine whether the political branches agree to impose rulemaking constraints that are likely to be effective. When broad political support exists for a constraint, the House, Senate, and president will be more likely to pass a constraint with a high probability of achieving its stated purpose from the perspective of the strong supporters (an "effective" constraint). Agencies may still undermine a constraint enacted under these conditions, but the design reduces the probability that they successfully do so. When significant opposition to a constraint mobilizes, the House, Senate, and the president will agree to a compromise constraint that is more likely to be undermined by agencies. Finally, the political branches fail altogether to enact constraints in the face of strong opposition.

II. DEFINING EFFECTIVENESS

A. Definition Used in This Dissertation

This dissertation measures effectiveness in terms of whether the constraint pushed policy in the direction and magnitude favored by its supporters. Thus, an effective constraint is one that fulfills the political actors who strongly support its enactment. An ineffective constraint fails to meet the expectations of its strong supporters.

Effectiveness should not be conflated with the net magnitude of the impact. For instance, a constraint intended to have only a weak effect is effective if it successfully serves this purpose (see Table 1). The hypothetical reporting requirement noted above

would therefore only satisfy the strong definition of an "effective constraint" if it induced the agency to make decisions favored by its strong supporters.

B. Alternative Definitions

The definition of effectiveness used in this dissertation is not the only such definition. A brief discussion of alternative definitions is now provided to clarify the definition used in this dissertation. In its weakest form, effectiveness may be defined merely as altering an agency's decisionmaking process. For instance, the Regulatory Flexibility Act would be defined as effective if agencies actually completed Regulatory Flexibility analyses on most rules. Under this definition, the Act would be effective even if none of these analyses actually influenced any of the agency's final decisions. Put differently, the Act would only be ineffective if agencies simply refused to complete the analyses. This definition is unsuitable for the purposes of this dissertation because it does not incorporate policy outcomes, which are of ultimate interest to the key players (politicians, agency leaders, interest groups, and voters). Put differently, the definition fails to incorporate the politics that are of central interest in this dissertation.

A stronger definition of effectiveness requires that the constraint in question affect agency decisionmaking in any direction. Put differently, this standard only requires the constraint to have some impact on the agency's decisions. Merely altering agency procedures alone is insufficient to satisfy this standard. For instance, the Regulatory Flexibility Act analyses discussed above would only be effective if they pushed the agency to either issue policies that were more or less favorable toward small entities. Thus, a constraint could fail to push agency decisions in the desired direction, but would still be classified as effective so long as it had some impact. For the same

reasons noted above, this definition is inadequate because it fails to incorporate the politics that are of central interest in this dissertation.

An even stronger standard for effectiveness requires that the constraint influence agency decisionmaking in the direction intended by its pivotal supporters in Congress. This definition comports with the positive political theory arguments that courts should discern legislative intent by looking to the statements of the pivotal voters on legislation (e.g., Weingast and Rodriguez 2003). Work in this positive political theory line argues that such statements are the most credible indicator of legislative intent because the pivotal supporters by definition have the power to skirt legislation. Thus, the arguments that sway them are those that the court should interpret as legislative intent. However, this definition is unsatisfactory in several respects. First, in many cases measuring the preferences of the pivotal members is quite difficult. On many bills, the pivots simply decline to express their preferences. Second, the pivotal members may agree to legislation containing multiple provisions for reasons unrelated to the rulemaking constraint. Thus, their support for the larger bill is not a reflection of their support for the particular constraint.

Defining effectiveness from the perspective of the strong bill supporters avoids these problems. Unlike the pivotal voters, strong supporters typically express their preferences clearly. This definition also captures the key elements of the political conflict that motivates the behavior of political actors enacting constraints.

Table 1: Relating Constraint Impact and Effectiveness

	Strongly Conservative in Practice	**Weakly Conservative in Practice**	**No Impact**	**Weakly Liberal in Practice**	**Strongly Liberal in Practice**
Intended to be Strongly Conservative	Effective	Ineffective	Ineffective	Ineffective	Ineffective
Intended to be Weakly Conservative	Ineffective	Effective	Ineffective	Ineffective	Ineffective
Intended to be Weakly Liberal	Ineffective	Ineffective	Ineffective	Effective	Ineffective
Intended to be Strongly Liberal	Ineffective	Ineffective	Ineffective	Ineffective	Effective

III. Step 1: The Influence of Politics on Legislative Design

A. Introduction

Presidents and members of Congress are goal-oriented actors, and rulemaking constraints are one tool to pursue their goals. This dissertation assumes that two goals predominate: electoral success and policy preferences (Fenno 1973). The following discussion outlines how these goals influence the legislative design of rulemaking constraints.

Interest groups and voters often influence the preferences of politicians with respect to rulemaking constraints. Members of Congress and presidents are the ultimate decisionmakers, however. This discussion therefore analyzes the decision from the perspective of these politicians while noting the influence of interest groups and voters on their preferences.

B. Political Goals

Studies of Congress often assume that electoral goals are paramount (Mayhew 1974). Presidents face somewhat different incentives, but electoral goals are nonetheless important. First term presidents are also electorally motivated, but they face a national constituency. As a result, they may be less beholden to special interest groups than Congress (Moe 1989). The reelection goal is less directly relevant for second-term presidents, but nonetheless salient. Second term presidents need to retain political support to advance their agenda, and they prefer that their party retain the presidency to bolster their legacy (Moe 1985, 238).

Rulemaking constraints are typically obscure and unnoticed by the voters. Even major regulatory policy issues such as the Department of Agriculture's Clinton-era rule to ban construction of roads in national forests attract relatively little political attention. Such regulatory issues pale in political importance to issues such as the economy and national security. The procedures governing the rulemaking process receive even less attention than regulatory policy issues. The public is virtually unaware of even the most prominent rulemaking procedures such as the notice and comment process, much less constraints like the Unfunded Mandates Reform Act.

In rare cases, politicians and political parties may bring rulemaking requirements to the attention of voters. For instance, House Democrats convened a committee hearing to publicize rulemaking process changes initiated by the Bush administration (House Committee on Science and Technology 2007). The 1994 campaign provides a more striking example. That year, regulatory reform was an important element in the Republican "Contract With America." Anti-regulatory rulemaking procedures such as

the Congressional Review Act provided substance for this campaign effort. Put differently, rulemaking procedures may support a broad political message.

Interest groups are much better informed about rulemaking constraints than voters. As noted above, many important policy decisions are made through the rulemaking process. Rulemaking is especially important in particular policy areas. For instance, very little major environmental legislation was enacted from 1991-2010, leaving virtually all major policy changes to rules. Interest groups therefore have strong incentives to influence rulemaking.

Interest groups have recognized the importance of the regulatory process. As the discussion in Chapter 3 shows, environmental groups vigorously supported NEPA. Similarly, the Conference on Small Business strongly backed the Regulatory Flexibility Act. These interest groups may provide contributions and campaign support to politicians who support constraints that advance their agenda.

A constraint may therefore further or hinder political goals of members of Congress and presidents. A constraint advances reelection prospects if either: 1) it is popular with the elected official's constituents in its own right; 2) it encourages agencies to issue politically salient rules favored by the elected official's constituents. The first condition rarely occurs because most rulemaking constraints are obscure. The second condition is satisfied if the constraint is effective and the public or relevant interest groups are aware of the rule and reward or punish the politicians accordingly. Politicians may therefore use constraints to gain the support of particular interest groups. Because politicians have different bases of interest group support, disagreement among interest groups is very likely to be translated into disagreement among politicians.

C. Policy Goals

Policy goals also matter. Running for Congress or the presidency requires enormous personal sacrifice. Many studies assume that individuals endure such costs partly to pursue their policy goals (Kelman 1987, 261; Shepsle and Weingast 1994; Ferejohn and Fiorina 1975). Measuring the latent policy preferences of politicians is impossible. Political forces contaminate observable measures of policy preferences such as roll call voting behavior or campaign position taking. However, most studies assume that at least a portion of such political behavior should be attributed to policy goals. Moreover, substantial empirical research shows that politicians hold different ideological preferences. As a result, a constraint that encourages agencies to issue either conservative or liberal policies is likely to create opposition from the other side of the ideological spectrum.

A constraint advances policy preferences if it encourages agencies to issue rules closer to the politician's ideal point.[4] For instance, a constraint may force an agency to analyze the environmental impact of rules. If effective, this will encourage agencies to issue more environmentally friendly policies. Again, this is no small matter given that the rulemaking process produces a great deal of contemporary law. Proposed rulemaking constraints may therefore generate political opposition.

Such political opposition may seem implausible at first glance. Admittedly, many members of Congress appear to devote relatively little attention to the rulemaking process as a whole, and even less attention to rulemaking constraints. Some members have recognized the importance of rulemaking, however. Such members frequently self-select

[4] Presidents have unique incentives to centralize control over the executive branch (Moe 1989). On balance, presidents may therefore favor constraints that increase executive control over agencies.

onto the House Committee on Oversight and Government Reform or the Senate Committee on Homeland Security and Governmental Affairs. For instance, in the late 1990's Republican Representative David McIntosh devoted significant attention to the rulemaking process. McIntosh argued that rulemaking generated intrusive government regulation and undermined Congress' power (Skrzycki 2006). This belief prompted his repeated efforts to monitor and oversee agency compliance with the Congressional Review Act. By contrast, Democratic Representative Henry Waxman was much more supportive of the rulemaking process. Waxman therefore conducted oversight efforts to ensure that constraints did not unduly burden the rulemaking process (Waxman 2007).

D. The Continuum of Constraint Design

1) Theory

This dissertation argues that politicians are guided by their policy and political goals when they design rulemaking constraints. The level of political agreement for a rulemaking constraint may vary markedly. In some cases, a constraint may enjoy broad political support and little opposition. In other cases, strong supporters of the constraint clash with staunch opponents.

For simplicity, this dissertation collapses the level of political support for a constraint into one continuum ranging from full agreement to complete disagreement. In cases of full agreement, no important opposition forms against the constraint as proposed by its supporters. As a result, the pivotal voters in Congress and the president support the constraint in this undiluted form. A constraint enacted under such agreement has the greatest probability of being effective because its supporters are not forced to make compromise concessions to opponents. Such compromises undermine the constraint's

expected effectiveness (Moe 1989). Unforeseen circumstances and principal-agency problems may still undermine the constraint, but it nonetheless has the greatest probability of being effective.

As disagreement over the constraint increases, opponents will successfully demand concessions in the constraint's structure. Again, such disagreement between supporters and opponents may manifest itself both within Congress and between Congress and the president. The net result is that constraint will be designed as a compromise that has a lower probability of being effective (again, effectiveness is defined as fulfilling the goals of the constraint's strong supporters). The level of compromise increases with the level of disagreement. As opponents gain greater political strength, they can demand more concessions, further reducing the probability that the constraint will be effective (Moe 1990). The constraint will not pass at all in the case of substantial disagreement.

Legislative time is scarce, and should be regarded as an investment activity (not a consumption activity). Given this time scarcity, why do members of Congress exert the effort to pass compromise constraints with little probability of being effective? First, compromise constraints may ultimately be effective. Subsequent discussion details the sources of such uncertainty, but for the present simply assume that a compromise constraint has an uncertain probability of succeeding. Advocates of the constraint may prefer to "roll the dice" and accept the best possible compromise that they can achieve. Opponents of the constraint may fear that a future Congress will enact a constraint with a higher probability of effectiveness. They may therefore enact a compromise to thwart off such future legislation.

Opponents and supporters also may have different information. Due to incomplete information and cognitive limitations, each side may hold different assessments of the probability that a given compromise constraint will be effective. Similarly, the two sides may have different tolerance levels for risk. These differences in information and risk tolerance may facilitate compromise.

2) Contribution to the Existing Literature

This theory builds on the work of Moe (1989, 1990, 1994) in several important ways. First, this theory predicts when the legislative process is more likely to produce an ineffective agency structure. Moe's work notes that legislative bargaining may produce such ineffective structures, but does not analyze when such structures are more likely to emerge. This dissertation builds on Moe's work by doing so. Moreover, this dissertation empirically tests this theory.

Second, this theory analyzes the specific institutional characteristics that increase the probability that rulemaking process constraints (an important example of bureaucratic structure) will be effective. Moe's work focuses on bureaucratic structures more broadly, and does not predict what institutional features distinguish effective and ineffective constraints. This dissertation supplements Moe's work by analyzing the institutional determinants of effectiveness.

Finally, this dissertation is one of the few works to empirically analyze the effectiveness of bureaucratic structures. Most work (e.g., McNollGast 1987, 1989) assumes without empirical justification that bureaucratic structures are effective. Moe (1989) offered empirical evidence that this assumption is often unjustified. This dissertation provides additional evidence in the context of rulemaking constraints, a

substantively and theoretically important class of bureaucratic procedures. This provides a more complete sense of how politics influences the design of bureaucratic structures.

IV. Step 2: Agency Implementation

A. Introduction

Constraints cannot be effective without agency implementation. Agencies may have incentives to undermine constraints, however. Even a constraint that was designed to be effective may fail due to such agency subversion. Such constraints are more likely to ultimately be effective than their compromise counterparts, however.

This section outlines how the design of constraints can reduce the principal-agency problem, thereby increasing the odds of agency compliance. A description of the basic principal-agency problem between Congress and agencies is first required.

B. The Basic Principal-Agency Problem

Congress and the president face a principal-agency problem (Spence and Zeckhauser 1971) with their subordinate bureaucratic agencies. This principal-agency problem is a product of two important conditions. First, the agent (the bureaucratic agency) has preferences that diverge from the principal (Congress and the president). In the context of legislative delegation, this typically means that the agency prefers a different policy choice than Congress and the president. Other goals may also lead agency leaders to defy their political superiors. Such goals may include increasing agency budgetary resources, improving future employment opportunities with regulated entities, winning promotion within government, bolstering job security, and enjoying leisure time (Wilson 1989; Downs 1967). Any of these goals may spur an agency leader

to diverge from Congress and the president. The relative importance of these goals likely differs greatly between agencies and individual bureaucrats, but any may cause agency leaders to defy their political superiors.

The second condition for a principal-agency problem is that an information asymmetry prevents the principal from observing the agent's action at no cost. This information asymmetry is exacerbated when the principal delegates a complex task to the agent. In the context of legislative delegation, this usually occurs when Congress and the president delegate to an agency in a complicated policy area.

Principal-agency problems increase when multiple principals (e.g., the House, the Senate, and the president) hold different preferences over the agent's behavior. If each of the principals must agree to sanction the agent, then the agent may exploit disagreement to impose its own preferences. This problem is detailed below.

C. Strategies to Mitigate the Principal-Agency Problem

The principal can take steps to mitigate the principal-agent problem. First, the principal may write a specific contract that reduces the agent's discretion. In the legislative context, Congress and the president would write more specific statutes. This reduces the potential for agent shirking by reducing the amount of authority delegated. However, this strategy may reduce the net benefit of delegation to the principal because an agent with little discretion will be less able to use his expertise on behalf of the principal (Miller 2005). For Congress, the central tradeoff is to maintain control over agencies while yielding sufficient control to harness agency expertise.

Second, the principal may monitor the agent on an ongoing basis. Congress pursues this strategy by empowering interest groups to monitor agencies on its behalf

(McCubbins and Schwartz 1984). Congress writes procedures that empower interest groups to monitor agencies. Interest groups influence ongoing agency decisionmaking, and also report instances where agencies deviate from their statutory mandate. This strategy utilizes the tremendous resources of the Washington interest group community, leveraging Congress' limited resources. The strategy is self-enforcing when interest groups have an incentive to influence the behavior of agencies, which make critical decisions in their policy areas. Congress may also impose other methods of ex ante monitoring such as requiring agencies to consider particular issues or criteria before reaching a decision.

Third, the principal may engage in ex post monitoring of the agent's compliance with the contract. This strategy may reduce agent shirking, but the monitoring process is likely to be costly for the principal. The principal must therefore balance the costs and benefits of such monitoring. In the context of American politics, Congress seeks to engage in an optimal level of ex post monitoring activities such as agency oversight hearings or Government Accountability Office (GAO) investigations. These oversight methods are costly and sometimes inaccurate measures of agency compliance, however. The following section elaborates on the limitations of ex post control.

In short, Congress and the president has three major options to confront the agency control problem: 1) delegate less; 2) attempt to prevent agencies from making unfaithful decisions (ex ante monitoring); 3) detect and overturn unfaithful agency decisions after the fact (ex post monitoring). This chapter next elaborates upon the problems with ex post control.

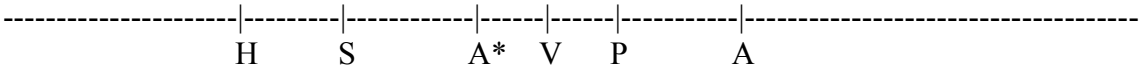
1) Limitations of Ex Post Solutions to the Control Problem

Congress and president have the authority to overturn or sanction agency decisions. The multiple principals problem severely constrains this power, however. Both houses of Congress and the president must agree to either overturn or sanction any agency decision. To the extent that they exercise gatekeeping authority, congressional committees may also have to support any override legislation. Agencies may exploit this disagreement between the political branches to issue a decision without the threat of being overruled.

Take the unidimensional model below first proposed by Ferejohn and Shipan (1990), and later analyzed by McNollGast (2007). Assume that all players have complete information regarding the preferences of other players. As noted, all legislative efforts require agreement by the House median (H), the Senate median (S), and the President (P). The Agency strategically decides whether to impose its preferred policy (A), or to select a policy favored by at least one of these branches.

Figure 1: Unidimensional Spatial Model of Separation of Powers

Agency Power without Ex Ante Oversight



If the agency adopts a rule at its ideal point (A), the House (H), the Senate (S), and the President (P) will all support override legislation. The result of the override will fall between H and P. The agency can foresee this, however, and impose a policy that will not be overturned. The president is indifferent between A and A*. The president prefers A to all points to the left of A*, so he will protect the agency by vetoing any legislation in this range. Let A* be the policy that the President regards as equally valuable as A. Congress will foresee the president's veto, and propose a policy at A* (Huber and Shipan 2002). However, the agency can foresee this strategy and simply propose policy at the President's ideal point (P). The president will veto any policy that diverges from this point, so policy rests at P unless Congress can override the president's veto. Congress can override any policy to the right of V. Therefore, the agency will move policy to V, where it will rest (McNollgast 2007).

These results change slightly as the positions of the players varies. For instance, the Veto Override (V) is not relevant when it is closer to the Agency (A) than the President (P). The fundamental point remains, however: the agency can exploit differences in preferences among the House, Senate, and President to avoid being overturned or sanctioned. For the sake of simplicity, this model excludes congressional committees, which arguably hold veto power over all override legislation (Weingast and

Moran 1988; Krehbiel 1991, 1998). If anything, this model therefore understates the difficulty of reaching agreement to overturn an agency.

2) Ex Ante Control Mechanisms

Congress and the president can impose ex ante constraints on agencies to reduce the problem outlined above. Unlike ex post constraints, ex ante control mechanisms do not require agreement by the political branches to control the agency. Instead, ex ante constraints directly influence the agency. For instance, Congress may require an agency to consult with a particular interest group. It may force the agency to publicize particular information used to justify a draft rule. It may mandate that an agency receive approval from another federal agency or from a state agency. It may force the agency to conduct a specific analysis. If effective, these constraints reduce agency discretion even when the House, Senate, and president are divided.

Moe (1989) and McNollgast (1987, 1989) sparked contemporary interest in the use of ex ante constraints as a method of political control.[5] As noted above, examples of such constraints include reporting requirements, judicial review procedures, consultation mandates, participation subsidies, and analytic requirements. Many of the rulemaking constraints analyzed in this dissertation are an important example of the final category.

Rulemaking process constraints may influence agency decisionmaking in two important respects that do not require the affirmative agreement of the House, Senate, and president.

[5] This discussion is not intended to imply that administrative procedures are intended solely as a mechanism of political control. Many administrative procedures may also be intended to further normative values such as deliberation, transparency and accountability, due process, rationality, and efficiency (Mashaw 1990; Robinson 1989; Asimow 1994).

1) Directly influence agency decisions: Constraints often require agencies to study the impact of their policy choices on a particular issue. For instance, NEPA requires agencies to consider the environmental impact of decisions. This analytic process alone may influence agency decisions simply by forcing agency staff to consider the relevant issues. The analytic process may also require the agency to hire staff. Such staff may be more sympathetic toward the policy objective underlying the constraint because of selection effects. That is, people are often drawn toward working in policy where they support the underlying policy. For instance, NEPA has pushed agencies to hire additional lawyers who specialize in NEPA compliance. Such lawyers typically support NEPA's underlying policy objective. Professional norms and training may reinforce this result. This may have an enduring impact on the agency (Moe 1989).

Constraints may also encourage or require agencies to consult with specific interest groups. This consultation process provides an opportunity for the interest groups to gain familiarity with the agency, its staff, and its policy priorities. This may allow these interest groups to become more effective advocates for their positions. These interest groups can give the agency information favorable to their position.

2) Empower judicial review: Judicial review is often viewed as an ex post sanction, but it may have an ex ante impact on agency decisionmaking. Rulemaking process constraints may increase the efficacy of judicial review. By granting procedural rights and providing additional information, rulemaking constraints can encourage interest groups to monitor the agency more closely and to bring more cases to the courts. Such active judicial review may check agency discretion if the court interprets the statute in accordance with the intent of the enacting Congress and president. Such interpretation

prevents the agency from strategically avoiding legislative override because the court can move policy unilaterally. This threat may deter initial agency deviance (Eskridge and Ferejohn 1992).

Judicial fidelity to the statute is not guaranteed, however. Judges may instead impose their own policy preferences (Segal and Spaeth 2002). If agencies anticipate this behavior, then judicial review may not deter them. Unfaithful judicial interpretation is not inevitable, however. Judges are socialized to enforce the law, which may reduce their desire to act as policy maximizers (e.g., Markovits 1998; Greenawalt 1992). In addition, institutional variables such as appellate review and collegial courts may encourage judges to interpret the law sincerely.

Even ideologically driven judicial interpretation may alleviate the control problem, however. The effect of an ideological court hinges on the location of the court's preferences relative to the House, Senate, and president (Eskridge and Ferejohn 1992, 182-186). Judicial review is irrelevant if the court's ideal point is more extreme than the House, Senate, and President. It is similarly irrelevant when located between the preferences of the House and Senate. However, judicial review matters when the court's ideal point falls between the agency and the nearest executive or legislative actor. The ideology of the reviewing judge is unknown to the agency ex ante, so the impact of judicial review is unpredictable. This unpredictability may deter risk-averse agencies.

D. The Institutional Characteristics of Effective Constraints.

Because of the principal-agency problem, the effectiveness of constraints is hardly guaranteed. This chapter now applies the preceding discussion to outline the

institutional characteristics that mitigate the principal-agency problem and thereby increase the probability that a constraint will be effective.

1) Textual Specificity

Writing a specific statute is a form of ex ante control. Congress inevitably struggles to write precise statutory constraints, however. The imprecision of the English language and the potential for unforeseen circumstances preclude such a comprehensive effort (Easterbrook 1983). Even if Congress could completely eliminate agency discretion with a precise constraint, doing so would undercut the benefits of delegation because agencies would be restrained from applying their expertise. In addition, Congress would be forced to exert enormous effort to write such a specific constraint. Textual specificity therefore should not be an important determinant of effectiveness.

2) Exemptions and Loopholes

Even a perfectly enforced constraint will be ineffective if it exempts many agencies entirely or includes broad loopholes allowing the agency to justify non-compliance. A committed Congress, judiciary, or president could not enforce such constraints without violating the law. Put simply, a constraint that fails to actually constrain is unlikely to be effective. The Regulatory Flexibility Act, discussed in the following chapter, provides an example of this outcome.

3) Interest Group Participation and Monitoring

Constraints that empower interest group monitoring by supportive interest groups may alleviate the principal-agency problem (McCubbins and Schwartz 1984). Empowered interest groups can use their access to lobby the agency directly, inform Congress of agency non-compliance, file lawsuits, and complain to the Executive Office

of the President. All these interest group behaviors can reduce the principal-agency problem by empowering the agency's political superiors to engage in more effective monitoring.

The existing literature has not explored the conditions under which such interest group involvement is effective. Studies of the rulemaking process provide insight into this issue, however. Empirical work has shown that changing a rule becomes much more difficult after the agency issues a notice of proposed rulemaking (NPRM) (West 2004; West 2009). The period preceding agency issuance of a NPRM is therefore critical (West 2009). Studies from the Congressional Research Service have similarly concluded that efforts to alter agency rules are most effective if they occur early in the regulatory process (Copeland 2005). Agencies are much less inclined to change a proposed policy later in the rulemaking process, when they have already become strongly associated with a particular policy choice.

Agencies are therefore less resistant to congressional and presidential oversight in the pre-NPRM period. Congress can thus influence agencies through informal communication. As the rulemaking process proceeds, Congress may be forced to undertake more costly oversight methods such as holding oversight hearings, sending formal letters, and introducing appropriations riders. Similarly, the Office of Information and Regulatory Affairs (OIRA) and other White House offices can more easily influence rules via informal pressure before release of a draft rule. As a result, a great deal of White House influence occurs in the pre-NPRM phase (Government Accountability Office 2003).

Later involvement also increases the risk of political backlash. Members of Congress are sensitive to being accused of politicizing the administrative process. The president is similarly sensitive. The OIRA case is again instructive. OIRA critics have frequently accused the agency of politicizing agency decisionmaking (e.g., Morrison 1985). Such influence becomes more public as the rulemaking process proceeds because all contacts between OIRA and agencies are disclosed in a public log. The extent of OIRA influence also becomes clearer because changes can be measured against the baseline of the agency's public proposal. In short, interest group participation is more effective in aiding congressional and presidential oversight if it occurs before an agency issues a NPRM. Congress and the president still have the authority to influence the agency as the rulemaking process progresses, but the cost is greater.

4) Direct Congressional Enforcement

As noted, Congress may independently initiate oversight activity. Examples of such ex post oversight efforts include holding oversight hearings, reviewing agency compliance reports, and pressuring the agency through the budget process. These strategies are subject to the limits outlined this chapter. Congress can maximize the effectiveness of such oversight by clearly tasking a particular committee to monitor agency compliance with the constraint. The committee will be particularly effective if the constraint is important to its mandate and the committee is composed of members who support vigorous enforcement. For instance, a committee composed of members concerned about unfunded mandates will be more likely to enforce the Unfunded Mandates Reform Act.

Assigning oversight to a committed committee does not guarantee the constraint's effectiveness, however. Instead, important problems check the efficacy of congressional oversight. First, the multiple principals problem outlined above may prevent Congress from enacting a sanction.

Second, political drift may undermine Congress' will to conduct oversight (Moe 1989). No Congress can guarantee that future Congresses will favor enforcing the constraint. Enforcement priorities may change over time in response to changes in congressional preferences. For example, by the end of the Clinton administration the Republican Congress appeared to lose interest in enforcing constraints that it enacted in 1995 and 1996. This "political drift" problem may push Congress to tasking monitoring and enforcement to a more stable Legislative Branch institution such as the GAO.

5) Judicial Review

As noted, judicial review can be a critical mechanism to achieve agency compliance with constraints. Courts have the power to sanction non-compliance ex post. For instance, a court may remand a rule to an agency with instructions to comply with a constraint. Such a decision is typically embarrassing to the agency and its leaders. Effective judicial review can therefore induce agency compliance prospectively (Ferejohn and Shipan 1990). The threat of judicial enforcement is particularly important when Congress and the president disagree over whether a constraint should be enforced. Without judicial review, the agency may exploit this disagreement to avoid being overturned (Eskridge and Ferejohn 1992). However, the uncertainty imposed by judicial review may deter such agency noncompliance.

A number of conditions influence the efficacy of judicial review, however. First, the statute or executive order obviously must enable judicial review. Second, judicial review is more effective when the statutory text imposing the constraint does not include large exceptions that allow agencies to legally justify non-compliance. Third, active interest group monitoring of agency compliance increases the efficacy of judicial review. Interest groups are an important source of lawsuits challenging non-compliance. Without such suits, the courts are unlikely to even receive cases to sanction agency non-compliance.

As discussed above, satisfying these conditions does not guarantee effective judicial review. Judges inevitably hold discretion when applying constraints, so their preferences matter. As noted previously, judges sometimes stray even from clear statutory text to impose their policy preferences (Segal and Spaeth 2002). Satisfying the conditions above increases the probability of successful judicial review, however.

6) Executive Branch Enforcement

Committed executive branch office oversight of a constraint increases the likelihood of successful enforcement. Executive branch enforcement is more likely to succeed when conducted by an agency within the White House or Executive Office of the President. Ordinary agencies do not have comparable status and authority, undermining their ability to compel compliance. Executive branch enforcement is also more successful when the enforcer holds substantial statutory authority.

Like congressional enforcement, political drift may undermine executive branch enforcement of constraints. Policy priorities shift between presidential administrations. Enforcement is more likely to be durable across presidential administrations if an agency

has a durable institutional commitment to the constraint. To take an example of a rulemaking requirement imposed by executive order, OIRA's reputation is largely based on its well-known commitment to benefit-cost analysis (West 2005). Moreover, OIRA is staffed largely with economists committed to benefit-cost analysis. OIRA clearly responds to presidential preferences, but its personnel and reputation create an enduring focus on benefit-cost analysis (West 2005).

Political drift is also less likely to undermine constraints that increase presidential power. Presidents cannot force their successors to vigorously enforce a constraint. They may encourage such enforcement by promulgating a constraint that increases presidential power, however. OIRA review is a classic example of such a constraint. OIRA's benefit-cost analysis is typically associated with Republican presidents, but Democrats have maintained the practice because it increases their power over the executive branch (Moe and Wilson 1994). Put simply, presidents of all stripes are loath to undermine their own power.

To recap, constraints on the rulemaking process are more likely to be effective if they: 1) do not include broad exemptions; 2) empower early involvement of supportive interest groups; 3) enable judicial review; 4) charge an executive agency with enforcement responsibility; 5) create a dedicated monitoring process within the legislative branch. Satisfying each of these criteria increases the probability that a constraint will be effective.

The relationship between these criteria and effectiveness is not linear, however. Instead, several of the criteria have an important interaction effect. The following relationships should be particularly important:

- No constraint is likely to be effective if it includes broad exemptions.
- Enforcement by supportive interest groups is more effective when coupled with judicial review or congressional enforcement. That is, supportive interest groups are more effective monitors when they can file lawsuits or complain to Congress.
- On the other hand, presidential and congressional enforcement are both strengthened if supportive interest groups are empowered to report agency non-compliance.
- Involvement of supportive interest groups is necessary for judicial review to be effective. Without such interest group involvement, parties are unlikely to file lawsuits allowing the courts to act as effective enforcers. Active involvement of interest groups with sufficient incentives to file lawsuits challenging agency non-compliance is therefore vital.

E. Summarizing Sources of Uncertainty Regarding Constraint Enforcement

Agencies should defy a constraint when the expected benefits of doing so outweigh the compliance costs. That is, the agency determines whether Pr(Caught) * E(Cost of Being Caught) > E(Net Benefit of Non-Compliance).

The following factors influence the probability that the agency is caught: intensity of judicial review, level of congressional enforcement, breadth of exemptions to the constraint, intensity of monitoring by supportive interest groups, level of media scrutiny, and dedication of an executive branch agent to enforcement. Each of these variables is unpredictable. The net probability of being caught is therefore unpredictable.

The cost of being caught is also unpredictable. Getting caught is more costly to the agency when the constraint is important to the political branches or the courts. These

institutions are more likely to impose a significant sanction against an agency thwarting one of their important policy priorities. Compliance costs increase in two ways. First, a constraint may simply force an agency to perform additional analysis that drains scarce resources. The more complicated and burdensome the analytic requirement, the greater the cost. This cost is particularly important for agencies facing a tight budget constraint. Second, the constraint may reduce agency autonomy to select a particular policy alternative. This process is detailed above. The greater the imposition on agency autonomy, the greater the cost of complying.

Congress and the president are aware that agencies face the compliance tradeoff outlined above. When the pivotal members of the political branches all agree, they will design constraints to increase the probability that non-compliance is detected.

F. The Complexity Problem

The previous discussion does not imply that supporters and opponents of a constraint are omniscient. Instead, these actors are boundedly rational. In some cases, the failure to write effective constraints may be a product of incomplete information and limited analytic capacity (March and Simon, 1958). Bounded rationality is particularly important when two conditions are satisfied: 1) the decision maker faces cognitive constraints; 2) the problem at hand is complex (Simon 1962).

The first condition is clearly met. Interest groups, members of Congress, and presidents have access to substantial staff and analytic resources. However, these institutions are subject to the same biases and limitations of other large organizations (Taylor 1984; Scott 1998). Numerous examples document policymaking failures due to incomplete information. As a result, both Congress and the executive branch are

structured in part to reduce informational problems (Krehbiel 1998). The proposition that Congress and the president face cognitive constraints thus requires little justification.

The second condition is also satisfied, as designing an effective constraint is clearly difficult. Writing effective constraints is challenging because the administrative state is vast and quite complicated. Supporters and opponents bargain over many different provisions when designing a constraint. To take just one example, they may empower the courts, the Government Accountability Office, or the OMB as the primary institution to monitor compliance. These institutional choices are even more difficult because the federal agencies implementing the constraints differ greatly. Agencies vary markedly in their analytic capacity, internal structures, interest group constituencies, and policy complexity. A constraint that works well for the Department of Education may therefore fail in the Department of Transportation.

The policy effects of a proposed constraint are partially uncertain at the time of enactment. This uncertainty stems from five major sources. First, agencies generally have strong incentives to minimize compliance, but they may occasionally embrace a constraint (Magill 2009). This may happen for a number of reasons. For instance, a constraint may advance the policy preferences of agency leaders or aid their internal employee management efforts.

Second, judicial interpretation and enforcement of constraints is highly uncertain. Courts have aggressively interpreted some constraints such as the National Environmental Policy Act while interpreting others such as the Regulatory Flexibility Act quite narrowly. Such aggressive judicial interpretation can be especially important if

induces ex ante agency compliance with the constraint. Judicial interpretation is not easily predictable, however.

Third, OMB enforcement is similarly uncertain. The case studies in Chapter 3 show that OMB has aggressively interpreted some procedures while actually admitting to neglecting others. OMB exerts indirect managerial authority over agencies, so its decisions may also induce ex ante agency compliance.

Fourth, exogenous changes in the policy world may also influence the impact of constraints. For instance, improvements in the scientific methods used to conduct environmental impact assessments increased NEPA's importance. Similarly, improvements in benefit-cost methodology may increase compliance with requirements triggered by cost estimates. Such improvements may make benefit-cost analysis more replicable and cheaper, reducing agency incentives to shirk. Exogenous changes may also create new loopholes or expand existing gaps in unpredictable ways. For instance, improvements in computing technology may allow an agency to conduct previously burdensome rulemaking consultation in a perfunctory manner.

Finally, future election results may influence the impact of a constraint. If future Congresses and presidents favor enforcing a constraint, then agencies are more likely to comply. As noted above, Congress and the president have many tools at their disposal to influence agencies. As a result, a constraint may be reinvigorated in response to a presidential election or a shift in partisan control of Congress. Because of this uncertainty, even a constraint created as a compromise has a small but non-trivial probability of succeeding.

V. Alternative Explanation: Are Rulemaking Constraints Symbolic?

Are ineffective rulemaking process constraints a form of symbolic politics? Symbolic political activity seeks to influence the opinion of political actors without altering policy outcomes (Edelman 1964; Sears et. al. 1980). Edelman (1964) launched much of the contemporary research analyzing symbolic political activity. In the context of the administrative process, Edelman argued that the political branches create regulatory agencies that appear to serve the public while actually serving regulated industries. For instance, Congress and the president may appoint one member of a multimember board who favors regulating in the public interest (61). This member issues dissenting opinions that create the appearance of public inclusion, but they do not affect policy outcomes (72). This illusion reassures the public and reduces conflict within the policy area (49).

One could argue that ineffective constraints on the rulemaking process serve a similar symbolic purpose. For instance, a constraint may send an anti-regulatory signal to the public while allowing the regulatory state to continue its work unencumbered by burdensome constraints. This reduces public antipathy toward agencies and Congress without affecting policy outcomes.

Rulemaking constraints are not symbolic, however. To be symbolic, constraints must have little impact beyond creating the impression among voters that the Congress and president share their priorities. These conditions are very unlikely to be met in practice, however. As noted above, most constraints are too obscure to serve as meaningful symbols. Put simply, very few voters have even heard of constraints such as the Unfunded Mandates Reform Act. Second, interest groups and political parties may

have a political incentive to undermine the symbolic nature of the constraint for the reasons noted above. Put differently, destroying the symbol by exposing the ineffectiveness of a constraint may be politically advantageous. Both of these problems greatly undermine the symbolic account as an explanation for why the House, Senate, and the president impose constraints.

CHAPTER 3: EMPIRICAL ANALYSIS

I. INTRODUCTION

This chapter tests the theory presented in Chapter 2 by analyzing the full population of generally applicable statutory rulemaking constraints. This statement is not intended to imply that the dissertation's theory is tested exhaustively, however. Instead, the theory is applicable to other institutional design issues. However, this dissertation's empirical analysis focuses on rulemaking constraints, a substantively important area in which existing studies have failed to recognize the influence of politics. Chapter 1 presents a fuller discussion of this issue.

A case study of each constraint presents a brief overview of the law, analyzes the level of agreement between supporters and opponents of the constraint, and then details whether the constraint was designed to be effective. Each case then concludes by evaluating the constraint's effectiveness in practice. To supplement the case studies, the chapter also presents a regression analysis of the impact of two constraints on the time required to complete rulemaking.

The cases are presented in order of political support for the constraint (that is, constraints that faced little opposition are presented first). The cases are therefore analyzed in order of their predicted probability of effectiveness:

- Congress and the president enacted NEPA during a time of general support for the environmental movement, and the constraint was designed to be effective. In practice, it has furthered the goals of its strong supporters.

- Revisions to the Consumer Product Safety Commission's rulemaking process, enacted in the wake of unity created by sweeping Republican victories in the 1980 election and broad support for curtailing the Commission, were designed to be effective.
- Broad support existed in 1980 for reducing the regulatory burden on small business, but contrary to the theory, the resulting constraint was not designed to be effective. In practice, agencies have generally disregarded the Act.
- President Truman and congressional Democrats compromised with congressional Republicans to enact the APA. As the theory predicts, the resulting compromise was not designed to maximize the probability of effectiveness. Over time, however, the APA's notice and comment process became effective due to judicial review.
- Supporters and opponents did not agree over the broad terms of legislation to create the Occupational Safety and Health and Safety Administration (OSHA), and the resulting legislation was a compromise that was not designed to maximize the effectiveness of OSHA's rulemaking process. In practice, OSHA has not been effective.
- President Clinton and the Republican Congress disagreed over the terms of both the Congressional Review Act and the Unfunded Mandates Reform Act. As the theory predicts, the resulting compromise was not designed to be effective. Indeed, agencies widely flouted these constraints.
- Intense disagreement scuttled passage of proposed regulatory reform legislation in 1981 and 1995.

II. Case Selection

This chapter analyzes the full population of statutory constraints that apply to a large portion of agency rules. This comprehensive coverage should eliminate concern that cases were strategically selected to support the theory. To expand the analysis, the case studies also include two rulemaking provisions that apply only to individual agency authorizing statutes: OSHA and the CPSC. These two cases were selected because they are major pieces of politically important legislation. Moreover, these cases provide additional variation in the level of political agreement, allowing a more comprehensive test of the theory.

III. Case Studies

A. NEPA Environmental Impact Statements

The National Environmental Policy Act (NEPA) requires agencies to prepare an "Environmental Impact Statement" (EIS) before writing rules with significant expected environmental implications. This requirement directs agencies to analyze the environmental implications of a proposed initiative, describe policy alternatives, and assess the environmental impact of such alternatives. EIS statements must also note unavoidable environmental impacts and describe any irreversible environmental consequences.

Agencies must accept public comments on a draft EIS, issue a final statement, and release a public record of the decisionmaking process. All of these steps must be completed before a rule may proceed (Johnson 2009, 389). For initiatives not expected to

hold significant environmental implications, NEPA requires that agencies produce less detailed "environmental assessments." Rules not expected to impact the environment are exempted as a "categorical exclusion."

Goals of Supporters:

NEPA's strong supporters sought to design a constraint that would force agencies to analyze and publicize the environmental consequences of their decisions. Ultimately, they hoped that this process would then encourage agencies to make more environmentally sensitive decisions (Lindstrom and Smith 2008).

Broad support existed for NEPA in 1969, and opponents of the legislation were in a relatively weak position. President Nixon and the democratic majority in Congress both sought to win the support of the growing environmental movement. Rachel Carson's famous book "Silent Spring" prompted much of the initial interest in the environmental movement (Carson 1962). A number of highly public environmental accidents in the late 1960's such as a major California oil spill and ignition of the Cuyahoga River in Cleveland heightened public concern with environmental issues (Lindstrom and Smith 2008, 20). Many new environmental groups formed in response.

Politicians took notice. In preparation for his 1972 reelection bid, President Nixon sought to gain political strength by embracing the newly popular environmental movement (Mashaw 1985). In his 1970 State of the Union Address, Nixon declared: "Clean air, clean water, open spaces – these should once again be the birthright of every American. If we act now – they can be." (Vogel 1988, 71). Congressional Democrats similarly embraced the movement. The result was a brief window of broad political support for increasing environmental protection (Lindstrom and Smith 2008, IX).

Virtually all of the landmark environmental statutes in effect as of 2009 were passed during this window, including the Clean Water Act, Clean Air Act, the Endangered Species Act, and NEPA.

While it clearly was not his top policy priority, Nixon was mildly supportive of increasing environmental protection. Analysts of the period argue that Nixon was concerned primarily with foreign policy, and displayed relatively little personal interest in most domestic affairs (Small 2003; Vogel 1988, 91). Moreover, NEPA's creation of the Council on Environmental Quality (located in the Executive Office of the President) furthered Nixon's overarching goal of increasing presidential authority over the bureaucracy (Moe 1989). The net result was broad support for using NEPA to force agencies to consider the environmental implications of their decisions.

Institutional Design:

NEPA's was designed to be effective. The following discussion outlines how NEPA stacks up on each key design feature. NEPA uses vague terms such as "major federal action" and "fullest extent possible" (42 U.S.C. 4332 (2008)). NEPA also includes exemptions for agencies certifying that their actions will not have a significant environmental impact. These broad terms and expansive exceptions clearly do not curtail agency discretion. NEPA's exceptions are narrower than those found in many ineffective constraints, NEPA does not include large categorical exemptions like excluding all independent regulatory agencies.

NEPA's effectiveness stems from its enforcement process, not from a tighter statutory scheme. Perhaps most importantly, Congress subjected the EIS requirement to judicial review. The courts widened the judicial review provision through subsequent

decisions. The most important decision, Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, came two years after NEPA's passage (449 F.2d 1109 (D.C. Cir. 1971)).

In its arguments before the court, Calvert Cliffs claimed that the Atomic Energy Commission's policy against automatically considering most environmental concerns outside the realm of radiological issues violated NEPA. The larger issue was whether NEPA supplanted existing agency procedures. The D.C. Circuit broadly interpreted the requirement that agencies give "appropriate consideration" to environmental concerns. The Court also narrowly read statutory language stating that NEPA did not impose additional obligations on agencies. The Court therefore interpreted NEPA to require the AEC to alter its decisionmaking process to incorporate environmental concerns (Rodriguez and Weingast 2006).

Interest groups made great use of this liberal judicial interpretation by aggressively challenging agency compliance with NEPA (Johnson 2009, 381-384). During the statute's first eight years alone, parties filed a total of 1052 NEPA suits (Johnson 2009, 384). Even unsuccessful NEPA lawsuits may have influenced policy outcomes if litigation expenses induced agencies to alter their behavior to avoid future legal challenges.

NEPA's impact was not limited to litigation. A NEPA suit may also alter the behavior of private parties. Research by Linda Cohen showed that NEPA lawsuits often imposed costly delays that deterred private parties from pursuing future projects that could provoke such a suit (Cohen 1979). This uncertainty from NEPA review deterred investment in large nuclear power plants.

NEPA also established executive branch monitoring of agency compliance with the EIS requirement. The Council on Environmental Quality was created to oversee NEPA implementation and to resolve inter-agency EIS disputes. The Council's views have changed in response to presidential preferences, but it has an enduring institutional interest in advocating for NEPA enforcement. NEPA enforcement comprises an important portion of the Council's mission, and neglecting this work would undermine the organization. Importantly, the Council sits within the Executive Office of the President, providing access to senior administration officials not linked to the Executive Office of the President. NEPA also induced many agencies to establish internal environmental offices. Some of these offices became internal advocates for NEPA, creating an institutional basis of support and increasing compliance.

The Act also empowered supportive interest groups to monitor agency compliance. The requirement that agencies seek public comment on proposed EIS's allowed interest groups to express their views during the critical early stages of the policymaking process, before an agency became publicly committed to a policy choice (West 2009). If this strategy failed, early involvement also enabled interest groups to prepare more effective judicial challenges. Such involvement also provided a larger record for judicial review. Interest groups could also better report non-compliance to the Council on Environmental Quality and to Congress.

Congressional monitoring of NEPA was similar to the ineffective constraints outlined above. Like other constraints, Congress has monitored NEPA compliance through its environmental committees. Committee interest has waxed and waned with political trends. Congress did not create a special oversight panel or specially task the

GAO with NEPA oversight. As a result, congressional oversight is subject to preferences of future congresses.

Effectiveness in Practice:

NEPA critics and supporters alike argue that the EIS requirement has been effective (Lindstrom and Smith 2008, 10). To begin, take the Forestry Service's famous "Roadless Rule" as an example of NEPA's importance in the rulemaking process. The Clinton-era rule restricted 55 million acres of national forest from road construction. This policy was extraordinarily controversial, and prompted nine lawsuits (Croley 2008, 205). NEPA was an important element of these lawsuits. In many of the lawsuits, opponents of the rule charged that the Forest Service promulgated an inadequate EIS (Croley 2008, 205-206). In addition, the lawsuits charged that the Service failed to adequately update the original EIS.

These NEPA arguments were an important component of the overall lawsuits (Croley 2008, 205). A Wyoming district court invalidated the rule partially on NEPA grounds. The court held that the Forest Service failed to adequately consider policy alternatives, instead selecting a pre-determined alternative (Croley 2008, 207). An Idaho court also ruled against agency's handling of the EIS, holding that the Forest Service failed to devote adequate time to hear public comments on its EIS proposal (Croley 2008, 206). Both decisions were ultimately overturned by appeals courts, which interpreted the Forest Service's compliance with NEPA more leniently. However, NEPA remained a salient issue throughout subsequent litigation.

Large-N analysis also confirms NEPA's effectiveness. Agencies have prepared EIS's on a wide scale. Agencies filed 5834 EIS's between 1970 and 1972, and an

average of 500-600 annually from 1980 onward (Johnson 2009, 388-389). These analyses were meaningful, and not simply boilerplate language. Moreover, EIS's became more thorough over time. At the time of this writing, the average EIS tops 570 pages, requires up to 18 months of drafting time, and costs up to $200,000 (Johnson 2009, 389). The behavior of well-informed interest groups also suggests that the EIS requirement is meaningful. The fact that proponents of recent legislation have exerted the effort to waive NEPA suggests that it matters (Johnson 2009, 392).

David Spence analyzed the impact of administrative procedures on Federal Energy Regulatory Commission decisionmaking. Passage of NEPA increased the probability that the Commission would issue a pro-environmental decision by 27 percentage points (Spence 1997, 438). By contrast, no other administrative procedure had a statistically significant effect. NEPA may also have had unobservable effects such as encouraging FERC to dismiss applications for projects requiring an EIS (Spence 1997, 442).

B. 1981 CPSC Rulemaking Requirements

In 1981, Congress and the president amended the Consumer Product Safety Commission's ("CPSC") rulemaking process. The strong supporters of this constraint sought to discourage the Commission from issuing binding rules in favor of voluntary standards. This case study outlines how broad agreement over this goal resulted in enactment of a law that was designed to effectively constrain the CPSC.

A brief history of the CPSC provides context for the 1981 amendments. The Consumer Product Safety Act of 1972 ("CPSA") established the CPSC. The Democratic

Congress passed the CPSA at the high-water mark of the consumer movement, which had gained substantial political strength by the late 1960's (Moe 1989). Congressional Democrats had a strong political incentive to respond to this movement by enacting a consumer protection statute. These members were sympathetic to the consumer movement, which was spearheaded by liberal stalwarts such as Ralph Nader and opposed by corporate interests that traditionally supported Republicans. Most non-southern Democrats also supported consumer protection on policy grounds.

President Nixon's policy and political preferences were more complicated. A moderate Republican, Nixon was more conservative than Congress (Moe 1989). Nixon felt political pressure to support the budding consumer movement, however (Moe 1989, 289). At the same time, he also needed to satisfy his business supporters. This political conflict made Nixon amenable to a compromise: create a consumer protection agency, but cripple it by incorporating design elements favored by business (Moe 1989, 290). This compromise allowed Nixon to support a broadly popular policy without alienating his core business supporters.

The Act gave the CPSC authority to regulate virtually all consumer products, and imposed a relatively low standard to exercise this power. In most cases, the CPSC was authorized to issue regulations whenever doing so was "reasonably necessary to prevent or reduce an unreasonable risk or injury." (Bryner 1987, 147). Both sides agreed to important compromises on this issue in 1972. This case study analyzes how the 1981 CSPA amendments modified these compromises.

Consumer groups were much weaker when the CPSC reauthorization arose in 1981. Newly elected President Reagan had campaigned to cut regulation. Like-minded

Republicans had won a majority of the Senate and reduced the Democratic majority in the House. The White House and the Senate strongly supported curtailing or even eliminating the CPSC. Consumer groups were on the defensive, and formed a weak opposition that was not in a position to demand meaningful concessions. Moe describes the political situation: "With Congress more conservative since the 1980 election and Republicans in control of the Senate, business had its best chance ever to gut the commission. Since abolition was not likely, business and its legislative allies went on record as being supportive of the general policy of consumer safety. The battle, once again, was fought over structure, and this time business groups very nearly pulled off a massive victory." (Moe 1989, 295-296). In short, proponents of curtailing the CPSC held significant but not absolute power. They used this power to redesign the rulemaking process to discourage use of binding rules in favor of voluntary standards.

1981 Rulemaking Process Requirements:

The 1981 CPSA Amendments were designed to be effective. The Amendments were heavily skewed toward curtailing the CPSC, imposing a number of important mandates and restrictions on the agency's rulemaking process (15 U.S.C. § 2058). Klayman summarizes the overall result of the amendments: "The Consumer Product Safety Amendments of 1981, passed during the prevailing spirit of budget cutting and deregulation, reduces the Commission's authority to enact product safety standards and thus creates obstacles to the Commission's achievement of the goal of greater consumer protection." (Klayman 1982, 98-99). The Amendments made a number of important changes to the CPSC rulemaking process.

First, the Amendments eliminated "offeror process," which solicited and subsidized consumer group participation in the CPSC rulemaking process (Cornell, Noll and Weingast 1976). Under this process, the CPSC did not design new rules internally. Instead, the agency solicited offers from external parties to draft the proposed rule. The CPSC would then accept one of the offers submitted from a technically competent organization (Patton and Butler 1973, 729). Congress gave the CPSC funds to subsidize consumer group participation in this process. The 1981 Amendments eliminated this process and the associated subsidy. This increased the relative influence of trade associations and business groups at the expense of consumer groups (Cornell, Noll and Weingast 1976).

Second, the Amendments reduced consumer group influence over the CPSC's agenda by eliminating a procedure whereby interested parties could petition the CPSC to initiate a rulemaking proceeding. The CPSC was required to respond within 120 days to all such petitions, and rejected parties could seek de novo review in a U.S. District court. Moreover, the petitioner could prevail in court by showing by a mere "preponderance of evidence" that the consumer product at issue posed an "unreasonable risk of injury." (Klayman 1982, 110). This process clearly favored consumer groups, who were more likely than industry groups to prefer issuance of CPSC rules. Repealing the process reduced pressure for the CPSC to issue new rules, thereby disadvantaging consumer groups (Bryner 1987, 147).

Third, the 1981 Amendments required the CPSC to privilege voluntary standards over mandatory rules. This requirement extended to several key stages of the rulemaking process (Klayman 1982, 100). Before proposing a mandatory regulation, the Act

required the CPSC to determine that no proposed voluntary standard would adequately reduce injury risk (Klayman 1982, 101). The agency was again required to declare the inadequacy of voluntary standards when issuing a final rule (Bryner 1987, 149). Again, this requirement discouraged the CPSC from issuing rules.

Fourth, the Amendments imposed several other requirements that increased the cost of rulemaking. The procedural requirements for banning a product were increased. Before 1981, the CPSC faced fewer procedural requirements for banning a product than for issuing a standard. The Amendments required the CPSC to undergo the same procedures when banning a product as when setting a standard. This reduced the incentive to ban instead of regulating. The CPSC was also prohibited from issuing product design standards. Instead, the CPSC could only impose performance standards. Again, the intent was to push the CPSC to issue fewer and more modest regulations (Klayman 1982, 107). When issuing a proposed rule, the Commission was required to include a regulatory analysis showing that the rule's benefits bore a reasonable relationship to costs. The analysis also had to establish that the rule was the least burdensome compared to alternative proposals (Bryner 1987, 148). Each of these requirements increased the cost of issuing regulations, encouraging the CPSC to consider alternatives.

Finally, the 1981 Amendments bolstered congressional review of the CPSC. The CPSC was required to publish an advanced notice of proposed rulemaking in the Federal Register. The CPSC was also required to submit a copy of these advanced notices to the applicable congressional oversight committees (Bryner 1987, 148). This requirement gave interest groups and Congress additional time to respond to proposed rules. Perhaps

most importantly, the Amendments allowed either the House or the Senate to unilaterally invalidate a CPSC rule absent action by the other house (Klayman 1982, 111). This single branch veto (shortly thereafter invalidated by the Supreme Court in a case concerning the Immigration and Nationalization Service) significantly increased the threat of congressional override by preventing the CPSC from exploiting House-Senate disagreement.

Institutional Design:

As the theory predicts, the 1981 Amendments were designed to be effective. The amendments did not include broad exemptions. The CPSC was almost always forced to abide by the new requirements, satisfying the threshold condition for effectiveness. The amendments also empowered early interest group involvement. The Act forced the CPSC to solicit proposals for voluntary standards. By the same token, consumer groups lost the right to petition the CPSC to issue binding standards. In short, the Act effectively privileged early participation from favored interest groups.

Congress subjected CPSC compliance with the 1981 Amendments to the "substantial evidence" standard of judicial review. This standard is higher than the APA's default review standard, which requires the courts to uphold all agency actions that are not "arbitrary and capricious."[6] This increased the likelihood that the courts would enforce the 1981 requirements.

Executive branch review was unexceptional. The Amendments did not empower enforcement by OMB or another White House office. Moreover, OMB did not review the newly required benefit-cost analyses of rules because the regulatory review executive

[6] Legal scholars have debated whether the "substantial evidence" standard is significantly more exacting in practice than "arbitrary and capricious review."

order exempted independent regulatory agencies such as the CPSC. The Act also failed to require CPSC consultation with other executive agencies before issuing new rules.

Finally, the 1981 Amendments empowered greater congressional review of CPSC rules. The CPSC was required to submit all rules to Congress well in advance of the standard APA publication deadlines. As noted, either the House or the Senate could unilaterally override a rule. Congress successfully invalidated high-profile CPSC regulations, possibly deterring issuance of other rules (Schwartz 1982, 63). Congress also engaged in standard oversight, holding oversight hearings and commissioning GAO investigations (e.g., Government Accountability Office 1987, 1988, 1997a, 1997, 1999).

Effectiveness in Practice:

In practice, the 1981 Amendments hamstrung the CPSC as intended. Virtually all analysts agree that the CPSC promulgated few rules after 1981. Bryner concluded that "[t]he rule-making efforts of the commission have been unable to meet the expectations created for them by consumer advocates and their allies in Congress." (Bryner 1987, 172-73). Moe comments more broadly on the CPSC's performance: "The CPSC swung into a Reagan-era equilibrium of meager budgets, Spartan staffing, 'unenlightened' appointees, poor performance, and voluntarism." (Moe 1989, 297).

The CPSC rarely developed rules. Instead, the agency "developed a practice of deferring virtually all efforts towards the development of mandatory standards upon the promise, however shaky, of industry groups to develop voluntary standards" (Adler 1989, 101). Interest groups such as the Consumer Federation of America heavily criticized the CPSC for declining to issue mandatory standards even in response to high-profile accidents. In one highly publicized incident, the CPSC spent years waiting for a

voluntary standard to emerge for swimming pool covers, which had been associated with at least 26 deaths (Adler 1989, 101). Numerous other anecdotes along these lines support this conclusion (Adler 1989, 102). For instance, one former CPSC Commissioner accused the agency of "groveling" to voluntary standards in the 1980's (Adler 1989, 100).

Rulemaking procedures alone did not produce this result. As Moe's analysis argues, Reagan-era budget cuts and conservative appointees were also quite important. A GAO analysis supports this claim, noting that "During the 1980s, funding and staff cuts resulted in CPSC postponing or dropping work on many alleged hazards…" (Government Accountability Office 1992, 11). In short, the effective rulemaking constraints imposed by the 1981 Amendments played an important role but not determinative role in restricting the CPSC's rulemaking activity.

C. Regulatory Flexibility Analyses

Supporters of the Regulatory Flexibility Act (RFA) sought to design a constraint that would reduce the regulatory burden for small businesses. Thus, an effective RFA would have pushed agencies to issue fewer rules and less burdensome rules for small businesses.

The Act requires agencies to prepare a "regulatory flexibility analysis" for all rules with a "significant" impact on a "substantial" number of small entities (5 U.S.C. § 601).[7] For such rules, agencies must prepare an "initial regulatory flexibility analysis" that accompanies their draft rules (5 U.S.C. § 603). After receiving comments on this

[7] The Act defines "small entities" as "small businesses, small non-profits, and local governments fewer than 50,000 residents."

notice, they must include a "final regulatory flexibility analysis" with the final rule. This final analysis must summarize and respond to the issues raised in comments. The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) modified the RFA slighly, but retained the same basic procedures.

Goals of Supporters:

Congress passed the RFA in 1980, a period of unified Democratic government. The Act was part of the Carter administration's initiative to reduce regulation. President Carter seems quite liberal today, but his administration introduced the first benefit-cost analysis of regulations coordinated in the White House.[8] The administration also supported deregulation of important sectors of the economy such as airlines, railroads, and trucking. These were major efforts, and some of the most successful examples of deregulation.

Both political parties in Congress were also supportive. The Democratic caucus in the Carter era still included a large contingent of conservative southerners. Such conservatives and even many liberal congressional Democrats such as Senator Ted Kennedy supported deregulatory initiatives (Derthick and Quirk 1985). At the time, many progressives viewed deregulation as a method of reducing industry capture of regulatory agencies. The Republicans were also supportive of small business, and vied to win its political support.

An active small business lobby emerged during this period. The White House Conference on Small Business coordinated much of this lobbying effort. The group issued a prominent report recommending deregulatory policies favored by small

[8] Presidents Nixon and Ford initiated more limited versions of benefit-cost analysis, but Carter's effort launched the modern era.

businesses. The combination of a general anti-regulatory sentiment, political sympathy for small business, and proximity of the 1980 election created substantial support in the White House and both parties in Congress for these recommendations. As a result, little political opposition to the RFA existed. The consensus existed to design an effective constraint. As the discussion below details, the RFA was not designed to be effective, however.

Congress and the president did not meaningfully alter the RFA until 1996, when they passed SBREFA. No political consensus existed to design an effective law at this point. Democrats and their interest group allies (particularly environmental groups and labor groups) were opposed to strengthening the RFA by writing an effective SBREFA. The newly elected Republican Congress and its small business allies favored passing a SBREFA that was designed to be effective. Further detail on this conflict is presented in the proceeding discussion of the Congressional Review Act. The present discussion simply stipulates that requisite agreement did not exist in 1996 to design a constraint that was intended to be effective.

Institutional Design:

Congress and the president held common goals when they enacted the RFA in 1980, but they did not design an Act with a high probability of being effective. A number of important features that would have increased the probability of effectiveness were lacking.

Most importantly, the RFA included broad loopholes, allowing agencies to justify non-compliance. Agencies have exploited two major loopholes that Congress included in the Act. First, the RFA gives agencies tremendous interpretive discretion to exempt their

rules; SBREFA retained most of these vague terms and expansive exemptions. Most importantly, the Act exempts agencies if they certify that a proposed rule will not have a "significant economic impact on a substantial number of small entities." (5 U.S.C. § 603). The RFA fails to define either the phrase "significant economic impact" or the phrase "substantial number of small entities." This lack of specificity gives agencies great discretion to avoid the Act (Government Accountability Office 2000, 7).

Second, the RFA categorically exempts a number of rules. The law only covers rules where an agency directly regulates a small entity, so indirect effects of rules do not trigger the Act (Mid-Tex Electric Coop v. FERC, 773 F.2d 327, 343 (D.C. Cir. 1985)). For instance, an EPA rule governing power generation would not require a regulatory flexibility analysis if it increased electricity costs for many small businesses. To trigger the RFA, the Act would have needed to directly regulate electricity prices for small businesses. This exception greatly reduces the Act's scope because regulation often has an indirect effect.

Agencies have applied the RFA very differently, underscoring its failure to constrain. The GAO surveyed four agencies, and found that each reached significantly different interpretations of the RFA exceptions outlined above. When agencies actually applied the RFA, their analysis used widely different methodologies. The GAO repeatedly urged Congress to narrow these exceptions and to clarify key terms in the Act, but such proposals were not adopted in the 1996 SBREFA revisions.

The Act includes a mixture of strong and weak enforcement provisions. The Act tasks the Chief Counsel of the SBA's Office of Advocacy with monitoring agency compliance. The Office lacks sufficient authority to ensure compliance, however. For

instance, the Office does not have power to mediate disputes between agencies and regulated parties. The Office also lacks authority to interpret the Act's text. Agency interpretations of SBREFA therefore hold equal authority to SBA interpretations (American Trucking Ass'n, Inc. v. United States EPA, 175 F.3d 1027 (D.C. Cir. 1998)). As a result of these provisions, one observer argued that SBREFA "eschews the provision of serious enforcement power to other institutions." (Sargentich 1997, 126).

Congressional monitoring of RFA compliance is also mixed. The Act charges the Small Business Committee with overseeing compliance. On one hand, the Committee is weak in comparison to traditional "A-list" committees such as Finance, Rules, or Appropriations (Stewart 1992). On the other hand, the Committee is dedicated almost exclusively to small business issues. The Committee's record is mixed. It has investigated agency non-compliance, but it also failed to successfully promote legislative changes recommended to increase compliance (Government Accountability Office 1999).

The Act also has mixed provisions for enabling interest group monitoring. The Act allows interest groups to submit comments responding to initial regulatory flexibility analyses, but such participation comes relatively late in the policymaking process. Interest group participation is generally more effective before an agency becomes publicly identified with a particular proposal by issuing a NPRM (West 2009). As a result, interest groups are unable to mobilize.

Before SBREFA, the RFA almost entirely precluded judicial review. The courts only analyzed RFA analyses when evaluating entire rules under the "arbitrary and capricious" standard (Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506m, 539 (D.C. Cir. 1983)). Courts were not empowered to independently evaluate the

agency analysis and determinations in the RFA process, however. Funk argues that "agencies widely ignored the Act" in response to this lack of independent judicial review (Funk 1996).

SBREFA allowed independent judicial review of several sections of the RFA, but excluded review of agency determinations that the RFA did not apply (American Trucking Ass'n, Inc. v. United States EPA 175 F.3d 1027 (D.C. Cir. 1998)). This allowed agencies to continue to exempting themselves from the Act without the threat of judicial review. Agencies were subject to judicial review if they actually prepared a RFA analysis, however. Ironically, this increased the incentive to apply the initial exemption.

In addition, the courts have interpreted the RFA and SBREFA narrowly in the few cases where they are empowered to hear cases. As noted, the courts read the RFA to exclude indirect regulatory effects. This interpretation substantially narrowed the scope of the Act. The courts also held that agency noncompliance with the RFA is "held harmless" because the Act does not require agencies to alter their substantive decisions.[9] As a result, the courts may only punish an agency caught violating the Act by ordering it to perform the analysis (Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 450 (9th Cir. 2003)). This decision was critical because it effectively eliminated meaningful downside for agencies considering violating the Act. At the worst, the agency would simply be required to perform the analysis it should have initially done. Judicial review therefore failed to act as an effective deterrent.

Effectiveness in Practice:

The RFA has been ineffective in practice. That is, the RFA has not led agencies

[9] The court's invocation of the harmless-error doctrine in the context of the RFA is more agency-friendly than when the doctrine is invoked in the context of the APA (Hickman 2006, 1791 ff).

to reduce the impact of their rules on small entities. Analysis of the Unified Agenda Database shows that agencies conducted RFA analyses on 92 of the 6110 (1.51 percent) rules finalized between 1998 and 2008. GAO investigations repeatedly reported agency non-compliance (e.g., Government Accountability Office 1994). The Congressional Research Service (CRS) also pointed to numerous examples of clear non-compliance. Finally, the SBA found that agencies frequently thwarted the Act. In 2008, twelve years after SBREFA strengthened the Act, the SBA said: "Overall agency compliance with the RFA continues to develop." (Small Business Administration 2009). In 2003, the SBA reported that although RFA compliance improved, "the Office of Advocacy has found over the years, and reported to the President and Congress, that many federal agencies failed to conduct the proper analyses as required by the law." (Small Business Administration 2003).

Although SBREFA strengthened the RFA in some respects, some evidence suggests that it actually increased the rate at which agencies avoided the RFA. GAO analysis suggests that agencies invoked exemptions to the RFA requirement more frequently after passage of SBREFA to escape the heightened requirements. The GAO wrote that passage of SBREFA: "[A]ppeared to prompt a reduction in the number of rules that the Environmental Protection Agency identified as affecting small entities…." (Government Accountability Office 2005, 4). After passage of SBREFA, the EPA increased its exemption rate from 78 percent to 96 percent (Congressional Research Service 2009, 10-11).

This finding did not prompt an increase in compliance. In 2006, the GAO continued to find widespread agency non-compliance: "We examined 12 years of annual

reports from the Office of Advocacy and concluded that the reports indicated variable compliance with RFA across agencies, within agencies, and over time…We noted that some agencies had been repeatedly characterized as satisfying RFA requirements, but other agencies were consistently viewed as recalcitrant. Agencies' performance also varied over time or varied by offices within the agencies." (Government Accountability Office 2006).

The Congress Research Service (CRS) also documented clear cases of agency non-compliance with the Act. Curtis Copeland of the CRS provided the following example while testifying before Congress:

> "For example, in 1999, the Environmental Protection Agency issued a proposed rule that would have lowered the threshold for reporting the use of lead under the Toxic Release Inventory (TRI) program from 25,000 pounds to 10 pounds. As a result, any business with 10 or more employees that used more than 10 pounds of lead per year in its manufacturing process would have to fill out a TRI report. By EPA's own estimates, the TRI report took more than 100 hours to fill out the first time, and lowering the reporting threshold would have swept in more than 5,000 small businesses, costing each of them about $7,500 the first year and more than $5,000 each subsequent year. Nevertheless, EPA certified that this rule would not have a "significant economic impact on a substantial number of small entities," so it did not trigger the requirements of the RFA." (citations omitted).

This is not an isolated example, as the CRS and GAO have shown other rules with similarly clear non-compliance.

Large-scale empirical work has analyzed whether the RFA increases the amount of time required to promulgate rules. Yackee and Yackee (2009) report that the RFA requirement does not delay the promulgation of rules. They estimate a statistical model predicting the amount of time required to complete a rulemaking, and find that completing a RFA analysis has no statistically significant effect. Large-scale empirical

analysis confirms this result. Greater detail on these results is presented in Section VI below. In short, the RFA and SBREFA have been ineffective by virtually any measure.

This result is clearly at odds with the dissertation's theory. The most likely explanation for this outcome is that the RFA's ineffectiveness was the result of incomplete information. The RFA was one of the first large-scale statutory rulemaking constraints. The RFA's supporters may have lacked the information to design a constraint that was likely to be effective. When they later had the information necessary to design an effective constraint (during the SBREFA revisions), they lacked the political will to do so.

D. APA Notice and Comment

The APA notice and comment process for rulemaking requires little introduction. Under notice and comment, agencies first publish a NPRM in the Federal Register providing either a description or the text of a proposed rule; in practice, agencies typically provide the later. Agencies then accept written public comments on this proposal. Finally, agencies weigh the public comments, revise the rule accordingly, and publish a final version of the rule in the Federal Register (5 U.S.C. § 553 (2006)).

Goals of Supporters:

Strong supporters of the APA intended for the notice and comment process to facilitate external participation in the rulemaking process, thereby constraining agencies from issuing rules that were disfavored by their client interest groups. Previous versions of the APA were more likely to have been effective in advancing this goal. Such legislation would have given external parties substantial opportunities to intervene in the

rulemaking process and would have allowed the courts to aggressively review agency decisions. Opponents successfully blocked such legislation, however.

The APA that ultimately passed was a political compromise that was less likely to be effective (to reiterate, effectiveness is measured from the perspective of the supporters). The New Deal's significant expansion of the administrative state shaped the political debate. The major factions within Congress were at odds on policy grounds. Republicans and Southern Democrats generally supported requiring agencies to complete a series of complicated procedures to promulgate rules such as holding trial-like proceedings. Agency compliance with these procedures would then be subjected to de novo judicial review. By contrast, most congressional Democrats favored weaker procedural requirements and more deferential judicial review. Attitudes toward the New Deal shaped these respective positions. New Deal opponents generally preferred to restrict the regulatory process because they disapproved of the policies instituted by agencies led by Roosevelt appointees. New Deal supporters preferred to give these agencies greater flexibility.

This conflict occurred beneath the radar. Administrative procedure was not a salient issue to voters. Interest groups had incentives to monitor the issue, however. Interest groups supporting the New Deal (and generally supporting non-southern Democrats) opposed stringent procedural restrictions. Groups opposing the New Deal (and generally supporting Republicans) had a stronger incentive to support such restrictions. The parties therefore did not hold common political goals in the 1930's and 1940's with respect to administrative procedures.

This conflict between supporters and opponents came to a head in 1941, when President Roosevelt vetoed the Walter-Logan Bill. This bill would have imposed many of the procedural restrictions favored by Republicans and conservative Democrats. Most importantly, the bill would have imposed much stricter judicial review of agency action. The D.C. Circuit would have received new jurisdiction to hear challenges to agency rules, and the courts would have reviewed agency decisions under the more stringent "substantial evidence" standard. Finally, the bill exempted most agencies created before the New Deal. These agencies had much greater Republican support than their New Deal counterparts.

On the surface, all of this conflict vanished when the APA passed unanimously in 1946. The bill passed because it was a compromise. The compromise became easier to reach because the positions of supporters and opponents of the legislation partially converged. On policy grounds, APA opponents (mostly Democrats) became more favorable toward passing the APA in 1946 because they feared losing power in 1946 and 1948 elections (McNollGast 1999). They passed the APA to complicate Republican efforts to repeal important components of the New Deal through the administrative process. Because the APA required additional procedural hoops, administrative changes initiated by Republicans would require greater time and effort. Moreover, they were more willing to pass legislation empowering a judiciary reshaped by 14 years of Democratic appointees (McNollGast 1999).

McNollGast argue that APA supporters (mostly Republicans) agreed to these compromises because they were risk-averse and feared that they would fail to gain both the presidency and Congress in future elections (McNollGast 1999, 194). By agreeing to

the deal, Republicans attained some procedural restrictions on the administrative state along with tougher judicial review. Moreover, passage of the APA did not preclude strong APA supporters from enacting more stringent procedural restrictions in the future (McNollGast 1999, 195).

On political grounds, APA opponents had a greater political incentive to compromise and support imposing procedural restrictions as political support for the New Deal faded. Shephard argues that this dynamic became particularly powerful when Truman took office because he lacked Roosevelt's political strength (Shephard 1996, 1658). The APA opponents therefore had a greater political incentive to compromise with Republicans, whose core support groups favored strong procedural restrictions.

The explanation outlined above is not universally accepted. Many legal scholars argue that the APA was a codification of procedures that had evolved incrementally during the 1930's and 1940's (Gelhorn 1986). The APA passed unanimously because it merely codified existing practice. A full assessment of this larger debate is beyond this dissertation's scope. Instead, the key point is that both of the explanations outlined above conclude that the APA was a product of political compromise. Even if the APA only codified existing practice, this was a compromise.

Ample historical evidence supports this contention. Shephard notes that the Truman administration prevailed on virtually all of its priorities (Shephard 1996, 1670). The final bill did not require agencies to conduct on-the-record proceedings to issue rules. Agencies were also not required to create a record for judicial review. Courts did not receive ex ante powers to enjoin agency actions (McNollGast 1999, 198). Finally, courts were empowered to overturn agency action only when the agency acted in an "arbitrary

and capricious" manner, a relatively lenient standard. At the same time, the APA satisfied GOP demands for stricter judicial review and procedural requirements such as on the record hearings.

Members of Congress noted this compromise during final debate on the APA. Shepherd summarized comments from Republican members: "Although conservatives indicated their grudging support for the bill, they noted that they would have preferred stricter controls on agencies…The bill's most favorable characteristic is that Truman would sign it." (1670-71). Some Republican members referred to the bill as "an important first step," and many expressed disappointment that it did not go further (1671). Shephard found corroborating evidence in private statements from members (1674). Shephard concluded: "The bill passed both houses unanimously not because everyone was thrilled with the bill, but because private negotiations had permitted the parties to cobble together an agreement that all could at least tolerate." (1675). In short, a more stringent and effective bill would have been unlikely to receive such widespread support.

Institutional Design:

The APA's was a compromise that was not designed to maximize the probability of effectiveness. The APA has a number of features normally associated the ineffective constraints. The key statutory language is short and vague. The statute does not even require agencies to publish the full text of a proposed rule when providing a NPRM notice, instead allowing only a description (5 U.S.C. 553(b) (2006)). The statute also fails to specify how agencies should incorporate public comments (5 U.S.C. § 553(c)).

The APA also includes important exemptions.[10] First, notice and comment is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." (5 U.S.C. § 553(b) (2006)). Second, agencies may exempt rules from notice and comment for "good cause." Agencies are to apply this exemption if notice and comment is "impracticable, unnecessary, or contrary to the public interest." (5 U.S.C. § 553(b) (2006)). Two common agency procedures for issuing rules fall under the "good cause" exemption. If the agency determines that public comment is unnecessary due to a lack of public interest, it may issue a "direct final" rule. If the agency determines that public comment is impractical due to an emergency or other exigency, it may issue an "interim final" rule. In this case, the agency issues a binding rule but solicits comments and reserves the option to alter the rule in response to such comments.

These exemptions are sweeping. The APA does not define any of the terms discussed above, leaving agencies substantial discretion to interpret them expansively and avoid notice and comment. Agencies must only publish a justification for applying an exemption in the *Federal Register*. The courts are the major check on such abuse, as all agency interpretations of these terms are subject to judicial review (Anthony 1992). However, the APA provided an ambiguous judicial review standard, effectively creating a lottery over the stringency of court interpretation.

Interest groups are empowered to participate in the notice and comment process. Interest groups can file comments on rules, lobby agencies, and challenge rules in court. Initially, this participation was relatively rare and unimportant. Agencies could thwart

[10] The APA also exempts other agency activities from notice and comment such as informal policymaking, and issuance of loans, grants, and subsidies. This dissertation focuses on exemptions in the rulemaking process, however.

interest group participation by declining to publish a full draft of their rules at the notice stage. Interest group participation only become important after the courts interpreted the APA expansively with the rise of the "Hard Look Doctrine" in the late 1960's.

No individual executive branch agency oversees compliance with the notice and comment process. OIRA review is linked to portions of the process, but OIRA does not monitor agency compliance with the APA; for instance, OIRA does not examine whether agencies correctly apply the "good cause" exemption. Executive branch enforcement is therefore weak.

Finally, congressional oversight is mixed. The Senate Committee on Homeland Security and Government Affairs and the House Committee on Oversight and Government Reform both oversee the regulatory process. Interest groups may complain to these committees when agencies violate the notice and comment process. Such complaints may provoke oversight hearings and budget scrutiny (McCubbins and Schwartz 1984). In practice, however, judicial challenges appear more common. In short, congressional enforcement is roughly akin to the ineffective constraints outlined above. The courts therefore act as the primary enforcers.

Effectiveness in Practice:

The notice and comment process was initially ineffective in furthering the baseline goal of fostering broad public participation in the rulemaking process. Peter Strauss argues that judicial review of the notice and comment process was "highly permissive" until the early 1960s (Strauss 1996, 754). During this period, agencies often provided vague notices of proposed rulemakings and provided only a few pages of justification for their final rules (West 2005).

Heightened judicial review beginning in the late 1960's transformed notice and comment into a meaningful process (West 2005). This transformation occurred more than twenty years after the APA's passage, and was hardly inevitable. The APA's ultimate effectiveness was therefore not primarily the product of its design. Thus, the APA's ultimate effectiveness does not contradict the dissertation's theory.

The courts transformed the APA by reviewing agency decisions under the APA's prohibition on "arbitrary and capricious" rules (APA 706(2)A)). The courts began devoting greater attention to rulemaking in the late 1960s and 1970s (Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir 1968). Prior to this period, judicial review was relatively lax (Strauss 1996, 755). This increased focus was at least partially a response to OSHA and EPA regulations that affected virtually all sectors of the economy (Strauss 1996, 755).

Courts began requesting greater justification for rules and evidence that the agency took a "hard look" at the policy choice at issue. As part of this movement, courts required agencies to provide a justification for their policy choices in the statement of basis and purpose to their rules. Courts further encouraged agencies to follow APA requirements by allowing interest groups to challenge rules before enforcement (Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967) (creating a presumption that agency rules were immediately reviewable upon completion of the rule)). As a result, agencies ignoring the APA faced the prospect of issuing a rule that was invalidated almost immediately after promulgation, a costly outcome.

Over time, the appellate courts and the Supreme Court furthered strengthened the requirements for arbitrariness review. Critically, the courts have required agencies to

provide information necessary to foster meaningful participation by the public and interest groups in the rulemaking process. Such requirements include sharing important scientific studies with parties interested in commenting on the rule (e.g., United States v. Nova Scotia Food Prods. Corp. 568 F. 2d 240 (2d Cir. 1977)). As importantly, the Supreme Court required agencies to provide greater justification when altering rules (Motor Vehicle Manufact. Assoc v. State Farm, 463 U.S. 29 (1983)). The Court's standard for arbitrariness review remains similar today (Fox v. FCC, 129 S. Ct. 1800 (2009)).

These decisions reshaped the notice and comment process, inducing agencies to provide more substantial justifications for their rules. For instance, agencies began responding to comments in the preambles to their final rules in anticipation of arbitrary and capricious judicial review. Preambles to agency rules and the rules themselves both became substantially longer (West 1995, 47-48). The increase in the duration of the rulemaking process also coincided with more stringent judicial review.

As the notice and comment process became more important, interest groups faced greater incentives to participate. The fact that interest groups expend vast sums participating in the notice and comment process is strongly suggestive of its effectiveness (Kerwin 1994). West comments that "Presumably, these insiders would not waste scare resources on a futile cause." (West 1995, 47). In addition, surveys of interest groups show that they believe the notice and comment process has an important impact on rules (West 1995, 47). In short, introduction of the "hard look" review doctrine transformed informal rulemaking.

Today, agencies use the notice and comment process to issue approximately 2,000 rules per year. Agencies also often avoid notice and comment, however. The GAO has conducted the largest analysis of agency invocation of the good cause exemption. The GAO reported that agencies avoided notice and comment on 50 percent of all final rules promulgated in 1997 (Government Accountability Office 1998). Many of these exemptions were clearly justified, but others were not. For instance, agencies exempted 11 of the 61 "major" rules that were projected to have an annual impact exceeding $100 million. The GAO updated this analysis in 2001 and 2002, and found an even greater rate of agency avoidance on such "major" rules (Government Accountability Office 2006, 9). In some cases, agencies also provided a patently unreasonable justification for forgoing notice and comment. For instance, the GAO documented cases where agencies claimed "good cause" to avoid the notice and comment process because they believed their rules were "in the public interest." (Government Accountability Office 1998, 21-23).

Measuring the impact of the notice and comment process on policy outcomes is more difficult. A number of studies analyze the extent to which agencies change their rules in response to comments. Such studies often debate whether comments submitted by corporate interests have an outsized influence on agency rules (Yackee and Yackee 2009). Observational equivalence problems complicate such studies, however. For instance, an agency may shape its rules in anticipation of receiving a particular comment. As a result, the existing literature does not precisely measure the influence of comments but generally concludes that the process matters (e.g., Golden 1998). In short, reasonable evidence exists that notice and comment is effective in fostering broad public

participation in the rulemaking process. This effectiveness was hardly inevitable, however. As the experience in the 1950's and 1960's suggests, APA rulemaking was relatively ineffective without committed judicial interpretation. Had the courts not transformed the rulemaking process in the 1970's, APA rulemaking could be ineffective today.

E. OSHA Rulemaking

Democrats and their labor allies strongly supported passing an OSH Act that granted OSHA substantial power to issue rules. From their perspective, the Act would have been effective if it created an OSHA that ultimately issued strong rules to protect worker safety. President Nixon, congressional Republicans, and their business supporters strongly opposed an effective OSHA rulemaking process. Substantial political division resulted in a compromise that was not designed to be effective.

Goals of Supporters:

The OSH Act was a compromise between the president and Congress. Worker safety emerged as a political issue by the late 1960's. Organized labor strongly supported bolstering worker safety, while business groups favored more modest improvements. Most congressional Democrats supported labor on both policy and political grounds. The political calculation was fairly clear, as most of these members had a strong incentive to support an important legislative priority of their longtime union allies. The policy issue was also relatively clear, as most non-southern Democrats in the late 1960's favored increasing worker safety.

President Nixon and his allies in Congress were more sympathetic to the concerns of business (Moe 1989). Vogel summarizes the partisan division: "Thus the OSH Act became one of the only pieces of regulatory legislation in which opinion was largely divided along partisan lines. With the exception of a few Republican senators from northern cities, Republican legislators represented the point of view of the business community, while Democratic representatives and senators – with the exception of those from the South – supported organized labor." (Vogel 1988, 86).

Nixon was willing to negotiate with Congress, however. Nixon and Congress primarily battled over OSHA's procedures and structure (Moe 1989, 300). Negotiating over structure allowed Nixon to embrace the broad goal of improving worker safety while winning important concessions for his business supporters. This battle encompassed many issues, the most important of which was the location of the new agency. Labor preferred delegating policy formulation and enforcement to the Department of Labor (Moe 1989, 298-299). Business preferred to place the agency outside the Department of Labor, which it viewed as hopelessly sympathetic toward labor. If possible, business also sought to fragment the new agency between different departments (Moe 1989).

Rulemaking Procedures:

The result was a compromise over many elements of OSHA's structure, including its rulemaking process. Opponents of a vigorous OSHA favored forcing the agency to use formal rulemaking, which roughly resembles the procedures used in a court trial. These procedures are costly and burdensome to the agency. Supporters of strong worker safety enforcement noted that formal rulemaking had previously burdened the Food and

Drug Administration, and instead preferred the less intricate APA informal rulemaking process.

The compromises emerged differently in the House and Senate. The House bill mandated much more rigid rulemaking procedures than the Senate bill (McGarity and Shapiro, 35). Congressman Lloyd Meeds recalled that conference committee debate on the issue was contentious (Meeds 1974, 336-337). The final rulemaking process is elaborate (29 U.S.C. 655), leading one commentator referred to the procedures as "a process that is Byzantine in its complexity." (Keleman 244). To initiate the rulemaking process, OSHA must receive a "criterion document" from NIOSH (a division of the Department of Health and Human Services). This document contains important scientific information necessary to issue a rule. Once OSHA has this document, it may issue a notice of proposed rulemaking ("NPRM"). This document typically includes the text of a proposed rule, but may be more general. Parties may then submit written comments for 30 days following this notice.

Next, OSHA is required to hold public hearings on the rule if requested by any of the commenters. Commenters must then file a detailed "notice of intent" to appear at the public hearing. Organizations and individual citizens can present either oral or written testimony to OSHA's presiding administrative law judge at this stage. These parties can also cross-examine other witnesses (Shapiro and McGarity 1989, 9-10). This hearing stage may consume substantial time and effort. Bryner notes that: "Hearings may last several weeks as a result of lengthy cross-examinations. Oral testimony is usually supplemented by extensive reports, and additional comments are received after the hearings" (Bryner 1987, 123-124). One of the first hearings on a rule to limit

occupational noise exposure included 100 participants, and consumed twenty work days (Kestenbaum 1976, 707).

After the hearing, OSHA generally accepts further comments, termed "posthearing comments." The relevant OSHA project manager then evaluates and summarizes the resulting rulemaking record. Keleman notes that this is no small task: "The record is usually so extensive that it is impossible for anyone higher up in OSHA to look at anything but its highlights." (Keleman 246). OSHA then issues a final rule and a written justification within 60 days of the hearing's commencement.

This entire process is commonly referred to as "hybrid rulemaking." Hybrid rulemaking mixes elements of the APA's informal rulemaking process (5 U.S.C. 553) and formal rulemaking process (5 U.S.C. 556-557). Like formal rulemaking, agencies hold hearings to compile a rulemaking record. These hearings are not governed by strict, trial-like rules, however. Instead, they supplement the APA's informal rulemaking procedures (Currie 1976, 1120). As noted, this process was relatively new in the early 1970's, increasing uncertainty regarding the ultimate effects.

The final bill also subjected OSHA rulemaking to the "substantial evidence" standard of judicial review. This standard is more exacting than the APA's default "arbitrary and capricious" standard (Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)). Business preferred this standard, while labor preferred the more lenient arbitrary and capricious test. The conference committee included substantial evidence review as a concession to bill opponents (Duke Law Journal, 1973).

Business and labor also debated whether to subject OSHA rules to a cost-benefit standard. Business groups wanted to require benefit-cost analysis for all rules. Labor

groups preferred to eschew benefit-cost analysis, and instead allow OSHA to mandate the best available technology. The final compromise was vague, but tilted toward labor groups by allowing OSHA to issue all "feasible" rules (Moe 1989, 301).

Finally, the Act encouraged OSHA to favor voluntary standards. Most importantly, the OSHA was required to adopt all existing "national consensus standards" within its first two years unless "promulgation of such a standard would not result in improved safety or health for specifically designated employees." (29 U.S.C. 655). Thereafter, the Act required that OSHA justify all significant departures from national consensus standards. These requirements forced OSHA to constantly consider national standards as a baseline for new rules, influencing debate on all rules.

Institutional Design:

The rulemaking process described above is not designed to be effective (again, effectiveness is defined as furthering the goals of the constraint's strong supporters). Put differently, the rulemaking process was not designed to achieve its intended purpose: create an OSHA that would issue protecting worker safety. Instead, the rulemaking process was designed to fail.

Perhaps most importantly, the rulemaking process empowered early interest group involvement. This involvement was not restricted to supportive interest groups, however. By opening involvement to all interest groups, the statute ensured that OSHA would become too bogged down to be effective. The rulemaking process included the standard APA requirement that agencies publish a draft of all rules and accept comments for 30 days. The Act also allowed interest groups (along with individual commenters) to request an "on-the-record" hearing. Interest groups had a strong incentive to participate

in this process on important rules, as failure to do so would advantage their opponents. The hearing requirement therefore became largely self-enforcing. Interest groups had a similarly strong incentive to monitor OSHA's compliance with the requirement to consider national consensus standards. At least one interest group was likely to favor such a consensus standard, creating a strong incentive to both publicize and to challenge OSHA non-compliance in court.

The Act empowered strong judicial scrutiny by subjecting OSHA to the more exacting "substantial evidence" review standard. Enabling early interest group involvement increased the efficacy of judicial review by enabling interest groups to monitor and challenge OSHA rules in court. Interest groups were also more likely to challenge OSHA because they stood a better chance of prevailing under the substantial evidence standard.

The net result has been aggressive judicial review of OSHA from the start. Shapiro and McGarity note that: "Although all agencies are subject to judicial review, the judicial interpretations of OSHA's burden of proof have particularly disadvantaged the Agency." (Shapiro and McGarity 1989, 9-10). The Supreme Court and the appellate courts have invalidated or modified OSHA rules in several high-profile cases. For instance, a plurality of the Supreme Court interpreted the OSH Act to mandate that OSHA prove that proposed rules were "necessary and appropriate to remedy a significant risk of material health impairment." (American Petroleum Institute v. OSHA, 448 U.S. 607, 631-32; 639-40 (1980)). The Court later reiterated that OSHA was required to show that workers faced a "significant risk" before issuing a regulation restricting chemical exposure (American Textiles v. Donovan, 452 U.S. 490 (1981). These decisions

increased the standard of evidence required to support OSHA rules, reducing rulemaking output.

The rulemaking provisions did not create a dedicated legislative branch enforcement process. Instead, Congress monitored OSHA compliance through ordinary ex post oversight methods such as committee hearings and GAO reports. The Act's provisions for interest group participation in the rulemaking process allowed interest groups to alert Congress of disfavored OSHA behavior. Congressional oversight provisions were otherwise unexceptional, however.

Finally, the OSH Act enabled executive branch monitoring by dividing OSHA's authority between different agencies. Most importantly, OSHA was required to consult NIOSH to begin a rulemaking. Because NIOSH was located in a separate agency, it often held different priorities. Moreover, the OSH Act did not create a process to resolve conflict between OSHA and NIOSH (Shapiro and McGarity 1989, 58). This hindered OSHA because NIOSH could delay its rulemaking proceedings by withholding the required "criterion document" (Shapiro and McGarity 1989, 57-59). Moe notes that NIOSH created "many problems" for OSHA (Moe 1989, 301). OSHA rulemaking output would likely have been greater absent the NIOSH requirement.

Effectiveness in Practice:

The procedures outlined above have hindered OSHA rulemaking, rendering the process ineffective. Keleman summarizes the result: "One result of the tortuous OSHA administrative procedures is that the agency has promulgated extremely few regulations by this process." (Keleman 1980, 246). A bevy of statistics supports this conclusion. OSHA's first twelve standards consumed an average of almost five years to promulgate

(Shapiro and McGarity 1989, 13). OSHA only promulgated twenty-four new substance-specific health regulations from 1972-1989 (Shapiro and McGarity 1989, 2). As of 1990, OSHA controlled only ten toxic workplace substances despite research suggesting that hundreds more such hazards exist (Sunstein 1990, 414). OSHA has issued no standards for over one-half of the chemicals deemed dangerous by the National Cancer Institute (Shapiro and McGarity 1989, 2). Finally, OSHA has been slow to respond to judicial decisions. OSHA did not promulgate a revised benzene standard until 1987, which was seven years after the Supreme Court struck down the original standard (Shapiro and McGarity 1989, 14).

Little appears to have changed since the early 1990's. A GAO study concluded: "In brief, the rulemaking requirements that have been placed on OSHA and other agencies over the years are clearly voluminous and require a wide range of procedural, consultative, and analytical actions on the part of the agencies. It is also clear that federal agencies sometimes take years to develop final rules." (Government Accountability Office 2001). This report also cited research from the National Advisory Committee on Occupational Safety and Health showing that OSHA required an average of ten years to create and issue a health or safety standard (Government Accountability Office 2001).

The rulemaking process constraints were not the only factor that constrained OSHA's rulemaking process. OSHA operates in a difficult and complex policy area. The scientific issues are quite challenging, and require significant analysis (Shapiro and McGarity 1989, 5-6). This complexity makes OSHA particularly vulnerable during judicial review. Of course, the OSH Act exacerbated this vulnerability by subjecting OSHA to substantial evidence judicial review (McGarity 1994, 102). OSHA faces other

important challenges such as budget constraints, which reduce OSHA's managerial capacity to handle multiple projects (Shapiro and McGarity 1989). The ideological convictions of OSHA appointees also matter a great deal. Finally, OMB review of OSHA may also slow or even terminate some important rules. The rulemaking constraints were nonetheless effective in curtailing OSHA's rulemaking activity.

F. Congressional Review Act

The Congressional Review Act (CRA) was intended to increase congressional control over the rulemaking process. The law was intended to allow Congress to more easily overturn rules, and in turn to better influence the rulemaking process. Opponents of the Act forced important compromises, however. As a result, the Act has not been effective by any stretch of the imagination.

The CRA created a standardized and expedited process for Congress to review and invalidate agency rules. The CRA requires agencies to submit all rules to both the Government Accountability Office and to Congress (5 U.S.C. § 801(a)(1)(A)). The Act tasks OIRA with classifying all rules as either "major" or "nonmajor."[11] The GAO is then responsible for compiling a database with basic information about all major rules and submitting reports to Congress detailing all such rules (5 U.S.C. § 801(a)(2)(A)). Major rules do not become effective until 60 days after receipt by Congress (5 U.S.C. § 801(a)(3)). During this period, Congress may pass a joint resolution of disapproval overturning the rule. The hurdles to pass such a resolution are identical to ordinary

[11] 5 U.S.C. § 804(2) defines major rules as those likely to result in: "(1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets."

legislation with one important exception: CRA disapproval resolutions are not subject to the Senate filibuster (Congressional Research Service 2001). A successful disapproval resolution eliminates the rule and prohibits agencies from issuing a "substantially similar" rule in the future.

Goals of Supporters:

The newly elected Republican Congress passed the CRA as part of its much-heralded "Contract With America." The Contract included a number of provisions ranging from imposing term limits to requiring a 3/5 vote to increase taxes. Regulatory reform, targeted at winning the support of small business owners, was an important component of the Contract. The Republican Congress therefore devoted substantial time to the issue, passing legislation to impose a 1-year moratorium on the implementation of new regulations (H.R.450) and to require additional cost-benefit analysis of regulations (H.R.926). In short, the CRA was just one part of a broader regulatory reform initiative.

President Clinton and congressional Democrats were less supportive. The Democrats were willing to agree to a compromise in the wake of large Democratic losses in the 1994-midterm elections, however. Much has been written about Clinton's efforts to "triangulate" between congressional Republicans and Democrats (e.g., Morris 1997). This effort included support for welfare reform legislation and rhetorical flourishes such as declaring that "the era of big government is over." The CRA was not a central element of this triangulation effort, but it allowed Clinton to support a regulatory reform measure proposed by congressional Republicans and appear more moderate. Agreeing to the measure also denied the Republicans an opportunity to portray Clinton as unsympathetic to small businesses.

Clinton was not willing to agree to a bill that was likely to be effective, however. Such a bill would have advantaged Congress in the competition to influence the bureaucracy. The Clinton administration preferred a much more active regulatory state than Congress. Congressional Republicans sought to reduce Clinton's control by issuing over 1,000 subpoenas, conducting aggressive oversight hearings, and delaying confirmation of Clinton appointees.

An effective CRA would have allowed Congress to more easily override Clinton administration rules, reducing Democratic influence. Such a shift would have prompted greater opposition from congressional Democrats and a veto from President Clinton. However, the Act passed easily because it was a compromise unlikely to have a major impact on the balance of power between the branches.

Institutional Design:

The CRA's was not designed to be effective. First, the Act offers Congress fairly slight advantages relative to simply overturning a rule via ordinary legislation. Both chambers must still take an affirmative vote in favor of a resolution of disapproval, which the president must sign. The Act exempts disapproval resolutions from the Senate filibuster, however (Congressional Research Service 2009).

Second, the president is likely to veto CRA disapproval resolutions to protect policies issued by his own administration. Approving a disapproval resolution would effectively acknowledge that the president's agencies issued an incorrect policy. Therefore, the Act is only likely to succeed under two conditions: 1) a recently inaugurated president evaluating his predecessor's rules; 2) a rogue agency issuing rules disfavored by both Congress and the president.

Third, Congress has other procedures at its disposal to influence agency rules. Most importantly, Congress may pass an appropriations rider prohibiting agency development or enforcement of a rule. This procedure is effective because it typically consumes little additional legislative time. Unsurprisingly, Congress has used this mechanism far more often than the CRA (Congressional Research Service 2009).

Fourth, Congress may pressure agencies to alter rules by conducting oversight hearings or commissioning GAO investigations. Such strategies neither consume valuable time on the legislative calendar nor require majority support from both chambers of Congress. A Congress moderately committed to overturning a rule may therefore prefer these procedures.

Fifth, the CRA is very blunt. The Act prohibits agency development of "substantially similar" rules, but does not define this term. Although this language is ambiguous, most observers interpret it as preventing agencies from modifying the rule in accordance with congressional preferences (Congressional Research Service 2009). Agencies are instead precluded from issuing any rule on the subject. This forces Congress to either legislate itself or to accept no rule at all (Congressional Research Service 2009). Congress avoids this choice by simply declining to use the CRA.

Sixth, the CRA fails to mobilize monitoring by sympathetic interest groups (those that are generally opposed to regulation). The Act does not give interest groups tools to monitor agencies such as additional procedural rights or access to information. As a result, interest groups have less incentive to pay attention to the Act. Interest groups may have monitored the Act more closely if the CRA had empowered them to review early

drafts of rules and then submit petitions to Congress to review particular rules. Such early involvement could have greatly increased net interest in the Act.

Seventh, Congress itself has failed to enforce the CRA. Congress has repeatedly declined to follow the GAO's recommendation to establish a joint committee dedicated to evaluating CRA rule reports and monitoring compliance with the Act. Instead, Congress assigned oversight to the Government Reform committees. These committees held several hearings on agency non-compliance, but failed to take action. The Committees also lacked the necessary resources to review the roughly 4,000 annual rule submissions. Proposals to increase resources for such screening repeatedly failed, however (Skrzycki 2006). Republican Representative Chris Cannon, chairman of the subcommittee charged with overseeing CRA compliance, noted that Congress failed to implement the procedures necessary to make the Act effective: "It was a good idea but very hard to execute. We haven't set up the proper procedures to make it work" (Skrzycki 2006).

Finally, the Act does not establish strong enforcement mechanisms. It explicitly prohibits judicial review, so the courts clearly are not effective enforcement agents (5 U.S.C. § 805). No executive agency is charged with monitoring compliance or ensuring that agencies submitted the necessary rules on time. This is understandable because the Act's stated purpose is to increase congressional authority over the rulemaking process. Indeed, Congress did charge the GAO with monitoring CRA compliance. Unlike an executive branch agency like OMB, the GAO lacks the authority to meaningfully punish agency noncompliance. The GAO is limited to issuing reports chiding agency non-compliance.

The CRA's ineffectiveness was probable, but not completely inevitable. The fact that the CRA allowed opponents of a rule to circumvent the Senate filibuster, that law's one major advantage over other overturn procedures, could have induced a supportive Congress to use the Act aggressively. Frequent use of the Act to overturn rules could have deterred agencies from issuing rules opposed by Congress.

Effectiveness in Practice:

The CRA has been ineffective. That is, the Act has not meaningfully increased Congress' ability to overturn and influence agency rules. Agencies have overtly flouted the Act, simply failing to submit approximately 5 percent of nonmajor rules (200 rules per year) to the GAO and to Congress (Government Accountability Office 2006). This non-compliance rate remained constant from 1996 to 2006. Agencies also failed to provide Congress the required 60 days to disapprove of 71 of the 610 total major rules issued from 1996-2006 (Government Accountability Office 2006, 1).

To take one example, the GAO determined that the Health Care Financing Administration ("HCFA") (a subunit of the Department of Health and Human Services) violated the CRA (Government Accountability Office 1996). HCFA issued a rule to make important changes in the formula for payments for physician services ("Medicare Program; Revisions to Payment Policies and Five-Year Review of and Adjustments to the Relative Value Units Under the Physician Fee Schedule for Calendar Year 1997," 61 Fed. Reg. 59490 and 59717). The rule adjusted payments on a geographic basis, and altered the valuation level of some physician services.

HCFA declared that the rule would become effective on January 1, 1997, depriving Congress of the required 60-day review period (5 U.S.C. 801). HCFA justified

this decision by arguing that: "a further delay in this rule's effective date in order to satisfy section 801 would not serve the law's intent, since Congress will not be in session during this period, and such delay in the effective date established by the Medicare statute is unnecessary and contrary to the public interest." The GAO noted that HCFA's rationale provided "no authority" to avoid the CRA, however (Government Accountability Office 1996, 2).

Congress itself has rarely sought to invoke the CRA, much less use the Act successfully. From 1996 to 2006, members of Congress introduced only 37 disapproval resolutions under the Act (Government Accountability Office 2006, 1). To provide context, agencies issued approximately 40,000 total rules during this period (Croley 2008). Congress successfully used the Act only once during this period, when it invalidated a Clinton-era rule setting ergonomics standards at the start of the Bush administration (Ergonomics Program, 65 Fed. Reg. 68,261 (Nov. 14, 2000)). Given that Congress has overturned rules via other mechanisms, it is unlikely that observational equivalence accounts for this disuse. Moreover, observational equivalence cannot account for the fact that the Democratic Congress elected in the 2006 election did not use the CRA; agencies could not have easily foreseen the 2006 election results because rules are typically initiated years in advance.

The transition after President Obama's 2008 election provides further evidence. Democrats criticized the Bush administration for issuing "midnight rules" in the weeks before the Obama administration assumed power. The Congressional Research Service examined rules issued in the waning months of the Bush administration. The Democratic majority in Congress and the Obama administration challenged 25 such rules via

techniques such as delaying the effective date of rules, directing agencies to review or rescind rules, and eliminating funding to implement rules (Congressional Research Service 2009). Congress never invoked the CRA, however. In fact, only one resolution of disapproval was even introduced. Tellingly, even this isolated effort violated CRA procedural requirements and was never pursued.

G. Unfunded Mandates Reform Act Reports

Like the CRA, the Unfunded Mandates Reform Act (UMRA) has been ineffective. Supporters of the UMRA – primarily congressional Republicans and sympathetic state and local government officials – wanted the Act to reduce the burden of unfunded mandates on state and local governments. An effective UMRA would therefore have discouraged agencies from issuing rules that impose significant costs on state and local governments.

The UMRA requires all non-independent federal agencies to prepare "written statements" assessing unfunded mandates for all rules requiring state, local, and tribal governments as well as private actors to spend a total of $100 million. Agencies are required to consider alternative policies, and select the least burdensome alternative that is consistent with the underlying policy goal.

Goals of Supporters:

The UMRA was enacted in the same bill as the CRA, and the political conditions debate was quite similar to the CRA debate described above. Like the CRA, the UMRA was part of the newly elected Republican Congress' initiative to reduce regulation.

Congressional Republicans also supported constraints on the discretion of agencies led by Clinton appointees.

President Clinton was willing to support a compromise version of the UMRA to serve the political goals outlined above with respect to the CRA. Clinton was not willing to give away the store and support a bill that was likely to be effective, however. Clinton had a stronger preference for use the regulatory process to pursue his policy goals than the Republican Congress. An effective UMRA could have disrupted his ability to do so. Clinton also opposed an effective UMRA because he sought to preserve discretion for his agency appointees.

Institutional Design:

Like the CRA, the UMRA is a compromise that is not designed to be effective. Most importantly, the UMRA contains fourteen unique exemptions, exclusions, and restrictions that allow agencies to avoid compliance. Consider just a few examples. First, agencies can evade the Act by using an APA exemption to avoid issuing a NPRM (5 U.S.C. § 553). Agencies invoke this exception on 50 percent of all rules. Second, the Act does not apply to rules issued by independent regulatory agencies.[12] Third, the Act only applies to rules requiring state and local governments to make "expenditures" totaling $100 million. A rule that reduces revenue of local governments does not trigger this threshold. Finally, the Act exempts "voluntary" programs. Many federal programs

[12] The Paperwork Reduction Act (44 U.S.C. § 3502(5)) defines the set of independent agencies as "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission."

are technically voluntary, but the pressure to participate is overwhelming because state and local governments lose significant federal aid if they opt out. Prominent examples include federal funding for highways and education. The net effect of these exemptions is substantial: the GAO concluded that the UMRA rarely applies to rules (Government Accountability Office 2004).

Agencies have significant discretion to avoid the UMRA in the few cases where they are not categorically exempt. Agencies can avoid the Act when compliance is not "reasonably feasible," which is undefined. The Act also lets agencies determine whether their rules trigger the $100 million unfunded mandate threshold. Agencies are not required to prepare a cost analysis of rules that they deem below the $100 million threshold, so external parties have little basis to assess their decisions. Note that these exemptions do not preclude a sympathetic agency from applying the Act. This could occur if the president appointed agency leaders particularly concerned with unfunded mandates. However, the Act clearly gives unsympathetic agency leaders sufficient discretion to minimize compliance.

The Act does not empower early participation by sympathetic interest groups (primarily state and local governments). Agencies are not required to allow interest groups to comment on drafts of unfunded mandates assessments. Instead, interest groups may only respond to finalized assessments. Moreover, interest groups are unable to request that agencies reconsider their analysis. These limitations complicate interest group efforts to monitor compliance. The Act also precludes judicial review, preventing state and local governments from using the courts for enforcement (2 U.S.C. § 1571).

Executive branch enforcement of the Act has been similarly ineffectual. The Act

requires OMB to compile UMRA written statements. OMB is then required to forward these statements to the Congressional Budget Office (2 U.S.C. § 1536). The Act also requires that OMB file annual reports with Congress documenting agency compliance with the UMRA (2 U.S.C. § 1538.) Critically, neither of these provisions requires OMB to monitor agency compliance with the UMRA on individual rules. A strongly committed OMB could have enhanced enforcement, but Congress passed the Act knowing that this was unlikely under the Clinton administration.

Congress has shown some interest in monitoring UMRA compliance. Each chamber tasked its governmental affairs committee with monitoring compliance. Congress also instructed the GAO to report on methods to increase agency compliance. These efforts signified a modest effort to enforce the Act. Congress repeatedly failed to pass legislation recommended by the GAO to improve agency compliance, however. Congress also declined to hold additional hearings or to use the budget process to sanction agency non-compliance. On balance, congressional enforcement efforts have been modest.

Like the CRA, UMRA effectiveness was unlikely but not impossible. Vigorous OMB and congressional enforcement could have induced agencies to work to fulfill the Act's spirit. This would have been particularly effective if agencies complied as a means of currying favor with Congress and the OMB on other issues.

Effectiveness in Practice:

Unsurprisingly, the UMRA has been ineffective. That is, the Act has not pushed agencies to reduce the burden of unfunded mandates on state and local governments. Agencies determined that the Act covered only three of the roughly 12,000 rules

promulgated during the first three years following the Act's passage (Government Accountability Office 1999, 10). The GAO's first assessment concluded that the "UMRA appeared to have had only limited direct impact on agencies' rulemaking actions..." (Government Accountability Office 1998). A later GAO review was even more definitive, concluding that the UMRA "has had little effect on agencies' rulemaking activities." (Government Accountability Office 1999, 9). These reports did not prompt agencies to alter their practices (Government Accountability Office 2005).

The GAO later concluded that agencies openly failed to comply with the Act: "Our review demonstrated that many statutes and final rules with potentially significant financial effects on nonfederal parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds" (Government Accountability Office 2004). The GAO then pointed to specific cases of non-compliance, identifying rules where agencies improperly applied Act exemptions (Government Accountability Office 2004, 36-43).

A USDA rule imposing new safety standards on retained water in raw meat and poultry products provides an illuminating example. The rule required the poultry industry to install new chilling systems, potentially triggering the UMRA. The USDA estimated that compliance costs could total "well over $110 million." The median and upper bound estimates of compliance costs therefore almost surely triggered the UMRA mandate. The GAO also noted that no other exemptions applied to the rule, suggesting that the USDA violated the UMRA (Government Accountability Office 2004, 34-35). Numerous similar violations likely occurred on rules not audited by the GAO. Finally, UMRA did not even affect the time required to complete the relatively few rules to which

it applied. The regression analysis presented in Section IV shows that the relationship between UMRA analysis and rulemaking duration is not statistically significant.

H. No Agreement, and No Legislation

Legislative failure is the least interesting and most intuitive of the four possible outcomes. The following examples are therefore relatively brief, and only intended to illustrate how disagreement between the Congress and president on both policy and politics kills a constraint.

On the heels of a sweeping 1980 election victory, President Reagan and the Republican-controlled Senate sought to pass a sweeping regulatory reform bill. The initial Senate bill required all agencies (including independent agencies) to conduct benefit-cost analysis on rules. The bill also required that agencies review all existing rules every ten years. Moreover, the bill allowed Congress to veto agency rules without presidential approval. Finally, the bill required the courts to apply a less deferential judicial review standard (Anderson 1998, 493).

The opponents with the power to block the bill, House Democrats, passed a more moderate bill that retained the APA's arbitrary and capricious judicial review standard, required presidential approval to overturn rules, and did not require benefit-cost analysis (Anderson 1998, 493). The opponents and supporters of the measure were unable to reach agreement, and the bill ultimately died.

After winning power in 1995, congressional Republicans again introduced a wide-ranging and stringent regulatory reform bill. The bill would have: 1) required risk analysis on all rules exceeding $25 million impact; 2) mandated benefit-cost analysis on

all rules with a cost estimate exceeding $50 million; 3) forced agencies to explore policy alternatives including forgoing regulation; 4) required peer review of all rules with an expected impact exceeding $100 million; 5) created a compensation system for "regulatory takings" (Anderson 1998, 494). The Clinton administration and congressional Democrats both opposed the legislation (Anderson 1998, 495). Senate Democrats ultimately blocked the package, which failed on a cloture vote with all Democrats united in opposition (Anderson 1998, 495).

Goals of Supporters:

In both cases, supporters and opponents of the bill were deeply divided. Both bills would have imposed meaningful restrictions on the regulatory process. This divided the parties because Democrats and their interest group allies (particularly labor and environmental groups) were more supportive of using regulation to advance their policy goals than Republicans and their allies (primarily business groups). During the 1981 reform battle, Democratic committee chairs in the House worried that the reform legislation would undermine regulatory implementation of important statutes (Anderson 1998, 493). As a result, the level of opposition was much greater than in the case of the 1981 CPSC reforms, which affected only one agency that was relatively unpopular at the time.

Opponents and supporters also very divided on the politics of both bills. The public supported reducing regulation in the abstract, but held relatively weak and uniformed views on the issue. Interest groups preferences were therefore important. Democratic-leaning special interest groups – environmental, labor, and civil rights groups – opposed both bills (Anderson 493). Supporting either bill threatened to reduce political

support of these key interest groups in future elections. By contrast, the Republican base of business supporters strongly supported the bill. This divergence in political incentives thwarted efforts to reach even a watered-down compromise.

IV. Large-N Analysis

A. Introduction

As a robustness check, this section draws upon additional data to analyze the ultimate effectiveness of the UMRA and the RFA. Devising a large-N measure of effectiveness is challenging. No objective and replicable measure of the impact of constraints on policy decisions exists.

As an indirect measure of effectiveness, this section analyzes whether constraints increase the number of days required to complete a rulemaking. This measure captures whether agencies are conducting analysis, which requires time to complete if done meaningfully. This does not measure whether and how the process of completing the analysis actually affects agency decisions, however. Stated differently, the analysis does not determine whether the constraint actually affected the decision. This is admittedly a rough proxy of effectiveness. This approach follows the approach in the most recent literature, however (Yackee and Yackee 2009; O'Connell 2010; O'Connell and Gerson 2008).

B. Data

This analysis uses the Unified Agenda Database.[13] This database includes all final rules from 1998-2008. The Unified Agenda Act requires agencies to submit a great deal of data about their rules to the Unified Agenda, which is published twice per year.

[13] Many thanks to Professor Joseph-O'Connell for kindly sharing this data.

The database therefore includes extensive information about rulemaking process that does not require subjective coding by outside researchers. Unfortunately, the database only includes data on two rulemaking constraints, however: the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; the Office of the Federal Register National Archives and Records Administration opted not to collect information about other constraints.

Dependent Variable:

The model predicts the number of days between initiation and final action on a rule. Initiation occurs when an agency first assigns a Regulatory Identification Number (RIN) to a rule. This date varies between agencies, but it may be preceded by substantial policy development (West 2009). Final action typically occurs when the agency publishes the rule in the Federal Register.[14] In relatively rare cases, final action may be a subsequent revision to the rule. The model is estimated only on rules that reached final action. The model is estimated on the natural log of the number of days because the untransformed variable is right-skewed (see appendix).

Independent Variables:

The analysis below includes a dummy variable for whether the agency applied the RFA or the UMRA. Agencies rarely invoked either analysis. The RFA was only applied on approximately 1.5 percent of the 6097 rules analyzed. Agencies completed UMRA analyses in about 5.5 percent of all rules. If these constraints increase the time required to complete rulemaking, the coefficients will be positive and statistically significant.

The model also includes the following control variables:

[14] The agency may reach this stage either by undergoing the full notice and comment process, or invoking an APA exemption to notice and comment such as the "good cause" exemption.

- Dummy variable for whether the agency estimated the rule would have an annual impact exceeding $100 million ("Economic Significance").
- Dummy variable for whether the agency was independent or executive (measured against the baseline of cabinet agencies).
- Dummy variable for whether the presidential administration shifted while the rule was under development.
- Dummy variable for whether partisan control of Congress shifted while the rule was under development.
- Dummy variable for whether the rule was subject to a deadline imposed by either Congress or the courts.
- Fixed effects for the 48 agencies in the dataset.

The ordinary least squares model to be estimated takes the following form to predict the duration of rule r (D_r):

$$D_r = ß_0 + ß_1(\text{Reg-Flex Analysis}_r) + ß_2(\text{UMRA Analysis}_r) + ß_3(\text{Rule Economically Significant}_r) + ß_4(\text{Independent Agency}_r) + ß_5(\text{Executive Agency}_r) + ß_6(\text{Change in Presidential Administration}_r) + ß_7(\text{Change in Partisan Control of Congress}_r) + ß_8(\text{Interaction of Presidential and Congressional Change}_r) + ß_9(\text{Rule Subject to Deadline}_r) + ß_{10}(\text{Rule Received Comments}_r) + \text{Agency Fixed Effects} + u_r$$

Table 2: Summary Statistics

Variable	Mean	St. Dev.	Min	Max
Rulemaking Duration	515.74	641.21	0	7083
Reg Flex Analysis	.069	.25	0	1
UMRA Analysis	.015	.12	0	1
Rule Economically Significant	.30	.46	0	1
Independent Agency	.15	.35	0	1
Executive Agency	.21	.41	0	1
Change in Presidential Administration	.13	.33	0	1
Change in Partisan Control of Congress	.11	.32	0	1
Rule Subject to Deadline	.14	.35	0	1
Rule Received Comments	.75	.44	0	1

Table 3: Invocation of Constraints and Average Time To Complete Rulemaking

RFA Applied?	N	Average Rulemaking Duration (std. dev)		UMRA Applied?	N	Average Rulemaking Duration (std. dev)
Yes	423	462.51 (566.83)		Yes	92	540.82 (448.98)
No	5687	519.70 (646.27)		No	6018	515.35 (643.72)

Table 4: Predicting the Time Required to Complete Rulemaking

Dependent Variable: Ln(Duration of Rulemaking) (in days)	(1)	(2)
Reg Flex Analysis	0.01	-.02
	(0.04)	(.045)
UMRA Analysis	0.07	-.00
	(0.08)	(.09)
Rule Economically Significant	0.19***	
	(0.02)	
Independent Agency	0.01	
	(0.23)	
Executive Agency	-0.01	
	(0.27)	
Change in Presidential Administration	0.98***	
	(0.03)	
Change in Partisan Control of Congress	0.61***	
	(0.03)	
Interaction of Presidential and Congressional Change	0.72***	
	(0.08)	
Rule Subject to Deadline	-0.13***	
	(0.03)	
Rule Received Comments	0.05+	
	(0.03)	
Constant	5.48	5.76
	(.046)***	(.041)***
Agency Fixed Effects	YES	YES
F (51,6055)	95.08	40.39
Prof > F	.00	.00
Adjusted-R2	.44	.23

N	6097	6097

Notes: Table provides ordered logit coefficient estimates (robust standard errors clustered on the cases shown in parentheses). + means significant at 10% level. * means significant at 5% level. ** means significant at 1% level. *** means significant at .01% level, two-tailed tests.

Model estimated with robust standard errors.

C. Results and Discussion

The results confirm the conclusions draw in the case study analyses of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. Neither constraint has a statistically significant impact on the time required to complete a rulemaking. If the model controls for all other influences on the time required to complete rulemaking, then agencies do not spend additional time completing RFA and UMRA analysis. This suggests that these rulemaking constraints are cursory and unimportant.

The model provides a relatively complete account of the rulemaking process. It explains 44 percent of variance in rulemaking duration. Moreover, the control variables are statistically significant in the expected direction. Political transitions in the Congress and presidency increase the time required to complete rulemaking. As expected, deadlines reduce completion time. Measures of political salience – economic significance and receipt of comments – both increase rulemaking time. In short, the model appears to capture much of the variation in rulemaking duration.

D. Robustness

A number of robustness checks were performed. First, analysis of the correlation matrix did not reveal likely multicollinearity problems (see appendix). Second, a plot of the model residuals did not suggest heteroskedasticity (see appendix).[15] Third, omitted variable bias does not appear to be of concern. This concern is very important because omitted variables that are correlated with independent variables included in the model violate the assumptions of the Ordinary Least Squares model. This may potentially generate biased results. The model therefore includes controls for the major variables

[15] The model is estimated using robust standard errors, but the standard errors are virtually identical using normal standard errors. This also suggests that heteroskedasticity is not a concern.

expected to influence rulemaking duration, leaving no strong theoretical basis to suspect omitted variable bias. The Ramsey Omitted Variable test confirms this intuition; the test results reject the null hypothesis that an omitted variable bias problem exists ($F(3, 6042)=5.72$; $Prob > F =0.0007$).

Fourth, bias from simultaneity is unlikely to be a concern. Put differently, increasing or decreasing the time required to complete a rule should not alter the values of the independent variables. For instance, a rule is extremely unlikely to cause a change in presidential administration or partisan control of Congress. Most deadlines are established at the onset of the rulemaking process, so increasing rule duration is unlikely to increase the probability that a deadline is imposed.

Simultaneity would occur if agencies only invoked the two constraints analyzed here when they expected these constraints to have little impact on the total rulemaking duration. Put more simply, simultaneity would exist if agencies only invoked the constraints when they expected that they would not matter. This strategic behavior would actually lead the regression results to understate the ineffectiveness of the constraints, however.

CHAPTER 4: IMPLICATIONS

I. INTRODUCTION

This chapter first discusses the positive implications of ineffective constraints. Contrary to the political control account, such constraints are unlikely to successfully favor particular interest groups. The ineffectiveness of some constraints may have important implications for the ability of Congress, the president, and the courts to influence agency behavior, however.

Next, the chapter outlines the normative implications of ineffective constraints. On the downside, such constraints are unlikely to further the normative values often ascribed to administrative procedures by legal scholars. On the upside, such ineffective constraints are unlikely to contribute to the ossification of the rulemaking process.

Finally, the chapter outlines two practical implications of ineffective constraints. First, what institutional characteristics differentiate effective and ineffective constraints? Second, how can judges and interested parties discern when Congress and the president were more likely to favor an effective constraint? This inquiry is useful for interpreting constraints according to the intent of the enacting Congress and president.

II. POSITIVE IMPLICATIONS

A. The Purpose of Administrative Constraints

The political control literature (e.g., Moe 1989; McNollGast 1987, 1989) argues that administrative procedures such as rulemaking constraints are designed to achieve political goals. McNollGast argue that the enacting congressional coalition imposes

constraints to favor its interest group supporters. These interest groups then use the information and access granted by constraints to monitor agencies. They then report back to Congress, which uses this information to oversee the agencies. In exchange, favored interest groups provide political support to members of the enacting coalition.

Legal scholars (e.g., Robinson 1989; Mashaw 1990) and political scientists (e.g., Balla 1998; Hamilton and Schroeder 1994; Hill and Brazier 1991; Spence 1997, 1999; Nixon, Howard, and DeWitt 2002) have questioned the political control account. The former group argues that constraints are not political. Instead, Congress imposes constraints to further normative goals such as due process and transparency.

The later group generally argues that constraints fail because of a principal-agency problem. Put simply, agencies exploit their superior information and Congress' limited oversight capacity to minimize compliance with constraints (e.g., Balla 1998). This dissertation suggests an additional critique of a subset of the political control account that neglects the multiple principals problem (e.g., McNollGast 1987, 1989). By focusing only on Congress and neglecting the president, McNollGast neglect that political compromise leads the Congress and the president to pass a constraint that is unlikely to succeed.

This explanation reconciles some of the debate between supporters and detractors of the political control account. It supports the account's overarching argument that administrative procedures are political; ineffective compromise constraints such as the UMRA are highly political. As a result, this finding is also compatible with the empirical contention made by both legal scholars (and a few political scientists) that many administrative procedures fail to foster political control. Compromise constraints may be

highly political yet ineffective at furthering the goals of their supporters. Put differently, this dissertation offers an alternative explanation from some of the political control account for how politics may influence imposition of administrative procedures (e.g., McNollGast 1987, 1989). This alternative explanation is compatible with the empirical critiques of the political control story but supportive of the overarching contention that administrative procedures are political.

B. Separation of Powers

1) Agencies Have Greater Power Than Previously Assumed

Existing political science analyses of delegation implicitly assume that Congress sincerely seeks to constrain agencies (e.g., Epstein and O'Halloran 1999). This dissertation suggests that this assumption is untrue when significant political opposition exists to a constraint, however. The empirical results in this dissertation suggest that such opposition frequently exists.

This is no small matter. The simple spatial model in Chapter 2 outlines the significance of ex ante constraints such as rulemaking procedures for agency behavior within the separation of powers system. Agency discretion increases without such ex ante constraints because agencies can strategically exploit disagreement between the president and the Congress to avoid ex post sanctions such as being overturned legislatively. Effective constraints reduce agency latitude to use this discretion, but ineffective constraints obviously do not.

To further illustrate the advantage that ineffective constraints convey to agencies, this section now analyzes the implications of violating that assumption for the two most

prominent models of delegation: Epstein and O'Halloran (1999) and Huber and Shipan (2002).

Epstein and O'Halloran (1999) model delegation as a game between the median congressional voter, a congressional committee, and an administrative agency. Both Congress and the agency seek to implement their preferred policy outcome. Congress chooses between writing a law internally in a committee and passing a broad statute delegating heavily to the agency. If Congress delegates to an agency, it both sets a policy (p) and establishes a discretionary range (d) in which the agency can act. The legislature manipulates the size of the discretionary range by writing a detailed or vague statute. Congress sets this range without knowing the relationship between policy choice and policy outcomes. The agency then chooses a policy within the discretionary range. Finally, Congress decides whether to accept agency's decision. If Congress rejects the decision, policy reverts to the status quo. The model yields two major predictions. First, Congress delegates more to agencies who share the ideological preferences of its median member. Second, Congress delegates more to agencies on complicated policy issues because agencies hold greater expertise (233).

This study questions the assumption that the agency does not exceed the discretionary interval. This assumption may be challenged on two grounds. First, an agency may disobey Congress and exceed the discretionary range (Moe 2009). Put differently, the assumption of perfect agency compliance defies the principal-agency literature documenting the conditions under which agencies successfully defy Congress (Moe 2009; Miller 2005).

More fundamentally, however, political concerns may dissuade Congress from even truly seeking to confine the agency to the discretionary range. This study's analysis shows that political conditions may induce Congress and the president to enact rulemaking constraints that do not enforce this discretionary window. Contrary to Epstein and O'Halloran's assumptions, Congress is forgoing an opportunity to control the agency.

Congress certainly may use other tools to control the agency. The fact that Congress enacts ineffective rulemaking constraints does not mean that all other forms of control are similarly ineffective. However, existing delegation models such as Epstein and O'Halloran have not recognized that political compromise may undermine Congress' desire to control agencies. Such compromise may influence other methods of congressional control that are commonly assumed to be important such as direct oversight hearings or use of the budget process. In short, Epstein and O'Halloran's model may overstate congressional control.

Huber and Shipan (2002) model legislative delegation as a game between a "bureaucrat" (an agency) and a "politician" (a legislature). The politician enacts a statute establishing a "compliance boundary" in which the bureaucrat can make policy decisions (95). Unlike Epstein and O'Halloran, the model allows the agency to exceed its discretion and breach this boundary. The politician enforces the compliance boundary via "nonstatutory factors, " which include the courts, interest groups, and legislative oversight. The model groups these enforcement mechanisms together and assumes that all increase the probability of agency compliance. The collective strength of these nonstatutory factors determines the probability that an agency will be sanctioned for

exceeding its authority. If the agency is sanctioned, the model assumes that policy moves to the legislature's ideal point (91).

Moe (2009) criticizes the assumption that all nonstatutory factors increase the probability of agency compliance. For instance, courts and interest groups may permit agency breaches of the compliance boundary that further their own policy preferences. Moe argues that the assumption of perfect enforcement by nonstatutory factors therefore "represents a best case for the legislature, and not a realistic representation of how delegation works." Moe adds that this assumption leads the model to overstate the extent of legislative control.

This dissertation suggests that an even deeper problem may exist, however. In some cases, the legislature may not even try to design nonstatutory factors that restrict the agency to "compliance boundary." Instead, political concerns may push the legislature to write ineffective nonstatutory factors. The model is therefore based on an inaccurate assumption, which overstates legislative control. Instead, the bureaucrat can use this discretion to move policy toward his ideal point. Huber and Shipan's model may therefore also overstate legislative control.

2) Congress Has Less Power and the President Holds Greater Power

As the discussion above suggests, ineffective constraints reduce congressional control over agencies. Ex ante controls on agency decisionmaking such as rulemaking constraints are more valuable to Congress than to the president. Congress has less power to direct agencies to take actions that will be shielded from overturn by political disagreement. Congress therefore has less ability to influence where the agency moves on the unidimensional model outlined in Chapter 2 (see Figure 2). The president is

arguably better positioned to induce such agency action (Moe 1987). In many cases, the president can issue directives to agencies (Kagan 2001). In cases where the president does not hold this formal power, his appointees are generally responsive to his policy preferences.

This is not to suggest that Congress is powerless. Congress has power to pressure agencies with weapons such as the budget process and oversight hearings. However, Congress often struggles to reach internal agreement regarding when to exercise these weapons (Moe 1987). By contrast, the president can act unilaterally (Moe and Howell 1994). The ability to impose ex ante restrictions on agencies therefore benefits Congress more than the president on average. Ineffective constraints thus advantage the president over Congress in the struggle to influence agencies.

3) Courts Have Less Power

Courts are reactive, relying on parties to bring cases. Parties are better able to bring cases when they hold a statutory cause of action. Some rulemaking constraints provide such a cause of action. For instance, a party may bring a suit alleging that an agency improperly avoided the APA's notice and comment requirement. Courts have greater power when they can hear such cases.

Ineffective constraints generally limit judicial review, reducing the power of the courts. If the constraint does not provide a cause of action, the courts obviously cannot hear cases to enforce the constraint. If the constraints are written with broad loopholes, the parties will be reluctant to bring such suits to the courts because they will lose. This is not to imply that courts are wholly dependent on constraints to hear cases. They hold jurisdiction to hear challenges to agency decisions in the absence of particular

constraints. On the margins, however, the courts have less power if parties do not bring cases challenging agency non-compliance with constraints.

III. Normative Implications

A. Ossification of the Rulemaking Process

A substantial literature in both law and political science has debated whether the rulemaking process has become "ossified," or bogged down by procedural requirements and judicial review (e.g., McGarity 1992; Eisner 1989; Mashaw and Harfst 1989; Pierce 1995). The constraints analyzed in this dissertation are an important example of such procedural requirements. Ossification proponents claim that the rulemaking process has become so burdened that agencies either issue rules after long delays or avoid rulemaking altogether. These studies generally take a dim normative view toward ossification, arguing that it unduly increases the costs of rulemaking. Ossification also encourages agencies to use adjudication and informal guidance in place of rules, imposing an additional set of costs (Berg 1986).

Other scholars respond that ossification claims are overstated (Wald 1993; Shapiro 2002). Several such studies have argued that the ossification thesis lacks empirical support (Jordan 2000; Johnson 2008; Yackee and Yackee 2009). These studies support this conclusion by correlating imposition of constraints with either time required to complete rulemakings or the number of rules issued. These are very imprecise measures of ossification, however. First, neither measure incorporates time spent before an agency formally began the rulemaking process by issuing a notice of proposed rulemaking. Research shows that this critical period consumes significant time (West

2009). Second, these measures do not precisely measure an agency's rulemaking duty. That is, how many rules should an agency actually issue under its statutory mandate?

These studies also fail to control for number of important omitted variables that may be correlated with imposition of constraints. For instance, Congress and the president may be more apt to impose constraints when regulation is politically unpopular. Regulation falls, but this drop is actually attributable to informal political pressure instead of constraints. As a result, these studies do not isolate whether constraints actually influence agency policy decisions.

This dissertation provides a more nuanced empirical analysis of whether rulemaking process constraints contribute to ossification. The results in this dissertation show that many rulemaking constraints are rarely even applied and therefore are unlikely to contribute to the ossification problem. Examples include the Regulatory Flexibility Act, the Unfunded Mandates Reform, and the Congressional Review Act. It is difficult to imagine how such constraints can plausibly contribute to the ossification problem.

Not all constraints are neglected so pervasively, however. Frequently applied constraints such as NEPA or the APA may indeed contribute to the ossification problem. However, proponents of the ossification thesis should not merely assume that all constraints contribute to ossification. To the extent that ossification is a real problem, it is caused by either frequently applied constraints or by other hypothesized sources of ossification such as exacting judicial review.

B. Normative Values

Much of the administrative law literature argues that rulemaking constraints further normative goals such as deliberation, democratic accountability, and due process.

Constraints may further these normative goals in two ways. First, they may be effective, meaning that they alter substantive outcomes in the direction intended by supporters of the constraint. Second, they may have a "non-instrumental" impact, meaning that they only alter agency processes. In this case, simply following the procedure furthers a normative goal even if the constraint has no impact on the final policy outcome. For instance, the process of receiving a hearing may afford a petitioner dignity even if the hearing has no impact on the probability that the petitioner ultimately prevails.

The results in this dissertation show that some ineffective constraints fail to meet either of these standards. For instance, the Unfunded Mandates Reform Act is so rarely applied that it cannot even have a non-instrumental impact. Other constraints arguably have a non-instrumental impact, but are not sufficiently effective to have an instrumental impact. The following discussion outlines how constraints may affect the pursuit of particular normative goals.

1) Deliberation

Sunstein (1988) and Seidenfeld (1992) argue that the administrative process should promote deliberation among citizens and between citizens and government. Agencies can foster such deliberation by formulating policy transparently. Citizens can then use this information to deliberate. If successful, such deliberation uncovers shared values among participants and encourages them to pursue a common policy goal. Civic republicans often argue that agencies are the ideal forum for such deliberation because they are neither too close to the people (like Congress) nor too far removed (the courts).

Frequently applied rulemaking process constraints may foster such deliberation. The APA notice and comment process (at least in its modern form) is the foremost

example of such a deliberation-fostering constraint (Seidenfeld 1992). Constraints that are ineffective because they are entirely ignored by agencies inevitably fail to foster deliberation, however.

This failure is a self-reinforcing process. For instance, the Regulatory Flexibility Act empowers the public to comment on draft regulatory flexibility analyses. Because the Act has been ineffective, few people have expended the time and effort to submit comments. This lack of public engagement and deliberation has in turn undermined the Act's effectiveness; as the case studies in Chapter 3 suggest, interest group involvement increases the likelihood that a constraint is effective. Similarly, the fact that agencies rarely invoke the Unfunded Mandates Reform Act has greatly reduced public interest in submitting comments. The net result has been a lack of deliberation on ineffective constraints.

2) Democratic Accountability

Democratic accountability is perhaps the most common justification for administrative procedures. Numerous studies have debated the normative implications of delegation to administrative agencies. Such studies typically debate whether administrative procedures mitigate the democratic accountability problem raised by delegation.

The predominant scholarly paradigm of democratic accountability with respect to administrative law has shifted over time. The "transmission belt" model held sway as the predominant justification until the 1970's (Stewart 1975, 1672). As the name suggests, agencies were to act as "transmission belts," faithfully implementing policy decisions made by the president and Congress. Such fidelity maintained democratic accountability

and prevented arbitrariness, a topic detailed below. In the context of rulemaking constraints, this model requires that agencies implement all constraints enacted by the Congress and president (including those enacted as a political compromise). Agencies therefore undermine their legitimacy by neglecting constraints. The UMRA and the RFA are important examples of such neglect. The effect is similar when agencies follow the letter of constraints but undermine their intent, rendering the constraint ineffective.

The transmission belt model eventually gave way to pluralism (Stewart 1975, 1687). The pluralism account incorporated the influence of interest group politics on agency behavior. Agencies did not neutrally implement statutes, but instead responded to political forces such as interest groups. Some scholars argued that the rulemaking process enabled broad interest group participation, generating representative policies (e.g., Davis 1970, 283). Such widespread participation neutralized the influence of individual interest groups, reducing the probability of agency capture and successful rent seeking. This model predicts that agencies implement constraints broadly and neutrally, allowing interest groups to compete equally to access the administrative process.

Ineffective constraints violate this prediction. This outcome supports scholars who argue that delegation to agencies is normatively undesirable because agency policymaking is not broadly representative (e.g., Lowi 1969; Lowi 1986; Ely 1980). Put differently, critics such as Lowi and Ely would not be surprised that a number of rulemaking constraints are ineffective because they do not believe that the administrative process cures the accountability problems raised by delegation to agencies.

The presidential dominance model eventually supplanted pluralism (Farina 1997; Kagan 2001). Proponents of presidential dominance argue that the regulatory state is

legitimized when agencies respond to the president, the only elected official with a national constituency. This broad constituency reduces the president's temptation to respond to narrow rent-seeking groups, and allows the voters to impose a broad shift in regulatory policy. In addition, the president alone could leverage his position as chief executive to coordinate policymaking among agencies. For instance, the president was also uniquely able to impose methodological changes such as requiring benefit-cost analysis. As a result, agencies should respond to changes sought by new presidential administrations. An agency that neglects a rulemaking process constraint favored by the president therefore reduces its legitimacy. The Regulatory Flexibility Act, supported by Democratic and Republican presidents alike, provides one example of such neglect.

3) Due Process

Scholars also argue that agencies should use decisionmaking procedures that are clear, fair, and rational (Bressman 2003, 496). In addition, agencies should provide justifications for their decisions. Such procedures discourage the agency from making arbitrary, inconsistent decisions that violate individual rights. By establishing and maintaining clear ex ante rules, agencies respect due process. Bressman argues that this concern with due process prompted the framers to create the separation of powers system (500). More concretely, this concern is expressed in the Due Process Clause of the Fourteenth Amendment.

The failure of agencies to even apply procedural constraints undermines due process. Put differently, constraints that lack even a non-instrumental effect cannot further due process. This dissertation shows that some constraints clearly lack even a non-instrumental effect. For instance, extremely sporadic application of the Unfunded

Mandates Reform Act deprives parties of clear ex ante guidance during the rulemaking process.

IV. How to Design Effective Constraints?

A. Introduction

This section analyzes how statutory drafters can maximize the probability that a constraint will be effective. That is, absent political constraints how can supporters of a constraint maximize the probability that their creation will be effective? The results from this dissertation offer five suggestions.

First, a constraint with broad exemptions is unlikely to succeed. Such exceptions doomed the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. Statutory drafters should therefore focus on avoiding broad exemptions for agencies. This requirement is necessary but not sufficient for a constraint to be effective.

Second, a constraint that enables judicial review is more likely to be effective. The courts can act as a critical backstop, checking agency defiance and inducing ex ante agency compliance. The courts may also interpret constraints in light of evolving circumstances (Eskridge 1986), preventing agencies from exploiting unforeseen events to evade the spirit of the constraint.

Third, a constraint is more likely to be effective if it charges an executive agency with enforcement responsibility. High-level executive branch agencies have some authority to encourage agency compliance with constraints. Like Congress, these agencies may also be influenced by political drift. Agencies whose institutional identity supports enforcing the constraint are especially likely to remain diligent enforcers,

however. The Council on Environmental Quality's support for NEPA is one such example.

Fourth, a constraint should create a dedicated process within Congress. Either a committee composed of members committed to the constraint or the Government Accountability Office may do such enforcement; the later is less likely to be affected by political drift. When it chooses to act, Congress has many tools at its disposal to monitor agencies. Congress can impose ex post sanctions on non-complying agencies such as oversight hearings or budgetary adjustments. The threat of congressional enforcement may therefore induce agency compliance.

Finally, constraints are more likely to be effective if they empower early involvement of supportive interest groups. Empowering monitoring by opposing interest groups threatens to undermine the constraint by allowing these groups to file frequent challenges that burden the agency's decisionmaking process. Interest group involvement in OSHA's rulemaking process is a classic example.

Supportive interest groups bring additional resources to monitor agency implementation of constraints (McCubbins and Schwartz 1984). Moreover, they have an incentive to monitor compliance of constraints that further their policy objectives. Such interest group monitoring is more likely to be effective when it occurs early in the agency decisionmaking process, before the agency becomes strongly associated with a particular proposal.

Interest group enforcement is more effective when coupled with the other enforcement mechanisms noted above. On one hand, interest groups are more effective monitors when they can file lawsuits, and complain to Congress and to executive branch

overseers. On the other hand, congressional oversight and judicial review are more effective when coupled with strong interest group oversight. That is, executive branch and congressional enforcement are both strengthened if interest groups are empowered to report agency non-compliance. Interest group involvement also empowers judicial review. Active involvement of interest groups with sufficient incentives to file lawsuits challenging agency non-compliance is necessary for the courts to act as effective enforcers.

Even a well-designed constraint may be ineffective in practice. As noted in Chapter 2, Congress and the president lack sufficient information to eliminate agency problems. Exogenous events may also undermine constraints. Perhaps most seriously, a perfectly drafted constraint still faces the political drift problem. Political uncertainty matters because Congress, the president, and the courts all influence how agencies exercise their interpretive discretion in implementing constraints (Moe 1989). For instance, Congress may pressure agencies to exempt rules from the environmental impact statement requirement. The political branches can also undermine enforcement mechanisms intended to ensure that agencies comply with constraints. For instance, a president can have OIRA reduce emphasis on enforcing agency compliance with an executive order. Congress can do the same with its committees. A unified president and Congress may also influence judicial implementation of constraints (Epstein and Knight 1997). Even a well-drafted statute cannot prevent such behavior.

V. Judicial Interpretation of Constraints

Judicial interpretation heavily shapes the effectiveness of some constraints. This section therefore presents a proposal for judges to interpret constraints. The proposal is only relevant for a judge seeking to interpret statutes according to the intent of the enacting legislature. That is, the proposal is directed toward "intentionalist" judges, and not to judges adhering to other approaches such as textualism or purposivism.

A. Defining Intentionalism

Intentionalism is a very broad term that is subject to many different interpretations. For the purposes of the following discussion, intentionalism is defined simply as enforcing the will of the legislature that enacted the statute (Dworkin 1986, 348). The claims made in this discussion do not extend beyond how a judge may achieve this narrow version of intentionalism. Roscoe Pound, an influential early intentionalist, outlined the approach: "The object of genuine interpretation is to discover the rule which the law-maker intended to establish..." (Pound 1907, 381).

Even this relatively narrow version of intentionalism is complicated, however. Indeed, two major iterations of intentionalism exist. First, judges may seek to discern whether the legislature formed an intention on the specific issue at hand. Second, judges may engage in "imaginative reconstruction." Judges apply this method when the legislature did not address a particular issue. Under this process, a judge seeks to determine what the enacting legislature would have intended had it contemplated a particular issue. This approach is often associated with U.S. Judge Learned Hand (Cox 1947). In the contemporary context, U.S. Supreme Court Justice Stephen Breyer is a primary advocate of this approach (Breyer 2005).

Judges use a variety of materials to discern legislative intent. Most intentionalists first look to the legislative text. They may also analyze the issue in light of the larger structure of the statute if the applicable text alone does not address the issue. They may also analyze the statute in light of related laws. Judges searching for "imaginative intent" of the enacting legislature analyze the historical circumstances surrounding passage of the statute. Finally, intentionalist judges often turn to the legislative history of the relevant statute. The legislative record includes materials such as committee reports, conference committee reports, floor debates, and committee hearings (Eskridge and Frickey 1990, 326).

B. Normative Debate over Intentionalism

The literature has long debated the normative merits of intentionalism. Proponents of intentionalism often argue that the approach promotes democratic accountability. By implementing the wishes of the last statutory command from the legislature, the courts encourage the legislature to update laws. Intentionalism also prevents unelected judges from making policy decisions. Finally, intentionalism encourages judges to overturn agency decisions that improperly rewrite statutes.

Critics of intentionalism offer several responses. First, they have drawn upon public choice studies to claim that no collective intent exists. As a result, even an omniscient judge could not discern the intent of a multimember legislature (Shepsle 1992). Legislative outcomes instead depend on institutional choices such as the order in which the alternatives are presented. Intent may also be elusive if the enactors simply failed to foresee the question at issue (Eskridge and Frickey 1990, 326). The following

discussion acknowledges these critiques, and presents alternatives for a court seeking to accurately discern legislative intent.

C. Reform Proposals

Existing studies have proposed that courts apply work from PPT to discern legislative intent. Such studies have focused almost exclusively on legislative history. For instance, McNollGast (1994) argue that courts may use PPT to differentiate credible and noncredible legislative history. Courts may use PPT to locate the "pivotal" actors in legislative bargains and then use their comments as the most credible expression of congressional intent. This approach supposedly separates meaningful legislative history from noncredible statements inserted merely to influence courts. This literature has not reached beyond legislative history, however.

This dissertation proposes that judges searching for legislative intent recognize that political alignment between the House, Senate, and president influences the design of rulemaking constraints. This approach would supplement existing methods of intentionalist statutory interpretation such as examining legislative history.

Put simply, judges could evaluate the political conditions surrounding enactment of a constraint. If the political branches were unified on both policy and political goals when enacting a constraint, judges would interpret the constraint more expansively. In cases of compromise, judges would interpret the statute more narrowly and defer to the agency's interpretation. This rule would reach a better the balance between democratic accountability and agency expertise. Legislative intent would be closely enforced only when Congress and the president sought to compel agency compliance with the constraint. Agency expertise would prevail in other cases. This proposal would better

balance the benefits of agency expertise with the desire to foster political accountability in the regulatory process.

D. Anticipated Objections

Putting aside the much larger debate over the merits of intentionalism, interpreting intent from the design of constraints raises a number of potential objections. These objections and brief responses are outlined below.

First, are the courts competent to evaluate the political and policy goals of the Congress and president? The courts are often reluctant to become directly involved in political issues, and decline to hear an entire subset of such issues under the "Political Question Doctrine." The rationale for this avoidance is two-fold. First, courts have less knowledge of the political process issues than Congress and the president. Federal judges hold life tenure, and do not engage in election campaigns. As a result, they are more willing to defer on such issues. Second, the courts fear losing independence if they engage in an overtly political dispute. The political branches may overrule their decisions, undermining their reputation for independence (Epstein and Knight 1998). Involvement in overtly political issues may threaten their independence even if the courts are not overruled, however.

Second, asking courts to infer congressional intent by judging the scope of their own powers under the underlying statute raises separation of powers objections. For instance, courts may seek to enhance their power by expansively interpreting the judicial review provision of a statute. In short, this strategy vests significant discretion in the judiciary. This violates the widely held sense expressed in both judicial doctrine and

academic scholarship that courts should not have wide discretion to determine the scope of their own jurisdiction and powers.

CHAPTER 5: CONCLUSIONS

I. Major Conclusions and Implications

This dissertation analyzed the influence of politics on the design and expected effectiveness of rulemaking process constraints. The results show that contrary to the conventional wisdom, some constraints are wildly ineffective. Constraints that are enacted in the face of significant opposition are usually compromises that are unlikely to be effective.

Both supporters and opponents of constraints have incomplete information when they bargain over the terms of a proposed compromise. Constraints are implemented in a complicated environment. As a result, strong supports may not succeed in designing an effective constraint even when they have the political support to do so. Alternatively, strong opponents may fail to doom a compromise constraint to ineffectiveness despite having the votes to do so. The case studies analyzed in this dissertation show that the relationship between political agreement over a constraint and effective design is strong, but not perfect because of this information problem.

These findings offer insight into a number of important issues. If constraints are ineffective because they are neglected entirely, then agencies may hold greater autonomy from Congress and the president than existing studies assume. That is, these neglected constraints do not "reign in" agencies. On average, such constraints empower the president at the expense of the courts and Congress. Presidents should therefore be less supportive of imposing effective constraints (holding policy consequences constant).

These findings also suggest that existing studies mischaracterize congressional and presidential goals with respect to administrative procedures. Some procedures are not designed to favor particular interest groups, to control agencies, or to advance normative values such as transparency and due process. Instead, some constraints are enacted as a political compromise with little chance of being effective. Existing studies therefore mischaracterize the purpose underlying at least some administrative procedures.

The results also suggest that not all rulemaking constraints contribute to the ossification problem. Existing studies thus overstate the severity of ossification. This dissertation also provides the first analysis of what institutional characteristics differentiate effective and ineffective rulemaking process constraints. Constraints that eschew broad exemptions, empower early interest group participation, and mobilize at least one effective enforcement agent among the three major branches are more likely to be effective.

II. Future Research Directions

These results suggest a number of promising avenues for future research. First, future work may analyze the effectiveness of constraints that apply only to individual statutes. Many statutes include unique constraints such as special judicial review provisions or additional interest group consultant requirements. The empirical analysis in this dissertation only encompasses constraints that apply to large classes of rules. Gathering data on when statute-specific constraints are imposed and whether they are effective would allow the theory to be tested more widely. That is, do the political

branches regularly impose compromise constraints with a low probability of being effective? Or, is this practice predominantly confined to overarching constraints?

Second, future research should examine administrative and judicial interpretation of constraints. To what extent do agencies and judges recognize whether constraints were designed to be effective? If agencies and judges recognize that constraints are the product of compromise between the House, Senate, and the president, what nonetheless induces compliance? Do agencies and judges only comply when doing so furthers their particular policy goals? Or, do they seek to strategically anticipate the future preferences of Congresses?

Third, future studies should analyze whether the political drift problem frequently undermines enforcement of constraints that were intended to be effective (Moe 1989). How frequently and intensely does political drift occur? Does the vigor of congressional and presidential oversight on constraints change significantly in response to electoral changes? Do the political branches seek to influence or even overturn court or agency decisions enforcing a constraint? Addressing these questions will provide a more complete picture of how the political branches influence the rulemaking process.

Fourth, additional work should explore the preferences of interest groups over rulemaking constraints. To what extent do interest groups view constraints as an opportunity to gain long-lasting influence over the rulemaking process? How actively do interest groups lobby Congress to shape constraints? Such analysis will provide a more complete picture of the extent to which constraints are politically salient. This will provide insight into the relative importance of policy and political goals to both branches.

Finally, additional empirical work should seek to devise better measures of the ultimate effectiveness of the constraints analyzed in this study. Some of the empirical evidence presented in this study focused on policymaking processes (e.g., did an agency consistently conduct an ostensibly required analysis?) rather than policy decisions (e.g., did the agency issue a pro-environmental rule?). Analyzing policy outcomes would provide greater leverage as to the ultimate effectiveness of constraints. This is no small task, as policy outcomes are often difficult to objectively classify. In addition, congressional and presidential intent in establishing a constraint is often unclear. Nonetheless, this effort will provide a more complete measure of constraint effectiveness.

APPENDIX:

Figure 2: Distribution of Dependent Variable Untransformed

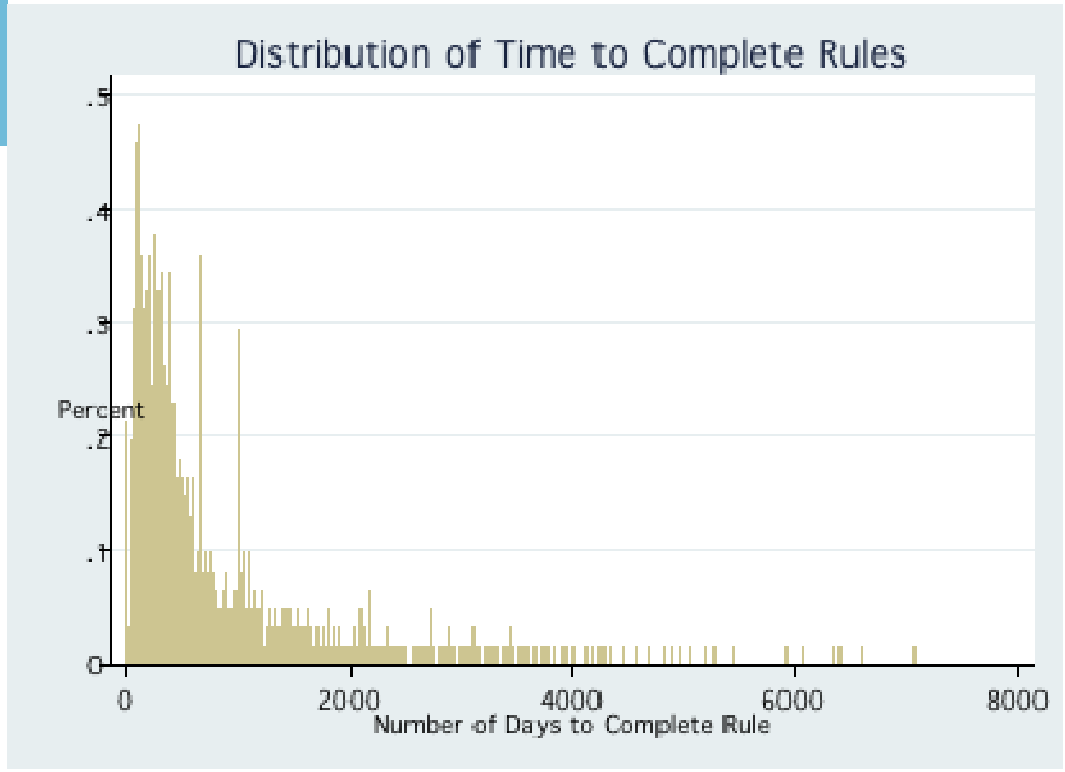
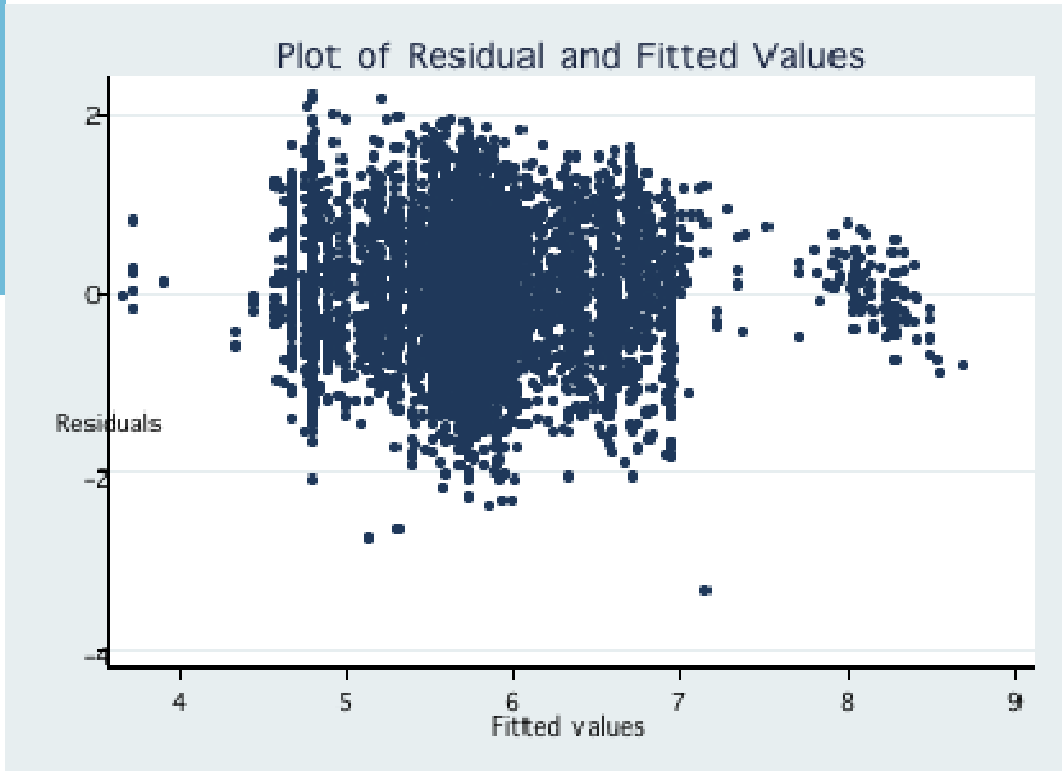


Table 5: Correlation Matrix of Independent Variables

	Econ Significant	Executive Agency	Independent Agency	Reg Flex Analysis	UMRA Analysis	Change in Presidential Administration	Change in Partisan Control of Congress	Rule Subject to Deadline
Economically Significant	1							
Executive Agency	-0.0216	1						
Independent Agency	-0.0376	-0.2107	1					
Reg Flex Analysis	0.0671	-0.063	0.0485	1				
UMRA Analysis	0.1358	0.033	-0.0357	0.088	1			
Change in Presidential Administration	-0.0271	0.0348	-0.0379	-0.0018	-0.0231	1		
Change in Partisan Control of Congress	0.0953	0.0125	-0.0202	-0.0597	0.0061	0.0348	1	
Rule Subject to Deadline	0.152	0.043	-0.1165	0.1265	0.1251	0.0119	0.0056	1
Rule Received Comments	0.0042	-0.5413	0.1675	0.0499	-0.0604	-0.1009	0.0265	-0.0955

Figure 3: Plot of Residuals v. Fitted Values



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