

“Reconsidering Agency Capture During Regulatory Policymaking”

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Abstract

In this chapter, I study agency capture as it applies to the federal rulemaking process. I define agency capture, and I put forward a two-prong test for identifying it. I apply this test to a dataset of 36 U.S. Department of Transportation regulations. The data are drawn from a content analysis of both rules and public comments, as well as a telephone survey of public commenters. Unlike most studies of rulemaking, I gather information from across the rulemaking process—from the proposal development stage through the notice and comment period. My analysis focuses on the potential influence of business interests, government interests, and nonbusiness/nongovernment interests on regulatory policy change. I find that business interests often participate at a high rate and hold influence over some rules. However, this influence is not consistent across rules or agencies. I also uncover evidence that the participation and influence of sub-national agency officials in rulemaking may provide a foil to business interests and thus may deter agency capture.

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This chapter, and the volume in which it resides, suggests the need to reconsider the theory of agency capture. Few constructs within the study of American politics and policymaking are more widely discussed than agency capture (Bernstein 1955; Stigler 1971; Sabatier 1975). Yet, while scholars, politicians, and the media frequently employ the idea of agency capture, there is neither a clear definition of the construct (Schlozman and Tierney 1986) nor a common way to identify it (Carpenter 2004). In this chapter, I begin to address these shortcomings in three main ways. First, I define agency capture, which I suggest is the control of agency policy decision-making by a sub-population of individuals or organizations external to the agency.¹ Second, I put forward a two-prong test for identifying capture that separates the constructs of “influence” from “control.” I argue that influence is a necessary but not sufficient condition of capture. Third, I provide an empirical assessment of these constructs by applying them to a sample of rules from the U.S. Department of Transportation.

Tasked with filling in the details of congressionally passed statutes, public agencies routinely propose and promulgate legally binding rules and regulations. And while the scope and topics of rules vary dramatically, some of our key public policy battles have been fought and decided via rules. For instance, existing rules specify standards for automobile emissions, clean water, and workplace safety; moreover, forthcoming rules will set requirements for state health exchanges and capital bank standards. In short, rules matter, and so does “rulemaking,” the political and policymaking process by which agency rules are formulated (Yackee 2006a, 2006b;

¹ As I discuss below, this definition holds both similarities and differences with the definition proposed in Carpenter and Moss’ chapter in this volume.

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McKay and Yackee 2007; West 2004, 2005; Kerwin and Furlong 2010; Yackee and Yackee 2010, forthcoming).

The Administrative Procedure Act of 1946 (APA) guides federal agency rulemaking, and it typically unfolds across two stages. First, there is a **pre-proposal stage**, where agency officials gather information and decide which stipulations and requirements to include in a draft rule (also called a Notice of Proposed Rulemaking or NPRM). During a second stage, the **notice and comment period**, the APA requires that most NPRMs be opened for public comment. After considering any public feedback, agency officials often announce a legally binding Final Rule.

It is important to note that agency capture—as I define it—is not an argument particular to rulemaking. Yet, if capture exists, then one might expect to see it manifest during the rulemaking process because, as West (2005, 655) suggests, rulemaking is “the most important way in which the bureaucracy creates [regulatory] policy.” As a result, rulemaking supplies an excellent test case for identifying agency capture. Moreover, this chapter does not assume the existence of agency capture and then seek remedies for its prevention; instead, it strives to put forward a reliable and generalizable method to identify agency capture during rulemaking.²

I assess capture during regulatory policymaking by focusing on 36 U.S. Department of Transportation (U.S. DOT) rules completed between 2002 and 2005. The most critical feature of these data is that each rule begins with an Advanced Notice of Proposed Rulemaking (ANPRM).

² See also the chapters by Carrigan and McCarty in this volume for thought-provoking efforts to identify and understand the conditions associated with agency capture.

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An ANPRM is a government document that begins the pre-proposal stage for some rules. In an ANPRM, the agency indicates how it may regulate or deregulate on a topic and asks for public comment. In theory, the information generated in this first round of comments informs the NPRM. In accordance with the APA, the NPRM must then be open for a second public comment period before it can be finalized. While all of the sample rules begin with ANPRMs, not all end as Final Rules; in fact, half of the rules are withdrawn by the agency before reaching Final Rule status.

I rely primarily on content analysis of government documents and a sample of the public comments taken from each stage of the rulemaking process to draw conclusions in this chapter. In the dataset, I coded information from the 36 U.S. DOT rules at each stage of the rulemaking process, for a total of 59 points of evaluation. Additionally, for a sub-sample of 19 U.S. DOT rules, I implemented a telephone survey of the public commenters. Finally, to assess implications generated through my analysis, I also used 2004 survey information drawn from agency heads in all 50 American states and across all policy areas.

These data provide several advantages. First, they allow me to study the full rulemaking process—from the pre-proposal stage through the notice and comment period—and evaluate how participation rates of different segments of the broader public, such as business or government interests, change across the different phases of rulemaking. Second, I am able to provide suggestive evidence regarding which segments or “sub-populations” are the most influential on policy outputs at various rulemaking stages. Third, by studying rules that are finalized, as well as rules that are withdrawn, these data are among the first to track the ability of

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sub-populations to halt the regulatory process. Fourth, I can assess influence tactics beyond the submission of comments, including the use of *ex parte* (i.e. “off the record”) lobbying. Of course, these data do not hold all the answers we seek with regard to capture during rulemaking. One shortcoming is that the study focuses on a relatively small number of rules drawn from nine agencies within one federal department (U.S. DOT). Moreover, if capture occurs either before the initiation or after the completion of rulemaking, then these data will be blind to its effects. Additionally, while the chapter breaks new ground by measuring multiple lobbying tactics—including *ex parte* lobbying—employed on a sample of agency rules, the chapter is limited in that I am not able to identify all of the potential influence mechanisms that may have been used by interested parties on these rules.³

The chapter proceeds as follows: First, I discuss the theoretical foundations of agency capture, and I put forward a two-prong test for identifying capture in the context of rulemaking. Second, I describe the data, variables, and methods employed. Third, I discuss the results. In particular, I uncover suggestive evidence that the participation and influence of state DOT agency officials—who are often important implementers of U.S. DOT policies—may deter agency capture. Finally, I conclude by suggesting potential pathways for future work.

Theoretical Foundations and a Two-Prong Test

³In particular, I purposively focus on “inside lobbying” tactics over “outside lobbying” tactics, meaning that I study the methods used by interest groups to influence administrative officials directly, as opposed to more diffuse public campaigns meant to influence the general policymaking atmosphere or public opinion on the issue.

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Images of the U.S. public bureaucracy are often curiously bifurcated. By one account, government agencies are made up of public servants who are among the best in the world and promote the public interest (Goodsell 2003).⁴ Here, bureaucrats strive to be non-political actors (Wilson 1887) and are motivated primarily by their aspirations to serve citizens (Perry and Wise 1990). In contrast, the other image of the bureaucracy is much less sanguine and arguably more frequently employed. Here, narrow, self-serving interests capture government agencies with the result being inefficient, ineffective, or even undemocratic public decisions (Bernstein 1955; Stigler 1971; Lowi 1979). In this section, I focus new attention on the latter description with the aim of better understanding the construct and its applicability to one of the main functions of the modern public bureaucracy: agency rulemaking.

Agency Capture

Agency capture is the control of agency policy decision-making by a sub-population of individuals or organizations outside of the agency. While in principle any sub-population may capture agency decision-making (Wilson 1980), the vast majority of the literature concentrates on the potential for nefarious influence by business or economic interests on regulatory outputs to the detriment of the “public interest” or the “public good.” Bernstein (1955, 92) begins much of the modern thinking; he theorizes that over time agencies “tend to relate their goals and objects to the demands of dominant interest groups in the economy.” Similarly, Rourke (1984) summarizes capture as an over-reliance on an interest group by an agency, such that the group

⁴ While the public’s overall evaluations of U.S. bureaucratic performance vary markedly over time, the bureaucracy’s macro-level approval often exceeds the approval of other representative institutions, such as the U.S. Congress (Yackee and Lowery 2005).

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develops a veto power over the agency's actions. Stigler (1971) and others (Posner 1974; Peltzman 1976) focus on how select interest groups attempt to capture "rents" by lobbying for additional government regulation. Bagley (2010, 2; see also Barkow 2010) suggests that capture is best understood as "shorthand for the phenomenon whereby regulated entities wield their superior organizational capabilities to secure favorable agency outcomes at the expense of the diffuse public."

Some recent scholarship suggests that concerns over agency capture remain relevant today. Barkow (2010) writes that agency capture may exist in the areas of banking, criminal justice and consumer protection. Bagley (2010) suggests that capture occurs at times within government agencies; however, he cautions that it can be subtle and difficult to detect. Nevertheless, both Barkow (2010) and Bagley (2010) conclude that elected officials ought to design public agencies and develop policy solutions so as to diminish agency capture in the modern bureaucracy.

Yet, a number of political scientists and public administration scholars call into question the widespread existence of agency capture (Sabatier 1975; Meier and Plumlee 1978; Gormley 1982; Berry 1984), as well as provide theoretical critiques against the concept. The most frequently cited challenge to the theory questions its black box treatment of political institutions. Moe (1987, 475), for example, writes, "[i]nstitutions are purposefully omitted from these [capture] models... The implicit claim is that institutions don't matter much." Hill (1991, 280) concludes that "capture, even among regulatory agencies, never has been as pervasive as was sometimes suggested." Wilson (1989) argues that agency capture is much more difficult in the

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modern era due to diversity in organized interests, the lower cost of information, and access to the courts. Rourke (1991) echoes this point, suggesting that agencies must satisfy the conflicting demands of a variety of groups.

Another challenge for much of the existing capture literature is the difficulty in clearly defining and in measuring the “public interest” or the “public good.” Yet, numerous scholars successfully employ proxies for this construct.⁵ For instance, Berry (1984) finds that public participation—or the participation of a public interest representative—during regulatory development provides a critical hedge against agency capture. He suggests that the presence of such representatives reduces the likelihood of capture by business interests. Similarly, Sabatier (1975) writes that regulatory agencies promulgate more pro-consumer policies when organized groups agitate for consumer interests, and Gormley (1982) finds that business interests are more influential in states where public interest advocates are not active.

Capture in Quantitative Rulemaking Studies

The quantitative rulemaking literature provides numerous accounts of who participates and who influences during rulemaking’s notice and comment period, and it is through these accounts that our understanding of agency capture may be inferred. For instance, Golden (1998) studies a sample of 11 rules and concludes that business interests submit the most comments on proposed regulations. However, she finds little evidence of excessive business influence or what she refers to as “agency capture” in the data. In other work, Croley (1998) and Kerwin and

⁵ See, for instance, Schwarcz’ insightful chapter in this volume for a discussion of other political actors, such as advocacy leaders, representing the public interest.

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Furlong (2010) also document the dominance of business participation during the notice and comment period (but see Cuéllar 2005). Furlong (1998) collects opinions from bureaucrats in rulemaking, and he finds that they believe themselves to be responsive—but not “captured”—by interest group participation.

In their survey effort, Furlong and Kerwin (2005) find that businesses and trade associations are involved in rulemaking at a greater rate than public interest groups; however, businesses and government officials participate at about the same rate. My earlier research (Yackee and Yackee 2006) provides evidence of sub-population participation and influence during notice and comment rulemaking. Using content analysis on a sample of over 30 rules, we find that business interests participate during the notice and comment period at a higher rate than other commenter types and hold more influence over Final Rule content.

Other research suggests that interest group influence—and particularly business interest influence—may be more important during the pre-proposal stage than during the notice and comment period of rulemaking. For instance, Kamieniecki (2006, 133) concludes that the content of the proposed rule is “probably a better indicator of the amount of influence business has in the rulemaking process” than business participation during the notice and comment process. My work with Naughton and others (2009; see also Nelson and Yackee, forthcoming) demonstrates an agenda setting and agency blocking role for organized interests during the pre-proposal stage; however, we do not investigate sub-population influence patterns. My most recent research (Yackee, forthcoming) finds that ex parte lobbying by interest groups during the pre-proposal stage holds influence over regulatory outputs. However, again, the focus is not on

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agency capture. Finally, others also suggest the need for greater study of the pre-proposal stage (Chubb 1983; Magat, Krupnick, and Harrington 1986; West 2004, 2005, 2009; Wagner 2010; Rinfret 2011), and at times, this work emphasizes the need for investigation into business influence patterns in particular.

Two-Prong Test and Testable Expectations

Despite years of scholarly discussion, ambiguity still surrounds the concept of agency capture. This ambiguity stems in large part from an unclear distinction between sub-population *influence on* agency decision-making and sub-population *capture of* agency decision-making in much of the literature. Gormley (1982) highlights this ambiguity; he writes that scholars too often confuse the concepts of influence and control when studying agency capture. Gormley (1982) suggests that businesses may be quite influential without controlling the regulatory process or the decision-making of agency officials. As a result, I define capture as the control of agency policy decision-making by a sub-population of individuals or organizations external to the agency.⁶ This definition fits with Carpenter's (2004) warning that simply observing policy outcomes that appear to favor well-organized and wealthy interests is not evidence of agency capture. Therefore, if one uncovers evidence of policy influence by a sub-population, then one

⁶ The definitional chapter in this volume by Carpenter and Moss focuses more on the intent of the regulated entities than on their control over agency actions. That chapter suggests that capture is best understood as regulation that by "intent and action of the industry regulated, consistently or repeatedly directed away from a defensible model of the public interest toward the interest of the regulated industry." My definition is broader, in that it moves beyond the interests and preferences of regulated industry to any sub-population of individuals or organizations; however, it is also, arguably, more limited in that it relies on the higher threshold of "control" over agency decision-making.

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must take the additional step of evaluating agency decision-making to understand whether that sub-population wields merely influence, or more powerfully, undue influence or even control over agency decision-making.

In short, influence is a necessary but not sufficient condition of agency capture. In light of this distinction, I separate out these constructs in a simple two-prong test. I ask: (1) Does a set of a sub-population of interests consistently hold greater influence over the writing of agency rules than other sub-populations? If yes, then the second prong of the test is activated: (2) Does a sub-population control agency decision-making with regard to rulemaking? I argue that an affirmative response to both the first *and* second questions constitutes agency capture. I map this test onto rulemaking by deriving several testable expectations. If agency capture exists, then:

(a) I expect that a sub-population of individuals or organizations—be it business interests or some other sub-population—will stand out as the top lobbying participant during rulemaking. Here, lobbying represents the first step toward potential influence. I expect that a high level of participation will occur across the rulemaking process (i.e. during the pre-proposal stage and the notice and comment period). Participation domination will also carry across lobbying tactics: it will be evident during the submission of public comments to rules and will occur through other less discussed lobbying tactics, such as *ex parte* lobbying or indirect lobbying through legislators or the elected executive.

(b) I expect that a sub-population will stand out as consistently influential across rules and agencies. Thus, if business or other interests have captured rulemaking, then they will be able to reliably move regulatory policy decision-making in their preferred direction. If agency capture is

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a widespread phenomenon, then I expect to see these patterns across most rules, regardless of the agency; if agency capture is an agency-specific phenomenon, then I expect to see these patterns across all rules promulgated by a particular agency. Again, if capture exists, then influence will likely occur across the different stages of the rulemaking process and across lobbying tactics.

(c) Assuming points (a) and (b) are satisfied, then in a captured agency I expect to see agency decision-making “controlled” by the sub-population. Control may reveal itself empirically in several ways. For instance, I expect to see agency decision-making gravitate toward the policy preferences of the sub-population, even when technical information, data, or evidence points decision-making in a different direction. I also expect to see agency decision-making move toward the policy preferences of the sub-population even when the preferences of other political actors, such as Congress and the President, point agency rulemaking in a different direction. These patterns will occur across multiple agency rules, suggesting that agency capture is a broad theoretical construct that generalizes across agency decision-making.

Data and Variables

I provide one empirical application of the two-prong test in this chapter. To do so, I rely primarily on a dataset of 36 U.S. DOT rules. I focus on U.S. DOT because it is one of the top promulgators of rules at the federal level and regulates across a diversity of controversial policy topics. I began the study’s data collection by completing 15 background interviews in Washington D.C. with the agency officials who worked on these rules. These interviews provided me context and insights into the rule’s subject matter. I describe the data and variables below.

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Rule Selection

To select the study rules, I first put together the population of U.S. DOT “completed actions” for the study’s focus years, which span from 2002 to 2005. Here, “completed action” means that the agency either promulgated the rulemaking activity as a Final Rule or it was withdrawn. This stipulation allows me to study the politics of agenda setting and agenda blocking during rulemaking (Kamieniecki 2006; Naughton et al. 2009). I then limited the selection to rules that began the pre-proposal stage with an ANPRM. As West (2004) suggests, rules that begin with ANPRM procedures give scholars a way to study the often non-transparent participation of concerned parties during the pre-proposal stage. It is important to note that ANPRM procedures—while used at a greater rate than other more specialized procedural mechanisms—are not used for the majority of rules.⁷ Nevertheless, as Naughton et al. (2009, 263) conclude in an analysis of ANPRM usage across the federal government, a “noteworthy” number of rules begin as ANPRMs, making studies utilizing ANPRMs an important “vehicle for understanding the broader phenomenon of [proposed] rule development.”

These parameters yielded 36 study rules.⁸ In order to capture the full rulemaking process—from the pre-proposal stage through the notice and comment period—I focused my

⁷ There has also been research into specialized procedural mechanisms employed during the pre-proposal stage, such as negotiated rulemaking (Coglianese 1997; Langbein and Kerwin 2000), which utilizes concerned parties to construct the preliminary rule. Despite great promise, negotiated rulemaking is infrequently used. Other work focuses on advisory groups (Balla and Wright 2001), which, at times, aid in the development of rules. However, neither line of scholarship generalizes well to rules without these specialized mechanisms.

⁸ I initially identified 38 candidate rules; however, despite significant efforts, I could not locate full rule docket information for two rules. Thus, my study focuses on 36 rules.

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analysis on each stage of rulemaking. Each stage represents the government agency's effort to solicit public comments, as well as make policy change, on one of these 36 rules. Within the pre-proposal stage of rulemaking, 36 rules took comments during an ANPRM phase, while two rules also collected comments in a Supplemental Advanced Notice of Proposed Rulemaking (SANPRM).⁹ Twenty rules were open for comments during a NPRM phase, while one rule also employed a Supplemental Notice of Proposed Rulemaking (SNPRM) to solicit public feedback. In the end, my study included 59 total rule stages.

There were 2,857 public comments submitted across the 59 stages. The range per rule was 3 to 387 comments, with an average of 48 comments. Several of the rules received fewer than 15 comments. While my past research focusing on public comments often studied rules garnering 200 or fewer comments (e.g. Yackee 2006a, 2006b), there is no such restriction here. Instead, I used the following sampling rule to collect information on each rulemaking stage: randomly sample either 15 comments or 10 percent of the comments per stage, and use whichever number is larger. Using this sampling rule, 754 comments were selected for analysis. This represents about 26% of the total comments.

Content Analysis

The content analysis focuses on government documents and public comments. It was completed primarily by three doctoral students and took place in fall 2006 and spring 2007. The coders were provided coding instructions and coding rules. The team and I worked on the same

⁹ Supplemental commenting periods are used on some rules to gather additional feedback from the public on new formulations of the government's draft regulatory policy.

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rule stages for the first three months. During this time, we met frequently and adjudicated disagreements. After that point, the coders worked independently and met with me to discuss questions. Ultimately, 13% of the sample was jointly coded, and almost 12% was (blindly) double-coded to assess the inter-coder reliability of the independent work. I generated Kappa scores on the key variables, and the scores all fell within acceptable bounds.¹⁰

In analyses below, I use the *Stage Change* dependent variable, which is generated by the content analysis and draws on variable construction techniques I have employed in other published work (Yackee 2006a, 2006b; Naughton et al. 2009). *Stage Change* measures the change in direction, if any, of government regulations across rule stages. To generate the measure, coders read the preamble and text of the documents provided by the government at the beginning of a rule stage. These documents may have appeared in an ANPRM, SANPRM, or NPRM in the sample. Coders then read the preamble and text of the government documents issued at the end of that rule stage. Thus, if a rule proceeded from ANRPM → NPRM → Final Rule, then there were two separate *Stage Change* measures taken; if a rule proceeded from ANPRM → Withdrawal, then one *Stage Change* measure was taken. Using a three-point scale, coders evaluated whether each stage shifted the government's regulatory position toward more regulation (+1), stayed about the same (0), or less regulation (-1). The variable's average suggests more frequent shifts toward less regulation, with a mean of -0.339 and a range of -1 to +1.

¹⁰ The kappa score for *Stage Change* variable was 1.0 and the *Commenter Preference* variable was 0.786.

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Coders also developed the main independent variable, *Commenter Preference*, in the analyses. Here, coders used the same three-point scale to evaluate whether the sampled commenters wanted a shift away from the baseline (i.e. the government document that began that stage of the rulemaking process). Thus, when a commenter wanted a shift toward more regulation, a +1 was recorded; when the commenter desired no shift or wrote to express support for the baseline position, a 0 was recorded; and when a commenter wanted a move toward less regulation, a -1 was recorded. I then took the mean score across the stage to develop a measure of commenters' mean desires. The average for *Commenter Preference* is -0.201 with a range of -1 to 0.867.

In a separate set of analyses presented below, I use a *Commenter Success* score; this score draws on variable construction techniques I develop more fully elsewhere (Yackee, forthcoming; Nelson and Yackee, forthcoming). To generate this measure, I combine the *Stage Change* and the individual-level *Commenter Preference* measure. *Commenter Success* is a dichotomous measure that scores a 1 whenever a rule shifts in the regulatory direction desired by the commenter and a 0 otherwise. For instance, when the commenter desires less regulation (-1) during a rule stage and the agency provides less regulation (-1), then there is a match, and the *Commenter Success* scores a 1. However, when a commenter desires less regulation (-1) and the agency provides either more or the same level of government regulation as the baseline, then there is no match, scoring a 0. The variable mean is 0.615 with a standard deviation of 0.487.

I also characterize each commenter into one of three sub-population groups: "business interests" (members or representatives of a trade association or individual business);

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“government interests” (state and local government officials and members of Congress and federal agencies); and “nonbusiness/nongovernment” interests (citizens, public interest groups, academia, think tanks, professional associations, or unions).¹¹ This categorization draws on my earlier work (Yackee and Yackee 2006). Due to a high rate of involvement, some of the analyses presented below also break out participation by state-level department of transportation officials.

Telephone Survey

I also draw conclusions from a telephone survey of public commenters drawn from a subsample of 19 study rules. I chose the 19 rules because—when looking at the sample—those rules all had “more recent” ANPRMs—meaning, they all had ANPRMs in 1999 or later. I employed this restriction in order to increase the probability of locating the survey subjects. In comparing the 19 study rules where the telephone survey was implemented to the 17 rules where the survey was not implemented, I found no systematic differences. I compared the averages for rule significance (measured via U.S. DOT’s significance determination), rule complexity (measured via the length of the rule’s abstract), and average length of the public comments.

The telephone survey was implemented by three graduate students and overseen by me during fall 2006 and spring 2007. Survey implementers attempted to contact the 230 commenters identified for the study, and 133 respondents participated (a response rate of 58%).

¹¹ Several of this volume’s chapters, including the contribution by Carpenter and Moss, focus on the “public interest.” Of course, reliable measurement of this construct has proven difficult given competing notions of what constitutes, or what ought to constitute, the “public interest.” However, the nonbusiness/nongovernment interests categorization used here may serve as a proxy measure for the public interest in these analyses.

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Comparisons made between the respondents and non-respondents revealed few differences on key demographic factors, such as gender, or other comment-level characteristics, such as average comment length. There was a more measureable difference on commenter location: 23% of the respondents were from the Washington DC area, while 36% percent of the non-respondents were from DC. The telephone survey queried respondents regarding topics connected to the specific study rules, including perceived comment influence and ex parte lobbying activity.¹² I also asked several more general questions about rulemaking, such as the level of influence of big businesses and corporations. Finally, the survey ended with demographic questions.

State Administrators Survey

To challenge implications generated by my analysis of the U.S. DOT rules, I also use data from the American State Administrators Project (ASAP), which secured survey data by mail from 940 agency heads in 2004. Responses were received from all 50 American states, and the agencies represented govern a broad range of subject matter, including state DOT agencies. The survey response rate was 28%.¹³ In this chapter, I concentrate on responses by state agency heads to questions querying the degree of influence various actors held on the promulgation of rules and regulations, which I describe more fully below.

¹² Elsewhere (Yackee, forthcoming) I make the argument that the ANPRM comment lists provide a mechanism to uncover ex parte lobbying trends during the pre-proposal stage of rulemaking. My argument draws on Chubb (1983); however, Kerwin, Furlong, and West (2010) also suggest that interest groups feel that they must put their views on the public record by commenting.

¹³ Additional telephone follow-ups with survey non-respondents completed by the ASAP survey administrators led them to conclude that the actual respondents to the questionnaire were representative of the universe of administrators to whom the ASAP surveys were sent.

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Results

I apply the two-prong capture test using a variety of strategies, including descriptive statistics, correlation analysis, and regression analysis. In most cases, I am limited by small sample sizes from making broad generalizations. However, where appropriate, I present quantitative patterns, describe findings, and provide suggestive evidence and conclusions. I begin this section with some basic information about the data. I then discuss who participates and who influences this sample of rules. I conclude with a discussion of agency capture.

Table 1 provides information on the study rules, including the topic of the rule and the promulgating agency. The rule topics demonstrate that U.S. DOT agencies regulate or attempt to regulate across a wide variety of subject areas in this sample, including standards for school bus safety, English language requirements for flight attendants, and bridge inspection standards. Moreover, numerous agencies within U.S. DOT are active rule-writers. In this study, nine agencies are represented: Federal Motor Carrier Safety Administration (FMCSA) was the largest rulemaking entity, promulgating 9 rules; Federal Highway Administration (FHWA) contributed 8 rules, Research and Special Programs Administration (RSPA) wrote 5 rules, followed by National Highway Traffic Safety Administration (NHTSA; 4 rules), Federal Aviation Administration (FAA; 3 rules), U.S. Coast Guard (USCG; 3 rules),¹⁴ Office of the Secretary (OST; 2 rules), Federal Transit Administration (FTA; 1 rule), and Maritime Administration (MARAD; 1 rule).

(Insert Table 1 here)

¹⁴ USCG is now part of the Department of Homeland Security.

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Table 1 also suggests diversity across the sample in terms of rule significance. Using U.S. DOT’s significance determination, I classify both finalized and withdrawn rules. The classification, however, shows no clear trends. For instance, significant rules are neither finalized at a substantially higher rate than withdrawn rules nor can withdrawn rules simply be classified as unimportant or trivial policy matters. Table 1 does make clear that a good number of rules are withdrawn before finalization. As indicated in the final column, 18 rules were ultimately finalized, while 18 rules were withdrawn. Moreover, a high percentage of rules (83%) were withdrawn after receiving the ANPRM comments, while a lower percentage of rules (17%) were withdrawn after a later stage of rulemaking. These results imply that studying the politics of the pre-proposal stage may be just as important as the notice and comment period. If influence exists—indeed, if agency capture exists—then it may be directed toward stopping unwanted proposals early in the rule formation process (Naughton et al. 2009; see broadly Kingdon 1995; Baumgartner and Jones 1993).

Sub-Population Participation

With these basic characteristics established, I now turn attention to the first set of testable expectations regarding the participation of sub-populations across rulemaking. My analysis here, as well as in the remainder of the chapter, focuses primarily on the three sub-population groups of business interests, government interests, and nonbusiness/nongovernment interests. Figure 1 provides a bar chart capturing the participation rates of sub-populations across the sample rules.

(Insert Figure 1 here)

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The first column of data in Figure 1 displays the involvement of coded commenters during the pre-proposal stage of rulemaking. The figure clearly displays the prevalence of business participation: businesses interests make up over 51% of total participants, followed by non-business/non-government participants at 26% and government interests at 24%. Of the business interests, about one third of the comments came from trade associations, while two thirds came from individual businesses or corporations. For the nonbusiness/nongovernment participants, citizens are the largest participant type, with public interest groups representing only 4% of the pre-proposal commenters. The majority of comments from government interests came from state DOT officials. The second column in Figure 1 displays a similar pattern; however, while business interests remain the modal category, the relative participation of both nonbusiness/nongovernment and government officials increased during the notice and comment period. Most notably, the percentage of comments from public interest groups nearly doubles during this second stage of rulemaking; however, the relative size of their contribution remains small at only 7%.¹⁵

Column 3 in Figure 1 suggests a different conclusion with regard to sub-population lobbying participation patterns. These data come from the telephone survey, which asked

¹⁵ While the relative size of public interest group participation appears small, these findings are in keeping with what other scholars have uncovered during federal agency rulemaking. Writing almost 15 years ago, Golden (1998) found low levels of public interest group participation during the notice and comment period; notably her data spanned several federal departments, including the Environmental Protection Agency, the U.S. Department of Housing and Urban Development, and U.S. DOT. Furlong and Kerwin (2005), in their larger study of interest group participation in rulemaking, also uncovered low rates of formal comment submission by public interest groups.

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respondents: “Outside of your written comment, did you have any communications with federal Department of Transportation officials about this rule? Yes or No.” Forty-nine of the 126 survey respondents who participated in this question answered “yes,” indicating that 38% of the respondents employed some form of ex parte lobbying.¹⁶ Column 3 presents the sub-population participation rates for those using ex parte lobbying.¹⁷ The largest category here is government interests at 39%, with almost all of those ex parte contacts coming from state DOT officials. Business interests and non-business/non-government interests both participate at the lower rate of 31%. The telephone survey also asked about indirect lobbying, which is operationalized on the survey as lobbying through elected legislators. The question was: “Did you contact any Members of Congress about this rule? Yes or No.” Only 14 of the 129 (11%) respondents to this question answered in the affirmative. Six of the 14 indirect lobbying participants came from business interests, while six came from nonbusiness/nongovernment interests. Only two government officials reported that they contacted a Member of Congress about the rule.

Overall, the results from Figure 1 suggest that business interests have an advantage within the primary form for providing feedback to agency officials—the submission of public comments— across both comment gathering stages of rulemaking. This finding matches the

¹⁶ Survey respondents were asked to categorize their contacts, with the choice categories being: phone call, email, face-to-face meeting, or other (please specify). I suggest that these contacts may be conceptualized as ex parte communications. Only one respondent chose “other.”

¹⁷ I tend to concentrate on the occurrence of external contacts instead of perceived levels of ex parte influence during rulemaking because this concentration mitigates the potential survey response bias attached to revealing lobbying tactics, and more broadly, assessing the importance of lobbying tactics.

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general conclusion found in the literature (Croley 1998; Yackee and Yackee 2006; Kerwin and Furlong 2010). It also provides renewed evidence in support of Furlong and Kerwin's (2005, 361) conclusion that "rulemaking actions typically increase the costs of doing business, and therefore one would expect increased participation by businesses or trade associations protecting their operations," and Wright's (1996; see also Jewell and Bero 2007) suggestion that businesses and trade associations will be more active in agency lobbying due to superior information regarding administrative issues.

But is this evidence of lobbying equal to domination by one sub-population? Not necessarily. For instance, business interests do not appear to dominate participation across lobbying forms. Indeed, the evidence from the survey suggests that sub-national officials frequently charged with implementing U.S. DOT's rules—state DOT officials—often provide agency officials informal feedback, and nonbusiness/nongovernment interests use indirect lobbying tactics at the same rate as businesses. Furthermore, when looking across this sample of rules, it is hard to conclude businesses dominate other sub-population voices through the submission of public comments: approximately 50% or more of the comments sent to agencies come from nonbusiness interests.

Yet, these aggregate-level descriptive statistics may obscure evidence of agency capture. For instance, business interests may dominant the dialogue surrounding particular rules, or the rule-writing in particular government agencies may be plagued by a near monopoly on participation by business interests. To investigate these possibilities, Table 1 provides across rule, stage, and agency participation rates for business interests. The evidence is arrayed in the

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four columns tracking a rule's progress within rulemaking. Each cell is shaded depending on the percentage of coded comments in that stage coming from business interests. Cells in grayscale with diagonal lines have the most business participation at 75% or over; cells in grayscale indicate that 50-74% of the comments came from business interests; dotted cells represent business participation at the level of 25-49%; and cells with no shading suggest that businesses contributed 24% or less of the comments in that stage.

Several conflicting patterns emerge. On the one hand, business interests participate at a high rate (75% or higher) across numerous rule stages, and this high-level of participation can be found across both finalized and withdrawn rules, significant and non-significant rules. On the other hand, there are more stages where business interests participate at a low rate (24% or lower) than at a high rate, and this low rate of business involvement also spans both termination events and rule significance types. Thus, there appears to be variation in business participation across rules. It is also notable that while individual rule stages or even entire rules may have high levels of business commenter participation, it is not clear that particular agencies consistently see high levels of business participation across rulemaking efforts. Of the three largest rule-writing agencies in the sample, both FMCSA and RSPA have rule stages that receive high levels of business participation but also rule stages that receive low levels of business participation. And FHWA has the lowest level of business participation for an agency in the sample, with no stage at over 50% business interest participation. In the end, these Table 1 findings suggest that business interest involvement is high across some rules; yet, businesses do not appear to dominate all sub-population voices across multiple rules or across particular

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agencies. These conflicting results cut against my expectations regarding the first prong of the agency capture test.

Sub-Population Influence

The second set of testable expectations points to sub-population influence during rulemaking. In this section, I start with several models focused on general commenter influence on rulemaking, and I then look for sub-population differences in influence across rule stages.

Table 2 presents results of an analysis of commenter influence across the various stages of the rulemaking process.¹⁸ The dependent variable is *Stage Change*, while the primary predictor variable is *Commenter Preference*, which represents the average regulatory direction sought by the coded commenters. The control variables include a measure of *Congressional Attention* to the rule, which is whether or not Congress passed legislation requiring the rule, and *Presidential Attention*, which is whether the president's Office of Management and Budget reviewed the proposed rule or not. The last two control measures are U.S. DOT's *Rule Significance* determination and a measure of *Rule Complexity*, which I operationalize as the length of the rule's abstract text in characters. I use regression analysis with robust standard errors clustered by agency; other clustering strategies, such as by rule, return the same results.¹⁹

¹⁸ The Model 2 results appear in my work already published with Naughton and others (2009); however, the Model 1 and 3 results are new to this chapter.

¹⁹ Given the ordered nature of the dependent variable I also used ordered probit. Similar results were returned. I chose regression techniques over ordered probit given the small sample sizes, particularly in Model 3. Statistical significance in all chapter analyses is determined by two-tailed tests and $p \leq 0.10$.

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Finally, as I highlight below, the results, particularly from Model 3, must be considered suggestive in nature due to the small sample sizes.

(Insert Table 2 here)

Model 1 in Table 2 presents the results for *Commenter Preference* across all rule stages in the sample. The findings demonstrate a significant relationship between *Commenter Preference* and *Stage Change*, which implies that the mean regulatory direction sought within the public comments influences the direction of policy change during rulemaking. The predicted values of the dependent variable generated when other model variables are set to mean or median values find a pattern of responsiveness: when public commenters, on average, desire less government regulation, then agencies tend to respond by adjusting policies toward less government regulation. In a similar but more muted fashion, agencies move rules toward more government regulation when commenters are united for more government regulation. Models 2 and 3 break these results out for the pre-proposal stage and the notice and comment period. However, small sample sizes, especially in Model 3, and the requisite need to be parsimonious in the model specifications warrant some caution in generalizing the results. However, despite these caveats, across both stages there is suggestive evidence of government responsiveness to the desires expressed in the public comments.

With this evidence suggesting the potential importance of commenters to policy change in hand, I now focus on sub-population differences. Again, my efforts here prove difficult due to the data, which are rich in information, but are not as extensive as necessary to run multivariate models with the various sub-population classifications across rule stages. Thus, I turn to

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correlation analysis to look at patterns in sub-population influence. I first look across rule stages at various levels of business interest participation and ask when commenters are most influential. To do so, I correlate *Commenter Preference* and *Stage Change* when business interests make up 75% or more of the public participants (12 cases), 50-74% of the public participants (22 cases), 25-45% (5 cases), and 24% or lower (20 cases).²⁰ When business participation is high, there is 0.73 correlation between *Commenter Preference* and *Stage Change*, and this relationship is statistically significant.²¹ When businesses make up 50-74% of the public participants, the correlation remains significant but drops to 0.50. At business participation rates of 25-45% the correlation is 0.34, and at 24% or lower, the relationship is -0.20; neither of these last two relationships is significant. Of course, these bi-variate correlations must be treated with some care, given that they do not control for other rule-level factors likely to influence the relationship between commenter desires and rule change, such as rule salience and complexity and political oversight measures.

²⁰ These cases of high business participation span both significant and non-significant rules, as well as rule finalization and withdrawal patterns. See Table 1 for the illustration.

²¹ It is noteworthy that business interests in the sample are not consistently asking for more or less government regulation in their lobbying. While the mean preferences found in business interest comments suggest that they wish to move rules towards less regulation (-0.224), the 361 business interests in the sample span the entire range on the individual-level *Commenter Preference* variable, with 209 business interests desiring less government regulation during the stage, 24 requesting no regulatory change, and 128 desiring more regulation. Moreover, of the 12 rule stages where business interests make up 75% or more of the public comment participants, four of the stages had the *Commenter Preference* variable tilted toward seeking more government regulation.

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The evidence from this first set of correlations allows for the possibility of business influence across some sample rules, but is it evidence in support of the first prong of the capture test? Not necessarily; business interests are not consistently influential across rules or across agencies. Instead, the results suggest a responsive bureaucracy—as the proportion of business interest comments increases, so too does *Commenter Preference* (see also, Yackee and Yackee 2006). These results correspond with Gormley’s (1982) finding that business interests are most successful in lobbying for policy change when their voices are largely uncontested by other interests in society.

A different way to think about sub-population commenter influence entails moving away from the idea of average commenter success and instead focusing on the fulfillment of the individual desires of commenters. In these analyses, I use *Commenter Success*, which is a “match” score that returns a 1 if a rule change occurred in the direction desired by the commenter. I then correlate this variable with sub-population type. Table 3 provides the findings broken out by rule phase. Before highlighting the results, it is important to note that these bi-variate correlations do not acknowledge other commenter participation on a rule or control for contextual or political factors or lobbying tactics.

(Insert Table 3 here)

Table 3 suggests several findings. In particular, the correlation between *Commenter Success* and being a business interest commenter is positive, small, and significant (0.08) during the pre-proposal stage; however, it is negative and significant (-0.24) during the notice and comment period. This juxtaposition of influence is noteworthy, and on its face appears to

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suggest that while business interests are influential early in the regulatory process, they are less influential later.²² Two facts, however, mitigate any strong conclusions with regard to these bivariate relationships. First, recall that numerous rules are withdrawn from consideration before reaching the notice and comment period in this sample. Thus, if business interests are successful in thwarting their least favorite regulatory initiatives early in the process, then one might expect that they would be on weaker footing with regard to rules that make it to the notice and comment period. Second, given that the sample rules all solicited comments during a pre-proposal stage, it may be that businesses were successful enough at this earlier stage of commenting that arguments for additional changes made later in the regulatory process were less persuasive. Both of these possibilities suggest that selection issues may be attached to the politics of influence during the notice and comment period.

Table 3 also suggests potential findings regarding the influence of government interests and nonbusiness/nongovernment interests on rule change. During the pre-proposal stage, there is no relationship between *Commenter Success* and a comment coming from a government interest, while there is a negative and significant (-0.14) relationship between *Commenter Success* and a comment coming from a nonbusiness/nongovernment interest. In contrast, during the notice and comment period, government interests appear better positioned to achieve *Commenter Success*

²² This juxtaposition of influence intensifies when one looks at the correlation between *Commenter Success* and a comment coming from a business interest seeking less government regulation during a rule stage (as opposed to more government regulation or no regulatory shift). Businesses and trade associations seeking less regulation are more successful during the pre-proposal stage (0.18) and less successful at the notice and comment period (-0.29) than the overall results. Both correlations are statistically significant.

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with a positive and significant correlation (0.17), while the relationship for nonbusiness/nongovernment commenters is insignificant. These findings suggest that government interests may be, at times, influential during rulemaking, while providing little evidence of nonbusiness/nongovernment influence.

When taken together, the results from this second set of correlations are mixed. However, in total, they do not suggest that any sub-population consistently holds greater influence over the writing of agency rules than any other sub-population. While there appears to be some evidence of agenda setting influence for business commenters—particularly when those business interests are advocating less government regulation early in the regulatory process—this influence may be partially offset by the influence of government officials during the notice and comment period, at least for those rules that are ultimately promulgated as legally-binding Final Rules. Thus, these analyses do not provide clear or consistent evidence in support of the first prong of the capture test.

Figure 2 displays information collected from the telephone survey on perceived commenter influence; this information, again, cuts against my expectations regarding agency capture. Respondents were asked: “Do you believe that your comment helped to influence the Department of Transportation’s actions on this rule? Yes or No.” A follow-up question asked all affirmative respondents: “On a scale of 1 to 5, with 1 being very little and 5 being a great deal, do you feel that this action affected this rule?” I then combined these questions into a 6-point scale running from 0 to 5. Eighty-two of the 127 (65%) respondents answered that their comment had some effect, while on the 6-point scale, the mean response across survey

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respondents was 1.83, which suggests a low level of influence. Figure 2 uses the 6-point scale to display perceived influence patterns by sub-population type. The figure clearly suggests that government interests—which in the case of the survey respondents are mostly state DOTs officials—believe their comments to be the most influential of the sub-populations. Moreover, this finding holds if you look at all government respondents (column shown in gray scale) or only survey respondents who also employed ex parte lobbying tactics (column shown in black with dots). Business interests find themselves the next most influential, followed shortly by nonbusiness/nongovernment interests.

(Insert Figure 2 here)

Survey respondents were also asked a more general question about business interest influence during rulemaking. The question was: “Do you feel that big businesses or corporations have an advantage during rulemaking? Yes or No.” Ninety-two of the 127 (72%) respondents answered “Yes.” The survey followed up with all affirmative respondents and asked: “Why?” Respondents’ qualitative answers varied; however, two categories stood out. First, 15 of the 92 (16%) respondents suggested that businesses have closer relationships with Members of Congress and these relationships advantaged big businesses and corporations. Second, 81 of the 92 (88%) respondents mentioned resources, implying that big businesses and corporations had a resource advantage. One respondent stated, “it is easier for big business to get their voice heard,” while another reasoned, “large businesses have more knowledge about the industry and the topic of the rule.” Yet, there were those with a different point of view, stating that “corporations or businesses do not have an advantage,” while another respondent stated that

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businesses *should* influence DOT rules because they are likely to be most affected by them.

Figure 3 breaks the findings down by sub-population. Government interests were the most likely to agree that big businesses and corporations have an advantage during rulemaking at a rate of 81%. Nonbusiness/nongovernment interests were also high at 76%; business interests were lowest at 64%.

(Insert Figure 3 here)

Is Rulemaking Captured?

Thus far, I have examined the testable expectations derived from the first prong of the agency capture test. I studied participation and influence patterns, reasoning that if broad and clear influence across rules or agencies by business interests could not be established, then there would be little need to activate the second prong of the test. In short, I asserted that influence was a necessary but not sufficient condition for agency capture. However, I do not find clear evidence of influence across rulemaking; indeed, the findings presented suggest a mixed picture of sub-population participation and influence.

To summarize, businesses are the largest participants across the sample rules in these data, but as I show above, business interest lobbying does not dominate across all sample rules, nor does it appear to dominate the rulemaking of particular agencies (at least the top three rule-writing agencies studied). In terms of influence, I completed two different assessments of potential business interest influence. While suggestive in nature, the analyses put forward evidence that businesses are not consistently influential. Moreover, their preferences appear to be advanced more often when other business-related commenters also participate within a

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particular rule stage. Put in different words, business influence appears to decrease as other subpopulations' participation increases. The results also suggest that government interests may be a foil to business interests. I find, for instance, that government interests—which in the sample are largely state DOT officials—show up as the modal category of ex parte lobbying participants. Moreover, they perceive their comments to be the most successful of the sub-population groups, and correlation analysis suggests that government interests may be well positioned to obtain their desired rule changes at certain times during rulemaking. In contrast, nonbusiness/nongovernment interests hold no clear advantage in participation or influence in these data.

Given these mixed results, I do not activate the second prong of the test. Stated differently, I do not look for evidence of sub-population “control” over agency decision-making in these data. Yet, this decision may be shortsighted. While Sabatier (1975), Gormley (1982), and particularly Berry (1984), see the public or representatives of the public interest (operationalized most closely in this chapter as nonbusiness/nongovernment interest) as a critical bulwark against regulatory capture, I find no such discussion in the capture literature with regard to sub-national government officials serving as a deterrent to capture. Indeed, the broader literature rarely studies the lobbying efforts of sub-national officials on federal government policymaking (Haider 1974; Cammisa 1995), and particularly the bureaucracy. It may be that business interests have also captured those sub-national agency officials lobbying for policy change. If such a pattern of influence exists, then there would be a clear and convincing need to pursue the second-prong of the capture test.

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I provide some leverage on this testable implication by utilizing a wholly separate dataset—in this case, data drawn from the American states—to perform several additional analyses. More specifically, I study the 2004 ASAP data, which queries state agency heads about the influence of clientele groups on the generation of their rules and regulations. While clientele groups do not align perfectly to business interests, these data provide the opportunity to investigate whether select organized interests hold high levels of influence over state agency heads, especially state DOT officials. The survey question wording is: “In making various agency decisions it is usually possible to identify and weigh several major sources of influence. Among these are: (1) governor, (2) legislators, (3) state courts, (4) clientele groups, (5) professional associations and (6) agency career officials. Please indicate below (by circling) the degree of influence each source has on decisions your agency makes in the following decision areas.” Agency heads were asked to respond about multiple decisions, including “Agency Rule/Regulations” on the following scale: 0-None, 1-Slight, 2-Moderate, and 3-High Influence.

I present the results broken out by nine agency categories in Figure 4. Several patterns stand out. First, among transportation agencies, clientele group influence on agency rules and regulation registers closest to “slight” on the four point scale and is, relatively-speaking, much lower than the influence of state legislators, the governor, or career agency officials on rules. Second, when comparing clientele group influence across agency types, clientele group influence on state DOTs ranks near the bottom of all policy areas. Third, patterns in the 2004 data are not an aberration. ASAP survey administrators found consistent patterns on this same question in their other survey efforts (in 1978, 1984, 1988, 1994, and 1998; see Miller and Wright 2008). I

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should note that these data do not rule out the possibility that clientele groups or business interests hold excessive influence over some state DOT agencies or some sub-national officials. However, the findings do call into question the generalizability of this argument across state DOTs.

(Insert Figure 4 here)

Sub-national officials are often called upon to help implement the federal rules issued by U.S. DOT, and as result, state DOT officials hold critical information relevant to the implementation of federal policy. Indeed, many of the major federal rule-writing departments, including the U.S. Department of Interior and the Environmental Protection Agency, rely on their state government partners to help implement federal rules.²³ Thus, it may come as little surprise to find state officials actively lobbying during rule formation. Indeed, these results correspond with Nugent's (2009) findings, which suggest that state and local officials today use a strategy of constructive engagement with the federal government. Nugent (2009) writes that one way this constructive engagement occurs is through state officials participating in federal agency rule development. He reasons that sub-national officials often bring needed expertise and experience to federal policy implementation decision-making. Given their access to technical information and data, sub-national officials may provide a previously underappreciated deterrent to agency capture during regulatory policymaking.

Conclusion

²³ Other research shows sub-national officials moving beyond their role as implementers of federal regulatory policy to a position of regulatory innovator and policymaker on issues where the federal government has either refused or failed to act (e.g. DeShazo and Freeman 2007).

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In this chapter I set out to reconsider the agency capture thesis within the context of modern rulemaking. I define capture and put forward a two-prong test for it. I apply the test to a dataset of 36 U.S. DOT rules with a focus on sub-population differences in participation and influence. I find, in short, that business interests often participate at a high rate and hold influence over particular agency rules. However, this influence is not consistent across rulemakings or agencies. I also uncover evidence that the participation of sub-national agency officials in rulemaking may provide a foil to business interests and thus may deter agency capture. In the end, I do not uncover evidence of wide-scale capture in these data.²⁴ It is especially noteworthy that this conclusion materializes from analysis of a sample of rules completed during a Republican administration, when one might expect business interests to be better positioned to obtain desired regulatory changes.

The data employed here—while rich in terms of knowledge about these 36 rules—are provocative limited in several important ways, and thus restrict the generalizability of the conclusions. I suggest three key limitations here. First, the rules all began with an ANPRM procedure, which limits the generalizability to federal rulemaking. Second, while nine agencies are included, all of these agencies reside within U.S. DOT, which may be less prone to agency capture than other agencies, particularly those with an express consumer-oriented mission (see Barkow 2010). Moreover, U.S. DOT may attract more sub-national officials as lobbying

²⁴ Here is it worth stating the obvious: a more relaxed definition of capture—one in which influence and not control may identify the construct, or one in which focuses on a particular rule or rules and not aggregate-level patterns across multiple rules—may return a different conclusion. Alternatively, a different conceptualization of capture, such as the one put forward by Kwak in his stimulating chapter, may return different results.

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participants than in some other agencies, given the tradition of state DOTs playing a role in implementing federal regulations. Third, as Golden (1998) writes, there is often variety in the messages sent by businesses within agency rulemaking. It may be that a more fine-grained treatment of variations in business interest lobbying is necessary to capture over agency decision-making.

It is clear that more work is needed to fully understand the theory of agency capture and to appreciate its applicability (if at all) to federal agency rulemaking. Fruitful paths for future research may include a sample from across multiple federal departments, including independent agencies, and a more fine-grained collection of data on the lobbying desires of particular interests. Additionally, while I interviewed 15 agency officials as part of the study, I did not collect information on the topic of agency capture (and in reviewing my lengthy transcripts from those interviews, the general topic never came up). Thus, I was not able to evaluate whether regulatory officials actively or even strategically encourage the participation of some types of commenters over others. Yet, as Sabatier (1975) broadly suggests, there is a tendency in the scholarly literature to see agency officials as passive actors, when in fact there are many cases in which their actions are key to understanding the politics of agency policymaking. Future work on agency capture ought to investigate this possibility during regulatory policymaking and integrate in agency officials' preferences, desires, and backgrounds.

By way of closing, I will reiterate the importance of clearly defining the construct of agency capture and putting forward new empirical assessments of its existence. In this book chapter I have built on political science scholarship from three decades ago (Sabatier 1975;

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Gormley 1982; Berry 1984), which suggests that any bias toward business and industry is exacerbated when other segments of society do not voice their concerns or advocate their preferences during regulatory decision-making. While this past scholarship uncovers the importance of citizen groups and public representatives generally, this chapter tentatively extends that focus to sub-national government officials, suggesting that they, too, may play role in countering business capture during agency rulemaking. The implications of the chapter for the design of regulatory policy and for leaders of regulatory agencies are two-fold. First, strategic agency officials may ensure greater legitimacy for their regulatory decisions when they actively encourage and engage segments of society beyond regulated entities. Indeed, even the appearance of a bias towards business during rulemaking may hold negative consequences for the agency by perpetuating the perception—if not the existence—of agency capture. And second, while much has been said about the information asymmetries present between regulated entities and other “public” participants during rulemaking, agency officials may wish to use special administrative procedures (such as ANPRMs), activate ex parte or “off the record” feedback networks, and use other regulatory design features to encourage the participation of knowledgeable sub-populations, such as state and local officials, during regulatory decision-making. Doing so may provide their agencies with a competing source of high-quality information during administrative rulemaking.

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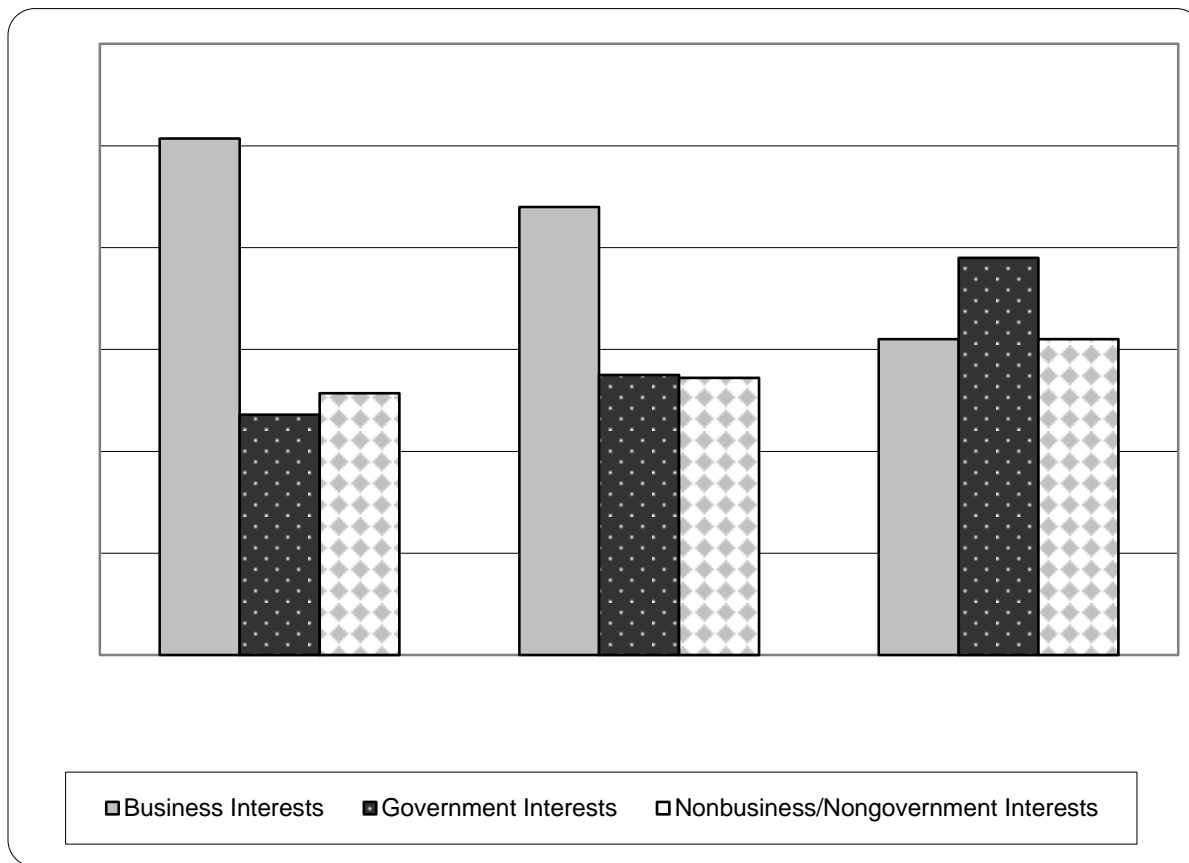
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Figure 1. Participation Across Rulemaking Stages and Lobbying Forms

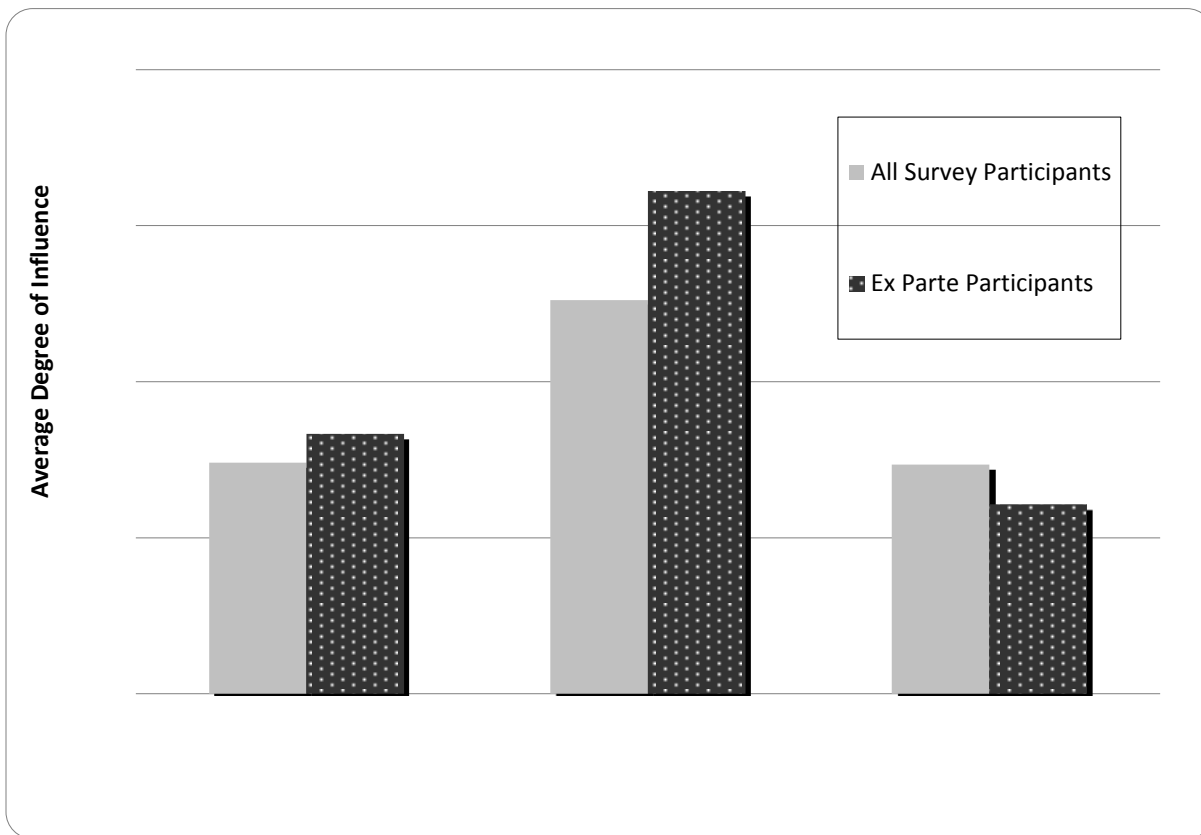


Source: Author’s Datasets. See text for details.

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Figure 2. Perceived Comment Success

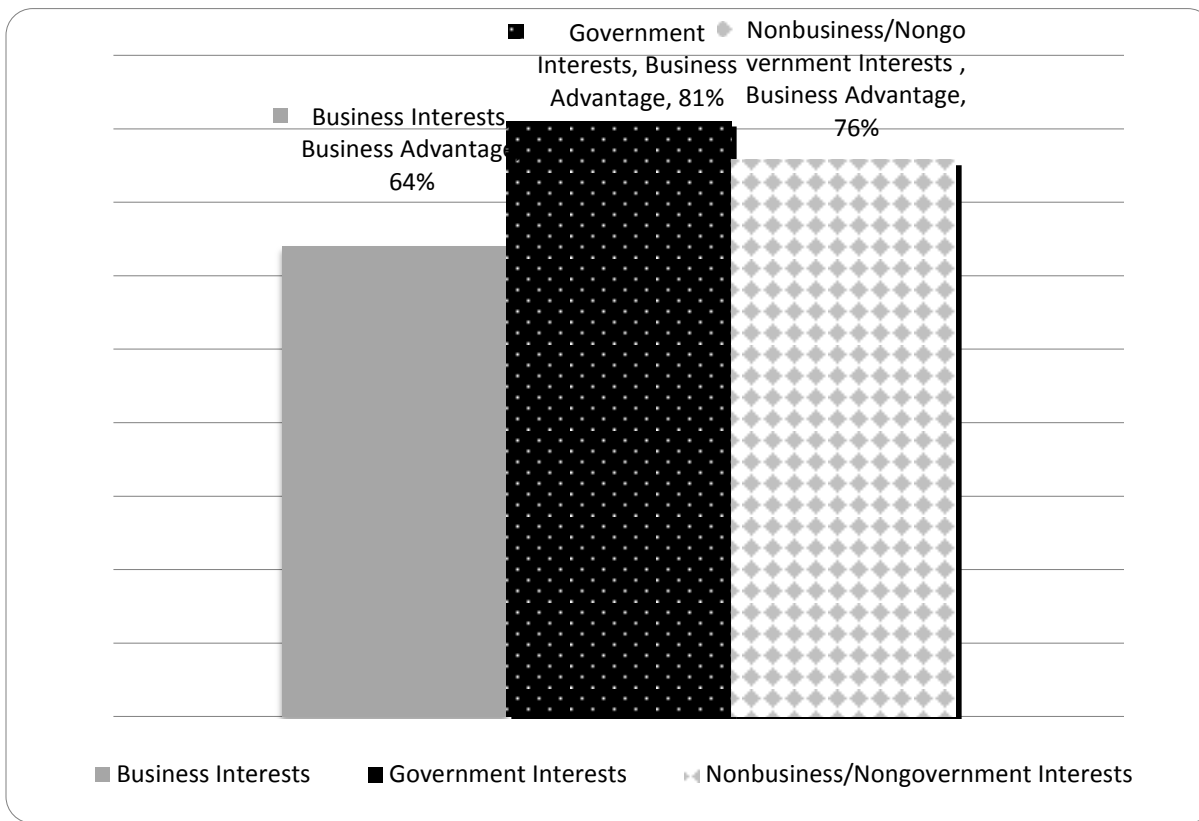


Source: Author’s Datasets. See text for details.

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Figure 3. Big Business and Corporations Advantage During Rulemaking



Source: Author’s Datasets. See text for details.

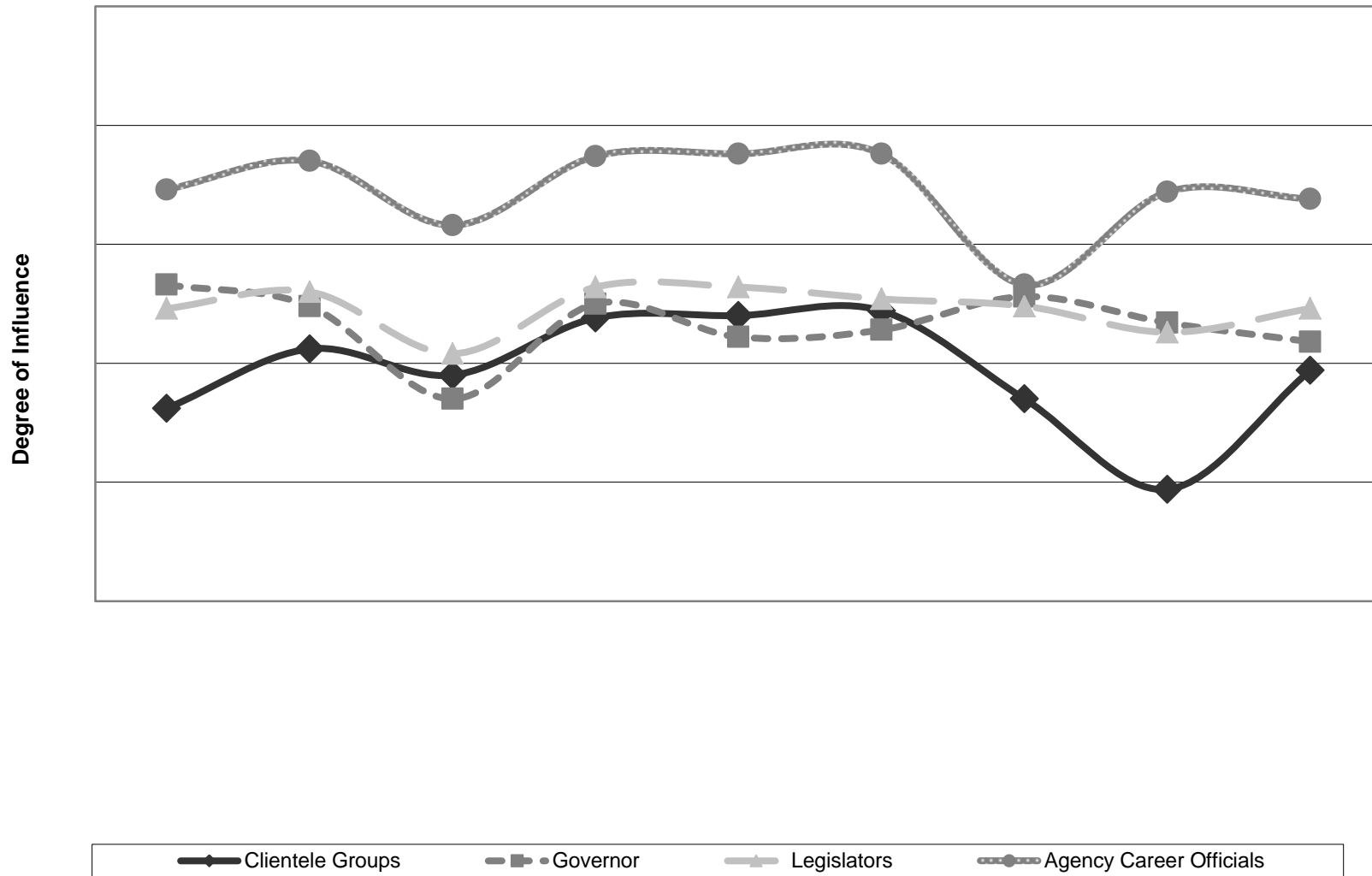
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Figure 4. Influence Factors on State Rules and Regulations

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Source: ASAP Data. See text for details.

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Table 1: Author's Sample Rules Drawn from U.S. DOT

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#	Rule Topic	DOT Agency	ANPRM	SANPRM	NPRM	SNPRM	Final Rule (FR) or Withdrawn (W)
Significant							
1	Airlines Computer Reservations System	OST	X	X	X		FR
2	Management Systems Pertaining to the National Park Service	FHWA	X		X		FR
3	Early Warning Defect Reporting Requirements	NHTSA	X		X		FR
4	Improve Tire Safety Information	NHTSA	X		X		FR
5	Management Systems Pertaining to the Bureau of Indian Affairs	FHWA	X		X		FR
6	Training Requirements for Entry-Level Commercial Motor Vehicle Operators	FMCSA	X		X		FR
7	Management Systems Pertaining to the Fish and Wildlife Service	FHWA	X		X		FR
8	Training Requirements for Longer Combination Vehicle Operators	FMCSA	X		X		FR
9	National Bridge Inspection Standard	FHWA	X		X		FR
10	Hazardous Materials Transport of Infectious Substances and Microorganisms	RSPA	X		X		FR
11	Management Systems Pertaining to the Forest Service	FHWA	X		X		FR
Non-Significant							
12	Safety of Uninspected Passenger Vessels	USCG	X		X		FR
13	Upgrade Fuel Integrity Performance Requirements	NHTSA	X		X		FR
14	Work Zone Safety and Mobility	FHWA	X		X	X	FR
15	Development of Standard for Protection Against Shifting and Falling Cargo	FMCSA	X		X		FR
16	Adoption of Latest IAEA Standards	RSPA	X		X		FR
17	Incident Reporting Requirements and Detailed Hazardous Materials Incident Report	RSPA	X		X		FR
18	Air Carrier Emergency Telephone Number Requirements	RSPA	X		X		FR
Significant							
19	Domestic Passenger Manifest Information	OST	X				W
20	English Language Requirement and Qualifications of Drivers	FMCSA	X				W
21	Emergency Response Plans for Passenger Vessels	USCG	X				W
22	Child Restraint Systems in Airlines	FAA	X				W
23	Inspection, Repair, and Maintenance for Intermodal Container Chassis and Trailers	FMCSA	X				W
24	Interstate School Bus Safety	FMCSA	X				W
25	Flammability of Interior Materials on School Buses	NHTSA	X				W
26	U.S.-Flag Vessels in the Shipment of Cargoes on Ocean Vessels	Maritime	X				W
27	Cargo Tank Rollover Requirements for Hazardous Materials	RSPA	X				W
28	Commercial Driver's License Standards and Biometric Identifier	FMCSA	X				W
Non-Significant							
29	Barges Carrying Bulk Liquid Hazardous Material	USCG	X				W
30	Certification of Size and Weight Enforcement for Highways	FHWA	X	X			W
31	Sleeper Berths on Motor Coaches	FMCSA	X				W
32	Out-of-Service Criteria	FMCSA	X				W
33	Highway Bridge Replacement and Rehabilitation Program	FHWA	X		X		W
34	Buy America Requirements Waivers for Microcomputers	FTA	X				W
35	Flight Attendant English Language Proficiency	FAA	X				W
36	Aircraft Engines - Fuel and Induction Systems	FAA	X		X		W

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Table 2. Commenter Influence Across Rule Stages

	1 All Rule Stages	2 Pre- Proposal Stage	3 Notice and Comment Stage	
	-----	-----	-----	
<i>Commenter Preference</i>	0.641 *	0.570 *	1.077 *	
	0.241	0.274	0.347	
<i>Congressional Attention</i>	0.126	0.221	-0.142	
	0.260	0.228	0.542	
<i>Presidential Attention</i>	-0.064	0.438	-1.104	*
	0.156	0.241	0.277	
<i>Rule Complexity</i>	-3.45E-04	-4.67E-04	-4.84E-04	*
	2.69E-04	2.50E-04	5.32E-04	
<i>Rule Significance</i>	-0.375 *	-0.578 *	0.363	
	0.156	0.275	0.413	
<i>Constant</i>	0.255	0.149	0.753	*
	0.217	0.224	0.314	
Observations	59	38	21	
R-Squared	0.221	0.300	0.456	

Notes: The dependent variable is *Stage Change*. OLS regression estimates are shown with clustered, robust standard errors. Key significant coefficients are in grayscale. *p<=0.10, two-tailed tests employed.

Source: Author’s Datasets. See text for details.

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Table 3. Correlations Across Rule Stages

<i>Commenter Type</i>	Pre-Proposal Stage		Notice and Comment Stage	
Business Interests	0.079	*	-0.236	*
Government Interests	0.045		0.166	*
Nonbusiness/Non-government Interests	-0.137	*	0.084	
Observations	457		250	

Source: Author’s Datasets. See text for details.

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