

The Politics of *Ex Parte* Lobbying: Pre-Proposal Agenda Building and Blocking during Agency Rulemaking

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ABSTRACT

Scholars generally agree that interest groups are active and at times influential during the notice and comment period of regulatory policymaking (or “rulemaking”). But current research often ignores the agenda setting that may take place during the pre-proposal stage of rulemaking. During proposal development, interest groups may lobby to: (1) influence the content of proposed regulations or (2) block items from the regulatory agenda altogether. This article focuses on *ex parte* lobbying—“off the public record” conversations in which lobbyists share policy and political information with regulators—during the pre-proposal stage of rulemaking. I assess the importance of *ex parte* influence with data from a content analysis of government documents drawn from seven federal government agencies and a telephone survey of interested parties. Overall, the findings provide the first empirical confirmation that “off the record” lobbying can, and at times, does matter to regulatory content changes during a stage of the American policymaking process that is often overlooked by scholars and the public: the pre-proposal stage of agency rulemaking.

The US Department of Transportation’s (DOT) National Highway Traffic Safety Administration (NHTSA) publicized a proposed rule in January 2001 that required all motor vehicle manufacturers to make new information on safety problems available to NHTSA. The rule’s aim was to allow for the identification of vehicle safety defects. NHTSA’s 38-page proposal ignited a firestorm of controversy, with automobile and motorcycle manufacturers lobbying against all or part of the proposed rule, whereas other interested parties supplied arguments that touted its importance for safety. The agency received hundreds of public comments in response to its proposed rule and ultimately issued a final regulation in July 2002.

Brief accounts such as this are the starting point for most discussions of agency regulatory policymaking (or “rulemaking”). Yet this account ignores the critical question of what happens *before* agencies, such as NHTSA, announce their proposed rules to the public. One is left to question: How is the content of proposed rules generated? And who (if anyone) influences proposal development? With the vast majority of rulemaking studies ignoring proposal development, scholars provide few answers (Kerwin 2003; West 2004, 2005). What little we do know suggests that the pre-proposal stage may be an important

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doi:10.1093/jopart/mur061

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venue for political activity and bargains (Naughton et al. 2009; Wagner 2010; West 2009). Nevertheless, the pre-proposal stage of rulemaking—when agency officials gather information and hammer out the text of proposed government regulations—remains a little understood phase in the American policymaking process.

I theorize that interest groups play a key role during the pre-proposal stage and, through their early lobbying efforts, often wield important influence over US federal rulemaking. I argue that group influence manifests itself through both agenda building and agenda blocking (see broadly, Kamieniecki 2006). Stated differently, at times, interest groups help to set the regulatory agenda by affecting the content of proposed rules; at other times, groups lobby to eliminate unwanted items from agencies' policy agendas during the pre-proposal stage. I theorize that *ex parte* (or “off the record”) contacts between interest groups and agency officials are a critical—albeit often nontransparent—mechanism frequently used to influence the content of regulatory outcomes during proposal development.

To assess this general argument, I employ content analysis drawn from the administrative rulemaking process and a telephone survey of rulemaking participants. In this study, I focus on US federal rules initiated by seven different transportation-related agencies. I also draw on 15 background interviews with agency officials involved with these rules. The resulting data, which are derived from rules that begin with an *Advanced Notice of Proposed Rulemaking* (ANPRM) procedure, allow me to track the participation of over 100 interested parties during proposal development.¹ Using descriptive statistics and logistic regression modeling, the analysis yields several advantages over existing research studies. Although others have suggested the importance of the pre-proposal stage (Rinfret 2011; Wagner 2010; West 2009) and even the possibility that formal participation opportunities during the pre-proposal stage may influence regulatory decision making (Naughton et al. 2009), this article provides the first quantitative assessment of *ex parte* influence mechanisms on proposed rules. Additionally, the article's research design strategy allows for the measurement of interest group influence on rules that are ultimately finalized, as well as rulemaking initiatives abandoned at some point during the regulatory process.

I focus on three key questions in the analysis: First, do *ex parte* contacts take place? And if so, do they matter to regulatory policy outputs? Second, how important is *ex parte* influence when controlling for other drivers of policy change? Third, is interest group influence during the pre-proposal stage primarily an agenda building or an agenda blocking mechanism (or both)?

I find that *ex parte* contacts between interested parties and agency officials do, at times, influence regulatory policy outputs during proposal development. I then demonstrate that these “off the record” lobbying efforts remain important even when controlling for other more traditional or transparent methods of public participation in agency policymaking. I also find suggestive evidence that *ex parte* contacts are a potential factor in causing the withdrawal of regulations from consideration, which implies that interest group activity during the pre-proposal stage helps to block unwanted policy changes from moving forward. These results provide some support for Bachrach and Baratz's (1962, 1963) concept of “nondecision making” during agency rulemaking. In the end, I conclude that interest groups can, at times, help to shape US federal government policy during rule development.

1 An ANPRM is a government document that may be used to begin the proposal development stage. It is described in more detail later in the article.

From a normative perspective, the study's results merit scrutiny. Scholars and practitioners have long suggested that there is little transparency or public awareness regarding the development of proposed regulations. As former US House of Representatives Member Chris Cannon (2006) once commented, "critical decisions regarding proposed rules are often made in the months and perhaps even years before rules are published. Surprisingly, little is known about how agencies actually develop these rules." This study begins to fill this key gap.

FOUNDATIONS AND ARGUMENT

Although it might come as a shock to some, estimates suggest that more than 90% of American "laws" are not statutes passed by Congress but instead are administrative rules promulgated by agency officials (Warren 2004). Tasked with filling in the details and gaps in congressionally passed legislation, agencies routinely propose and promulgate rules, and the subjects and effects of these rules are often far from trivial. Existing rules specify standards for automobile emissions, clean water, and workplace safety, and forthcoming rules will likely set requirements for derivative trading and bank capital standards. In short, rules matter. And so too does "rulemaking," the process by which most legally binding agency rules are formulated (Kerwin 2003). As West (2005, 655) concludes, the rulemaking process represents "the most important way in which the bureaucracy creates policy."

The federal rulemaking process generally begins with *proposal development*. In this first stage, agency officials gather information and decide which stipulations and requirements to include. The agency then typically announces a proposed rule to the public by providing a "Notice of Proposed Rulemaking" (NPRM). The Administrative Procedure Act (APA) of 1946 generally mandates a second stage—the *notice and comment period*—in which the NPRM is open for public review. During this second stage, all interested parties are invited to provide written comments regarding the content of the proposed rule. After reviewing the comments, the agency usually issues a "Final Rule," which is enforceable as law. Although rulemaking may appear to be a rather straightforward process, it is also an important venue for politics and policymaking and raises key implications for our understanding of governance. I focus on two implications below: transparency in public agency decision making and the political accountability of government agencies.

Transparency in Decision Making

One of the main themes within administrative law and public administration literatures is the importance of transparency in agency decision making (Brandeis 1913; Croley 2000; Lubbers 2006; Rosenbloom 2000, 2003; West 1995). The legal scholarship often suggests that if agency decision making occurs in an open forum, then the general public interest is more likely to prevail, instead of the priorities of "special interests." Transparency is a central goal of the most important federal rulemaking statute, the APA, which is Congress's attempt to make agency "decision-making procedures open, accessible, and fair" (Croley 2000, 47; see also Rosenbloom 2000).² Subsequent to the passage of the APA, numerous

2 Other statutes also seek to bring transparency to rulemaking (Rosenbloom 2003). The Federal Advisory Committee Act, for instance, affects rulemaking because agencies occasionally use advisory groups to help develop NPRMs (Balla and Wright 2001).

court rulings have increased transparency in rulemaking (Rosenbloom 2000; Stewart 1975). For instance, the courts have required agencies to place rule-related materials obtained after NPRMs into publicly available “dockets” and to consider and respond to public comments carefully (McGarity 1992; Rabin 1986; Shapiro 1988).

The court rulings also led numerous federal departments to largely block *ex parte* contacts during rulemaking after the issuance of NPRMs (whereas *ex parte* contacts are defined as “off-the-record, private communications between agency decision-makers and other persons concerning the substance of the agency’s proposed rule”) (Lubbers 2006, 335). When such contacts do occur after the NPRMs issuance, some departments, like DOT, require a summary of the contacts to be placed in the official rule docket. Yet, no similar restrictions block *ex parte* contacts during proposal development. Thus, although procedural requirements have often increased transparency in agency decision making during the notice and comment period, the influence of *ex parte* contacts during the pre-proposal stage is, in most cases, blocked from public view (Wagner 2010).³ This lack of transparency may harm governance by (1) restricting the public’s ability to respond to *ex parte* contacts, (2) increasing the influence of “insiders,” (3) running counter to the idea of accountability (Lubbers 2006, 339), and (4) creating an imbalance between the participants active during the notice and comment process (Wagner 2010, 1369).

In his study of the administration of mining law by the US Department of Interior, Strauss (1975) warns of the questionable nature of consultations before the notice and comment period. He (1975, 1251) suggests “the results may be to cheapen the ostensibly public procedures by encouraging all compromises to be made in advance.” Strauss (1975, 1253) concludes that it is “wasteful and misleading to permit” a “more covert process, to which only some segments of the affected public are permitted access.” Similarly, Wagner (2010) writes that regulated entities are aware of the advantage provided to those participating during the pre-proposal stage. She ties this participation to judicial review, suggesting that given the high deference to agencies that typically occurs during judicial review, regulated entities will see an advantage to lobbying early. Wagner (2010, 1366) concludes, “[a]lthough proposed rules, on the surface, appear to be drafted by agency staff based on internal technical analyses, most of them are likely the result of extensive negotiations with interested parties that remain unrecorded and perhaps even unacknowledged.”

Political Accountability

A key concern within numerous scholarly accounts of political accountability is the delegation of policy-related decisions to bureaucrats (Epstein and O’Halloran 1999; Huber and Shipan 2002; Meier and O’Toole 2006; McCubbins and Schwartz 1984; West 1995; Wilson 1989; Wood and Waterman 1994). This literature often suggests that procedural constraints on bureaucratic decision making, like the APA, may play a role in maintaining agency accountability to elected officials (Bressman 2007; McCubbins, Noll, and Weingast 1987, 1989; but see Balla 1998), as well as structuring the interest group environment during rulemaking (de Figueiredo, Spiller, and Urbiztondo 1999). Proponents of the APA’s notice and comment procedures argue that these procedures may hold the promise of

3 Several scholars acknowledge the importance of rule development. And there is some work on administrative procedures agencies employ to open up proposal development, such as the infrequently used negotiated rulemaking procedures (Coglianese 1997) and advisory groups (Balla and Wright 2001).

increasing the political accountability of agencies by equalizing the opportunities to participate in and influence regulatory policymaking (Croley 2000; Harris and Milkis 1989; Rossi 1997). Under this view, rulemaking is a “refreshingly democratic” means of making law (Asimow 1994, 129). It may come as no surprise, however, that a good deal of empirical evidence suggests interest groups are the main participants during the notice and comment period (Golden 1998; Yackee 2006a; but see Cuéllar 2005). For instance, Yackee and Yackee (2006) find a bias toward business during the notice and comment period due to higher levels of participation and influence among business interests.

In contrast to the sizeable literature on external stakeholder participation during the notice and comment period, “[e]xisting work on rulemaking has overlooked the informal process through which most of the important decisions are often made” (West 2005, 655; see also West 2004, 2009). In one exception, Chubb (1983) draws on a handful of interviews with interest groups in the energy sector: he (1983, 141) finds that “[i]nformal participation, which includes all modes of involvement other than written comments and hearing testimony, was widely and decisively regarded as the most effective means of influencing oil regulation.” A handful of other social scientists also highlight proposal development as a critical stage, with Naughton et al.’s (2009) recent work being a notable contribution. It establishes that formal public commenting opportunities provided to external stakeholders during the pre-proposal stage of rulemaking, such as the ability to participate during a commenting period before the promulgation of a proposed rule, can influence government regulatory decision making. Naughton and coauthors’ work, therefore, suggests a form of political accountability within rulemaking’s pre-proposal stage.

Argument

Scholars generally agree that interest groups are active and, at times, influential during the notice and comment period of rulemaking. Yet little research emphasizes the mechanisms by which influence may also take place during the pre-proposal stage of regulatory policymaking. During proposal development, I theorize that interest groups lobby to: (1) influence the content of proposed regulations and (2) block items from the regulatory agenda altogether. I suggest that the most effective tactic is *ex parte* lobbying, “off the public record” conversations in which lobbyists share policy and political information with regulators.

Ex parte contacts are beneficial to both bureaucrats and interest groups. After all, modern-day NPRMs are detailed and often lengthy documents that provide specific regulatory policy language (West 2004). For the bureaucrat, information collection for these NPRMs is costly, and regulated firms and individuals often have the information necessary to generate factually accurate and technically feasible NPRMs and Final Rules (Magat, Krupnick, and Harrington 1986; Yackee and Yackee 2006). I specifically suggest two information shortcomings for agencies during the pre-proposal stage: (1) a scarcity of policy-relevant data and (2) a lack of political information.⁴ I define “policy-relevant data” as the technical data, scientific studies and industry standards necessary to inform policy formation.

⁴ This argument builds on broader scholarship suggesting the importance of information gathered from external sources to agency decision making (Allison 1969; Lindblom 1959; Pika 1983; Rourke 1984; Wilson 1989), and, more generally, on the finding that information from interest groups is influential to the policymaking process (Burstein and Hirsh 2007).

I characterize “political information” as information gathered regarding the strength of opposition or support for a proposed rule, suggestions on framing the specific provisions found in proposed rules, and insights regarding likely implementation problems. *Ex parte* contacts from interested parties mitigate the costs of obtaining both types of information by providing full and frank feedback on policy problems and solutions.

Interest groups will employ influence mechanisms beyond *ex parte* lobbying during the pre-proposal stage when applicable, such as the formal submission of feedback to agencies, “indirect” lobbying by working through Members of Congress, and participation in rule hearings or advisory groups. However, I theorize that private face-to-face or telephone conversations (i.e. *ex parte* contacts) between interested parties and agency officials are more influential than these less interactive communication methods. Direct and bidirectional communications allow these groups to reinforce, reiterate, and repeat their arguments to agency rule-writers. This provides for a “give-and-take” between regulators and interested parties and an avenue for candid and thorough feedback. It also allows informal participants a chance to privately respond to an agency official’s specific critiques and questions with additional information and/or data collection before the promulgation of an NPRM. Moreover, the provision of this information gives interest groups access to agency decision makers at the precise time these officials are deciding the NPRM’s content (for a summary on the importance of access, see Baumgartner and Leech 1998). In sum, I theorize that the provision of information, when coupled with access to agency officials, yields noteworthy interest group influence during the pre-proposal stage.

I expect this influence to take two main forms—agenda building and agenda blocking (Kamieniecki 2006; Naughton et al. 2009). I suggest that interest groups help build an agency’s agenda by lobbying during proposal development. By lobbying early in the regulatory policymaking process, groups introduce the facts agencies consider, define policy problems, and develop the detailed stipulations in proposed government rules (see broadly, Baumgartner and Jones 1993; Cobb and Elder 1983; Jones and Baumgartner 2005; Kingdon 1995; Naughton et al. 2009). Many of these stipulations are likely to persist in the final regulations that become law—thereby extending the influence of groups that lobby early. And even if they do not persist in exactly the same form, they do affect the Final Rule by, at a minimum, framing the debate and scope of action available during the notice and comment period. This latter point is noteworthy because courts are often critical of Final Rules when changes made during the notice and comment period move the content of the Final Rule beyond the scope established in the NPRM (Lubbers 2006). This fact, I argue, only increases the importance of agenda setting during the pre-proposal stage.

I also expect groups to use the pre-proposal stage to block the regulatory agenda. New policy ideas often fizzle out early in the process because of strong interest group pressures (Baumgartner and Jones 1993), and as Kingdon (1995, 49) concludes, “[m]uch of interest group activity in these processes [i.e. agenda setting] consists not of positive promotion, but rather of negative blocking.” Thus, I theorize that *ex parte* lobbying during proposal development often helps to secure the removal of unwanted rules before they take effect.

TESTING THE ARGUMENT

I test this argument with a quantitative assessment of informal participant influence on changes to the content of regulatory policy outputs. I also model a number of rival contextual and political explanations. Below, I discuss the data, methods, and variables.

I supplement the data description with insights gathered from 15 background interviews with agency officials associated with these regulations.⁵

Data

I focus on the informal participation of 133 interested parties during agency proposal development. This participation is clustered around seven transportation-related agencies and 19 separate rules. Each rule in the sample begins with an ANPRM procedure.⁶ An ANPRM is a government document that may be used to begin the proposal development stage. Sometimes Congress will instruct an agency to begin a rule with an ANPRM; other times, an agency will decide to institute this additional procedure on its own. It is a preamble followed by a set of questions at the beginning of proposal development. In this document, the agency typically indicates how it may regulate or deregulate on a particular topic and then asks for formal public comment. The information generated in these comments may then be used to inform the NPRM. My background interviews suggest that agencies use ANPRMs for a variety of purposes, including gathering new information, floating “trial balloons,” and figuring out an agreeable regulatory mechanism.

My goal is to test the general theory with data drawn from rules that begin with an ANPRM. This research design choice has both strengths and weaknesses. One potential weakness is that the bulk of federal regulations do not begin with an ANPRM. According to the *Unified Agenda*, 647 rules began with ANPRMs from spring 1995 to spring 2006.⁷ Over this same time period, the *Unified Agenda* identifies 6,146 Final Rules via the notice and comment process. Thus, although the majority of rules do not begin with ANPRMs, the aggregate-level patterns indicate that ANPRMs are used at a noteworthy rate. Another potential weakness is that agencies or Congress may employ ANPRMs as a mechanism to invite interest group participation during the pre-proposal stage or at least to show that they are not hostile to it.

These limitations are balanced by three strengths. First, by selecting rules with ANPRMs, I am able to control for whether or not the perceived formal influence of ANPRM commenters affects the content of proposed government rules. Second and most importantly, rules with ANPRMs offer a mechanism to identify *ex parte* lobbying and thereby address a problem that has vexed past scholarship on the topic. In short, ANPRM rules provide me with a list of commenters active during proposal development; I argue that this list also encompasses the vast majority of likely *ex parte* participants. In drawing this conclusion, I rely on Chubb’s (1983) suggestion that *ex parte* participants will also submit written comments. He reasons that *ex parte* participants will submit comments to register their group’s general interest in a rule “on the record,” should a court challenge to the rule become necessary.⁸ Even groups that support an agency’s preliminary policy proposal are

⁵ I completed 15 face-to-face background interviews in July 2006. The interviews took place in Washington, DC. The interviewees ranged from technical rule writers to an agency’s legal counsel. The interviewees were chosen because they had experience with a rule in the larger project.

⁶ The decision to write an ANPRM may be conceptually distinct from the decision an agency makes regarding whether or not to begin developing a proposed rule in the first place.

⁷ The *Unified Agenda* is a government document that is published semi-annually and summarizes the pending substantive notice and comment rules of all federal agencies at that time point. There may be some rulemaking activities that are not included in the *Unified Agenda*. For instance, some regulations may not be preceded by a proposed rule, and others may be promulgated so routinely or so frequently that agency officials do not list them in the *Unified Agenda*.

⁸ The courts base their review on the materials present in the formal rule docket (Lubbers 2006).

likely to comment because, by formally commenting, a group mitigates the chance that a rule will be changed based on the comments of others and retains the ability to appeal the rule in court.⁹ My approach here—to rely on formal participation records to uncover informal participation—is not unique: Hall (1996) also uses formal participation to identify informal participation in his study of interest groups and the Congress. Third and finally, regarding the key dimensions of rule salience and complexity, rules with ANPRMs do not appear to differ substantially from rules that do not begin with ANPRMs. To draw this conclusion, I compare all ANRPM-led and NPRM-led rules listed in the *Unified Agenda* from spring 1995 to spring 2006.¹⁰

I focus on seven transportation-related agencies: Federal Maritime Administration, Federal Transit Administration, Research and Special Programs Administration, Federal Highways Administration, National Highway Transportation and Safety Administration, Federal Motor Carrier Safety Administration, and the US Coast Guard. At the federal level, transportation is one of the key policy arenas for rulemaking; according to the *Unified Agenda*, DOT is one of the top three federal rule-writing departments. Moreover, each year, these seven agencies promulgate rules on important public policy issues, including those in this study, such as safety information provision requirements for motor vehicle manufacturers, limits on carrying hazardous materials, standards for bridge inspections, and school bus safety.

To select the specific sample, I use the *Unified Agenda* to create a list of all DOT completed actions from 2002 through 2005.¹¹ The *Unified Agenda* classifies rules as “completed actions” if they have been formally withdrawn by the agency or promulgated as a Final Rule—I capture both finalization events.¹² From this list, I identify all rules that begin with an ANPRM in 1999 or later. I restrict the sample to ANPRMs in this time period to ensure a greater chance of information retrieval. Principally, I need to locate the ANPRM commenters for the telephone survey (described below), and a more recent timeframe aided my ability to find these commenters. These choices yield 19 study rules.¹³

9 Indeed, this may explain why it is not uncommon for interest groups to submit short comments that merely state the group’s support for an agency’s preliminary policy proposal.

10 I employ the agency’s “priority categorization” to capture rule significance. This categorization is a five-point scale that rates rules from economically significant (1), other significant (2), substantive/nonsignificant (3), routine and frequent (4), and to informational/administrative/other (5). On this scale, ANPRM-led rules score, on average, a 2.6, whereas NPRM-led rules score a similar 2.8. I use the length of a rule’s abstract to capture rule complexity. I expect that complex rules will have longer abstracts because more regulatory detail needs to be explained. Again, the complexity of the ANPRM- and NPRM-led rules on this measure is comparable. ANPRM-led rules have, on average, 612 characters in the abstract, whereas NPRM-led rules have 503 characters. This difference of about 100 characters is substantially smaller than the standard deviation for either mean score, which is approximately 400 characters.

11 I identify rules based on the Regulatory Identification Numbers (RINs). I included all unique RINs—those which were not combined or joined with other RINs—and met the sampling requirements.

12 Of the 19 rules, 13 yielded NPRMs (68%), and 12 were finalized (63%).

13 These choices remove 17 rules, which were completed between 2002 and 2005 and had an ANPRM before 1999. As part of a larger research project, I complete a multidimensional content analysis on these 17 rules. I found no systematic differences when comparing these 17 rules to the 19 rules used in this study. I looked for systematic differences across rules with pre-1999 ANPRMs and rules with ANPRMs in 1999 or later. I compared the averages for the significance of the rule (measured via the agency’s significance determination), the complexity of the rule (measured via the length of the rule’s abstract), average length of public comments, and the average rate of interest group participants within the coded comments. Comparable results were returned. Two other rules had ANPRMs before 1999. However, despite a trip to DOT headquarters in Washington, DC, I could not obtain the full public comment information on these rules.

These 19 rules received a total of 619 comments during the pre-proposal stage. I selected a stratified random sample of the 619 comments to analyze. I used the following general sampling rule for each regulation: I randomly selected either 15 comments or 10% of the total comments, whichever number was larger. This strategy allowed for some adjustment across the different rule types, thereby providing a practical mechanism for selecting comments from both higher salience rules (arguably, rules with many comments) and lower salience rules (rules with few comments). This strategy yielded 230 public comments to analyze.¹⁴ Overall, the coverage rate was 37% (230 out of 619).

Data Collection and Methodology

I used content analysis to identify shifts in regulatory policy during proposal development. The content analysis was led by a faculty member and instituted primarily by three doctoral students.¹⁵ I generated kappa scores to assess the coders' intercoder reliability, with scores falling within acceptable bounds.¹⁶ Ultimately, the content analysis yielded variables designed to identify shifts in regulatory content during proposal development.

I employed a telephone survey to identify informal participants during proposal development.¹⁷ The telephone survey was led by a faculty member and implemented by three Master's students.¹⁸ The team attempted to contact all 230 interested parties identified for the study. We completed 175 contacts; 133 respondents agreed to participate, eliciting a response rate of almost 60% (133 out of 230).¹⁹ I gleaned information from the public comments to complete a sensitivity analysis for the 133 respondents and 97 nonrespondents. Overall, few major differences emerged. For instance, the gender of both the respondents and nonrespondents is approximately 90% male. The number of participants coming from interest groups is remarkably similar, and high, at 84% for both the nonrespondents and respondents. The percent of nonrespondents with a Washington DC area zip code, however, was 36, which is higher than the 23% of respondents that were from the DC area.

14 Several rules received fewer than 15 public comments.

15 The content analysis took place between September 2006 and May 2007. All rules for the larger project were coded, which includes the 19 rules used in this study. The coders used a codebook and a specific set of coding instructions. All coders were involved with the construction of the coding rules. The full team, including the faculty advisor, worked for the first 3 months together and jointly coded about 13% of the total work. Then, the coders met often with the faculty advisor to discuss any coding disagreements or issues. Another 12% of the doctoral students' work was (blindly) double coded to assess the intercoder reliability of their independent work. This check resulted in the double coding of 84 comments.

16 For instance, the kappa score across the larger project for the rule-level government involvement variable was 1.000 and the comment-level government involvement variable was 0.786. These two variables are critical because they combine to form this study's dependent variable, *Desired Rule Shift*.

17 Surveys are but one way to observe *ex parte* contacts. For instance, some US Departments prohibit *ex parte* contacts after the NPRM unless they are docketed. For these agencies, it may be possible to search the rule dockets and construct a measure of *ex parte* participation. However, I caution researchers who attempt this strategy that all contacts may not be properly docketed and that there may not be enough information in the rule docket to discern *ex parte* participants' policy preferences. Thus, surveys may remain the best way to observe this behavior. That said, future work may want to survey both agency officials and public participants and use this type of multimethod design strategy as a check on the validity of the measure.

18 The survey was in the field from November 2006 to April 2007. The Master's students made their phone calls during normal business hours from a faculty office. The students received training on the survey instrument from the faculty advisor and continual supervision.

19 Although the survey provides a usable population of 133 responses, the sample size decreases somewhat in the models shown later because some respondents chose not to answer all survey queries.

I use descriptive statistics and logistic regression models to assess the argument. Robust standard errors are employed and are clustered by rule. Substantially similar findings to those presented later are also returned when I employ a hierarchical modeling approach (where survey participants are nested in rules or nested further in agencies). I chose to present the results from the logit strategy because it is more straightforward and none of the random intercepts in the hierarchical model were significant.

Dependent and Independent Variables

The dependent variable, *Desired Rule Shift*, is derived from two variables collected in the content analysis. The first variable examines the degree and direction of shifts in rule-level outputs between two government documents: (1) the ANPRM and (2) the NPRM or Withdrawal notice. Coders began by reading both documents. They then evaluated whether the second government document (the NPRM or Withdrawal notice) expands the role for government involvement (+1), does not shift the level of government involvement (0), or provides for a lesser role for government involvement (−1) than the ANPRM.²⁰ For example, a rule coded as a +1 may have introduced a new regulatory requirement in the NPRM that was not found in the ANPRM. A rule coded as a −1 may have indicated the agency's interest in a regulatory requirement in the ANPRM but then abandoned the requirement in the NPRM (or abandoned the requirement in the Withdrawal notice).²¹ The second variable is derived from a content analysis of comments received during the proposal development stage. It is scored on the same three-point scale. A commenter who wants the role of government expanded from what was portrayed in the ANPRM scores a +1, a commenter who wants about the same level of regulation scores a 0, and a commenter who wants a lesser role for government than provided in the ANPRM scores a −1.

The dependent variable is dichotomous and measures whether or not a commenter receives his or her *Desired Rule Shift* [in terms of the general regulatory direction of the rule shift during proposal development]. Thus, the measure scores a 1 whenever the rule-level and comment-level variables, described above, “match.” For instance, when the commenter desires less regulation (−1) and the agency provides less regulation during proposal development (−1), then there is a match and the *Desired Rule Shift* variable scores a 1. However, when a commenter desires less regulation (−1) and the agency provides something different (either more or the same level of regulation), then there is no match, and the dependent variable scores a 0. Overall, *Desired Rule Shift* “matches” a total of 91 times (out of 133 observations): 68 times with an agency providing less regulation when an interested party wanted less and 23 times with an agency providing more regulation when an interested party wanted more.²²

Two key independent variables capture *ex parte* contacts and influence and are derived from the telephone survey of ANPRM commenters. The first variable, *Informal (Ex Parte)*

²⁰ Under well-established laws of administrative procedure, both regulatory and deregulatory activities generally must be accomplished by promulgating a new rule.

²¹ For all rules, coders first identified whether the ANPRM was attempting to regulate or deregulate an issue. Regarding withdrawn rules specifically, if the ANPRM was focused on increasing the level of regulation, and it was withdrawn before finalization, then it would be coded a −1. However, if the ANPRM was focused on deregulation and it was withdrawn, then it would be coded a +1.

²² Although there are cases in the data where rule change is coded a 0 and there are also cases where the commenter's desired change is coded a 0, there are no cases where the “zeros matched.”

Contact, assesses whether or not contacts with agency officials were made outside the public commenting process. The question wording is: “Outside of your written comment, did you have any communications with federal Department of Transportation officials about this rule?” Yes or No. A 0 on this question indicates no *ex parte* contact, whereas a 1 indicates at least one *ex parte* contact.²³ The mean for this variable is 0.389 with a standard deviation of 0.489. A follow-up question asks all affirmative respondents to rate the perceived influence the contact(s) had on proposal development. The question wording is: “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 the rule?” I use the replies from both questions to create a six-point *Informal (Ex Parte) Influence Scale*. A 0 on this scale indicates no *ex parte* contact (and thus no influence); 1 indicates informal contact with a rating of “very little” influence, whereas 5 indicates an *ex parte* contact with a rating of a “great deal” of influence.²⁴ The variable mean is 0.900 with a standard deviation of 1.344 and a range of 0 to 5.

Two variables measuring the potential for political intervention are also included in all model specifications. The first measure captures whether or not Congress required the ANPRM. In this sample, Congress required six of the nineteen rules (32%) to begin with an ANPRM. The variable controls for the possibility that Congress may require the ANPRM process in an effort to structure interest group participation and influence during the pre-proposal process. Second, I include a measure tapping whether or not the President’s Office of Management and Budget (OMB) reviewed the proposed rule. This variable controls for the possibility of presidential intervention in the early stages of rulemaking, as well as the ability of an interest group to use OMB’s review process as an indirect influence mechanism. Both measures acknowledge that political attention to rules may play a role in rule change (West 1995; Woods 2005) and may affect interest group access, lobbying, and influence.

I assess the robustness of the primary model results in several supplementary analyses. In the first additional analysis, I explore other influence strategies that interested parties may have employed. The first measure examines whether or not the survey respondent contacted a Member of Congress about the rule during proposal development. Additionally, I include a variable measuring whether or not a respondent used or intended to use the US court system to appeal the rule. I insert a measure to assess whether or not a survey respondent believed that his or her ANPRM comment influenced the government’s decision making on this rule.²⁵ Finally, I include a variable to control for other potential influence

23 The survey then followed up with all affirmative respondents to the *Informal Contact* question on the telephone survey and asked the form of their communications, with the choice categories being: phone call, email, face-to-face meeting, or other (please specify). Only one respondent did not pick a category from the provided list. This suggests that my theoretical understanding of an *ex parte* contact largely matched up with the empirical data. The modal category was face-to-face communications, with 69% of the affirmative respondents indicating they had used this strategy on the rule in question during proposal development. Telephone contacts were the second most frequently listed tactic. Furthermore, over 38% of the affirmative respondents indicated that they had used more than one of these strategies within the same rule.

24 I rely on the informed opinions of interested parties to provide select information for the study. My reasoning here follows Hoffmann’s (1967, 57; see also Weick 1979, 1995, 2001), who writes, “perceptions are more than a part of political reality: they mold it, insofar as they are the springs and fuel of action.” Furthermore, Hofer (1994) finds that perceived measures of group influence during agency regulatory policymaking correlate highly with objective measures of group influence.

25 The question wording is: “Do you believe that your comment helped to influence the Department of Transportation’s actions on this rule?” Yes or No. The average for this variable is a 0.646 with a standard deviation of 0.480, indicating a perception of influence during the pre-proposal stage.

modes. This rule-level measure gauges whether or not interested parties had other formal influence opportunities available to them during the development of this regulation—outside the already specified formal and informal avenues. This measure, called *Other Rule Influence Methods*, scores a 1 if the rule had a hearing, a working, or advisory group, or if the rule was part of a negotiated rulemaking.

In other supplementary analyses, I introduce four demographic control variables collected from the telephone survey. *Age* is the respondent's age in years. *Gender* scores a 1 for males and 0 for females. *Education* is a three-point scale, where 1 represents some college or less education, 2 a college degree, and 3 a completed graduate degree. *Partisanship* scores a 1 if the survey respondent self-identifies as a Republican or as an Independent that leans Republican; a 0 is recorded for all Democrats, those leaning Democrat, and other Independents.

I insert controls for rule salience and rule complexity in an additional model. Rule salience is measured by whether DOT deemed this rule to be significant or not. The complexity measure is the length in characters of the rule's abstract. Finally, in the last two analyses, I split the sample and analyze separately rules that were finalized and rules that were withdrawn. These analyses have small sample sizes and the results are considered suggestive in nature.

RESULTS

The results are organized around several questions: First, do *ex parte* contacts take place? And if so, do they matter to regulatory policy outputs? Second, how important is *ex parte* influence when controlling for other drivers of policy change? And third, is interest group influence during the pre-proposal stage primarily a mechanism for agenda building, agenda blocking, or both?

Question 1: Do ex parte conversations take place? The short answer is “yes.” The dichotomous *Informal Influence* variable indicates that almost 40% of participants (49 of the 126 respondents who answered this question) report *ex parte* contacts with agency officials during proposal development, leading me to conclude that there is some evidence of *ex parte* contacts. Moreover, 51% (25 of the 49) of those interested parties who report an *ex parte* contact believe their actions had a moderate to large impact on the rule. But do these *ex parte* contacts affect the content of regulatory policy outputs? Table 1 presents the results; numerous specifications are shown with the number of observations arrayed across the table's bottom. The main model specifications are displayed in table 1, columns A and B. Given the dichotomous nature of the *Desired Rule Shift* as the dependent variable, the models are estimated by logistic regression. Recall that *Informal Contact* assesses whether or not there was an *ex parte* contact during proposal development, not the perception of *ex parte* influence. Model B utilizes the six-point *Informal Influence Scale*.²⁶

The main study results are found in the positive sign and statistical significance of *Informal Contact* in Model A and the *Informal Influence Scale* in Model B. These results indicate that, when controlling for two potential political intervention mechanisms, *ex parte* contacts can affect the likelihood that an interested party will see their desired regulatory

²⁶ In table 1, I concentrate on the *Informal Contact* measure over the *Informal Scale* measure because the *Contact* measure moves away from perception of influence—perceptions that may be, at times, less reliable. However, I reran all the models with the *Informal Scale* as the dependent variable. None of the basic conclusions change.

Table 1
Does *Ex Parte* Lobbying Influence Proposed Rule Development?

	Model A: Basic	Model B: Scale	Model C: Other Tactics	Model D: Demo- graphics	Model E: Rule Controls	Model F: Agenda Building	Model G: Agenda Blocking
Intercept	0.287 0.422	0.321 0.430	-0.114 0.589	1.429 1.607	0.096 0.759	0.371 0.600	0.103 0.585
Informal (<i>ex parte</i>) Contact	1.219** 0.465	— —	1.189** 0.522	1.791** 0.690	1.258** 0.485	0.958* 0.517	2.126* 1.234
Informal (<i>ex parte</i>) Scale	—	0.506** 0.229	—	—	—	—	—
OMB NPRM Review	-0.274 0.440	-0.260 0.419	0.414 0.480	-0.599 0.590	-0.104 0.505	-0.124 0.393	-1.634** 0.746
Congress Requires ANPRM	0.366 0.508	0.383 0.521	-0.052 0.442	0.193 0.675	0.490 0.723	0.720 0.582	-1.166 0.795
Perceived Formal Influence	—	—	0.397 0.321	—	—	—	—
Work through Congress	—	—	-0.313 0.830	—	—	—	—
Work through Courts	—	—	1.176 1.193	—	—	—	—
Other Rule Influence Methods	—	—	0.177 0.665	—	—	—	—
Age	—	—	—	-0.084** 0.031	—	—	—
Education	—	—	—	0.977** 0.297	—	—	—
Partisanship	—	—	—	0.373 0.683	—	—	—
Gender	—	—	—	1.401 0.890	—	—	—
Rule Complexity	—	—	—	—	0.001 0.001	—	—
Rule Salience	—	—	—	—	-0.609 0.754	—	—
Observations; clusters	126; 19	126; 19	119; 19	119; 19	126; 19	85; 12	41; 7
Log-pseudolikelihood	-74.787	-74.523	-70.296	-59.165	-73.646	-49.779	-21.433

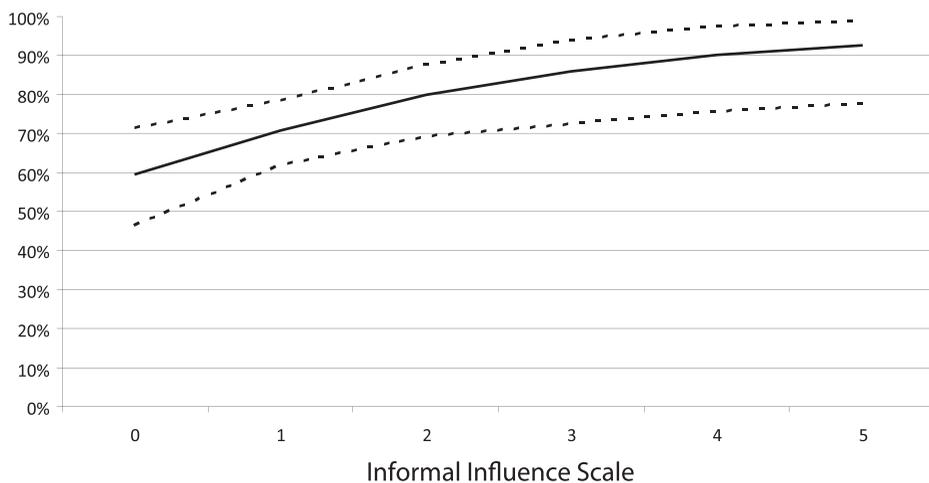
Note: SEs are shown under coefficients. The dependent variable is dichotomous measure, *Desired Rule Shift*. See text for details.
 ** $p \leq .05$; * $p \leq .10$, two-tailed test.

modifications completed during proposal development. The other model variables in the basic specifications are insignificant.

Thus, I find evidence in support of the study's main argument: *ex parte* contacts between third parties and agency decision makers do, at times, affect the content of regulatory policy outputs in this sample of rules. To get a better sense of the effect size of these coefficients, I generated the predicted probability of the dependent variable while varying the *Informal Influence Scale* (with other variables held constant). I display these estimates, along with the 90% confidence interval to acknowledge the uncertainty around the estimates in Figure 1. I find a positive relationship: as the perception of *ex parte* influence goes up, so too does the likelihood of receiving one's *Desired Rule Shift*. For instance, moving from the lowest to highest points on the scale returns a 33% increase in the probability that an interested party receives his or her *Desired Rule Shift* when *ex parte* contacts are utilized. I find a 24% increase in the probability of obtaining the interested party's preferred regulatory outcome during proposal development when varying *Informal Contact* from 0 to 1.²⁷ From this evidence, I conclude that private conversations between interested parties and public agency decision makers hold influence over some rule outputs in this sample of ANPRM-led rules. These findings confirm West's (2005) expectation that the participation of outside parties matters to regulatory policy development.

I also find that informal participants tend to provide technical and political information to regulators at a higher rate than those participants not employing informal lobbying. Here I use difference of means analyses in connection with a survey question that asks: "Did you

Figure 1
Predicted Probabilities for Desired Rule Shift. *Source:* Author's dataset. See text for details.



27 The point estimates shift from 0.58 (90% confidence interval is 0.46–0.71) to 0.82 (0.72–0.90). It is worth emphasizing that these point estimates clearly suggest the presumption that rule shifts are likely in the data. Figure 1 displays a similar pattern. Thus, the *ex parte* lobbying findings imply that *ex parte* contacts further elevate the likelihood of rule shifts occurring.

share any specific information with Department of Transportation Officials? Such as Data, Scientific Studies, Language for the Rule, and/or Other (please specify).” The results indicate that informal participants are 52% more likely to share data and scientific studies with rule writers than other participants, and 62% more likely to provide rule language.²⁸

To provide a better sense of who participates in an *ex parte* fashion, I group the participants across three categories—business interests, government participants, and nonbusiness/nongovernment actors. I find that *ex parte* participants are, for the most part, split across these categories. State and federal government participants represent the largest category of *ex parte* participants at 39%, with the vast majority of these informal contacts coming from state departments of transportation officials. Business interests (including businesses, corporations, and trade associations) provide 31% of the *ex parte* communications, whereas nonbusiness/nongovernmental actors (including public interest groups, academia, think tanks, professional associations, citizens, and unions) provide 31%.

Of these *ex parte* participants, government actors view their informal participation as the most influential with a mean score of 2.8 on the *Informal Influence Scale*, followed by nonbusiness/nongovernment interests at 2.1 and business interests at 1.8. Difference of means tests confirm significant differences in perceived *ex parte* influence between business versus nonbusiness interests, as well as government versus nongovernment interests. Although we have long known that state and local officials frequently lobby at the federal level of government (Haider 1974), these results conform with Nugent’s (2009) more recent observations that state officials often participate in federal agency rule development and through this lobbying subnational officials may bring expertise and on-the-ground experience to regulatory decision making.²⁹

Question 2: How important is *ex parte* influence on proposal development when controlling for other potential drivers of policy change? Model C checks the robustness of the study’s main findings against other lobbying strategies. Overall, I demonstrate that the *Informal Contact* variable remains an important driver of content changes during proposal development. None of the additional variables gain significance, including the *Perceived Formal Influence* measure. Model D assesses whether demographic factors diminish or wholly remove the statistical or substantive importance of *ex parte* contacts. I do not find evidence of mitigation; instead, the inclusion of these control variables augments the size of the *Informal Contact* coefficient. Two additional variables in this model specification are significant. The *Age* variable suggests that older participants are less likely to obtain their preferred regulatory shifts during rule development, whereas *Education* is positive and significant, suggesting that interested parties with graduate degrees are, on average, more successful in securing rule modifications.

I incorporate two additional rule-level contextual controls in Model E. Here, I control for rule salience and rule complexity, which scholars suggest may affect the ability of interested parties to affect rule change (Gormley 1986; Yackee 2006a). I find that the size and significance of *Informal Contact* is preserved despite the inclusion of the additional variables.

Question 3: Is interest group influence during the pre-proposal stage primarily an agenda building or an agenda blocking mechanism (or both)? I first focus on any

28 Although these results suggest support for the article’s theoretical reasoning, they do not indicate whether the information came directly from an *ex parte* contact or from some other mode of participation.

29 In his list of interest group types active during rulemaking, Kerwin (2003) includes “other layers of government.”

differences in *ex parte* lobbying rates across finalized rules and those that are withdrawn before finalization; 29 of the 49 (59%) *ex parte* contacts take place on the 12 finalized rules, whereas 20 of the 49 (41%) take place on the seven withdrawn rules.³⁰ To assess mean differences, I perform a *t*-test to compare the means of *Informal Contact* across rule termination events. Statistically significant differences do not materialize. To assess the substance of the influence question, I re-analyze the main model with data for rules that were ultimately finalized (Model F) and rules that were withdrawn before promulgation (Model G). The sample size and fit of both models are diminished; thus, I consider these results suggestive and not confirmatory. Nevertheless, two patterns stand out. First, *Informal Contacts* are significant in cases of agenda setting and agenda blocking. These results suggest that *ex parte* lobbying contacts may affect rules that are ultimately finalized, as well as those rules withdrawn before completion. Second, the substantive effect of the *ex parte* coefficient is predicted to be somewhat larger in the agenda blocking model. I find that *ex parte* participants are 41% more likely to obtain desired rule withdrawals than lobbyists who did not employ *ex parte* contacts.³¹ With regard to agenda promotion, the effect size is 18%.³² Again, the sample sizes here are small, and thus, these predicted probabilities must be considered suggestive in nature. Only one of the control variables, *OMB NPRM Review*, is significant and only in Model G. This suggests that for rules that are ultimately withdrawn, OMB proposal review is related to a lower degree of commenter influence during the pre-proposal stage.

In summary, the logit findings and descriptive analyses presented here provide support for the study's main argument—policy battles are, at times, fought and won by interest groups during a stage of the American policymaking process that is frequently hidden from view: agency proposal development. However, some prudence is warranted. Although the theory seeks to draw generalizations across rulemaking, the study's research design, in particular its concentration on rules with ANPRMs, affects my ability to draw unqualified inferences. For instance, on the one hand, agency officials may hold fewer informal discussions regarding ANPRM rules because of a belief that the necessary information for rule formation will materialize as part of the formal ANPRM commenting process. According to this line of reasoning, the assessment strategy provided in this study is likely to provide a conservative test of the theory. However, on the other hand, agencies may issue, or Congress may require agencies to issue, ANPRMs in an effort to invite interest group involvement (or even influence) during the pre-proposal stage of rulemaking. Thus, the decision to issue ANPRMs may, itself, be politically important and ought to be analyzed using a selection modeling strategy. Such an effort would allow one to rule out the alternative causal explanation that interest group influence manifests itself at the behest of agencies or Congress.

In either case, the findings in this article suggest that future work ought to assess the role of *ex parte* influence in NPRM-led rules and ANPRM-led rules, as well as investigate more broadly how agencies and the Congress may interact with interest groups to bring about policy change during the early stages of rulemaking. Furthermore, although the

30 Of the 20 *ex parte* contacts from withdrawn rules, 4 came from businesses, 6 from nonbusiness/nongovernment interests, and 10 from government actors. For finalized rules, 11 came from businesses, 9 from nonbusiness/nongovernment interests, and 9 from government.

31 The point estimates shift from 0.64 (90% confidence interval is 0.49–0.77) to 0.82 (0.73–0.89).

32 The point estimates shift from 0.43 (90% confidence interval is 0.26–0.60) to 0.84 (0.68–0.95).

study's rules are drawn from seven different federal government agencies, future work must explore the potential variation that exists across additional departments and agencies. It may be that DOT has more concentrated interests than other departments, such as the Environmental Protection Agency, or *ex parte* contacts may play a different role in DOT decision making than in other departments, such as the US Securities and Exchange Commission. Despite these caveats, this study makes an important contribution to the literature: it provides the first empirical confirmation that “off the record” lobbying can, and at times, does matter to regulatory content changes made during the pre-proposal stage of agency regulatory policymaking.

CONCLUSION

The formation of government regulations has long been considered an arena for policy formation and policy implementation (Chubb 1983; Kerwin 2003; West 2004, 2005); yet, too little is known about the politics, or lack thereof, of the pre-proposal stage of the regulatory policymaking process. Indeed, our lack of scholarly understanding stands in contrast to recent government policy changes. On January 18, 2011, President Obama issued executive order 13563 guiding presidential oversight of rulemaking. The order leaves the existing regime established by President Clinton largely in place. Yet, the one exception to this characterization concerns so-called “public” participation during the pre-proposal stage of rulemaking—where the President now asks agencies to seek the views of affected citizens and organizations before issuing NPRMs. This new stipulation demonstrates the importance of pre-proposal participation to agency policymaking and suggests the importance of scholarly study dedicated to this often overlooked phase of policymaking. Stated differently, as one observer writes, rule development must be moved “out of the shadows” (Kerwin 2008, 1).

In this article, I move the literature forward by arguing that during the pre-proposal stage of rulemaking interest groups lobby to: (1) influence the content of proposed regulations and (2) block items from the regulatory agenda altogether. I suggest that the most effective tactic is *ex parte* lobbying, “off the public record” contacts in which lobbyists share policy and political information with agency regulators. Using data collected via content analysis and survey research from seven federal rule-writing agencies, we now know that *ex parte* contacts between interest groups and agency officials during proposal development can influence the content of regulatory policy outputs. Moreover, this result holds when controlling for potential influence methods and other rival contextual and political explanations. I also uncover preliminary evidence that *ex parte* contacts are a factor causing agency officials to withdraw regulations from further consideration, suggesting that interest group activity during the pre-proposal stage of rulemaking may help to secure the elimination of unwanted regulations before they are promulgated.

West writes, “[a] meaningful assessment of responsiveness in rulemaking must also consider the decision-making process that precedes notice and comment” (2005, 662–3). This study takes up West’s challenge and four main research and policy implications emerge:

First, the findings suggest a need to study the full cycle of rulemaking—from proposal development to rule finalization. Past empirical research has focused almost exclusively on the role of political influence during the notice and comment period of rule finalization (Balla 1998; Cuéllar 2005; Golden 1998; Woods 2005; Yackee 2006b). This research focus is appropriate given that the majority of rules are ultimately open for public scrutiny during

the notice and comment period. Yet, a simple focus on the notice and comment period—while ignoring the politics of proposal development—may also be misplaced. Could it be that the most important regulatory decisions take place before the proposed rule is promulgated? The findings here do not provide an answer to this question, but they do suggest the need for future work that considers the agenda setting and blocking taking place during rulemaking's pre-proposal stage.

Second, the results uncovered in this study suggest the need to reevaluate the desired level of transparency within the federal rulemaking process. This is a complicated task. From a normative perspective, a more transparent policymaking process is preferable to a less transparent process. The citizens within a representative democracy ought to be able to follow and understand how government officials make policy decisions. Yet it would be inappropriate to conclude that interest group influence, and even *ex parte* influence during proposal development, is—in and of itself—nefarious. Interested parties play a key role in transmitting policy and political information to agency officials, and the regulatory state is much better off in seeking this information than ignoring it. As West (2009, 954) writes, “[a] hypothesis worth considering in this regard is that the informality of prenotice rulemaking facilitates the exploration of issues and accommodation of interests that are often required by delegations of legislative authority.” Stated differently, “Is there a place for private conversation in public dialogue?” (Lee 2007). Garrett and Vermeule (2008), in their work on the budgetary process, may provide one practically oriented answer. They detail numerous benefits attached to transparency, but they also write that transparency can negatively affect bargaining by encouraging posturing and inflexibility. In balancing the costs and benefits of transparency, Garrett and Vermeule (2008) recommend that opacity may be more acceptable during the early stage of the budgeting process, whereas transparency may be more desirable in the later stages. Although not a perfect analogy to regulatory policymaking, the general lesson is worth some consideration: it may be that some opacity is desirable during the pre-proposal stage, especially given the public participation opportunities provided for most rules during the notice and comment period.

Third, this study uncovers suggestive evidence that interest group influence may play a role in securing rule withdrawal during federal agency rulemaking. If powerful interests can stop the rulemaking process when desired, then normative issues may arise. Indeed, the transparency features of the notice and comment process—which are heralded as an innovation of the modern administrative state—are severely limited if the most contentious issues are resolved before the promulgation of a proposed rule. Future work ought to gather more data to properly sort out the implications these findings hold for our understanding of agenda setting, political power, and the important place that rulemaking holds within the American policymaking process.

Fourth and finally, this article raises important theoretical and practical consequences for judicial review of agency policymaking. As Edley (1990) suggests, judicial review is premised on the notion that the courts can observe agency actions, a concept that is enshrined within the public notice and comment period of rulemaking. Yet, this general tenet appears violated by *ex parte* influence during pre-proposal decision making. As Wagner (2010) suggests, one possible judicial reform would be to ban *ex parte* contacts during the pre-proposal stage, or at a minimum, require that these contacts be docketed for court and public scrutiny. However, like any potential government reform effort tied to transparency, this one presents both positive and negatives. On the benefits side, there would be greater

transparency in agency decision making and perhaps improved political accountability to all external stakeholders. But in terms of costs, the potential reforms may have a chilling effect on the ability of agency officials to secure the necessary information to write proposed rules and may require yet another procedural hurdle for agency officials to jump through during the rulemaking process. Securing a normative solution to this trade-off is beyond the scope of this article, but the results here, at a minimum, begin to identify this trade-off and suggest the need for additional attention from scholars and practitioners alike.

FUNDING

I am grateful to the Smith Richardson Foundation and the University of Southern California's Bedrosian Center on Governance and the Public Enterprise for funding parts of the data collection in this study.

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