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Capturing Regulatory Agendas?: An Empirical Study Of Industry Use Of Rulemaking Petitions

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CAPTURING REGULATORY AGENDAS? AN EMPIRICAL STUDY OF INDUSTRY USE OF RULEMAKING
PETITIONS

Daniel E. Walters¹

ABSTRACT

A great deal of skepticism toward administrative agencies stems from the widespread perception that they excessively or even exclusively cater to business interests. From the political right comes the accusation that business interests use regulation to erect barriers to entry that protect profits and stifle competition. From the political left comes the claim that business interests use secretive interactions with agencies to erode and negate beneficial regulatory programs. Regulatory “capture” theory elevates many of these claims to the status of economic law. Despite growing skepticism about capture theory in academic circles, empirical studies of business influence and capture return ambiguous results, and they have failed to analyze fully the critical agenda-setting stage of the regulatory process (where business influence is likely to be especially pronounced), leaving capture theory standing as a plausible description of regulatory policymaking.

In this Article, I take a close look at business influence in the agenda-setting stage of the rulemaking process. Using original data on all the rulemaking petitions submitted to three administrative agencies from 2000 to 2016, I trace how, when, and why agencies respond, giving attention to the agencies’ responsiveness to the type of petitioner and the character of the requests. Although business interests may participate at a higher rate than public interest groups and individuals, analysis of the factors that drive agency decision making about which petitions to accept suggests a distinct lack of any business advantage. Even in a venue where it would be exceedingly easy to give business interests precisely what they want, agencies remain largely unmoved and even-handed. The pattern that does emerge—an agency preference for using petitions to inform incremental revision of existing regulations to reflect changed circumstances or new technologies—probably does inure mostly to the benefit of regulated entities, but it is difficult to square with theories of excessive influence or capture of the regulatory process by business interests. These findings strongly suggest that agencies are able to maintain critical distance from business in making important decisions about the scope of the regulatory agenda and, by extension, the content of regulatory law.

¹ Regulation Fellow, University of Pennsylvania Law School. This paper stems from my doctoral dissertation work on rulemaking petitions. I thank Cary Coglianese, Susan Yackee, Ryan Owens, Dave Weimer, and Donald Downs for their guidance on this project, Gabe Scheffler and Shana Starobin for their feedback, and Dori Molozonov and Melinda Wang for their helpful research assistance.

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INTRODUCTION

Few questions have received as much attention as those surrounding business influence in the regulatory process.² The relationship between business interests and regulatory policymaking is widely perceived as a close one—so much so that agencies are often thought to be fully “captured” (*i.e.*, controlled) by the businesses they regulate.³ As the economist George Stigler put it in one influential contribution to one strand of “capture theory,”⁴ generally speaking, “regulation is acquired by the industry and is designed and operated primarily for its benefit.”⁵ This story of business capture, in turn, is often cited as a reason for reformation of the administrative process,⁶ if

² William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter and David A. Moss, eds., 2014); PAUL J. QUIRK, *INDUSTRY INFLUENCE IN REGULATORY AGENCIES* (1981) (discussing the development of the capture idea); Chris Carrigan & Cary Coglianese, *George Stigler, ‘The Economic Theory of Regulation,’* in OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 287 (Steven J. Balla, Martin Lodge, & Edward C. Page, eds. 2015).

³ See Daniel Carpenter and David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 4 (Daniel Carpenter and David A. Moss, eds., 2014) (noting that much of the literature on regulation relied on “models in which capture of regulators by incumbent firms is all but inevitable”); BRINK LINDSEY AND STEVEN M. TELES, *THE CAPTURED ECONOMY* (2017) (arguing that capture is widespread in federal, state, and local regulation, and that this capture is a major reason for growing economic inequality and stagnant economic growth).

⁴ William Novak has brought attention to the numerous strands of “capture theory,” including variants emanating from political science scholarship, see Samuel Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955), from historical scholarship, see GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963), and even in the work of Progressive era scholars, such as Frank Goodnow and Woodrow Wilson, who helped build the modern administrative state. See Novak, *supra* note 2. One of the striking things about the many strands of capture theory is that they know no ideological boundaries. See Carpenter & Moss, *supra* note 3, at 5 (linking capture theory to a “fatalism” about government regulation that can be “seen in the center, the left, and the right of political discourse”).

⁵ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). In this canonical statement, Stigler clearly echoes Richard Olney’s remark, made half a century before during the creation of the Interstate Commerce Commission, that “[t]he Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. . . . The part of wisdom is not to destroy the Commission, but to utilize it.” Thomas Frank, *Obama and ‘Regulatory Capture,’* WALL ST. J. (June 24, 2009), available at <https://www.wsj.com/articles/SB124580461065744913>.

⁶ STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 22 (2008) (“The public choice theory’s account of regulation carries with it a reform agenda: The view that the fundamental differences between regulatory and market decisionmaking explain the problem with regulation strongly suggests that market outcomes are preferable to regulatory outcomes.”);

not for the wholesale “deconstruction of the administrative state.”⁷ So goes the thinking, capture is so institutionally implanted that it is better to pull out the entire institution, root and branch, than to seek measured reforms.⁸

However, empirical work examining these claims about business influence has returned mixed evidence and ambiguous takeaways. On the one hand, virtually every study of business participation finds that business interests do in fact have an outsized voice (i.e., participate more consistently) in the regulatory process, particularly in the context of the Administrative Procedure Act’s “notice-and-comment” process.⁹ Some studies have likewise shown that business interests are more influential than other groups when they submit comments or meet with decisionmakers, particularly when they are unopposed.¹⁰ On the other hand, few studies have been able to show empirically that this outsized participation and influence actually translates into de facto control over agency decisions, as capture theory would seem to require.¹¹

Carpenter & Moss, *supra* note 3, at 10 (noting that “arguments stipulating capture often carry policy prescriptions. They move quickly from ‘is’ to ‘ought,’ and they are especially likely to recommend deregulation,” and citing Simeon Djankov, Rafael La Porta, Florencio Lopes-de-Silanes, & Andrei Shleifer, *The Regulation of Entry*, 117 Q. J. ECON. 1 (2002) for an example).

⁷ Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State,’* WASH. POST. (Feb. 23, 2017), available at https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.16c394723ed7.

⁸ A newer wave of “capture” scholarship paints a much less bleak picture, acknowledging that capture may sometimes exist, but that it is usually something that can be addressed by smart institutional design. See Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1 (2010); Rachel E. Barkow, *Insulating Agencies Avoiding Capture through Institutional Design*, 89 TEX. L. REV. 15 (2010).

⁹ See, e.g., Frederick J. Boehmke, Sean Gailmard, & John W. Patty, *Business as Usual: Interest Group Access and Representation Across Policy-Making Venue*, 33 J. PUB. POL. 33 (2013); Jason Webb Yackee and Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) [hereinafter *A Bias Towards Business*]; Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103 (2005) [hereinafter *Sweet Talking*]; Scott R. Furlong and Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353 (2004). One exception is the study of three significant rulemakings conducted by Justice Tino Cuellar, which found extensive citizen participation far outpacing business participation in public comment periods. See Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005).

¹⁰ See, e.g., Yackee & Yackee, *A Bias Towards Business*, *supra* note 9; Yackee, *Sweet Talking*, *supra* note 9; Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President’s Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015).

¹¹ Susan Webb Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter and David

Of course, almost all of the research to date examines participation in the latest stages of the regulatory process, when most of the important *political* disputes over the agency's agenda and the broad substance of agency action have been resolved.¹² The focus on these late stages poses serious methodological problems that limit what we can learn from empirical study. First, showing influence at these later stages most often means showing that business interests are successful in encouraging agencies to tinker with the technical minutiae of rulemaking proposals that may well still impose substantial costs on the regulated and deliver substantial benefits to the public.¹³ Consider, for instance, National Ambient Air Quality Standards (NAAQS), which the U.S. Environmental Protection Agency promulgates and updates on a set schedule mandated by the Clean Air Act.¹⁴ Evidence that business interests (producers of electricity) succeed in influencing the EPA to relax the permissible concentration levels of an air pollutant between a proposed rule and final rule might show up in a carefully designed empirical study as evidence of influence, but that fact alone would tend to obscure the fact that NAAQS overwhelmingly impose costs on discrete businesses to benefit the general public.¹⁵ Second, precisely because what typically remain in the latest stages of the rulemaking process are technical, detail-oriented questions that require substantial expertise and on-the-ground knowledge of the regulated activity, it is hardly surprising that business interests have

A. Moss, eds., 2014) [hereinafter *Reconsidering Agency Capture*]; Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221 (2012).

¹² Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 865 (2016); SHELDON KAMIENIECKI, CORPORATE AMERICA AND ENVIRONMENTAL POLICY: HOW OFTEN DOES BUSINESS GET ITS WAY? 133 (2006) (arguing that proposed rules reflect most of the important decisions that agencies make and are likely to contain indicia of business influence); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 693 (2012) (noting “the well-known fact of administrative life that most of the real policymaking in legislative rulemaking occurs well before an agency publishes an NPRM in the *Federal Register*”).

¹³ Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998) (finding that most changes attributable to business influence in the public comment process were minor, technical changes with no clear impact on the overall stringency of the rule); *but see* Haeder & Yackee, *supra* note 10, at 513 n.20 (analyzing the substantive significance of changes to rule texts during review in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and finding that business interests were able to influence OIRA to adopt substantively significant changes at an even later stage than the public comment period).

¹⁴ See 42 U.S.C. §§ 7408-7409 (2016) (prescribing the EPA's duties to promulgate and revise NAAQS for criteria air pollutants).

¹⁵ See U.S. Env'tl. Prot. Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020* (April 2011), available at https://www.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf (estimating the net benefits by 2020 of Clean Air Act regulations, including about 85 percent attributable to the NAAQS alone, at \$2.0 trillion and the costs at \$65 billion).

disproportionate influence, as they tend disproportionately to possess this expertise and information.¹⁶

For these reasons, there is much more that can be gleaned about the nature and impact of business involvement in the regulatory process from examination of the stage of the process where business influence is most likely to be truly formative, consequential, and contrary to the public's interest: the agenda-setting stage of the regulatory process.¹⁷ Looking for evidence of excessive business influence during public comment periods is somewhat like losing one's keys and looking only where the light is good. Business participation and influence at this stage is easy to observe because it is so public, but there is every reason to believe that the potential payoff of business participation at the much less visible agenda-setting stage is greater.¹⁸ If we are looking for an accurate picture of business interests' ability to sway regulators to act contrary to the public interest, and perhaps to effectively control and capture agency decision making, we need to go where the influence is likely to be most pronounced, not where the light happens to be.

In this Article, I aim to do just that by examining in unprecedented depth how business interests attempt to shape agency agendas. Rulemaking petitions, which are specifically provided for by the Administrative Procedure Act (APA),¹⁹ allow any person to request that an agency initiate rulemaking proceedings to change regulatory law, whether by adding new regulatory programs or by amending or rescinding existing ones.²⁰ Rulemaking petitions therefore give business interests the

¹⁶ Cary Coglianese, Richard Zeckhauser, & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 278 (2004) (“Often, the best source of information about the risks of products, the behavior of individuals and firms, the costs of remediation or mitigation, or the feasibility of different technologies will be the very firms that the government regulates.”).

¹⁷ Coglianese & Walters, *supra* note 12 (highlighting the probable importance and paucity of scholarly research on the agenda-setting phase of the regulatory process); Yackee, *Reconsidering Agency Capture*, *supra* note 11, at 299 & n.44 (collecting sources making just this point).

¹⁸ Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 102 (2011) (noting that public participation during public comment periods on proposed rules is likely the “tip of the iceberg in providing avenues for interest groups to inform agencies' rulemaking projects”); Yackee, *Reconsidering Agency Capture*, *supra* note 11, at 309 (reporting results that “imply that studying the politics of the preproposal stage may be just as important as the notice and comment period,” and that “[i]f influence exists—indeed, if agency capture exists—then it may be directed toward stopping unwanted proposals early in the policy formation process”).

¹⁹ 5 U.S.C. § 553(c) (2016).

²⁰ Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking: Final Report to the Administrative Conference of the United States*, ACUS at 21-24 (2014), available at <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%255B11-5-14%255D.pdf>.

means to further “corrosive capture” via deregulatory petitions,²¹ as well as to further “anti-competitive capture” via proposals for new regulatory requirements that disproportionately affect competitors or establish a monopoly by creating barriers to firm entry.²² Moreover, because non-business interests submit petitions as well, almost always to impose additional regulations on business,²³ it is possible to view the ultimate fate of petitions submitted by these other groups as a window into agencies’ propensity to favor business interests by keeping pro-regulatory ideas *off* the agenda.²⁴ In short, rulemaking petitions are a useful lens through which to study business influence in all its varieties at the earliest and most important stages of the regulatory process, and close examination of how rulemaking petitions affect agency agendas thus promises to advance our understanding of business influence on regulation.

The paper proceeds in four parts. Part I grounds the research in the tradition of empirical research examining business participation, influence, and capture. Part II then provides background on rulemaking petitions, highlighting how little is known about the institution. Part III turns attention to an analysis of original data on the complete set of petitions submitted to three federal administrative agencies from 2000 through the early part of 2016. I analyze two key questions using quantitative data collected on the lifecycle of each petition: *Who petitions (and for what)?* and *How often (and how quickly) does the agency listen and respond?* In Part IV, I discuss what these findings mean for our understanding of business influence in the regulatory process. On the whole, the analysis suggests that, while they succeed in petitioning more often by some measures, business interests have something less than a stranglehold on regulators’ agendas. Moreover, most of the success of business interests in petitioning is confined to some of the least troubling kinds of requests—*i.e.*, those from diffuse business interests asking for technical changes to existing regulations to provide regulatory relief or update outdated provisions. I argue that the evidence supports the idea that agencies engage with interest groups with critical distance at the agenda-setting stage, and that the driving force in agency decision making is not the identity or interests of the petitioner, but instead the agencies’ incrementalist, pragmatic orientation toward improving existing regulatory programs.²⁵ Agencies, at

²¹ Carpenter & Moss, *supra* note 3, at 16-18 (describing “corrosive capture” as occurring where “organized firms render regulation less robust than intended in legislation or than what the public interest would recommend”).

²² Daniel Carpenter, *Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 153-54 (Daniel Carpenter and David A. Moss, eds., 2014) (distinguishing “corrosive capture” from a “Stiglerian account of capture” that “predicts that captured regulation will be *stronger* in the sense of imposing more rigid and less permeable entry barriers to the market”). See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976); Gary Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983).

²³ See *infra* Tbl. 1.

²⁴ Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373 (2011).

²⁵ See *infra* Part IV.B.

least those covered here, largely ignore petitions, and especially so when they evince a patina of attempted anti-competitive capture.

I. WHAT IS KNOWN AND WHAT IS NOT KNOWN ABOUT BUSINESS INFLUENCE IN THE REGULATORY PROCESS

There is little question that business interests are extensively involved in American policymaking. Whether viewing from 30,000 feet or from within the weeds of a specific institutional context, empirical studies are more or less unanimous in finding that business interests are active and sophisticated in their participation,²⁶ and that these well-heeled interests often get what they want.²⁷ There are probably innumerable venues in which this business activity is operative, including in campaign spending,²⁸ in lobbying Congress for legislation,²⁹ and in the generation of influential ideas and policy solutions in think tanks,³⁰ but the focus in this paper is on business participation in a more limited domain: the regulatory process, and in particular, rulemaking.

Why focus on the regulatory rulemaking? First, rulemaking is how most law is made—the number of regulations promulgated each year far exceeds the number of laws produced by Congress.³¹ Second, according to a tradition known as “capture theory,” the regulatory process is

²⁶ See, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986); FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY (2009); Benjamin I. Page, Larry M. Bartels, & Jason Seawright, *Democracy and the Preferences of Wealthy Americans*, 11 PERSPECTIVES ON POL. 51 (2013).

²⁷ See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564 (2014); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2016). *But see* Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSPECTIVES ON POL. 1053 (2015) (taking issue with the Gilens & Page study, *supra*); Omar S. Bashir, *Testing Inferences About American Politics: A Review of the ‘Oligarchy’ Result*, 2 RES. & POL. (2015) (same); J. Alexander Branham, Stuart N. Soroka, & Christopher Wlezien, *When Do the Rich Win?*, 132 POL. SCI. Q. 43 (2017) (same).

²⁸ RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (2016).

²⁹ LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE (2015).

³⁰ DANIEL W. DREZNER, THE IDEAS INDUSTRY: HOW PESSIMISTS, PARTISANS, AND PLUTOCRATS ARE TRANSFORMING THE MARKETPLACE OF IDEAS, ch.5 (2017).

³¹ Croley, *supra* note 6, at 14 (“[Agencies’] decisions dwarf those of the other three branches, certainly by volume and arguably by importance as well.”); see generally CORNELIUS KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (2011).

virtually hardwired for pathological business domination.³² The argument stems from the logic of collective action, which posits that those narrow interests with the most to gain or lose will always be more motivated to organize, mobilize, and participate than more diffuse interests with only small stakes in any given policy fight.³³ While regulatory policymaking certainly imparts substantial diffuse aggregate benefits to the public at large,³⁴ it also often imposes substantial concentrated costs of compliance on regulated businesses, making them much more acutely interested and motivated to take countervailing action in the otherwise obscure field of agency rulemaking.³⁵ With these asymmetrical stakes, business interests can generally be expected to invest a great deal of resources in seeking to control, or at least influence, regulatory policy relative to other more unorganized and inattentive public interests. Whatever one thinks about the second-order question about whether business influence in the regulatory process amounts to full-on capture,³⁶ the logic of collective action strongly predicts disproportionate participation and influence by business interests. Regulators, for their part, are thought to be dependent on this participation, which makes this participatory skew likely to manifest in skewed outcomes as well.³⁷

A. Prior Empirical Research on Business Capture in the Regulatory Process

Many students of the regulatory process have examined just this hypothesis, exploiting the fact that publicly visible administrative procedures for rulemaking bring some (but certainly not all) regulatory lobbying by business to the surface. This feature of the administrative process, known as “notice-and-comment rulemaking,” is established by the Administrative Procedure Act (APA),³⁸ and it basically entails requirements that agencies issue a detailed proposal of their planned course of action, allow for a period (usually a few months) of public submission of comments, and then issue

³² Croley, *supra* note 6, at 22 (noting that under accounts of regulatory capture, “[t]he regulatory system advances concentrated interests not accidentally or incidentally, but rather by its very structure and design”). Capture theory is oftentimes treated interchangeably with a somewhat broader research tradition known as “public choice” theory, which basically applies simplistic rational choice economic modeling to government institutions, such as the bureaucracy. For general background on public choice theory in the law, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* (2010); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1999); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *GEO. L.J.* 97 (2000).

³³ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

³⁴ See *supra* note 15 and accompanying text (describing the net benefits of Clean Air Act regulations).

³⁵ JAMES Q. WILSON, *THE POLITICS OF REGULATION* (1980).

³⁶ For an argument that capture is conceptually distinct from, and far less common than, ordinary business influence, see Carpenter & Moss, *supra* note 3.

³⁷ Wagner, Barnes, & Peters, *supra* note 18, at 102 (“Business groups . . . benefit from the agencies’ need for information that only regulated interests can provide.”); Coglianese, Zeckhauser, & Parson, *supra* note 16.

³⁸ 5 U.S.C. § 553 (2016).

a final rule addressing the public feedback.³⁹ Although agencies largely remain free to receive ex parte contacts while engaged in rulemaking,⁴⁰ interested parties have strong incentives to submit written comments between the introduction of a proposed rule and issuance of a final rule.⁴¹ Likewise, after the comment period, agencies must submit the most important rules to the White House Office of Information and Regulatory Affairs (OIRA), which reviews the rules under certain Executive Orders and, importantly, grants and logs any meetings with any interested party that would like to seek changes.⁴² Because at each of these stages it is possible to view rules before and after observable lobbying by business interests, it is possible to test the extent of business influence by documenting the presence of business interests in regulatory processes and linking observed changes to requests made.

On the whole, these studies have revealed striking evidence of business dominance of these procedural opportunities for participation. For instance, in a first-of-its-kind study, Cary Coglianese showed that business interests were both omnipresent and numerically dominant in public comment periods in a sample of important environmental rulemakings from 1989 through 1991.⁴³ Specifically, industry associations commented in 96 percent and individual businesses commented in 80 percent of the rules he examined.⁴⁴ Overall, business interests filed almost 60 percent of the comments submitted.⁴⁵ Several subsequent studies drawing on more diverse samples of agency rulemaking confirm that these findings were not anomalous or specific to the Environmental Protection Agency. For instance, Jason and Susan Yackee find that about 57 percent of comments

³⁹ See Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466 (1991) (discussing the steps involved in notice-and-comment rulemaking, also known as “informal rulemaking”). In reality, there are many steps before, between, and after these bare-bones steps of notice-and-comment rulemaking. Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841, 842 (2017).

⁴⁰ Sidney A. Shapiro, *Two Cheers for HBO: The Problem of the Nonpublic Record*, 54 ADMIN. L. REV. 853 (2002).

⁴¹ Doing so allows one to preserve an issue for possible pre-enforcement challenge of a rulemaking in federal court. Otherwise, courts will likely consider any claims in judicial review nonexhausted. See Wagner, Barnes, & Peters, *supra* note 18, at 116-17.

⁴² These requirements, which have existed since the Reagan administration but have maintained the same basic form since the Clinton administration, require agencies to perform cost-benefit analysis of significant proposed rules and revise rules in response to OIRA’s analysis of those cost-benefit analyses before finalizing them. See generally Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produce a Chilling Effect and ‘OIRA Avoidance’ in the Agencies?*, 43 PRES. STUD. Q. 443 (2013); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821-885 (2003) [hereinafter *White House Review*]; Haeder & Yackee, *supra* note 11.

⁴³ CARY COGLIANESE, *CHALLENGING THE RULES: LITIGATION AND BARGAINING IN THE ADMINISTRATIVE PROCESS* 75 (1994) (unpublished Ph.D. dissertation, University of Michigan).

⁴⁴ Coglianese, *supra* note 43.

⁴⁵ Coglianese, *supra* note 43.

in their sample of rulemakings from across the executive branch came from business interests.⁴⁶ Wendy Wagner and colleagues find that the number is even greater in the context of hazardous air pollutant regulation, amounting to 81 percent of the comments submitted.⁴⁷ Rule review at OIRA is similarly dominated by business interests, with such interests logging well over 50 percent of the meetings in each of the major studies of participation.⁴⁸ These patterns have been confirmed again and again in a variety of stages of the regulatory process.⁴⁹

The empirical evidence is much more mixed, however, when it comes to assessing business influence, defined as an association between participation and policy changes. Some, but certainly not all, studies are able to trace linkages between participation and favorable outcomes, particularly in the case of business interests.⁵⁰ These studies code changes as either increasing or decreasing the stringency of proposed rules, and then show that requests for increases or decreases in stringency in public comments from business interests are associated with such changes.⁵¹ Yet, in many of the studies, it is not clear how significant the changes were as a matter of policy. This is both because large-n studies do not usually attempt to assess comprehensively the policy issues at play and because the change in policy is usually measured relative to a recent iteration of the rulemaking process (for instance, the changes from the proposed rule to the final rule). One might not expect much serious change in these short windows of time, as too significant a change could run afoul of administrative law requirements that final rules be a logical outgrowth of the proposed rule.⁵² Moreover, agencies may sandbag against business influence of this sort by issuing proposed rules that are more stringent than they would even prefer.⁵³ Where the sample has been small enough to assess the policy significance of changes linked to greater participation, researchers have generally concluded that

⁴⁶ Yackee & Yackee, *A Bias Towards Business*, *supra* note 9.

⁴⁷ Wagner, Barnes, & Peters, *supra* note 18.

⁴⁸ Croley, *White House Review*, *supra* note 6; RENA STEINZOR, MICHAEL PATOKA, & JAMES GOODWIN, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMP PROTECTION OF PUBLIC HEALTH, WORKER SAFETY AND THE ENVIRONMENT 5, Ctr. for Progressive Ref. (2011); Haeder & Yackee, *supra* note 11.

⁴⁹ See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) [hereinafter *Citizen Participation*]; Boehmke, Gailmard, & Patty, *supra* note 9.

⁵⁰ Compare Yackee & Yackee, *A Bias Towards Business*, *supra* note 9, with David C. Nixon, Robert M. Howard, & Jeff R. DeWitt, *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59 (2002).

⁵¹ Yackee & Yackee, *A Bias Towards Business* *supra* note 9.

⁵² *Env'tl. Integrity Proj. v. EPA*, 425 F.3d 992, 995-98 (D.C. Cir. 2005) (discussing the logical outgrowth rule).

⁵³ Croley, *supra* note 6.

most changes are insignificant. Often, they are technical in nature, and rarely to do they “alter[] the heart of the proposal.”⁵⁴

B. The Primacy of the Agenda-Setting Stage

In sum, there is extensive evidence that businesses participate at high rates but little evidence that any of this participation is truly consequential. But that may simply reflect the fact that the late stages of the regulatory process that have been the focus of this literature would not be suspected to yield many changes of any kind. In large part because administrative procedures like notice-and-comment rulemaking and OIRA review put significant pressure on agencies to present polished work, agencies have actually pushed almost the entirety of rule development to the pre-proposal stage.⁵⁵ Agencies that do not sufficiently hone and vet their proposal before the issuance of a proposed rule cannot conduct the kind of public comment dialogue that courts expect,⁵⁶ and they also risk vacatur for violating the logical outgrowth rule—a court-imposed requirement that final rules bear some basic resemblance to the proposed rule circulated for comment.⁵⁷ Thus, for most agencies, the agenda-setting stage of the rulemaking process will likely see the weightiest agency decisions being made about the content of the rules.⁵⁸ And where there are weighty decisions being made, the logic of collective action tells us that the groups with the most at stake are not likely to be too far behind.⁵⁹ Consequently, empirical studies of business interest influence in the regulatory process that ignore agenda-setting are likely to miss much of the action. Indeed, political scientists interested in political power have long cautioned against ignoring the “second face of power”—the decision *not* to take on a particular agenda item from among the universe of possible agenda items—precisely because these kinds of decisions open opportunities for disproportionate influence on policymaking.⁶⁰

⁵⁴ Golden, *supra* note 9, at 259 (finding that only one rule in her sample saw notable substantive changes between proposal and finalization; William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. 66, 73 (2004) [hereinafter *Institutional Policy Analysis*] (finding a majority of rules in his sample did not change substantially between proposal and finalization)).

⁵⁵ West, *Institutional Policy Analysis*, *supra* note 54, at 68; Murphy, *supra* note 12.

⁵⁶ *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249-53 (2d. Cir. 1977).

⁵⁷ William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 580 (2009) [hereinafter *Black Box*]; Murphy, *supra* note 12, at 685.

⁵⁸ Coglianesse & Walters, *supra* note 12.

⁵⁹ Wagner, Barnes, & Peters, *supra* note 18, at 111 (arguing that “[i]ndustry enjoys a particularly privileged position in the development of rules”); West, *Black Box*, *supra* note 57, at 589.

⁶⁰ Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962); Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963);

To be sure, research on business influence has not entirely ignored the agenda-setting and pre-proposal stages of the regulatory process. Taking advantage of the fact that agencies sometimes issue so-called advanced notices of proposed rulemaking (ANPRM) and accept open-ended comments when they are considering a particular agenda item, Susan Yackee and colleagues have shown that businesses are not only frequently involved in reinforcing agencies' inclination to act, but also exercise influence by engaging in agenda-blocking.⁶¹ Similarly, Wendy Wagner, Katherine Barnes, and Lisa Peters show that regulated business submitted "at least 170 times more informal communications . . . during the pre-NPRM stage than public interest groups" in a sample of EPA's hazardous air pollutant rulemakings.⁶² However, because in both these studies regulated entities knew proposed rules were coming because of the ANPRM or because a statutory deadline required the rulemaking, these studies do not explain how interest groups may have influenced the agency to act in the first place.

Going one step further, William West and Connor Raso probe the earliest stages of agenda-setting by sampling finalized agency rules and then tracing them to their origins.⁶³ West and Raso find that about half of these rules emerged from the informal interaction of government officials and business interests within the context of existing programs, and that they were most often demonstrably nonconsequential efforts to update or correct rules based on feedback and experience in implementation.⁶⁴ The remaining rules were nondiscretionary—*i.e.*, compelled by statute or court order, and thus only loosely the product of lobbying.⁶⁵ A more recent study by Wendy Wagner and colleagues likewise uncovers a rich tapestry of "incrementalist" adaptations of existing rules encouraged by business interests and other groups.⁶⁶ These studies suggest that the bulk of business influence at the agenda-setting stage is collaborative, and the workaday rule amendments that result are presumably not far from the public interest in keeping regulatory programs working.⁶⁷

Of course, even these latter two studies examine only one side of the equation. In each instance, the sample is drawn from instances of successful lobbying; unsuccessful attempts by business interests to shape the agenda were not observed. More informative would be study of discrete instances where agencies are presented with a choice to add an item to their agenda and

⁶¹ Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373 (2011); Keith Naughton et al., *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258 (2009).

⁶² Wagner, Barnes, & Peters, *supra* note 18, at 125.

⁶³ William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495 (2012).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017).

⁶⁷ Coglianese & Walters, *supra* note 12.

make decisions that either do or do not benefit business interests. In the next part I explain why rulemaking petitions capture these scenarios and why examining them can advance the study of business influence.

II. RULEMAKING PETITIONS: NUTS AND BOLTS

The right to petition the government is older than the Constitution itself, and it has always offered its users the promise of political influence.⁶⁸ One way petitions offer the promise of influence is through the meta-politics of petitioning. In the antebellum Republic, for instance, women anti-slavery activists used petitions to Congress to build powerful political coalitions that would later support the women's suffrage movement.⁶⁹ Even though such petitioning has rarely led to any concrete action from the target of the petition, the opportunity to network has touched off social movements, party building, and state building.⁷⁰ But petitions can also be efficacious in a more narrow, legal sense. As some constitutional scholars have noted, petitions invoke a regularized process and afford some semblance of due process to the petitioner, effectively making them a protector of minoritarian rights.⁷¹ When that process is ignored, petitioners have more recourse than they otherwise would have to force an institutional response.

It is this latter kind of “legal” influence that most applies to petitioning in the regulatory process.⁷² The APA provides that any “interested person” can file a petition with an agency and

⁶⁸ Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142 (2016) [hereinafter *Lobbying and the Petition Clause*] (characterizing 2015 as the “eighth hundredth anniversary of the right to petition” because its roots go back at least to Magna Charta); Schwartz & Revesz, *supra* note 20, at 7 (tracing the First Amendment right to “petition the Government for a redress of grievances” to “frustration over the repeated denial of the colonists’ petitions sent to their government in England”); Jonathan Weinberg, *The Right to be Taken Seriously*, 67 U. MIAMI L. REV. 149, 192-95 (2002).

⁶⁹ Daniel Carpenter & Colin D. Moore, *When Canvassers Became Activists: Antislavery Petitioning and the Political Mobilization of American Women*, 108 AM. POL. SCI. REV. 479 (2014).

⁷⁰ See generally Clayton Nall, Benjamin Schneer, & Daniel Carpenter, *Paths of Recruitment: Rational Social Prospecting in Petition Canvassing*, AM. J. POL. SCI. (2017); Daniel Carpenter, *Recruitment by Petition: American Antislavery, French Protestantism, English Suppression*, 14 PERSPECTIVES ON POL. 700 (2016); Daniel Carpenter & Benjamin Schneer, *Party Formation through Petitions: The Whigs and the Bank War of 1832-1834*, 29 STUDS. IN AM. POL. DEVELOPMENT 213 (2015); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. __ (2018, forthcoming).

⁷¹ McKinley, *Lobbying and the Petition Clause*, *supra* note 68, at 1184-85 (discussing how the historical petition right, as enshrined in the First Amendment to the U.S. Constitution, had “more in common with the right to procedural due process than it [did] with free speech,” and how the “petition right preserved only the procedures of acceptance, consideration, and response for each petition without respect to the political power of the petitioner”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1155 (1991).

⁷² To be sure, the recent trend toward “mass commenting” campaigns in notice-and-comment rulemaking closely resembles the kind of meta-political petitioning campaigns that Carpenter and others have documented in earlier eras. For instance, in its rulemaking proceeding to rescind net neutrality regulations,

request “issuance, amendment, or repeal of a rule.”⁷³ Petitions may mirror the informal, *ex parte* contacts that generate so much of the incrementalist activity documented above—indeed, the APA’s definition of a petition may technically extend to such oral contacts⁷⁴—but once a petition is defined as such, it triggers obligations on the part of the agency to respond.⁷⁵ The APA spells out the duty in unequivocal terms: “Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.”⁷⁶ Section 555(e) of the APA prevents agencies from simply sitting on petitions without making a decision by providing that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.”⁷⁷ Agency rules often also spell out additional procedures for the processing of petitions, including tight deadlines for responses and requirements that certain information be included with the petition.⁷⁸

The principal advantage of filing a petition rather than informally lobbying an agency is just this procedural formality. Because of this formality, petitioners have a legal recourse when their petition is ignored. When an agency fails to respond sufficiently quickly or thoroughly, the petitioner may

the Federal Communications Commission (FCC) received over 20 million comments, most urging the agency to keep the regulations. See Brian Naylor, *As FCC Prepares Net-Neutrality Vote, Study Finds Millions of Fake Comments*, NPR (Dec. 14, 2017), available at <https://www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments>. Under the standard administrative law understanding, the vast majority of these mass comments required no response from the FCC, and they are decidedly not treated as “petitions.” See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2010) (discussing the mass comment phenomenon, outlining the consensus view, and offering a slightly heterodox take on the importance of agency responses to mass comments). I am aware of no study that examines whether participation in mass comment campaigns leads to a similar kind of political mobilization as occurred with petitions to Congress in early American history, but it is an interesting question worthy of research.

⁷³ 5 U.S.C. § 553(c) (2016).

⁷⁴ Schwartz & Revesz, *supra* note 20, at 24-25.

⁷⁵ Schwartz & Revesz, *supra* note 20, at 11-13. There are many lingering unanswered questions about what constitutes a petition. *Id.* at 24-25. As mentioned above, courts have not treated public comments as petitions for the purposes of enforcing procedural norms in notice-and-comment rulemaking, but in some instances agencies read comments as petitions, siphoning off a request for changes to the scope of a rulemaking and promising to deal with it separately.

⁷⁶ 5 U.S.C. § 555(e) (2016).

⁷⁷ 5 U.S.C. § 555(b) (2016).

⁷⁸ Schwartz & Revesz, *supra* note 20, at 31-32 (reviewing agency-imposed procedures governing appropriate petitioners, what constitutes a “grant,” deadlines for agency responses, tiers or stages of review, and decision criteria).

sue to force a response.⁷⁹ For instance, in a recent decision the U.S. Court of Appeals for the Ninth Circuit held that the U.S. Environmental Protection Agency (EPA) had to respond to a petition submitted by the Natural Resources Defense Council requesting a ban of the pesticide chlorpyrifos, which has been linked to brain damage in children.⁸⁰ According to the court, the EPA's nearly nine-year delay in deciding on the petition was "egregious and warrant[ed] mandamus relief."⁸¹ Moreover, if there is denial of the petition, what would otherwise have been a "simple nondecision[]," which courts generally lack jurisdiction to review, becomes a "decision[] not to decide," which is presumptively reviewable.⁸² Lingering legal uncertainties about whether denials of petitions for rulemaking are final agency actions were definitively resolved in *Massachusetts v. EPA*.⁸³ There, EPA's rejection of a rulemaking petition requesting that the agency take action to curb greenhouse gas emissions from automobile sources eventually resulted in the U.S. Supreme Court ordering EPA to either ground its petition denial in factors recognized by the statute or grant the petition—and EPA chose the latter on remand. Although the Court emphasized that the level of deference given to petition denials may be greater than it is under ordinary arbitrary and capricious review,⁸⁴ the

⁷⁹ The APA gives courts the power to review agency actions unreasonably delayed. See *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC") (applying a multi-factor test for determining whether there was an unreasonable delay of legally required agency action). In effect, courts treat this TRAC factor analysis under the APA as synonymous with the writ of mandamus, see *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) ("Although the exact interplay between [mandamus and APA relief] has not been thoroughly examined by the courts, the Supreme Court has construed a claim seeking mandamus under the MVA, 'in essence,' as one for relief under § 706 of the APA." (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986))). To be sure, this is generally a difficult hurdle for plaintiffs to jump: courts have always treated mandamus as a "drastic and extraordinary remedy reserved for really extraordinary cases." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citing *Ex Parte Fahey*, 332 U.S. 258, 259-260 (1947)) (internal quotations omitted).

⁸⁰ *In re Pesticide Action Network North America v. EPA*, 798 F.3d 809, 811 (9th Cir. 2015).

⁸¹ *Id.*

⁸² Cass R. Sunstein & Adrian Vermeule, *The Law of Not Now: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 159 n.2 (2014); see also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 672 (1985) (noting that inaction is less reviewable when it involves mere delay, rather than a "decision not to act").

⁸³ *Massachusetts v. EPA*, 549 U.S. 527 (2007) (holding that "[r]efusals to promulgate rules are ... susceptible to judicial review" because, "in contrast to nonenforcement decisions," which are presumed unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985), "agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'" (quoting *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987)); see also *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002). For a discussion of how rulemaking petitions render different kinds of traditionally unreviewable agency actions reviewable, see generally Sean Croston, *The Petition is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles Over "Regulation Through Guidance"*, 63 ADMIN. L. REV. 381 (2011).

⁸⁴ See *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007).

decision speaks for itself in terms of the power of judicial review to force agencies to respond to petitions with a meaningful, tailored response. In sum, courts stand at the ready to review agency decisions regarding rulemaking petitions, which means rulemaking petitions can be a powerful tool to influence agenda-setting.

Although it is easy enough to point to major rulemakings that began with petitions,⁸⁵ such as the EPA's regulations of carbon emissions, we know practically nothing about how rulemaking petitions work in practice. Indeed, "[t]here is scant empirical evidence on the number of petitions received and how they are ultimately disposed,"⁸⁶ and "[l]ittle is known about stakeholder and agency practices with respect to submitting and addressing petitions."⁸⁷ That has begun to change, however, with a number of studies suggesting that petitions are quite often an effective means of influencing agency agendas. Michael Livermore and Richard Revesz first brought valuable attention to the potential functions of petitions in their work on Clean Air Act petitions submitted to EPA.⁸⁸ Wendy Wagner and colleagues, in their study of rule revisions, showed the more general reach of petitions, identifying informal interest group pressure and rulemaking petitions as the second and third most frequent sources of rule revisions ahead of court orders, congressional action, and presidential requests.⁸⁹ Most of the lobbying and petitions came from "regulated industries" with the greatest "incentives to keep agency rules operating properly."⁹⁰ Eric Biber and Berry Brosi study the

⁸⁵ A common view among administrative law scholars, fed by readily available examples of petition-initiated regulatory proposals, is that petitions can be a vehicle for public interest groups to check agency inaction and prevent capture. See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2012); Croley, *supra* note 6, at 259-60 (discussing a rulemaking petition to regulate tobacco that "showed agency responsiveness to public interest advocates acting through the administrative process rules to affect . . . agencies' agendas"). The quantitative look that I provide in Part III, *infra*, will allow some evaluation of this widespread triumphalist assumption about how petitions work in practice.

⁸⁶ CORNELIUS KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 78-79 (2011).

⁸⁷ Steven J. Balla & Susan E. Dudley, *Stakeholder Participation in Regulatory Policymaking in the United States*, OECD (Oct. 2014). While one Senate report found that petitions "submitted by representatives of those outside a regulatory industry approximated or exceeded petitions submitted by regulated industries," see Croley, *supra* note 6, at 260 n.2 (citing Study of Federal Regulation, vol. 3: Public Participation in Regulatory Agency Proceedings 14-15), there has been little detailed work on patterns of petitioning.

⁸⁸ Livermore & Revesz, *supra* note 85.

⁸⁹ Wagner et al., *supra* note 18, at 218 fg. 7.

⁹⁰ Wagner et al., *supra* note 66, at 226. If this focus on technical adaptation is a common feature of petitions, Reeve Bull's suggestion that rulemaking petitions could serve as a useful structuring device for retrospective rulemaking (*i.e.*, reviewing existing rules and making adjustments or rescinding outdated regulations) makes a good deal of sense. See Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. (2015).

somewhat specialized petitions process for Endangered Species Act listing decisions, finding that citizen petitions relay critical information to the U.S. Fish and Wildlife Service as it makes decisions affecting wildlife.⁹¹ David Nixon provides the most in-depth look at petitioning to date in his examination of rulemaking petitions filed at the Federal Communications Commission, where about half of all rulemakings originate with a granted rulemaking petition.⁹² Relevant to discussions of business influence and capture, Nixon found that “[i]nstitutionalized players clearly enjoy advantages in getting the Commission to accept their proposals for policy change.”⁹³ However, Nixon’s research does not trace the fate of granted petitions after the agency’s decision, nor it does it attempt to evaluate the policy significance or the general content of the petitions that were granted.

These studies show a growing appreciation of the importance of rulemaking petitions in agency agenda-setting, but important questions remain about whether petitions facilitate excessive or inappropriate business interest influence.

III. PETITIONS AND BUSINESS INTERESTS: A QUANTITATIVE LOOK

In this Part, I analyze an original dataset comprising the lifecycle of rulemaking petitions submitted to three different agencies: the U.S. Consumer Product Safety Commission (CPSC), the Food Safety & Inspection Service (FSIS) in the U.S. Department of Agriculture, and the National Highway Traffic Safety Administration (NHTSA) in the U.S. Department of Transportation. I selected the agencies because they are high-volume rulemaking agencies, because data on rulemaking petitions⁹⁴ received by the agencies are available or reasonably accessible for a period of time encompassing multiple presidencies and configurations of power in Congress,⁹⁵ and because they are representative of the diversity of relevant characteristics across the regulatory state.⁹⁶ On this last point, the agencies vary on whether they are independent agencies or executive agencies, and they

⁹¹ Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321 (2010).

⁹² David C. Nixon, *Setting the Agenda for Federal Agencies: Rulemaking Petitions at the FCC*, 23 JUSTICE SYS. J. 1 (2017).

⁹³ Nixon, *supra* note 92, at 251.

⁹⁴ My focus is entirely on general rulemaking petitions. Agencies routinely accept other kinds of petitions, such as petitions for waivers from generally applicable regulations, but much as rulemaking is the most important way that agencies set policy, rulemaking petitions are the most important kind of petitions. See Schwartz & Revesz, *supra* note 20.

⁹⁵ Although *regulations.gov* is, in theory, a central electronic docketing system for all agency activities, including petitions received, it is in practice usually incomplete. An exception is NHTSA, which posted almost all petitions it received on *regulations.gov* (the remainder were discovered through systemic searches of the *Federal Register*). For CPSC and FSIS, the bulk of the submitted petitions were docketed on agency websites, although some missing information required a trip to FSIS’s physical docket room in Washington, D.C.

⁹⁶ DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012).

also differ in their ideological leaning, at least by the estimation of Clinton-Lewis scores.⁹⁷ The dataset covers all petitions submitted to these three agencies between 2000 and most of 2016—a total of 290 petitions. While full records from start to decision were available for 175 of these petitions, 115 of the petitions were right censored (*i.e.*, did not receive a response from the agency during the period of observation, and we cannot be sure whether this is because the study ended before a response could issue or because the petition was constructively denied by nonresponse). We can observe essential characteristics of these petitions, as well as the fact of nonresponse, but in many cases we cannot know what the agency thought of the petition because it never weighed in.

These technical considerations aside, there are three frames through which to analyze petitioning and the relative influence of business interests: these are 1) the characteristics of petitions and the timing of submission; 2) the outcomes of petitioning; and 3) the timing of outcomes. The data allow analysis within each of these frames. First, by reading each petition or the description of the petition offered by the agency, it was possible to content code petitions on a number of dimensions, including what type of party submitted the petition, whether they sought a pro-regulatory or de-regulatory change, whether the change sought was substantive or technical, and whether the petition asked for an entirely new regulation or sought to amend an existing regulation. I made these content-based coding determinations myself, and I validated this coding by giving a research assistant a random sample of petitions to code and computing inter-coder reliability statistics.⁹⁸ Second, data on dispositions at several stages of the petitioning process were collected, including whether the agency ever responded at all to the petition, whether it granted the petition, and whether it finalized a rule stemming from the grant.⁹⁹ Finally, the data note the dates associated with each major stage of petition processing,¹⁰⁰ which makes it possible to examine the ways the

⁹⁷ See Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3 (2007). On these scores, which rely on expert evaluation of agency ideological leanings to generate a scaled ideology estimate, the CPSC scored -1.69 (very liberal), FSIS scored .07 (moderately conservative), and NHTSA scored .16 (more conservative).

⁹⁸ Each of the variables fell well within the range of acceptable agreement for inter-coder reliability, with results ranging from “moderate agreement” (*de-regulatory petition* had an agreement rate of 82.5 percent and Cohen’s kappa score of .548) to “almost perfect agreement” (petitioner type had an agreement rate of 87.5 percent and a Cohen’s kappa score of .835). See Anthony J. Viera & Joanne M. Garrett, *Understanding Interobserver Agreement: The Kappa Statistic*, 37 FAMILY MEDICINE 360, 362 (2005).

⁹⁹ For FSIS, the agency’s final response was usually included on the website where petitions were collected. For CPSC and NHTSA, I usually had to do structured searches of the *Federal Register* to log final responses. I searched for a petition number (if applicable), party names, and key petition terms for any *Federal Register* log of activity related to each petition identified. This painstaking process was aided by the fact that NHTSA and CPSC were relatively consistent in how they formatted responses to petitions. Of course, there remains some chance that these searches missed some responses, but most should be accounted for. The difficulty of tracking down these records underscores the need for more systematic docketing activities for petitions. See Schwartz & Revesz, *supra* note 20.

¹⁰⁰ Two petitions did not have a date of submission, making these observations drop from the analysis involving agency response times.

agencies manage their petition dockets over time and to assess any disparities in the processing time for petitions.

A. Characteristics and Trends of Business Participation

The content coding of petitions yielded important information about the aggregate patterns of petitioning—what kinds of groups participated, to what degree they participated, and what they asked for when they participated. Of course, for the purposes of this Article, the most relevant information concerns business interests' patterns of involvement. Fully 170 of the 290 petitions in the data (58.62 percent) were filed by business interests, a category comprising both single business corporations, such as the Ford Motor Company or Tyson Foods, and industry associations, such as the American Trucking Association or American Association of Meat Processors. However, although business interests numerically dominate the petition process, the data reveal that business interests are far from monolithic, with diffuse business interests (industry associations) pursuing notably different strategies than discrete business interests (single businesses).

1. Static Characteristics

As a first cut, Table 1 breaks out the count of petitions by the basic petitioner types and the petition type. Business interests (combining both industry associations and single businesses) are far more likely to seek deregulatory changes, technical changes, and derivative changes to existing text than are non-business interests. The profile is clear: the modal petition submitted by a business interest is a narrow request to amend existing regulations by eliminating or softening certain requirements. For example, in April 2007, the Alliance of Automobile Manufacturers (AAM)—an industry association representing BMW, DaimlerChrysler, Ford Motor Company, General Motors, Toyota, and Volkswagen at the time—petitioned NHTSA to amend a list of approved Child Restraint Systems (CRS).¹⁰¹ AAM aimed to fix a specific problem that had emerged because NHTSA had not kept up to date the list of approved CRS systems for safety testing, as it had promised when its advanced airbag rule had initially been promulgated. The list was populated with CRS systems that were no longer even in production, making it “impossible for vehicle manufacturers to acquire the CRSs that are needed to conduct certification tests to assure compliance with the requirements of the standard.”¹⁰² AAM's proposed solution called for NHTSA to “allow manufacturers the option of certifying vehicles to any edition of [the list] for five model years after the edition first becomes effective,” in effect giving manufacturers more flexibility to comply using a variety of standards.¹⁰³

¹⁰¹ Alliance of Automobile Manufacturers, Petition for Rulemaking to Amend FMVSS No. 208 with Respect to Testing with Child Restraint Systems, at 1 (Apr. 27, 2007), available at <https://www.regulations.gov/document?D=NHTSA-2007-27027-0012>.

¹⁰² *Id.* at 4.

¹⁰³ *Id.* at 6.

As Table 1 shows, it is somewhat atypical for business interests to seek pro-regulatory, substantive, and original proposals, but such petitions do exist. Consider the National Chicken Council's petition to FSIS requesting that the agency "adopt regulations establishing labeling requirements for not-ready-to-eat (NRTE) stuffed chicken breast products that may appear ready-to-eat (RTE)."¹⁰⁴ As the National Chicken Council explained, it was "becoming increasingly aware that some consumers may not know how to properly recognize and prepare NRTE stuffed chicken breast products that may appear RTE."¹⁰⁵ Perhaps as a means of protecting itself from liability or preemptively protecting the industry's reputation against bad apples, the Council saw more regulation of labeling as needed and sought to have that codified as a new section in the Code of Federal Regulations.

TABLE 1: CHARACTERISTICS OF PETITIONS BY PETITIONER TYPE

	Deregulatory	Regulatory	Technical	Substantive	Derivative	Original
<i>Individual</i>	12 (29.27)	29 (70.73)	8 (19.51)	33 (80.49)	25 (60.98)	16 (39.02)
<i>Public Interest</i>	5 (6.41)	73 (93.59)	5 (6.41)	73 (93.59)	30 (38.46)	48 (61.54)
<i>Single Business</i>	55 (56.12)	43 (43.88)	50 (51.02)	48 (48.98)	80 (81.63)	18 (18.37)
<i>Industry Ass'n</i>	42 (58.33)	30 (41.67)	33 (45.83)	39 (54.17)	61 (84.72)	11 (15.28)
<i>Non-Business</i>	18 (15.00)	102 (85.00)	13 (10.83)	107 (89.17)	56 (46.67)	64 (53.33)
<i>Business Interest</i>	97 (57.06)	73 (42.94)	83 (48.82)	87 (51.18)	141 (82.94)	29 (17.06)
<i>Total</i>	114 (39.45)	175 (60.55)	96 (33.22)	193 (66.78)	196 (67.82)	93 (32.18)

While business interests writ large do appear to share some general inclinations toward deregulatory and derivative petitions, there are important differences between single businesses (which are more discrete interests with potentially more to gain through a strategy of anti-competitive capture) and industry associations (which are more diffuse interests representing a host of businesses in competition with one another). Compared with single businesses, industry associations are marginally more likely to seek substantive changes and deregulatory changes, and more likely as well to target existing rules for amendment rather than proposing new programs. Table 2 focuses on just the category of single businesses, showing notable differences in strategy depending on firm characteristics. Large firms, defined by inclusion on either the Fortune 500 or the Global Fortune 500,¹⁰⁶ or both, were significantly more likely to seek pro-regulatory changes and technical changes, and marginally more likely to propose original programs. Consider, for example, a petition

¹⁰⁴ National Chicken Council, Petition to Establish Regulations for the Labeling and Validated Cooking Instructions for Not-Ready-to-Eat Stuffed Chicken Breast Products That Appear Ready-to-Eat, at 1 (May 24, 2016), available at <https://www.fsis.usda.gov/wps/wcm/connect/e63c4755-2965-4872-b834-fcd798f58488/16-03-National-Chicken-Council.pdf?MOD=AJPERES>.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ Coding was based on the lists published in 2017. See FORTUNE 500, <http://fortune.com/fortune500/> (last accessed Jan. 19, 2018); GLOBAL FORTUNE 500, <http://fortune.com/global500/> (last accessed Jan. 19, 2018).

submitted by General Motors NA—number eight on the Fortune 500 and number 18 on the Global Fortune 500—requesting that NHTSA “require the installation of daytime running lamps (DRLs) on passenger cars, multipurpose passenger vehicles, trucks and buses that have a gross vehicle weight rating under 4,536 kilograms.”¹⁰⁷ Somewhat similarly, petitions submitted by repeat players, defined as petitioners who submitted at least one other petition during the period of study, were more likely to be pro-regulatory and technical, but were also more likely to be derivative in the sense of toying with existing rule text.

TABLE 2: CHARACTERISTICS OF SINGLE BUSINESS PETITIONS BY BUSINESS CHARACTERISTICS

	Deregulatory	Regulatory	Technical	Substantive	Derivative	Original
<i>Fortune</i>	12 (48.00)	13 (52.00)	15 (60.00)	10 (40.00)	20 (80.00)	5 (20.00)
<i>Small Bus.</i>	43 (59.72)	29 (40.28)	35 (48.61)	37 (51.39)	59 (81.94)	13 (18.06)
<i>RepeatPlay</i>	37 (52.11)	34 (47.89)	41 (57.75)	30 (42.25)	61 (85.92)	10 (14.08)
<i>OneShot</i>	59 (60.20)	39 (39.80)	41 (41.84)	57 (58.16)	79 (80.61)	19 (19.39)
<i>Total</i>	55 (56.70)	42 (43.30)	50 (51.55)	47 (48.45)	79 (81.44)	18 (18.56)

Together, these patterns may suggest that the biggest business players may use petitions to impose regulatory barriers to entry, whereas the smaller business players tend to seek regulatory relief. At the very least, the findings demonstrate that there is no one-size-fits-all approach to business participation in rulemaking petitions. Business interests seek a wide variety of regulatory actions.

2. Submission Patterns

The data also allow some treatment of the patterns of petitioning over time, given that the sample comprises petitions submitted over a 16-year period encompassing three presidential administrations. As Figure 1 demonstrates, one of the most striking overall trends is a generally steady decline in petitioning activity over this time period. Since this time period mostly corresponds to the shift from a Republican President (George W. Bush) to a Democratic President (Barack Obama), one possible explanation is that petitioners see more opportunity in a Republican administration than in a Democratic administration. This opportunity might look different depending on what the petitioning group wants—public interest groups may see petitions as a way to set up litigation to force agency action, and business groups may see either an administration receptive to requests for regulatory relief or an administration that may not have as many qualms with facilitating anti-competitive capture by powerful economic interests. But the trend is unmistakable. And it stands to reason: if Democratic administrations are, on balance, more proactive with respect to regulation, there would be less potential agenda space to be filled by petitioning, and therefore less potential payoff for using the device.

¹⁰⁷ General Motors NA, Daytime Running Lamps, at 1 (Dec. 20, 2001), available at <https://www.regulations.gov/document?D=NHTSA-2001-8876-0011>.

FIGURE 1: NUMBER OF PETITIONS SUBMITTED BY YEAR, 2000-2016

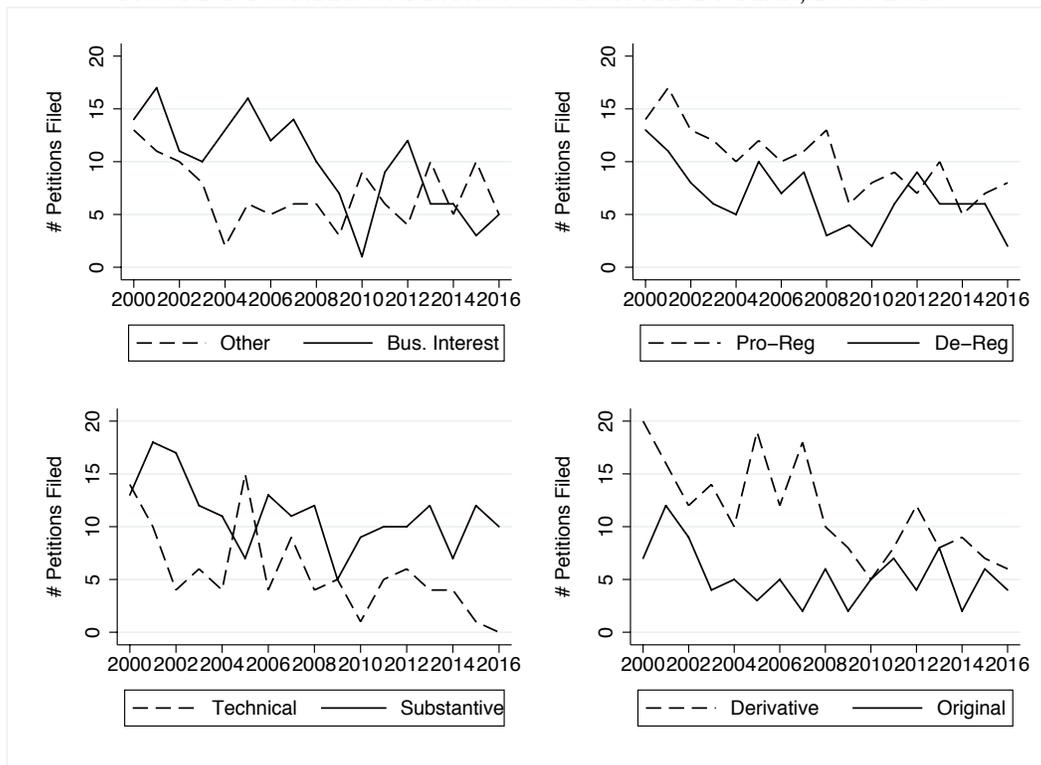


Figure 1 also reveals some notable trends with regard to petition characteristics. Most apparent are the sizeable differences in the trends of business interest participation versus non-business interest participation, on the one hand, and of original versus derivative petitions on the other. In both instances, a disproportionate amount of the general surge of petitions during the George W. Bush Administration comes from business interests and is derivative (*i.e.*, seeks changes to existing text rather than proposing wholly new programs). The trends for the opposites of these categories (*i.e.*, non-business interest petitions and original petitions) are relatively static over the entire 16-year period. Compare this to de-regulatory and pro-regulatory petitions, which were filed at about the same rate over time, although that base rate itself changed.

B. Distribution of Outcomes

The second frame through which to view petitioning activity concerns outcomes. Although there may be some symbolic petitioning,¹⁰⁸ on the whole it is fair to assume that when a party submits a petition, a major goal is to have the agency grant that petition and begin a rulemaking responsive to the request. In the aggregate, only 60.34 percent (n=175) of petitions in the data received a response during the course of the study, and of these, only 63 were granted. This translates to a 36

¹⁰⁸ Again, historical work on petitions in Congress suggests that coalition building and political mobilization was a major purpose of petitioning, *see supra* notes 69-70 and accompanying text, and there is no reason to think that this purpose has faded away in the context of rulemaking petitions. Interest groups frequently publicize petitions.

percent chance of a grant, conditional on actually receiving a response (and merely a 21.72 percent chance of a grant *ex ante*). Clearly, petitioning most often does not achieve even the most basic goals of the petitioner.

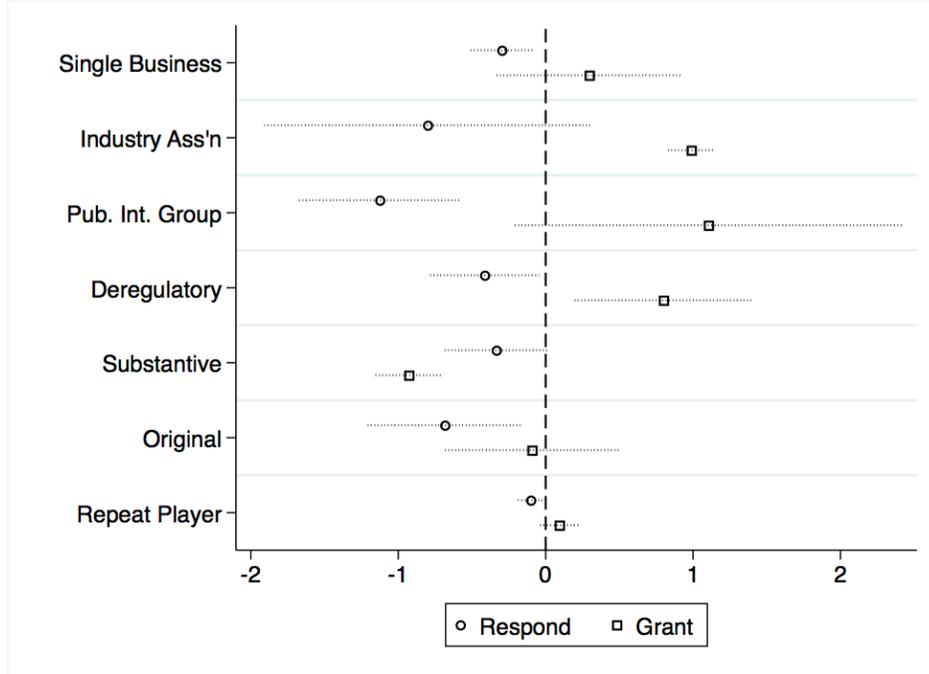
When it comes to competition across petitioner type for these few grants, however, the evidence suggests the playing field is not entirely level. Figure 2 displays the results of two separate logistic regressions of the basic determinants of agencies' decisions to respond to and grant petitions.¹⁰⁹ The results suggest two basic—and somewhat contradictory—biases in the decisions agencies make about petitions. First, in terms of responding to petitions (and, for the moment, ignoring the substance of the disposition), agencies favor relatively discrete interests, such as individuals and single businesses. In terms of marginal probabilities, individual petitioners have well over a 70 percent chance of hearing back from the agency when they petition, whereas public interest groups have less than a 50 percent chance. Single businesses also fare better on average than industry associations, although that difference is not statistically significant. Second, the bias shifts toward relatively diffuse interests when it comes to the ultimate decision to grant a petition. Whereas individuals were the most successful parties in terms of garnering an agency response to their petitions, they have far less success with grants, with only a 20 percent chance of a grant compared to a 52 percent chance of a grant for industry associations. Industry associations' 52.4 percent chance of a grant is higher than single businesses' 33.8 percent chance (the difference is statistically significant at the $p=.017$ level). And while public interest groups had an estimated 34.3 percent chance of a grant, the 95 percent confidence interval extends as high as 59.1 percent. On the whole, the most diffuse interests (both business-oriented and public-oriented) have the upper hand in terms of actually receiving a grant, even as more discrete interests are more likely to have their “day in court.”¹¹⁰

As discussed in Part III.A, business interests are hardly monolithic in terms of the substantive changes they seek by petitioning, and as Figure 3 demonstrates, there are measurable differences in the kinds of business requests that are likely to sway agencies. The results are from six logistic regressions: one for single businesses, one for industry associations, and one for public interest

¹⁰⁹ I also estimated these models as a Heckman selection model, *see* Francis Vella, *Estimating Models with Sample Selection Bias: A Survey*, 33 J. HUM. RES. 127 (1998), but the results were substantively similar and diagnostics suggested there was no need to specify a selection model (*i.e.*, the factors that determine responsiveness *per se* are substantively different from the factors that determine grants). This means there is no real risk that agency tendencies in the response stage are statistically biasing the estimates of the factors that determine grants.

¹¹⁰ It is worth pausing to note the importance of the fact that agencies generally do individual petitioners the courtesy of officially responding even when they decline to act on a petitioner's request. That is, the data suggest agencies take “the right to be taken seriously” seriously. Weinberg, *supra* note 68. Social psychological research suggests that, when it comes to the factors that shape citizens' perceptions of government, showing that the government is listening is more important than giving citizens the outcomes they desire. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988). The agencies in this study deserve some credit for their special responsiveness to the least powerful players in the process.

FIGURE 2: EFFECTS OF PETITIONER TYPE ON PETITION RESPONSES AND GRANTS



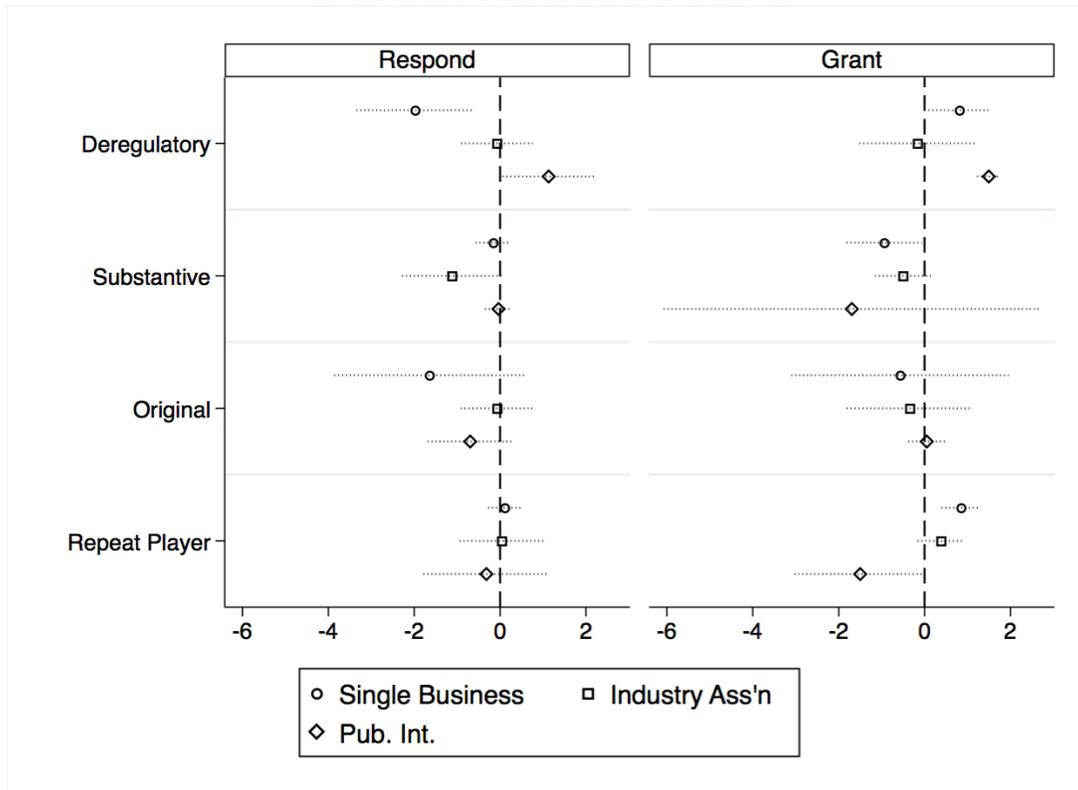
Notes: Labels represent the point estimates of logistic regressions with response and grant conditional on response as dependent variables. Whiskers represent 95 percent confidence intervals. In each regression, robust standard errors are clustered at the agency level. For the logistic regression of responses, the total observations were 288 and the pseudo R2 was .0556. For the logistic regression of grants conditional on response, the total observations were 175 and the pseudo R2 was .1012. Petitions submitted by individuals serve as the reference group, or baseline, for *Petitioner Type*.

groups, all for the two critical decisions to respond to and grant petitions.¹¹¹ For responses, the important factors are whether the petition seeks a deregulatory and/or a substantive change. On the whole, pro-regulatory petitions and technical petitions are more likely to generate responses. Interestingly, whether the petitioner is a repeat player is not a significant factor. For grants (conditional on receiving a response at all), technical petitions are similarly favored. However, there are two important shifts in emphasis at this threshold. First, familiarity with the petitioner becomes an extremely important factor, at least for single businesses. A petition submitted by a single business that filed at least one other petition improved the chances of a grant from 27.1 percent to 44.4 percent. Second, whereas pro-regulatory petitions submitted by single businesses fared far better in terms of garnering a response of some kind, once a deregulatory petition receives a response, it is actually far more likely to be granted than a pro-regulatory petition. The probability of a grant jumps from 25.5 percent to 41.5 percent, holding all else constant.

¹¹¹ Again, running these models as a Heckman selection model made no substantive difference. See *supra* note 109 and accompanying text.

What can these results say about business influence and capture via petitions? On the level of influence, business interests clearly hold an advantage, with business interests on the whole having a 40.9 percent chance of a petition grant compared with a 27.7 percent chance for non-business

FIGURE 3: EFFECT OF INTERACTIONS BETWEEN PETITIONER TYPE AND PETITION CHARACTERISTICS ON PETITION RESPONSES AND GRANTS



Notes: Labels represent the point estimates of logistic regressions with response and grant conditional on response as dependent variables. Whiskers represent 95 percent confidence intervals. In each regression, robust standard errors are clustered at the agency level. For the response models, the observations and model fit were as follows for each group: single businesses (n=97, pseudo R2=.0801); industry association (n=72, pseudo R2=.0544); and public interest group (n=78, pseudo R2=.0427). For the grant conditional on response models, the observations and model fit were as follows for each group: single businesses (n=68, pseudo R2=.1332); industry association (n=42, pseudo R2=.0223); and public interest group (n=35, pseudo R2=.1607).

interests (statistically significant at the $p=.028$ level). Without a plausible measure of the public interest, however, it is difficult to say that petitions facilitate capture. Moreover, if petitions were facilitating the most pernicious form of capture—the use of regulation to impose restrictions that disproportionately burden business competitors and erect barriers to entry¹¹²—not only would we expect to see single businesses fare better than more diffuse business interests such as industry

¹¹² Carpenter, *supra* note 22, at 153-54 (noting that the *sine qua non* of the “Stiglerian account” of capture is that it “predicts that captured regulation will be *stronger* in the sense of imposing more rigid and less permeable entry barriers to the market,” in effect allowing the industry to use “regulation to form a cartel and restrict supply and/or entry”).

associations, but we would also expect to see pro-regulatory petitions from single businesses being granted more frequently than deregulatory petitions. Neither is the case.

However, the results are at least theoretically consistent with an account of corrosive capture where individual businesses succeed in relieving themselves from regulatory requirements that broadly apply.¹¹³ One of the strongest patterns in the data is the success of deregulatory petitions, provided that these petitions can survive some disproportionate skepticism in the selection decision to respond in the first place. Agencies seem to be most inclined to use petitions from business interests to identify opportunities to trim existing regulations and dole out regulatory relief, particularly when doing so involves a technical fix that the regulated clientele has identified.¹¹⁴ This last caveat may suggest, however, that the data are more consistent with healthy regulatory incrementalism than with highly consequential regulatory rollbacks.¹¹⁵

C. Timing of Responses and Grants

While receiving up-or-down determinations on petitions may be the ultimate goal for petitioners, half of the battle is against the clock. Agencies sometimes act within days of receiving a petition, but often they sit on petitions for extraordinarily long periods of time.¹¹⁶ For the petitions in my data that received a response, the longest observed delay before an official response was 3,805 days, or almost 10.5 years.¹¹⁷ To be sure, agencies' median response time was considerably more

¹¹³ *Id.* at 154-55 (discussing the mechanisms of “corrosive capture,” which aims to “push the regulatory process in a ‘weaker’ direction, not with the aim of reducing entry, but with the aim of reducing costly rules and enforcement actions that reduce firm profits”).

¹¹⁴ Wagner et al., *supra* note 66, at 244-45 (“Our study reveals that some revision techniques are rigorous and transparent, but that others lack transparency and fail to provide opportunities for all relevant interests to weigh in on technical issues and policy changes. As such, they may facilitate the kinds of subterranean decisionmaking long associated with agency capture.”)

¹¹⁵ *Id.* at 227-41 (discussing the policy benefits of rulemaking incrementalism); Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 140-43 (1996) (same); Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulations Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004) (same). For a more general discussion, see *infra* Part IV.C.

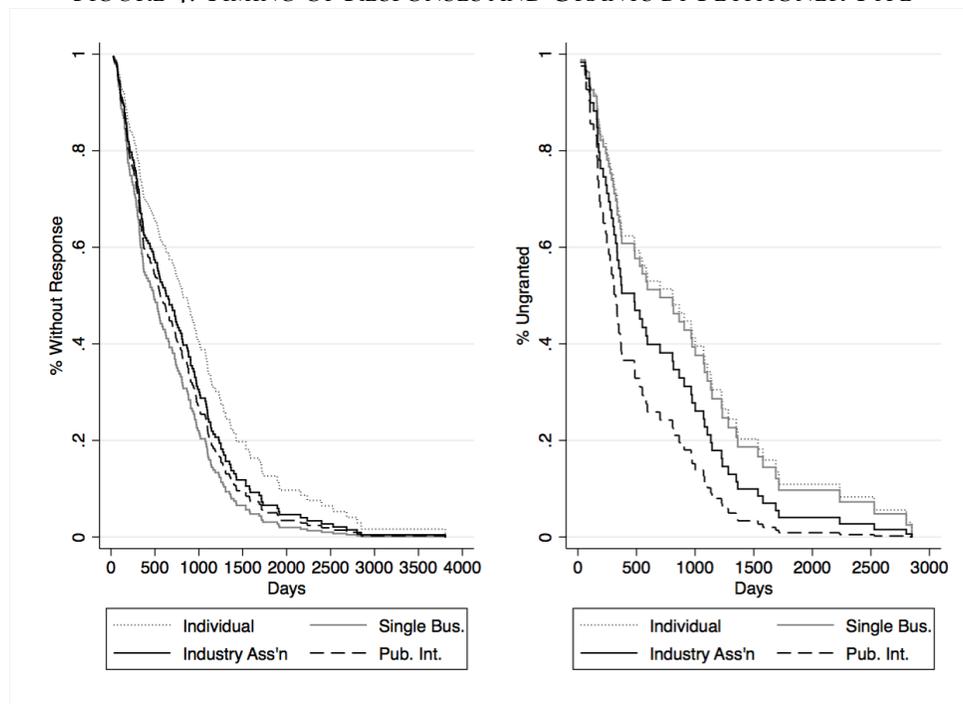
¹¹⁶ In theory, a long delay might entitle a petitioner to sue for an order to respond to the petition. See Schwartz & Revesz, *supra* note 20, at 13-17. However, Schwartz and Revesz report that there is, all told, very little “unreasonable delay” litigation over pending petitions. *Id.* at 67 (noting that “[s]tatistics bear out that litigation over petitions is not very common,” and that “[s]ome stakeholders will threaten litigation to force an agency response after a long delay, but often the agency simply takes that opportunity to deny the petition, and the lawsuit is dropped”).

¹¹⁷ Of course, some petitions in the data never received a response during the period of observation, and if they are considered with the rest, then the maximum consideration time was essentially the entire duration of the study: 6,197 days, or 16.98 years.

palatable, with fully 50 percent of petitions receiving their response within 573 days and 25 percent within 264 days.

With such drastic ranges of consideration time, it is clear that there is a possibility of disparate treatment across groups and types of requests. We can use survival analysis to examine the factors that determine how swiftly agencies process petitions. I estimated response times using a Cox proportional hazard regression, which allows comparison across groups while holding characteristics of petitions constant. Figure 4 shows the resulting survival curves—an estimation of the probability of receiving a particular response at any given time—for both the fact of the agency's official response (left panel) and the response if the response was a grant (right panel), both broken out by petitioner type. These curves show statistically significant disparities in the pace of processing petitions submitted by different kinds of interests. Starting with the left panel, we see that, relative to the baseline group (individual petitions), petitions from single businesses ($p=.000$), industry associations ($p=.011$), and public interest groups ($p=.022$) are processed faster. Of the four petitioner types, single businesses are the fastest, with a hazard ratio of 1.68, or about a 68 percent greater chance of receiving a response at any given time than an individual petition. Compared to more diffuse interests (i.e., industry associations and public interest groups), single businesses are 37 percent and 24 percent more likely to receive a response at any given time. Of the characteristic covariates, only deregulatory petitions are significantly different in terms of response time: with a hazard ratio of 1.20 ($p=.012$), such petitions are about 20 percent more likely to receive a response at any given time than pro-regulatory petitions, holding all else constant.

FIGURE 4: TIMING OF RESPONSES AND GRANTS BY PETITIONER TYPE



Notes: The plots represent survival estimates derived from a Cox proportional hazards regression. The estimated survival curves control for the following covariates: *deregulatory*, *substantive*, *original*, *repeat player*.

However, when the analysis changes to the processing of grants (right panel) and not just responses, the advantage of single businesses falls away and the most significant advantage goes to public interest groups. Public interest groups have a hazard ratio of 2.13 ($p=.000$), meaning they are fully 113 percent more likely to receive a grant at any given time than individual petitioners. They are, moreover, 68 percent more likely to receive a grant at any given time than industry associations, and 108 percent more likely than single businesses to receive a grant.

Much as Figure 3 broke out the interactions between petitioner type and petition characteristics, Table 3 below reports the effect on timing of agency responses for the different kinds of requests petitioners make. The results are reported as hazard ratios, or the likelihood of receiving a determination at any particular time, where estimates above 1.0 indicate faster processing and estimates below 1.0 indicate slower processing. The results in Table 3 show that the most important factors in speeding up a response vary across petitioner type. Single businesses are 203 percent more likely to receive a response and 324 percent more likely to receive their grant at any given time if they are a Fortune 500 or Global Fortune 500 honoree than if they are not. Similarly, industry associations are 144 percent more likely to receive a response and 492 percent more likely to receive their grant if they are a repeat player in the data than if they are not. By contrast, the most important determinant of public interest group success is when they petition for deregulatory changes: indeed, they are 545 percent more likely to receive a response at any given time and 280 percent more likely to receive their grant at any given time if they are breaking from their usual pattern and suggesting regulations should be weakened in some way.

TABLE 3: COX PROPORTIONAL HAZARD REGRESSIONS OF THE DETERMINANTS OF THE TIMING OF PETITION RESPONSES AND GRANTS

	Respond			Grant (If Responded)		
	Single Bus.	Industry Ass'n	Pub. Int.	Single Bus.	Industry Ass'n	Pub. Int.
Deregulatory	.992	.838	5.45***	.575	1.24	2.80***
Substantive	1.85	.902	.655	3.85*	.929	.622
Original	1.08	1.14	1.86*	2.12	.276	2.06*
Repeat Player	.581**	1.44*	.999	.733	4.92*	1.05
Fortune 500	2.03***			3.24**		
N	66	42	34	22	22	11
Wald X^2	11.79	.05	52.71	.19	11.82	.24
Prob > X^2	.0027	.9744	0.000	.6612	.0027	.4300

In sum, survival analysis shows significant disparities among petitions in terms of response time and grant time. One of the strongest findings is that public interest groups get to the finish line (*i.e.*, a grant) much more quickly than other groups. While single businesses got some kind of news from the agency much faster, the agencies were at the same time much slower to grant petitions from single businesses than from diffuse groups. Still, some evidence does fit the “capture” story.

Looking more closely at business interests, there is some evidence that large businesses do better than small businesses, and that being a repeat player often helps in the process.

D. After the Grant

The ultimate measure of success is convincing the agency to not only begin a rulemaking, but also to finish it. By this test, rulemaking petitions are far from a sure bet. Of the 290 petitions in the data, only 40 (13.8 percent) resulted in a final rule during the period of study.¹¹⁸ But while success is, overall, rare, the first column of Figure 5, which presents the results of logistic regressions with the dependent variable set as adoption of a petition as a final rule, makes clear that there are certain *ex ante* predictors of success. These models, unlike the ones before, control for a number of covariates that are expected to affect agencies' ability to finalize rules.¹¹⁹ Relative to individual petitioners, only public interest groups are more likely to see their petition materialize as a final rule. Likewise, deregulatory petitions are more likely to succeed, and substantive petitions are less likely to succeed. It would be difficult to square these probabilities with a story of capture or even of excessive business influence, although by the same token the kind of petition that succeeds hardly fits the triumphalist narrative of petitions as a means of spurring major regulation. The most successful petitions tend to be technical and deregulatory, even if they are submitted by public interest groups.

Then there is the question of petitions that made it through the gauntlet and garnered a grant. Grants of petitions only mean that the agency will initiate rulemaking. Many proposed rules—even those that don't have their origin in a rulemaking petition—are withdrawn before they are finalized.¹²⁰ And, in the context of petitions, there might be situations where the agency insincerely grants petitions it does not intend to finalize, whether to appease the filer or to satisfy the terms of a court order.¹²¹ Is there any evidence that the agencies used this mechanism to award disparate

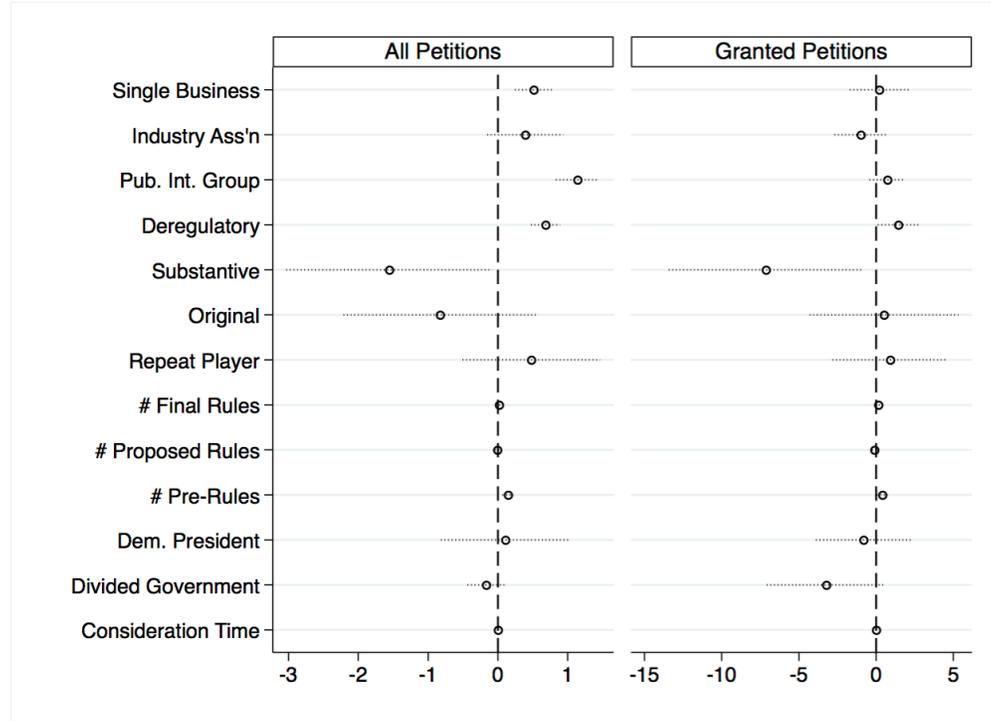
¹¹⁸ This is somewhat surprising, given that courts do review delays in finalizing rules initiated via petition, and may in fact “treat the cessation of a rulemaking with more scrutiny than a straight denial of a petition.” Schwartz & Revesz, *supra* note 20, at 26.

¹¹⁹ These additional covariates are # *Final Rules* (count of the number of actions in the *Unified Agenda* at the final rule stage at the time of the agency's decision on the petition); # *Proposed Rules* (count of the number of actions in the *Unified Agenda* at the proposed rule stage at the time of the agency's decision on the petition); # *Pre-Rules* (count of the number of actions in the *Unified Agenda* at the pre-proposal stage at the time of the agency's decision on the petition); *Dem. President* (dummy variable for whether the President was from the Democratic Party); *Divided Government* (dummy variable for whether either chamber of Congress and the President differed in party identification); and *Consideration Time* (the number of days from the petition filing to the agency's decision to grant the petition).

¹²⁰ See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959-63 (2008) (presenting data on rulemaking withdrawals captured by the *Unified Agenda of Federal Regulatory and Deregulatory Actions*).

¹²¹ Schwartz & Revesz, *supra* note 20 (discussing the phenomenon of pro forma denials in response to court orders to respond).

FIGURE 5: DETERMINANTS OF ADOPTION OF REGULATORY PROPOSALS IN FINAL RULES



Notes: Labels represent the point estimates of logistic regressions with response and grant conditional on response as dependent variables. Whiskers represent 95 percent confidence intervals. In each regression, robust standard errors are clustered at the agency level. For the “All Petitions” model, the total observations were 171 and the pseudo R2 was .2476. For the “Granted Petitions” model, the total observations were 62 and the pseudo R2 was .6147. Petitions submitted by individuals serve as the reference group, or baseline, for *Petitioner Type*.

benefits to different types of group? Figure 5 again provides some of the answers to these questions. The results of the logistic regression suggest that no one type of petitioner does particularly well relative to the baseline category of individuals. In fact, the only petition characteristic correlated with finalization is substantive ambition. Overall, there is little evidence that grants are insincere for any particular group.

These results must be taken with a grain of salt, however. Some of the failures to finalize might simply be the result of the rulemaking process failing to run its course. Rulemaking can take many years, and many of the observed grants happened within the last few years of the available data. These results are therefore just a preliminary look at how agencies treat granted petitions after the formal response.

IV. DISCUSSION AND CONCLUSION

Rulemaking petitions present a relatively unique opportunity to examine business influence in action. In the world of rulemaking, the opportunity to observe discrete agency choices about

agenda-setting is extremely rare.¹²² Rulemaking petitions are an exception to the general rule that both interest participation and agency responses to participation at the agenda-setting phase of the rulemaking process are invisible. Often, the only trace of this process that emerges is the decision to initiate a rulemaking proceeding by announcing a notice of proposed rulemaking or, in some instances, an advanced notice of proposed rulemaking.¹²³ The participation and lobbying that did not result in changes or any kind of agency response might as well have never occurred.

But with rulemaking petitions, it is possible to trace systematically the requests for regulatory change straight through both decisions and non-decisions, revealing the full spectrum of influence. And not only do rulemaking petitions come at the very earliest possible stages of the rulemaking process, when opportunities for influence are the greatest and the most likely to yield significant fruit,¹²⁴ but they also allow a relatively “pure” observation of influence. Almost by definition, an agency *needs* to be influenced if a petition is submitted. Petitioners would have little reason to submit the petition if the agency was already fully on board with the request.¹²⁵ Would-be petitioners could spare themselves the trouble if the only purpose was to ensure that agencies were aware of an issue—there are open telephone lines for that kind of communication.¹²⁶ Formalizing a petition suggests that the petitioner believed that the agency needed nudging. Thus, any positive agency action in response to petitions suggests that agencies were in fact influenced—to move out of a state of inertia, at the very least.

Studying rulemaking petitions thus presents the possibility of overcoming some of the difficulties that have dogged empirical assessment of claims of excessive business influence and capture in the rulemaking process. Empirically examining who petitions, for what purposes, and with what kind of success is a path to a better overall understanding of business influence, both attempted and achieved. What emerges in this study is the strong probability that business influence on regulatory agenda-setting, and by implication, on regulatory policy, is quite limited.

A. Capture?

In evaluating the evidence, I draw on Susan Yackee’s three-prong test for identifying capture empirically. First, if capture exists, we would “expect that a subpopulation of individuals or organizations—be it business interests or some other subpopulation—will stand out as the top

¹²² Coglianese & Walters, *supra* note 12; West & Raso, *supra* note 63.

¹²³ See *supra* notes 61 and accompanying text.

¹²⁴ West, *Black Box*, *supra* note 57.

¹²⁵ It is not unimaginable, however, that agencies might encourage parties to petition for certain changes that both the petitioner and the agency are on board with if the agency believes that it needs political and legal cover for its action.

¹²⁶ See *supra* notes 40 and accompanying text.

lobbying participant.”¹²⁷ Second, we would “expect that a subpopulation will stand out as consistently influential.”¹²⁸ Finally, but only if the first two prongs are satisfied, we would “expect to see agency decision making gravitate toward the policy preferences of the subpopulation, even when technical information, data, or evidence points decision making in a different direction.”¹²⁹

On the first prong, the data do reveal business interests as the dominant petitioners, at least when one considers single business corporations and industry associations as part of a larger category of business interests. As reported, business interests accounted for 58.62 percent of the observed petitions. But content coding the substance of the petitions, even to the limited extent possible here, suggests that there is significant heterogeneity even within the business community as to the overall goals of petitioning—and that may complicate the story. While business interests as a whole seek more deregulatory and “derivative” petitions (in effect, amendments to existing rules to soften their requirements) than do public interest groups or individuals, single business corporations more often seek out pro-regulatory changes that impose new requirements on an industry. This is particularly the case with the biggest corporations, *i.e.*, Fortune 500 or Global Fortune 500 players, which were significantly more likely to seek pro-regulatory changes than smaller businesses. By contrast, industry associations are more focused on deregulatory, technical changes, perhaps reflecting their more diffuse interests as representatives of an entire industry.

If business interests are split to account for this heterogeneity, then it is clear that there is no clearly dominant interest. Single businesses account for the highest percentage (33.91) of the sample, but public interest groups are not far behind at 26.99 percent. Industry associations account for only 24.91 percent of the sample. It also bears mentioning that individual petitioners (14.19 percent¹³⁰) most often advanced requests similar to the ones submitted by public interest groups. Consider, for instance, a petition submitted by Justine May, whose recreational vehicle’s tires kept blowing out because the collective weight of appliances and attachments exceeded the maximum

¹²⁷ Yackee, *Reconsidering Agency Capture*, *supra* note 11, at 300-01.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ This figure indicates that individuals meaningfully participate in the petitions process at a much higher rate than they do in later stages of the rulemaking process. See Coglianese, *Citizen Participation*, *supra* note 49, 958 (discussing studies finding minimal individual participation and concluding that “neither agencies’ acceptance of comments by e-mail nor the development of the Regulations.gov portal have led to any dramatic changes in the general level or quality of public participation in the rulemaking process,” and that “[m]ost rules still garner relatively few overall comments and even fewer comments from individual citizens”). Although Justice Tino Cuellar finds that the vast majority of public comments in three important rulemakings came from individuals, Cuellar, *supra* note 9, at 462 tbl. 4, he does not distinguish “between comments from individual members of the public who chose to send in comments with little prodding from organized interests . . . and those whose comment was generated as a result of interest group organizing, *id.* at 434. In contrast with these mass commenting campaigns, the individual petitions here are truly individual contributions to the regulatory process, and they are not a negligible fraction of the total petitioning activity.

load.¹³¹ When she complained to the manufacturer, it “said they have no regulations they are required to follow” as far as reporting the maximum carrying capacity.¹³² Her petition sought to change that (and the agency followed through on her request).¹³³ Most other individual petitions are similarly oriented toward consumer issues, and take on a similar posture toward business regulation. Considered together, public interest groups and individual petitions accounted for a plurality of the petitions observed. The predominance of business interests thus depends in part on how one defines business interests.

Proceeding to the second prong, the evidence stands in tension with a conclusion that business interests achieve consistently higher influence than any other group. Together, business interests had a greater chance of having any given petition granted, and the difference was statistically significant. Additionally, there are indications that status as a repeat player or a multi-national corporation helps business interests garner a grant or capture the limited attention of the regulator. But when we disaggregate business interests, public interest groups do at least as well as, if not better than, either single corporations or industry associations. Certainly, no one group does consistently better than all the other groups. Moreover, the frame through which we evaluate outcomes matters a great deal. For instance, individual petitioners do better than most other groups when it comes to garnering a formal response from the agency.

The lack of consistently disproportionate influence is striking because of how easy it would be to give business interests whatever they want. Rulemaking petitions, because of their low visibility and low risk of oversight, are prime territory for “subsystem politics.” In contrast with notice-and-comment rulemaking, where the agency publicly notifies interested parties of the opportunity to respond to proposals, the difficulty of monitoring petitioning activity insulates the agency from exposure to countervailing perspectives and competing interests. While there are occasionally letters submitted supporting or opposing a petition,¹³⁴ usually all the agency has to go on is the information provided by the petitioning party, and all it has to worry about, from a strategic perspective, is disappointing that party and perhaps engendering litigation. This is the kind of area where expectations of business influence are high, if traditional models of public choice are to be believed. But agencies are decidedly reluctant to act on petitions, both with respect to business interests in particular and as a general matter.

¹³¹ Justine May, Petition to the Nat'l Highway Traffic Safety Administration (Jan. 14, 2000), *available at* <https://www.regulations.gov/document?D=NHTSA-2000-7073-0002>.

¹³² *Id.*

¹³³ Nat'l Highway Traffic Safety Administration, Federal Motor Vehicle Safety Standards; Cargo Carrying Capacity 72 Fed. Reg. 68,441 (Dec. 4, 2007).

¹³⁴ And in some cases, the agency will open a public comment period on the petition, although it is not required to by the APA. Schwartz & Revesz, *supra* note 20.

Given these results, it is not even necessary to proceed to Yackee's third prong—i.e., effective control over agencies against the agency's preferences.¹³⁵ The data strongly suggest that agencies keep their distance from the petitioning parties, casting serious doubt on the validity of the public choice account of agency capture.

B. Incrementalism and Autonomy

As just discussed, the identity of the party does not seem to drive agency decision making with regard to rulemaking petitions. What does apparently drive agency decision making, however, is a certain type of interaction with petitioners of all kinds. Specifically, agencies favor rulemaking petitions that request narrow, technical changes in a deregulatory direction. In terms of marginal probabilities, requesting a deregulatory change raises the probability of a grant (conditional on response) 16.92 percent (statistically significant at the $p=.007$ level) and requesting a substantive change decreases the probability of a grant (conditional on response) 20 percent (statistically significant at the $p=.000$ level), holding all else, including petitioner type, constant. These patterns suggest that business interests find petitions useful as a device to bring agencies' attention to outdated provisions in existing regulatory programs, and that agencies likewise find these suggestions useful as a way of structuring their ongoing monitoring of regulatory programs.¹³⁶ When combined with the overall low rates of petition grants, the picture that emerges is one of an adaptive and incrementalist dialogue between regulated entities and agencies,¹³⁷ with agencies retaining a great deal of autonomy and directorship of the deliberations.

That agencies apparently use rulemaking petitions in this way is not terribly surprising. When agencies engage in rulemaking, they are not, and cannot be, "synoptic."¹³⁸ They are bound to make mistakes, and one of the critical functions of stakeholder engagement is to identify these mistakes and generate ideas for how to fix them.¹³⁹ Often, the most targeted (and least costly) way

¹³⁵ As discussed above, one advantageous aspect of studying petitions is that they represent instances where the agency probably does not itself prefer to act. Thus, in some ways, the evidence of influence doubles as evidence of (a lack of) control. The fact that business interests do not influence the agency at a higher rate than any other group means that business interests do not control the agency.

¹³⁶ This is entirely consistent with prescriptive calls to use rulemaking petitions to structure retrospective review of regulatory programs. See Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265 (2015). For a general discussion of retrospective review (aka regulatory "look back"), see Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579 (2014).

¹³⁷ Wagner et al., *supra* note 66; Eisner & Kaleta, *supra* note 115; Shapiro & Glicksman, *supra* note 115.

¹³⁸ MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988).

¹³⁹ Wagner et al., *supra* note 66, at 187-88 (noting that "mistakes are inevitable" in the rulemaking process and that "a regulatory agency's wellbeing depends on its regulations remaining current with changing public attitudes and the political preferences of those in a position to influence its actions"); Biber & Brosi, *supra* note 91 (finding that citizen petitions provided essential information to agency officials about the need for Endangered Species Act listing); West & Raso, *supra* note 63.

to fix mistakes is to revise problematic rule text, rather than tossing out the rule in its entirety or issuing informal enforcement guidance that ameliorates the problem.¹⁴⁰ By some accounts, this kind of incrementalist dialogue with interest groups, including regulated entities, is a sign that the regulatory process is working as it should to adapt pragmatically to changed circumstances.¹⁴¹ So long as the “deregulatory drift” and predominance of business interests does not reach certain thresholds¹⁴²—and it does not appear to have in the rulemaking petitions analyzed in this study—then all is well.

The flip side of this tendency, however laudable it is, is that petitions generally fail to move agencies in the opposite direction—*i.e.*, toward major transformative regulatory action. Although a number of commentators have advanced what might be described as a “triumphalist” narrative about the pro-regulatory, action-forcing impacts of petitions¹⁴³—a narrative fed by such successes as the petition to EPA to regulate CO₂ emissions, and many others—the data here suggest that this kind of impact is exceedingly rare. For public interest group and individual petitioners, the probability of the agency granting a pro-regulatory, substantively ambitious petition was 15.78 percent, well below the average for all petitions in the sample.

The takeaway is that agencies are, by and large, unmoved by rulemaking petitions, and when they do act in response to petitions, it is in a decidedly pragmatic, moderate, and incrementalist mode. This, in turn, has implications for how we think about business influence in the regulatory process. Even in this forum, where the deck is seemingly stacked in favor of rent-seeking behavior,¹⁴⁴ subsystem politics, and agency capture, agencies appear to remain basically autonomous fair dealers, motivated by techno-bureaucratic commitments above all else. While this might mean that petitions may fail to contribute much to the democratic *bona fides* of the regulatory process,¹⁴⁵ the findings also ought to throw some cold water on the hegemony of the public choice account of agency decision making.

¹⁴⁰ Wagner et al., *supra* note 66, at 197-98 (describing the pitfalls of wholesale rescission, replacement, and informal interpretation as against revising the text through the rulemaking process).

¹⁴¹ *Id.* at 242-43 (praising the “virtues” of incrementalist “dynamic rulemaking”).

¹⁴² *Id.* at 241. See also Schwartz & Revesz, *supra* note 20, at 26 (noting that “Congress and the courts have expressed some concerns with an overly permissive right to petition for amendments and repeals [of rules], which may interfere with specific statutory schemes to manage legal challenges to recently enacted rules, and which may force agencies to continually revisit and re-litigate long-established rules”).

¹⁴³ Croley, *supra* note 6; Livermore & Revesz, *supra* note 85.

¹⁴⁴ Teresa M. Schwartz, *Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 76 (1983) (arguing that petitions are a vector for special interest influence).

¹⁴⁵ See generally Reeve T. Bull, *Making the Administrative State ‘Safe for Democracy’: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611 (2013).