What Public Comments During Rulemaking Do (and Why)

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Abstract

Public comments on proposed federal regulations influence the content of public policy. Tactically speaking, there are two distinct reasons why comments might indeed obtain influence: they may either inform the regulator about policy consequences or they may threaten the regulator with sanction by more powerful political actors, especially the Courts or Congress. Which tactics do members of the public – especially firms and interest groups – use during commenting and why? We explore this question by manually coding eight-hundred comments from firms and interest groups regarding rules issued by four financial regulators post Dodd-Frank. We find that the vast majority of comments have purely informational content, while a smaller number involve threats suggesting involvement of political principals, and the ratios are stable across the various agencies. We interpret these findings as evidence that informing has greater marginal benefit for the typical commenter than threatening. In order to explore the mechanisms behind these findings, in particular whether they are driven by benefits or costs, we explore how the strategy of outside interests changes across the resource distribution, analyze the litigation records of firms against these agencies, and present a case study of a high-stakes rule where different kinds of interests used different strategies.

Administrative policymaking reflects an uneasy compromise between openness, fairness, and efficiency. As the scope of regulatory tasks facing the bureaucracy increased in the 1930s, policymakers of all political stripes agreed that the administrative process needed more openness (Jaffe 1941; Biddle and Pound 1941). "The comparatively large number of recent orders . . . impos[ing] criminal penalties by way of fine and imprisonment . . . is without numerical precedent in the history of government," decried the American Bar Association's Committee on Administrative Procedures (ABA Annual Report, 1934, p. 555), "[O]rders are retained or buried in the files of the government departments, some are confidential and are not published... the presumption of knowledge of the law becomes, to term it mildly, more than violent." The Federal Register Act of 1935 addressed but did not resolve these issues. Agencies still commonly issued "rulings" with substantial economic implications, without consulting outside parties or making these rulings available to the public (Attorney General's Committee on Administrative Procedure 1941, pp. 141-142).

Although few objected to greater access and transparency, there was profound disagreement over how to balance fairness and efficiency. Conservative industry associations like the National Association of Manufacturers favored measures aimed at promoting fairness, including legalized procedures for introducing and testing evidence, extensive judicial review of agency determinations, and strong Congressional oversight. Liberal academics like Felix Frankfurter wanted a system more inclined toward efficacy, in particular that expert policymakers receive wide-discretion, a degree of flexibility about which procedures to use, and limited opportunities for judicial or political review (Schiller 2007). Behind this swirling vortex of normative and legal considerations lay a surprisingly simple issue-space: were you for the New Deal or against it? The Administrative Procedures Act of 1946 answered these question of process solidly in favor of the New Deal left (Shepherd 1995; McNollgast 1999). Agencies were entitled to issue rules of general applicability using procedures that were open, but highly informal. They would need to provide notice and opportunity for public comment, but were only required to "consider" those views; they need not accept them. "[J]udicial review of rulemaking is about all that the conservatives got, and they got very little of that" (Shapiro 1986).

Although the APA was intended to give agencies the space necessary for expert government unsullied by politics, many have argued that its success was short-lived. In the 1950s and 1960s, legal scholars, judges, and agencies increasingly viewed the task of writing regulation as producing a mutual accommodation of preferences between competing special interests (Lowi 1979; Stewart 1975). In the 1970s and 1980s, dissatisfaction with the emerging interest group politics of the fourth estate, coupled with a resurgence of political conservatism, provoked judicial reinterpretation of the administrative process more along the lines favored by the 1930s conservatives. The APA was understood as requiring much more procedural formality, particularly in the form of increasingly lengthy description of the purpose and process behind regulation, less deferential "hard-look" review, and new analytical requirements demonstrating the cost and benefits of agency action (Stewart 2003). According to some, the nascent push for "regulatory fairness" has prompted agencies to retreat on the dimensions of openness and efficacy. Some maintain that agencies no longer use the comment process to acquire expertise and information (Elliott 1992; McGarity 1992). Real decisions and deliberations occur in the bowels of the deep state, prior to the notification of the mass public (West 1985). Requirements that were once considered quasi-legislative acts that required public notice in the Federal Register are now promulgated invisibly in the form of "guidance" that is not subject to judicial review (Parillo 2016). One might legitimately fear the return of the Kafkaesque administrative practice of the 1930s.

Arguments about the changing drivers of agency decision-making are to be taken seriously, if skeptically. As historian Thomas McCraw famously quipped, generalizing about regulation gives scholars a choice "between extreme caution on the one hand, and extreme likelihood of error on the other" (McCraw 1975). The extent to which regulatory policymaking is best understood as technocratic, pluralistic, or judicialized remains an open question (Schuck and Elliott 1990). For each model, it is not hard to find exemplary cases. A more fundamental question concerns the typicality of these modes of administrative policymaking, in particular about their *distribution* across the regulatory state. The stakes of understanding the character of contemporary regulation-making could not be higher. Agencies routinely issue rules with huge social and economic ramifications affecting diverse issue areas, from internet service provision, to prescription drug coverage, to financial risk-taking and the environment.

The key assumption that drives our theoretical and empirical investigation is that the character of administrative policymaking is defined, fundamentally, by the mechanisms of influence that interest groups have over the content of regulation. Moreover, the communications of interested parties are highly informative about which mechanisms work and why. Commenting on proposed regulations is costly. Firms, associations, and public interest groups have a great deal at stake in obtaining successful regulatory outcomes. As repeat players, they have opportunity and incentive to learn what works for them and what works for others. What comments from these actors *do* is a good indication of *what works*, which in turn reveals the character of the process that decides so many salient outcomes.

Our primary theoretical contribution is teasing out the different implications of models of administrative policymaking for the persuasive tactics that interested parties should use. Our primary empirical contribution lies in testing hypotheses about what tactics should be used against comments that we manually code. In total, we read 800 comments from firms, interest groups, and peak associations submitted to four financial regulators. Our decision to focus on financial regulation is motivated by the fact that although the issues each regulator deals with are similar, the clientele of these agencies vary, as do their structural and policy independence (Selin 2015). It does not hurt that these agencies were engaging in a great deal of rulemaking during the years in which comments are widely electronically available. We find that the vast majority of comments communicate preferences and frame facts. Very few communicate original facts, threaten litigation, or pull Congressional fire-alarms. These patterns hold regardless of agency and are constant across the resource distribution of commenters.

The possibility that threats are intimated but not expressed is very real, if difficult to evaluate. With regard to legal threats, however, we are able to observe when these threats are followed by judicial decisions. We conduct an exhaustive review of D.C. Circuit cases where financial regulators were named parties and find very few examples of judicial review of rulemaking, consistent with two previous studies (Wagner, Barnes, and Peters 2011; Schuck and Elliott 1990). For those few contemporary cases where there was judicial review, we are able to identify whatever comments were submitted. In the vast majority of cases these comments were unambiguous legal threats according to our coding. Conversely, we show that no other kind of comments produced judicial decisions.

We interpret our findings as consistent with the notion that financial regulators use their discretion to respond to public preferences under conditions of bounded rationality. We interpret the limited evidence of threats being used as supporting the notion that threats are so highly constrained that they are of secondary importance in deciding policy outcomes in the making of most financial rules.

Mechanisms, Prevalence, and Influence

Our tests of models of public influence over rulemaking rely on several rational choice axioms. We assume that firms, associations, and interest groups comment because doing so in expectation leads to more favorable regulatory outcomes. We assume that commenting involves substantial direct costs associated with producing comments[1] and may also involve indirect costs, for example to organizational reputation.[2] Finally, we assume that the strategies we describe are available to all external actors, possibly with variable benefits or variable costs.

In light of these assumptions, it follows that the strategy selected most frequently by commenters typically provides the greatest marginal benefit. The distribution of tactics used

[1]According to one New York Times account, the starting price on a typical comment letter on a Dodd-Frank rule from a white-shoe firm is $100,000. `http://www.nytimes.com/2011/09/09/business/dodd-frank-paperwork-a-bonanza-for-consultants-and-lawyers.html`

[2]There are also internal costs to commenting as firms have to decide whether or not to reallocate resources to commenting on a particular regulation.

in rulemaking therefore offers theoretically significant tests of core theories in bureaucratic politics regarding bureaucratic motivation and decision-making. On a more practical level, the distribution of tactics one observes during rulemaking help determine the character of public deliberation that occurs during this important policy-making procedure, which in turn influences the quality of the policies that agencies produce.

Nevertheless, there are important limitations to what one can learn from observing the revealed preferences of firms, which we do not wish to sugar coat. The marginal benefit of commenting is not the only quantity of interest for the political science literature. We would like to know, for example, whether the expected benefit of using Tactic X is large or small, whether the expected costs of Tactic X are large or small, and how Tactic X's costs and benefits compare with those of Tactic Y. While the marginal benefit of using a particular quantity depends on these latent factors, fairly trivial examples show that the marginal benefit provides limited evidence about these quantities. Tactic X may be the most powerful weapon in the arsenal, but also be prohibitively expensive, so its usage is practically never observed. Tactic Y might be affordable if not powerful, and so its usage is prevalent. Such dynamics are sometimes discussed in the international relations literature, for example by scholars seeking to understand the importance of nuclear weapons vis a vis inter-state bargaining (Sechser and Fuhrmann 2013). The difficulties of pinning down the raw benefits and costs that should be understood as creating opportunities for further research. One should not use them as an excuse to avoid learning about the marginal benefit in the first instance. Just as the fact WMDs are very rarely used is a fact of immense theoretical and practical significance for international relations, so too are patterns of intimidation and information in this context of great significance for researchers on bureaucracy and interest groups.

We offer three analytically distinct partial solutions to elaborating why the marginal benefit for certain tactics appears higher than for others, in particular whether predominant usage of particular tactics is driven by differences in benefits or costs. First, we believe that theory and literature supports assumptions on the ordering of the benefit that each tactic should engender. Congress has the largest number of tools for controlling agencies and they cut the deepest, so credibly threatening Congressional action must bring the most benefit. Information provision seems to rely only on the good graces of the agency, so it must bring less benefit than credibly threatening Congress. Credibly threatening to sue should bring an intermediate level of benefit, since Courts have limited jurisdiction and should only review the single challenged rule or single provision in the enabling statute. If one accepts this ordering on benefits, or makes some alternative ordering or assumptions about the costs, then the range of interpretations of the data we collect is greatly winnowed, as we shall explain at greater lengths in the discussion section. Second, we consider the use of tactics after conditioning on submitter resources. The benefits of regulatory changes are related to the size of the firm or interest group, and so too the costs of using particular tactics. Given inequality of resource endowments, one expects better resourced firms to positively select the more beneficial tactics even if more costly. Finally, we also consider how the use of tactics change depending on which regulator the comment is addressing. Each of the financial regulators have different clientele, different levels of policy discretion and independence from Congress, and also different capacity to defend themselves in Court, which can be proxied for and one can correlate with expected effects on the use of tactics.

With our general framework described, we proceed to reviewing adducing hypotheses about what commenter tactics should be observed most frequently across rulemaking.

Bureaucratic Responsiveness

In democratic government, officials are supposed to respond to the preferences of the public, where public is understood capaciously to include both citizens and formal and informal associations of citizens, such as social movements, peak organizations, or firms. Yet there is a problem, because the task of governing is so vast and complex that one cannot have elected officials do everything. Hence, democracies create agencies to actually implement and execute policy. While representatives chosen by electoral institutions have direct incentives to respond to public preferences, the structural incentives for unelected bureaucrats are much less clear, which invites suspicion that these agencies might be ignoring or subverting their political overseers.

The notion that bureaucrats would not respond to public preferences is, for democratic theorists, an uncomfortable one, although Miller and Whitford (2015) note that bureaucratic indifference might actually be a good thing if it allows democracies to overcome moral hazard. Whatever the desirability of public responsiveness of bureaucracy, there are a number of papers that find evidence bureaucrats *do* respond to public preferences, at least during notice-and-comment (Balla 1998; Yackee and Yackee 2006; Haeder and Yackee 2015). Final rules are replete with references to commenters and the changes brought about by commenters. Take the Dodd-Frank Credit Risk Retention rule, a rule that requires securitizers of asset-backed securities to retain at least 5% of the securities on their books; commenters are mentioned over 1,000 times in the rule and are credited as causing significant changes to the rule, including allowing some offsets against the 5% requirement. These results are also consonant with the literature exploring the public responsiveness of the federal judiciary (e.g. Casillas, Enns, and Wohlfarth 2011; McGuire and Stimson 2004), which is arguably even more insulated from political pressure than the executive agencies. While the fact that bureaucracies are at least somewhat responsive to the public may be taken as a primitive, it is worth considering the theoretical mechanisms supporting this assumption.

The simplest argument in favor of responsiveness to public preferences during rule-making relates to what one might call task definition. Statutory authority, regulations, and guidance documents all affirm that what agencies are supposed to be doing in undertaking rule-making is considering the views of the public, so it is not far-fetched to claim that to some degree this is actually what they are doing. In most agencies, there are standard operating procedures for how comment letters are handled, and the ostensible purpose of these practices is to make routine the process of responding to public preferences. The Federal Reserve's current standard operating procedure for how it handles the publication of rules has been unchanged since 1979 (Federal Reserve Bulletin, 1979, pg. 137; FOIA G-2018-0067), and it requires the staff to produce a publicly available summary of the comments received and an additional document outlining recommendations for amendment based on these comments. Both documents must be submitted to the board prior to publication. Different agencies have somewhat different processes.[3] Regardless of what standard operating procedure the agency uses to handle comments, their purpose is to promote the organization's responsiveness to what interested parties are telling them.

Consideration of the career concerns and individual incentives of bureaucrats also supports the notion of bureaucratic responsiveness. Upper-echelon agency employees are mindful that "the coalition supporting [the agency] is frequently weak, short-lived, or shot through with internal contradictions" (Wilson 1989), and so will seek compromise with all sides to avoid undermining the enabling coalition. Further down the organizational chain such macro-political concerns may become less salient, although there are compensating considerations. Wilson (1980) classifies government employees by the source of their rewards, with *careerists* valuing the ability to move up in the agency, *politicians* who wish to move on to elective or appointive office, and *professionals* who desire high occupational status. Failure to perform the tasks as the agency defines it could prove troublesome for moving up the ladder. Many agencies actively attempt to cultivate impartiality and open-mindedness as characteristics of their decision-making process (Coglianese 2016), and employees that wish to succeed in such agencies may also possess or actively cultivate such virtues. By contrast, bureaucrats who wish to attain appointed office may fear the consequences of decisions that are unpopular with the public, as records of their choices may hurt their ability to survive confirmation hearings or obtain advisory roles, as several noteworthy examples show. Finally, lawyers, economists, and scientist's professional training encourages them to develop and prize traits of impartiality and open-mindedness that are crucial for understanding and

[3]See, for example, the EPA's Action Development Process, `https://yosemite.epa.gov/sab/SABPRODUCT.NSF/5088B3878A90053E8525788E005EC8D8/%24File/adp03-00-11.pdf`

reacting to public preferences.

The arguments offered thus far have largely arisen from the more sanguine corners of the bureaucratic politics literature. Yet even on the "dark-side," for example the literatures addressing regulatory capture (Bernstein 1955; Stigler 1971) and iron triangles (Maass 1974), the presumption is actually that bureaucratic agencies are responsive, albeit only to a small group of privileged interests or firms. If the agency does the bidding of the regulated entities, then it is still responding to public preferences, just in an inequitable fashion. While inequitable responsiveness and equitable responsiveness are obviously very different phenomena, in empirical studies of rulemaking it can prove hard to distinguish the two, as previous formal theoretic work has shown (Libgober 2018). According to public choice theory, broad groups that have shallow interests at stake will not organize to voice their interests, while narrow groups that are directly concerned will make their views known (Wilson 1980). And indeed, it turns out that on most rules, business interests submit many more comments than non-business interests.[4] If the only segment of the public that shows up is the regulated segment, there is no way to tell whether the agency is responsive to the whole public or is only responsive to the regulated sector. Such difficulties aside, the important takeaway is that theories of capture also tend to support the notion that agencies will respond to the public preferences they observe.

> H0: If bureaucratic agencies are responsive to public preferences, then comments describing preferences toward the proposed regulation should prove common.

Bureaucratic Rationality: Bounded and Comprehensive

A contrasting perspective on what comments should do comes from consideration of models of bureaucratic rationality. Most formal models of agency decision-making start from the assumption that regulators are rational actors that wish to obtain particular policy outcomes.

[4] On particularly high salience rules, such as the Federal Communication Commission's Net Neutrality rule or the Environmental Protection Agency's Clean Power Plan rules, comments from the general public vastly outnumber comments from organized interests.

In order to provide generality, these models typically avoid committing to a particular theory of bureaucratic motivation, however personal policy preference, public interest motivation, or some indirect financial or social rewards are usually postulated (Epstein and O'Halloran 1999; Gailmard and Patty 2007, e.g.). The problem for the regulator is that it is not fully informed about how its actions relate to outcomes. Outside actors are thought to possess private information that may help the regulator to make the policy it wants (Grossman and Helpman 2001; McCarty 2017). Yet the outside actor's own utility depends on the regulator's choice, which creates a conflict of interest when it comes time for the outside interest to share what it knows. The outside actor could hide or misrepresent the information it has in the hopes of obtaining a more advantageous outcome, and even the possibility of this misrepresentation can make the regulator suspicious of the outside actor is saying. From the perspective of such models, success in lobbying depends on surmounting the credibility problem. As a result, one would expect comments to present, however selectively, hard facts and data.

Yet other observers of administrative behavior argue that rational-choice models fundamentally misunderstand the problem of decision-making processes in organizations (Simon 1947). Real policymakers operate under conditions of genuine uncertainty about how the actions at their disposal relate to outcomes, possess a multiplicity of goals that they do not balance consistently balanced or consider simultaneously, and aim to achieve good enough performance ("satisficing") rather than seeking optimal solutions (Lindblom 1959; Jones 1999).

The implications of such "bounded rationality" for interest group advocacy are profound. The interest groups challenge is not, in this view, to provide facts and data. Rather, their task is "coping" with the rationality limitations of bureaucratic agents (Jones 1999). The main coping strategy relates to aiding the agency in interpreting facts already commonly known. "The problem for the receiver is not a lack of information but rather an overload" (Jones 1999). The policymaker does not necessarily understand what goals are even at stake in the policy, which ones are most salient, and may have only vague ideas about how the potential outcome space looks. Interest groups "try to control the prevailing image of the policy problem through the use of rhetoric, symbols, and policy analysis" (Baumgartner and Jones 1991). The regulator is likely to rely on reputations and other social cues to assess the credibility of the information they receive rather than undertake costly efforts to verify the facts they are receiving themselves (Carpenter 2010; Kwak 2013). It may even rely on the outside interest to understand what actions it has available to it (Hall and Deardorff 2006). The agency may suspect conflicts of interest, but is not necessarily sure what they are, and therefore can be convinced that the interest of the outside group is the same as that of the public at large (Bernstein 1955).

In light of this discussion, we offer the following contrasting hypotheses about what we might expect comments to do:

> H2: If the problem of lobbying is to credibly convey private information, then comments providing verifiable facts and data should prove common.

> H3: If policy-making is multidimensional and bureaucratic attention limited, then comments providing perspective on the issues ("framing") should prove common.

Shadow Bargaining

Thus far our discussion has focused on the internal constraints affecting agency decision-making and how interest groups might target these constraints in their advocacy. Many would presume that the *external* constraints on agencies are the most significant drivers of their behavior (Mashaw 1994). In particular, theories of Congressional and judicial dominance suggest that regulatory outcomes largely reflect a bargain struck between interest groups in the shadow of Congress and the Courts. These theories and their implications are sufficiently similar that it is usually not particularly important which kind of actor is doing the oversight (Stephenson 2007), although we shall mention a few differences that are important.

In the strongest and simplest formulation of each theory, bureaucratic agencies are controlled perfectly by their political principals, so that regulatory outcomes reflect precisely the desires of these external actors (Weingast and Moran 1983). Indeed, the set of controls that each branch of government possesses are formidable. “Congress can abolish an agency or reorganize it, change its jurisdiction or allow its program authority to lapse entirely. Congress can cut its appropriations and conduct embarrassing investigations” (Fiorina 1981). The power of the Courts are no less significant. Although Courts require private interests to bring a case, once brought, courts have potentially very wide discretion. “The records in administrative cases often are so extensive that reviewing courts can extract from them plausible grounds for either an affirmance or a remand” (Schuck and Elliott 1990). Remands are very costly to agencies, as they can wreak havoc on an agency’s plans regarding budget, enforcement, and the issuance of future rules related or unrelated to the issues at stake in litigation (Mashaw 1994; Cross 2000).

Although scholars sometimes argue in favor of this strong form of the external control thesis, more commonly a subtler interpretation of dominance is advanced (McNollgast 1999; Gailmard 2014). Agents possess divergent preferences and discretion about how to make policy, not because the principal wants either, but because technological constraints are such that eliminating slack is impossible, require investments in excess of the principal’s budget constraint, or entail side effects that are undesirable (Epstein and O’Halloran 1999; Bendor and Meirowitz 2004). For example, failure to give the bureaucrat slack today may result in a future version of the principal taking policy in a drastically wrong direction (Shepsle 1992). Since the principal cannot arrange the cards, all it can do is “stack-the-deck” to make the odds of better outcomes more favorable (McCubbins, Noll, and Weingast 1987). In particular, deck-stacking requires the use of ex ante and ex post controls that can align, however imperfectly, the agent’s private incentives with that of the principal’s.

With ex ante controls, one can “set and forget.” Not so with rewards and punishments assigned ex post, which require the principal to know whether the triggering conditions are satisfied. For both Congress and judiciary-centric theories of administrative policymaking, interest groups serve this critical monitoring function. In the widely-cited terminology of McCubbins and Schwartz (1984), administrative procedures force agencies to reveal what they are doing to interested citizens and organizations, who act as "fire-alarms" by "bring alleged violations [of Congressional intent] to congressmen's attention." Most models of judicial review of agency policymaking do not assign interest groups/litigants an explicit role in the strategic interaction between agencies and Courts (e.g. Bueno De Mesquita and Stephenson 2007; Stephenson 2006; Turner 2017). The fact that agency action is always followed by judicial review in these formal models seems to presume that potential litigants are plentiful and their incentives to bring litigation unproblematic. Gailmard and Patty (2016) is an important exception that explicitly considers interest group incentives in commenting and litigating. Although their model also assumes the Court always reviews, it allows for the possibility that the interest group will not have made the investments necessary to obtain a favorable outcome.

Models of bureaucratic oversight either explicitly or implicitly assume that interest groups are delegated the task of monitoring. This delegation gives these outside actors a degree of bargaining power. The more credibly the commenter can threaten to trigger the principal's ex post controls, the more bargaining power they thereby obtain. Yet it is important to recognize that this bargaining power is not unconstrained. A firm does not wish to threaten its regulator with litigation, for firms often fear that their regulator may be vindictive and engage in reprisals (Carpenter 2010). Threats also implicate reputations in a way that may require an undesirable level of commitment, for the failure to follow through can damage one's credibility and lead to even greater costs down the line. Finally, courts and Congress have their own constraints on action that vicariously implicate interest groups. While one might fear a court's ability to reach any outcome it wants, legally speaking an agency acting reasonably within its statutory discretion is entitled to make the rule it wants. In such cases, litigation has only nuisance value to the firm and substantial direct costs. By contrast, Congress, its committees, and its members operate under severe attention constraints. Even if one gets the attention of someone in Congress, that is a far cry from getting the attention of the floor or the committee. The forces pulling toward inaction in Congress are enormously powerful (Baumgartner, Berry, et al. 2009).

In light of these considerations, shadow-bargaining models makes the following predictions:

> H4: If threatening judicial review is credible and its usage unconstrained, then comments threatening to initiate litigation should prove common.

> H5: If threatening to involve Congress is credible and its usage unconstrained, then comments suggesting Congressional action should prove common.

Case Selection: Why Financial Regulators Are the Best to Look At

Virtually every regulator engages in rule-making to some degree, which raises issues of case selection. Our decision to focus on financial regulators in the post Dodd-Frank era reflects a mix of principles and practical considerations. Rules are organized by regulators into "dockets," which constitute an official record of written materials used by the regulator to formulate policy, including the comments whose contents we wish to analyze. Electronic availability of such dockets greatly lowers the costs of acquiring comment data. In the last fifteen years or so, U.S. federal regulators have almost uniformly made their dockets available online, usually on regulations.gov. Unfortunately, obtaining the rulemaking dockets for most American state jurisdictions and other countries remains prohibitively difficult. For these reasons, we limit the scope of our case selection to fairly recent rulemaking at the US federal level.

Since a number of U.S. federal rulemaking agencies manage electronic dockets directly on their own websites, rather than using the cross-agency platform of regulations.gov, the next problem is identifying the appropriate set of regulators. In light of the hypotheses and assumptions driving our research project, the regulators we focus on should

1. frequently engage in rulemaking so that the interests that advocate before them have sufficient opportunity to have learned the costs and benefits of various strategic choices.

2. frequently write rules with significant distributive consequences, so that outside interests have sufficient incentive to learn what works and does not.

3. possess clientele for whom it is possible to obtain good resource proxies, so that one can assess hypotheses about whether choice of tactics is resource constrained.

4. have different levels of political insulation.

5. make policy that has a similar subject matter, so that differences are attributable to institutional features of the regulator rather than the subject of regulation.

These criteria greatly winnow the set of regulators we might examine. The Federal Aviation Administration is one of the most prodigious rulewriting agencies in the Federal Government, yet a large proportion of these are "Air-Worthiness Directives" which appear to have low distributive stakes. The Occupational Safety and Health Administration issues numerous rules that have important distributive consequences, but it is hard to get proxies for the resources of the many private firms subject to their regulation. Indeed, the criteria we offer are sufficiently constraining that identifying a compatible set of agencies is no easy feat.

Major legislative overhauls of regulatory regimes task multiple agencies with making rules on similar subjects, and so represent a plausible strategy for identifying constellations of regulators that might satisfy our criteria. The electronic rulemaking era has witnessed major regulatory overhauls in several discrete policy domains, including education (No Child

Left Behind), elections (the Biparistan Campaign Reform Act), healthcare (the Medicare Modernization Act, the Affordable Care Act), and finance (Gramm–Leach–Bliley, Sarbanes-Oxley, Dodd-Frank). Each of these policy enactments suggest a plausible set of rulewriting agencies for our purposes, however for various reasons finance agencies implicated in Dodd-Frank seemed to represent the best fit.

Finance represents a policy arena with uniquely large distributive implications, as the 2008 financial crisis infamously showed. No less than seven federal regulators[5] govern the $1.4 trillion financial sector, which constitutes 7% of the US economy. Owing to the fundamental instability of finance and the potentially for runs, banks and related entities are the subject of heavy, and often changing, regulation (Philippon and Reshef 2012). Besides having particularly strong incentives and opportunity to learn about how to achieve favorable outcomes, there is evidence that the financial firms regulated by these agencies actually are particularly good at obtaining favorable regulatory outcomes. For example, the profitability of finance firms and earnings of finance employees has greatly outstripped that of other sectors since 1980. Also owing to the fundamental instability of the banking enterprise, financial institutions are subject to extensive reporting requirements, and as a result finding data about commenter resources is somewhat easier in this domain than in others. While it is impossible to find instances where different agencies are regulating the exact same conduct independently, the fractured system of financial regulation in the United States comes close. Prudential regulation applies to actors, not so much on the course of conduct, but on what kind of actor one claims to be while doing it. As a result, there are many opportunities for "regulatory arbitrage" as independent regulators to come to different judgments about the same activities (Barr, Jackson, and Tahyar 2016). Particularly post-Dodd Frank, the agencies can be understood as struggling to deal with the same basic problem of excessive risk taking and uncertainty, and insufficient capitalization in financial institutions.

[5] These are, in no particular order, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, the National Credit Union Administration, the Securities and Exchange Commission, the Department of Treasury's Office of Comptroller of the Currency, and the Commodity Futures Trading Commission.

Due to resource constraints, we determined that we would not be able to read comments from all seven of the financial regulators and still obtain reasonable sample sizes within each agency. As a result, we narrowed our inquiry to a smaller set of agencies that would best provide leverage against our primary hypotheses relating to control by political principals. In particular, Selin (2015) presents a factor analysis of agency enabling statutes and shows that the structural independence of agencies can be classified according to two-latent dimensions: one relating to the political independence of the decision-makers and one relating to the political independence of their policy decisions. The Federal Reserve Board, the Securities Exchange Commission, the Federal Deposit Insurance Corporation, and the Commodities Futures Trading Commission are strongly independent on both dimensions, but the Board has the most independence on both dimensions. The other three agencies offer contrasting levels of the two independence factors: the National Credit Union Administration has more decision-maker independence but is subject to stronger political review, while the Consumer Financial Protection Bureau has even more policy independence than the Federal Reserve but a low level of decision-maker independence. Finally, the Treasury has a low level of independence on both dimensions. As a result, by focusing on the Board, the CFPB, NCUA, and the Treasury we would obtain very different institutional structures that might plausibly lead to different commenter tactics, especially those whose mechanism of effectiveness is tied to oversight.

Another aspect of these particular agencies that fed into our selection was that they seem to possess different regulatory clientele and have different reputations. The Board is one of the largest regulatory agencies, is the prudential regulator of the world's most important financial institutions, as well as six or seven thousand other smaller banks.[6] The Consumer Financial Protection Bureau is purportedly the most aggressive, consumer-friendly and business-hostile agencies in the Federal Government, and it covers a very broad set of financial entities. The National Credit Union Administration is a fairly small financial

[6]The banking industry is undergoing rapid consolidation in the past decade, so the exact figure would depend on the year.

regulator that focuses on a narrow clientele of Credit Unions, non-for-profit entities that operate, essentially, as banks, who are their direct competitors. The relationship between the Credit Unions and NCUA is sometimes described as "cozy."

Although there are many reasons to focus on the financial regulators in general and these four agencies in specific, by doing so we may limit the external validity of our findings in several respects. Finance poses issues that are complex in ways that other topics are not. In many areas, complexity depends on the high scientific barriers to entry. For example, one might say that is true for pharmaceuticals or nuclear power. In finance, the complexity relates more to the bewildering diversity of actual and potential contractual arrangements between market participants, the manner in which these various practices fit together, and the macro economic implications that result. It is possible that in different issue spaces, perhaps ones that were not so complex or where hard scientific facts mattered more, a different style of advocacy would prevail. Similarly, some have argued that financial regulators operate with more discretion than other regulators. To the extent that greater bureaucratic discretion reflects a broader bargaining window within Congress, or weaker grounds, it may also diminish the role of Congress and the Courts relative to other areas.

Defining Measures

Although notions such as "legal threats" or "fire-alarms" have common currency in political science, their meaning is not sufficiently unambiguous as to be useful for consistent measurement (Adcock 2001). In order to develop a more systematic definition of the concepts underlying our study, we began by acquiring the roughly 7,700 unique comments available for download on the Federal Reserve's Dodd-Frank rulemaking page.[7] Of these, each of the authors read one hundred comments chosen via simple random sampling, rejecting those that were not from firms or advocacy groups. From this initial exploration, we made the following observations:

[7] `https://www.federalreserve.gov/apps/foia/proposedregs.aspx`

- Comments contain a mix of persuasive techniques.

- Letters that seem to suggest action of any kind in the Courts or Congress are exceptional while those offer policy information and preferences are common.

- Most frequently when Congress is mentioned, it is in the context of describing outcomes that Congress wanted. Sometimes these outcomes are specific and tailored to the policy choices actually under consideration (e.g. "Congress wanted municipal bonds to count as Tier 1 capital"), but more often the outcomes are so broad and unobjectionable that they are synonymous with the common interest (e.g. "Congress wanted to create a stable banking system").

- When commenters are specific about particular policy choices Congress wanted, they often go on to explain that the agency's proposal is acting directly against Congress's intent, often making textual arguments and referring to speeches on the Congressional floor. A number of these letters were sent on behalf of particular companies, sometimes unnamed, by large New York law firms.

- Commenters sometimes indicated that they had CCed members of Congress on their letters.

- Commenters sometimes described actions undertaken by favorable Congresspersons after passage, which seems to be more of a warning that "police-patrols" were occurring than a threat to notify Congress of deviations from the legislative bargain.

- There were no suggestion of involving OMB, Presidential administration, the media, or any other principals besides courts or Congress.

These findings had several important implications as we moved to systematize our measures. Our coding should assume the use of one tactics does not exclude the use of the other. Our coding scheme should attempt to define threats expansively, as the greater measurement threat to the conclusions is that the threats are *under-counted* rather than *over-counted*. Congress is invoked in three ways: a Congress person is CCed on the comment, the letter mentions actions undertaken by a Congressperson following passage that suggest ongoing Congressional attention or interest, and the letter describes outcomes that Congress wanted when it passed the law. While the first two definitions are precise enough that they can be used for measurement (in what follows, we use codes CC and CA), invoking Congressional intention is more ambiguous. It could indicate the sharing of policy perspective, a threat to go to Court, or a threat of Congressional sanction, all of which should produce influence for different reasons. In order to ensure the distinctness of our coding in regard to the mechanisms of influence, we use code CI to refer to descriptions of what Congress wanted where (1) the outcome Congress wanted is specific and not a broad unobjectionable principle, and (2) the section in which the Congressional intent is referenced is not part of a legal threat.

Our goal in coding legal threats is to identify comment letters that raise legal arguments that the commenters could subsequently use in court. Practitioners sometimes emphasize that their goal in commenting is to lay the groundwork for arguments they intend to make in subsequent litigation (Scalia 2017). To code a document as being a threat there are two elements the comment must satisfy:

1. The comment contains a citation to a legal authority, such as a statute, case law, or a specific constitutional provision.

2. The citation is followed by a claim that the agency is in violation of this legal authority.

The second prong is particularly important, since virtually every comment discusses a law or regulation, and the mere presence of some or even a lot of discussion of law does not necessarily imply a threat. An example of a legal threat is found in a comment by the American Council of Life Insurers on the rule regarding Margin and Capital Requirements:

> Section 4s(e)(3)(C) of the Commodity Exchange Act (”CEA”) states that the Prudential Regulators “shall permit the use of non-cash collateral, as the regu-

lator...determines to be consistent with (i) preserving the financial integrity of markets trading swaps; and (ii) preserving the stability of the United States financial system." In the Reproposed Rule, the Prudential Regulators permit only cash collateral for VM and do not provide an analysis that would support a determination that permitting non-cash collateral for VM would negatively affect the financial integrity of the swaps market or the stability of the U.S. financial system. [8]

We make no restrictions on the plausibility of these legal arguments, the extent of the research behind them, the number of alleged violations, whether the sender of the letter is a lawyer or law firm, or any other plausible criteria for ensuring that the threats are genuine and credible. We merely code whether there is an alleged violation of a specific legal authority.

In considering our definitions, it is important to distinguish between comments that are litigation threats and comments that pose litigation risk. Practitioners' accounts suggest that firms may submit informative comments to the regulator if they plan to challenge the agency in Court on the grounds that the regulator has not actually made a reasoned decision or considered all the options. In this sense, all comments might be viewed as raising some litigation risk. Identifying litigation risks is an important part of the job of the general counsel of an administrative agency, and it is natural that they would tend to view all comments in this light. At the same time, the risks posed by informational comments are obviously much lower because the commenter must convince a court that the agency's decision was irrational. Courts are loathe to replace their inexpert judgment for that of an administrative agency. An outside interest whose only grounds for challenge is that the agency has failed to come to a reasoned decision is certainly setting out on a rough path that is unlikely, in most cases, to lead to success. Nevertheless, as a robustness check of our coding scheme, the section after next canvasses the case law for challenges to financial regulation and codes the comments

[8] `https://www.federalreserve.gov/SECRS/2014/November/20141126/R-1415/R-1415_112414_129786_278794149594_1.pdf`

submitted by challengers. As we shall see, commenters challenging the reasonableness of the agency's decision are often explicit that this is what they are doing, and will including citations to statutes or case law standing for the proposition that agency decisions must be reasoned in order to be lawful.

Although our definitions are intended to separate allegations that the agency is abusing its Congressional slack from comments describing good public policy and also legal threats, in certain instances we found that commenters seemed to invoke different kinds of threats in different sections. For example, one might have one section that argued the agency was contravening Congressional intent in a specific way, yet did not rely on any explicit legal authority to argue this was the case. Then in another section, the same comment would identify a specific authority that the agency was allegedly violating. In such a circumstance, we would consider the comment as engaging in both a fire-alarm threat related to Congressional intention and a legal threat, so would mark code "CI/L." Although CI is an exclusive code at the paragraph or several paragraph level, at the comment level none of our codes are exclusive.

The majority of Federal Reserve comments that we read express preference and present facts. In a broad sense, they are informational comments rather than threats, and their prevalence is consistent with theories of bounded rationality, bureaucratic responsiveness, and private-information sharing. In order to dig deeper into what these preferences or facts look like, we developed a detailed coding scheme breaking down each category. For preferences, we consider the commenter's tone ("uniformly positive","uniformly negative", or "mixed"), their view of the impact on regulated firms and individuals ("went too far","did not go far enough", or "was about right"), whether the preferences were expressed broadly toward the proposal as a whole or narrowly toward specific aspects, and finally whether the preferences were expressed by ranking alternatives or monolithically being for or against certain aspects. In the case of factual comments, we separated the substance of this new factual evidence (e.g. 'case study', 'content analysis', 'quantitative data/analysis', or 'offering perspective on facts, describing issues, or discussing principles'). The dominant role of the latter in rulemaking is predicted by theories of bounded rationality, while technocratic models of expert policymaking would suggest that factual material should have some other substance. For factual comments, we also identified the qualification the commenter possessed to offer this information (e.g. personal experience, scientific/social-scientifc expertise, legal expertise, or policy domain expertise). Finally, we considered how broad a set of actors the factual information related to, either firm, industry, entire economy, or regulated entities.

The final step in comment selection is to identify the sampling strategy. An important fact to know in this context is that commenter participation rates are highly skewed, with a small fraction of rules receiving thousands or even millions of comments, and the vast majority receiving at most a few hundred. As a result, the typical comment on a regulation is a form letter submitted by an ordinary citizen on one of a small set of rules, while the typical comment on a typical regulation is submitted by an interest group or firm and could pertain to virtually any matter. Other scholars have approached this problem by focusing only on dockets that receive a "Goldilocks" level of commenting: not too much but not too little (Golden 1998; Yackee and Yackee 2006). We prefer to address this problem via stratified sampling. We sample comments by first picking a rule at random among all the rules issued by an agency. Then, once we have picked a rule, we pick a comment at random from the comments selected by the same agency. In this way, our sampling scheme ensures that our estimates reflect the characteristics of the typical comment on the typical rule, which we consider the most meaningful quantity of interest.

Results

Figure 1 presents a high-level overview of the prevalence of threats to involve Congress or the Courts. The estimates range from as high as 28% of the comments at the FRB[9] and as low

[9]N.B.The FRB comments were done by an RA that had a clear tendency to identify a comment as invoking Congressional intent that we would consider to be purely describing broad, unobjectionable goals and, as a

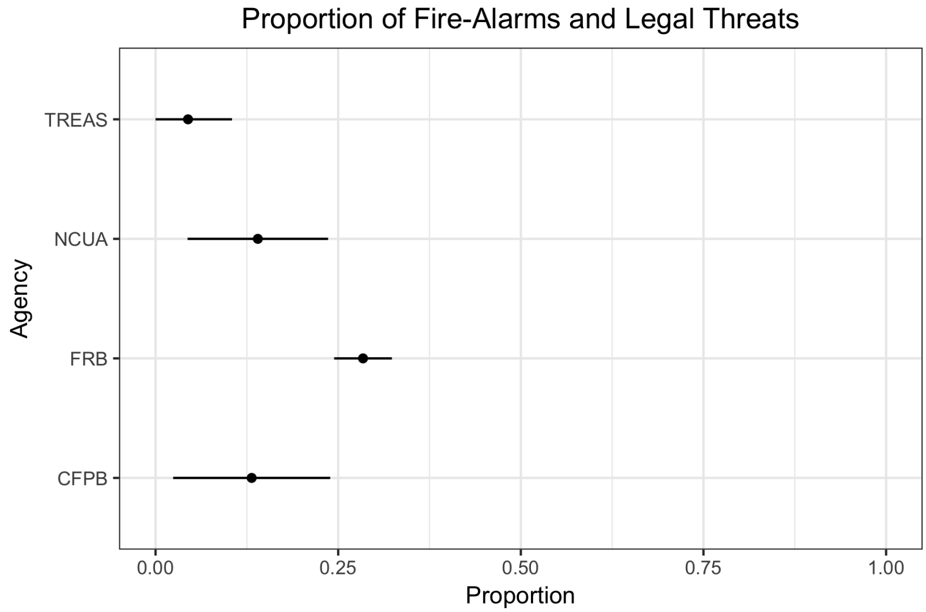

Figure 1: Proportion of comments broadly understood as raising the possibility of external sanction in the Treasury, National Credit Union Administration, Federal Reserve Board, and CFPB. Confidence intervals calculated using the bounds $\hat{p} \pm 1.96 * \sqrt{\frac{\hat{p}(1-\hat{p})}{N}}$

as 4% in the case of Treasury. The uncertainty estimates are calculated assuming a binomial data generating process. In light of the confidence intervals, it is not clear that the tendency of commenters to engage in "threats"-broadly understood-actually differs by agency.[10] If we understand the function of the remaining comments as providing the regulator with information of some kind, then the figure also implies that information provision dominates threat-making in each of the financial regulatory agencies. Generalizing across the agencies, it seems only about one in ten comments seem to suggest some kind of external sanction.

Table 1 further breaks down the population level estimates for each of the kinds of tactics individually. Treating comments that use multiple kinds of threats as their own category, the threatening comments can be considered as belonging to one of five bins. Since threats are about one in ten comments, the estimated proportions in some of the bins will be close to 0. In this circumstance, frequentist confidence intervals for a binomial proportion have poor coverage and may violate boundary constraints. As a result, we here calculate Bayesian

result, we expect this number should be lower after we finish double-coding and resolving discrepencies.

[10] Again, we may revise this claim after the data collection completes.

Kind	CFPB	FRB	NCUA	TREAS
CC Cong.	0.000	0.058	0.00	0.000
	(0.001,0.09)	(0.039,0.078)	(0,0.07)	(0.001,0.077)
Cong. Attention	0.000	0.010	0.06	0.000
	(0.001,0.09)	(0.004,0.023)	(0.021,0.154)	(0.001,0.077)
Cong. Intent	0.053	0.120	0.02	0.000
	(0.015,0.165)	(0.084,0.136)	(0.005,0.103)	(0.001,0.077)
Legal Threat	0.026	0.052	0.06	0.000
	(0.006,0.132)	(0.034,0.071)	(0.021,0.154)	(0.001,0.077)
Multiple	0.053	0.044	0.00	0.044
	(0.015,0.165)	(0.028,0.063)	(0,0.07)	(0.013,0.143)

Table 1: Distribution of Threats. 95% Bayesian credible intervals formed assuming a binomial likelihood and weakly informative Beta(1,1) prior.

credible intervals using a weakly informative prior. For each particular tactic, the credible intervals are overlapping, indicating that even on this finer level there do not appear to be significant agency level differences between tactical use. If we assume, reasonably based on our prior analysis, that the typical significant rulemaking receives about 100 unique comments from firms and interest groups, then just a few of each kind of threat will be observed in a significant rulemaking docket.

Turning to the informational comments, which make up the vast majority of the comments each agency receives, we first illustrate the prevalence of comments that communicate "facts" and those that convey "preferences" in Figure 2. As expected from our initial exploration of comments at the Federal Reserve, the proportion of usage of each tactic is high, indeed it is clear that the majority of commenters offer both facts and preferences. The tendency in each agency for preferential comments to outweigh factual comments is apparent, but the difference is shy of significance according to a one-sided Fisher test ($p \approx 0.16$).[11] The overall proportion of usage in either case is also not clearly different between the agencies.

Although our hypotheses are targeted toward prevalence of fairly broad categories, we nevertheless collected data on several other aspects of the preferential comments we received, in order to provide texture and intuition behind these results. We looked, for example, at the

[11]ED: We should likely expect significance with more data

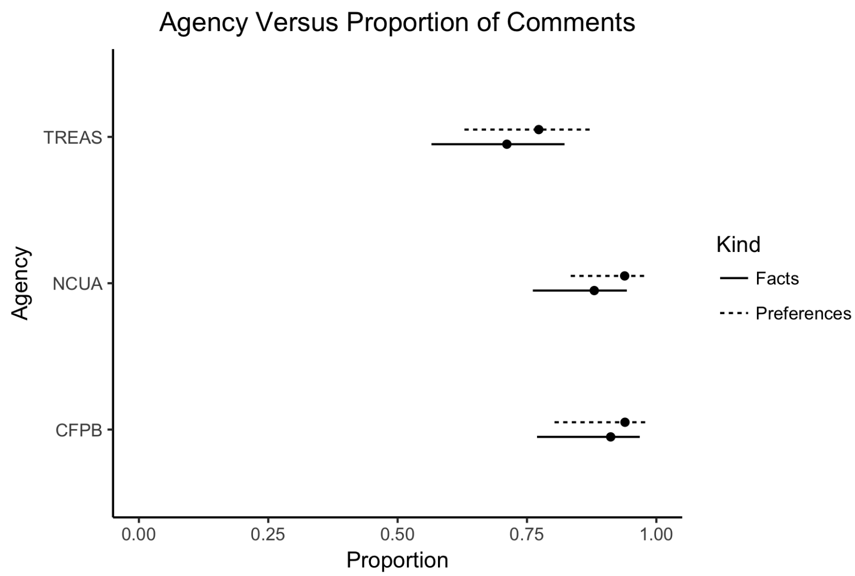

Figure 2: Facts and Preferences

valence of the comment toward the entire proposal. With the exception of the CFPB, the plurality of commenters offered a mix of positive and negative comments supporting some but not other aspects of the proposal (NCUA: 47.8%; TREAS: 40.6%), the next largest block offered uniformly supportive comments (NCUA: 34.8%; TREAS: 37.5%), and a relatively small proportion offering only uniformly critical remarks (NCUA: 17.4%; TREAS: 21.9%). At the CFPB, however, the situation was quite different. Roughly three out of every four comments that expressed preferences about the proposal were uniformly negative (76.7%), roughly one in six comments expressed support and opposition to various aspects of the proposal (16.7%), while only about 7% of comments were uniformly supportive of CFPB regulation. The likeliest explanation for the remarkable negativity of the CFPB advocacy environment is that we have deliberately only chosen to look at the comments of firms and interest groups, and most of the latter are industry associations rather than consumer advocates. As an agency designed to regulate in an aggressive, consumer-friendly fashion, it is not surprising that its proposals would be received unfavorably, although it is interesting that the overwhelming negativity does not apparently translate into a higher rate of overt litigiousness.

While valence is an important aspect of commenter attitudes, on its own it gives little indication of the direction of the policy adjustment that commenters would want. After all, a fair compromise may provoke uniform opposition. Inspired by Yackee and Yackee (2006), we analyzed the commenter's perspective on how regulated entities were treated under the proposal. In all agencies, the plurality response was that the proposal went too far (CFPB: 72.4%; NCUA: 51%; TREAS: 48.3%). At the CFPB, the next highest response was that the proposal did not go far enough (17.4%), likely a reflection of the outnumbered but nonetheless assertive consumer groups that submit comments on their proposals. Only 4% of commenters at the National Credit Union Administration thought that the proposal did not go far enough, and 16% at the Treasury. At the CFPB, 10% of commenters thought the agency had gotten the regulatory burden "about right", while at the National Credit Union administration the number was just over 44%, at Treasury just over 35%.

Two additional aspects of preferences we examined related to the depth of preferences and engagement with the proposal. Here the results were more consistent. The majority of comments focused narrowly on specific aspects rather than considering the proposal as a whole (CFPB: 87.5%; NCUA: 77.8%; TREAS: 56.2%). The commenters also tended to convey what they wanted in a monolithic way rather than ranking the outcomes it would like best, second best, and so forth. Only 11% of comments at NCUA considered ranking of alternatives, at Treasury it was 3%. Based on these findings and our own impressions from reading many of these comments, one could summarize the typical preferential comment in most financial agencies as follows. The commenter begins by offering support for the overall regulatory aims and suggesting that the agency has done a fine job implementing them, except at the CFPB, where the typical commenter would argue that the proposal is fatally flawed in numerous respects. The comment would go on to argue that the proposal is too hard on regulated entities in a few specifics, or at the CFPB, many specifics. It would suggest that these deficiencies should be changed without considering in any detail what the commenter's preferences would be in regard to the potential alternative courses the agency might take.

Turning now to the factual comments, theories of informational lobbying and bounded rationality lead one to different presumptions about the kinds of information that commenters should provide. In terms of substance, the comment might provide new facts based on case study, content analysis, or quantitative analysis and data. Alternatively, it might situate well or generally known facts in a broader factual or normative context. Again, we found that the CFPB was different than the other agencies. At the Credit Union Administration and Treasury, we found that over ninety-percent of comments offer framing. The proportion of comments offering quantitative data and analaysis was rarer, only 5% at factual comments at NCUA, but 25% at Treasury. Content analysis, understood as close reading and categorization of text, were rare, only 5% of comments. The content analysis frequently consisted of summarizing and analyzing comparable state and federal law requirements. At the CFPB, framing played a greatly diminished role,[12] only 35% of comments. Quantitative analysis was as rare as the other agencies (3% of all factual comments). A great deal of case study evidence appears to have been offered to the CFPB (45% of all factual comments).

The credibility of information a person offers is determined in part by the reasons he or she came to possess it. We coded for four, non-exclusive possibilities for the "qualifications" or "claim to authority" that seemed to back up the claims a comment made: personal experience, scientific or social scientific expertise, expertise in law, or expertise in the policy arena. The vast majority of commenters in all agencies presented themselves as policy experts (CFPB: 73%;NCUA: 86%; TREAS: 91%) as opposed to experts in the law of financial regulation (CFPB: 37%;NCUA: 27%;TREAS: 15%) or personnel experience (CFPB: 23%;NCUA: 36% ;TREAS 32%). Almost none claimed the basis of their knowledge was scientific or social-scientific analysis of problems related to the ones facing the regulator.

[12]ED: Will be interesting to see if this one stays after double-coding is completed)

Threats Versus Actions: The Case of Litigation

The results presented thus far suggest that comments during financial rule-making largely convey information about preferences, provide perspective on the values and facts that should govern policy-making, or offer illustrative case studies. Threats play a secondary, even minimal, role in most commenting for most financial agency rulemakings. Nevertheless, one reasonable concern is that our definitions of "threat" are too restrictive and that the financial regulators can observe threats we, despite our best efforts, cannot. We have guarded against this possibility by defining legal and Congressional threat in as liberal a fashion as seems conceptually meaningful, nevertheless it is possible that threats are so subtle that we still cannot detect them. In order to assess the plausibility of this concern, we conduct an additional content analysis of judicial decisions where a court reviewed financial agency rulemaking, as well as the comments from the plaintiffs that initiated the suit. If our coding scheme is valid, then judicial review of financial regulations should be rare, at least relative to the number of regulations. Further, if our scheme is valid, then the overwhelming majority of plaintiffs should submit a legal threat to the docket of the rule they eventually challenge.

In order to identify cases of judicial review of financial rulemaking, we conducted a Lexis-Nexis search for judicial decisions where one of the financial regulators was a named party and containing any of the following terms: "rulemaking, "rule-making," "proposed rule", and "final rule." In order to generate additional results, and because we were unconstrained by the need to read a sufficient number of comments per agency, we expand our definition of "financial regulator" in this context to include the FDIC and the SEC. We further refined this search by focusing on cases in the D.C. Circuit. Because so many federal agencies are headquartered in the District of Columbia, this particular circuit has become the preeminent administrative law jurisdiction in the United States and the location where most instances of judicial review of rulemaking should occur.[13] For the resulting set of 175 decisions, we

[13] Indeed, our basic search returned more than twice as many results in the D.C. Circuit as in the next most numerous jurisdiction, the 2nd Circuit, which had at least 50% more cases than the 9th circuit, which had at least 50% more cases than all the others.

first identified whether the decision actually involved a challenge to an agency regulation. For decisions where a regulation was challenged, we identified the citation of that regulation, which agency issued that regulation, the web address of the rulemaking docket and plaintiff comment associated with the decision, if available, and whether the plaintiff's challenge to the rule was succesful.

We found that only about 40% of the decisions matching our search actually involved judicial review of a rule, which is to say 76 decisions published between 1947 and 2018. For many of the decisions, it was not possible to find the dockets containing comments electronically. Generally, only dockets relating to cases decided in the last decade were electronically available, with universal coverage only emerging for cases decided after 2010. For 25 of the decisions, we were able to identify the rulemaking dockets that corresponded to the regulations under challenge. A number of these decisions arose from the same legal controversy, in the sense they they involved the same litigants challenging and defending the same final rule. In total, we have fifteen unique disputes for which a docket was electronically available. In all but one of these disputes, the plaintiff preceded their legal challenge by a comment. The only exception was a suit by the New York Republican party challenging an SEC rule that prohibited donations by investment advisers to campaign committees (NY Repub. State Comm v. SEC, 70 F. Supp. 3d 362, (D.C.D. 2014)), and also the Republicans' appeal/refiling of the case in Circuit court (NY Repub. State Comm v. SEC, 799 F.3d 1126, (D.C. Circuit 2015)). In these cases, the New York Republicans attempt several variations on the argument that they had no actual notice of the rulemaking. Unsurprisingly, they did not submit a comment and their challenge was not succesful.

For the fourteen remaining disputes in which a docket was available, we collected and analyzed a total of thirty-four comments submitted by the litigants. Commenters that eventually sued may have a tendency to file multiple comments, which we also note is unusual. The National Association of Manufacturers submitted six letters to the SEC about the Conflict Mineral rule; the Business Roundtable and Loan Syndication Trading Associations submitted four comments regarding each of the rules they were challenging. In thirteen out of fourteen disputes, at least one of the comments submitted by the future litigant was an explicit legal threat according to the definitions we used in our paper. The only exception was a comment letter by the Florida Banker's Association which included a paragraph that claimed the agency was "abusing its regulatory authority and doing so in a manner that is contrary to Congress' intent and the last ninety years of legislative history."[14] Because the letter did not cite a specific authority anywhere in the document, it was not a legal threat according to our definition.

Overall, twenty-three of the comments were legal threats according to our definitions, while eleven were not. Two of these non-threats were requests for extension and two were recommendations that the regulator examine the attached academic or governmental studies. We consider these as incontrovertibly non-threatening. The remaining seven comments were offered on regulations that would eventually become challenged in one of the following cases: *Loan Syndications & Trading Association v. SEC*, *Business Roundtable v. SEC*, or *National Association of Manufacturers v. SEC.* Potentially, these letters may have been offered to help build support for a claim that the agency's decision-making was "arbitrary and capricious," but these were hardly sufficient to make out a claim of that on their own.

To get a better sense of how these non-threatening comments fit into the argument that the agency has come to an arbitrary decision, we focus on the letters of Business Roundtable, since theirs is the only case that was ultimately decided on these grounds. During Notice and Comment, Business Roundtable submitted four letters. The first letter argued that 'the current 60-day comment period is inadequate under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(c)," which is an explicit legal threat in our definition. They followed with a 114-page single-spaced memorandum whose table of contents includes headers such as "The Proposed Election Contest Rules... Exceed the Commission's Section 14(a) Authority" and "The Proposed Election Contest Rules Raise Serious Constitutional Concerns." Both

[14] https://www.regulations.gov/contentStreamer?documentId=IRS-2011-0001-0046&attachmentNumber=1&contentType=pdf

sections deliver many explicit legal threats. Notably, the majority of the memorandum is devoted to describing why the rules are unnecessary and why they are likely to have pernicious side-effects that the agency had not considered. Section IV (B) in particular brings together the claims that the agency had not rationally evaluated the regulatory problem while including explicit references to the APA, the Regulatory Flexibility Act, and the Paperwork Reduction Act. As far as the remaining letters, one was little more than a cover letter, whose purpose was to enter into the public record a study published on SSRN about the role of corporate governance in firms weathering the 2008 financial crisis. The final letter was a ten-page discussion of the merits, weaknesses, and conclusions of the social-scientific studies and reports in the docketing record. It is inevitable that any coding scheme would miss these two, since they appear as classically informative comments. At the same time, the Business Roundtable's case for bureaucratic irrationality and over-reach was largely built in a letter that was easily a legal threat by our definition.

It is also worth noting that the twenty-three comments which led to lawsuits were remarkably unsubtle, especially when compared with most of the comments that we identified as "legal threats" in our main exercise. For example, the American Bankers Association begins its letter to the National Credit Union Administration by declaring that "[t]hroughout this proposal the Board sidesteps the Federal Credit Union Act requirements in the name of industry growth and replaces its own judgment for that of Congress... The ABA urges the Board to reconsider this egregious overreach and withdraw this proposal."[15] Phillip Goldstein, President of the Hedge Fund Kimball & Winthrop, was even more blunt in one[16] of the comment letters that preceded his eventual suit against the SEC:

> [W]e have taken the liberty of providing the Court's opinion in Lowe below so

[15] `https://www.ncua.gov/Legal/CommentLetters/cl-cfmm-20161208-kbrittany-aba.pdf`

[16] Mr. Goldstein also submitted a second letter, a 6 page dialogue between himself and "Humpty Dumpty's great great grandson, Bumpty Dumpty," who "is a senior staff attorney at the SEC in the Division of Investment Management's Office of Expediency." The dialogue, a parody of a segment of Lewis Carol's *Alice in Wonderland*, accuses the SEC of intentionally violating the *Lowe* precedent and promulgating the regulation in order to drum-up business for the private legal services industry, in which "Bumpty Dumpty" eventually intends to work. It is interesting to note that, despite the "wondrous" tone of his letters, Mr. Goldstein would go on to win his challenge in the D.C. Circuit Court of Appeals.

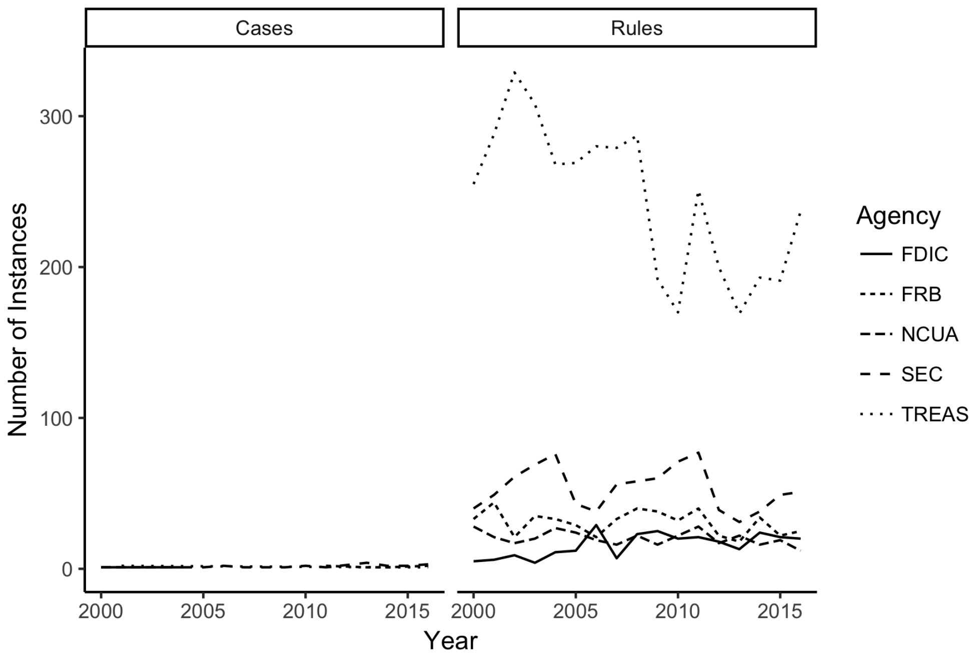

Figure 3: Number of cases of judicial review of rulemaking and number of rules issued per year in six financial agencies between 2000 and 2016. Over the entire sixteen year period, there were thirty six instances of judicial review of rulemaking by the six financial regulators.

> that the Commission's legal wizards can familiarize themselves with it. After reading it, we are confident they will see the wisdom of abandoning a misguided effort to redefine "client" and save itself the embarrassment of being rebuked by a reviewing court if the rule is adopted as proposed.

Figure 3 shows the comparison between number of cases involving judicial review for each regulator and the number rules being issued for the period between 2000 and 2016. Twenty of the thirty six cases from a single agency, the SEC, which was not part of our original coding. Even at the SEC, the rate of lawsuits works out to about one per year, at the same time as the agency issued about sixty regulations per year. The ratio of cases to rules is small, and the ratio of cases to comments is a small fraction of that. Since 2010 the Federal Reserve has received about 7700 comments on 110 rules, although the median rule only received ten comments. Comparing such figures with the estimated proportion of legal threats (between 2% and 6% of comments), it seems that most of what we call legal threats are at most bluffs. Even when plaintiffs do bring judicial challenges, it turns out they win only about a third, so even initiating a suit should hardly indicate to the agency that its position is precarious. One potentially worrying possibility, for our story at least, is that few legal threats turn into actual lawsuits because the financial regulators frequently capitulate to legal threats and so do not result in judicial decisions. However, if agencies were quick to capitulate to legal threats, we should expect more active threatening by opposing interests, especially given the fact that there are generally commenters on both sides of a proposal. As a result, if threats were frequently leading to capitulation, we should see a higher overall proportion of threats among all comments. The best explanation for this fact pattern is that recourse to lawsuits is highly constrained and does not typically offer sufficient marginal benefit among potential commenter strategies, especially as compared with other tactics.

Are Commenters' Choice of Tactics Driven By Resource Constraints?

Under the logic of revealed preferences, the choices of rational actors reflect their judgments about the marginal benefit of typical actions. Nevertheless, without more information, it is impossible to know whether the marginal benefit of choosing X is higher than choosing Y because X brings more benefit than Y or has higher costs. Alternatively, there might be constraints that prevent the choice of Y, although we usually do not lose much in thinking of hard constraints as sufficiently large costs. One approach to testing whether the decisions are benefit or cost driven is to examine whether choice changes as a function of features that are likely correlated with the constraints. For example, suppose that threatening litigation brings the most benefit, but also comes at significant costs that the many small firms cannot afford to incur. In such a world, one might find the few, well-resourced firms prefer to bully and the many, smaller firms prefer to beg, but that would reflect the comparatively high costs of bullying for small firms rather than the comparatively low benefit of litigation. Of

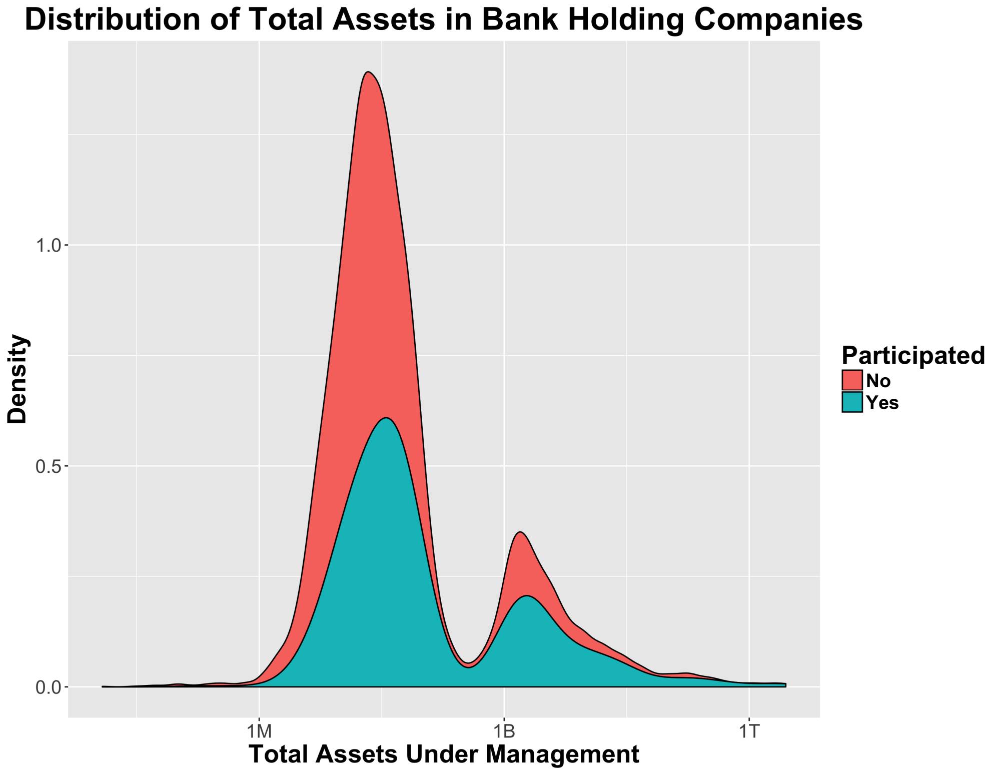

Figure 4: Density plot of assets under management for Bank Holding Companies that submitted comments on Dodd Frank rulemaking compared with ones that did not.

course, our decision to collect data about variables that are correlated with constraints must reflect some assumptions, which might themselves be difficult to evaluate. Nevertheless, most reasonable theories would assume that the constraints that an actor faces in using a tactic are related to resource-endowments, in particular that wealthy actors have lower effective costs. In this section, we focus on evaluating how usage of bullying tactics relate to resources, in order to shed light on whether are more likely related to the benefits or constraints with their usage.

Before proceeding too far down this line of inquiry, it is worth considering how the propensity of firms to comment changes as one moves up the resource distribution. To do so, we collect data about the resources of bank holding companies that submitted comments to the Federal Reserve regarding Dodd-Frank rules and compare them to those that do not. Figure 4 compares the assets under management of banks by commenter status. The bimodal distribution is likely explained by the higher regulatory requirements of managing at least a

	Comment Type					
	L	CA/CC/CI	CA/CC	CI	CA	CC
	(1)	(2)	(3)	(4)	(5)	(6)
Log Total Assets	0.001	−0.082	−0.146	−0.157	0.256	0.067
	(0.005)	(0.083)	(0.106)	(0.108)	(0.261)	(0.108)
Constant	0.021	-0.814^{*}	-1.052^{*}	-1.024^{*}	-5.888^{***}	-2.617^{***}
	(0.031)	(0.476)	(0.589)	(0.597)	(1.768)	(0.654)
Observations	310	310	310	310	310	310

Note: *p<0.1; **p<0.05; ***p<0.01

Table 2: This table presents regressions exploring the relationship between commenter size and the propensity to involve Congress in one of several fashions, focusing on BHCs

billion dollars in assets relative to managing less than a billion dollars. The figure illustrates how the more assets a bank has, the more likely it is to participate in notice-and-comment. However, resources do not appear to be a barrier for most banks: for almost any part of the asset distribution one examines, there are examples of firms with that level of assets that did participate in notice-and-comment rulemaking sometime in the last eight years.

Table 2 contains OLS regressions exploring the relationship btween threats on log assets and log revenue. In none of the specifications does the size of the firm predict whether or not a commenter made a particular kind of threat. Nevertheless, it is important to recognize that the amount of power available to these regressions is limited by the rareness of threats in general. Even reading and coding some three-hundred comments submitted by banks, we have just a few examples of each kind of threat from which to assess the relationship with assets.

Discussion and Conclusion

The results and mechanism checks of the last three sections have developed a number of descriptive facts with rich theoretical significance. Despite the agencies having varying degrees of political insulation, and catering to differing kinds of interests, the use of tactics across financial agencies was remarkably similar. In each case, information-provision dominated all the threat mechanisms. In most cases, the information that the comments provided was about the preferences of the commenter or communicated facts within their knowledge. Consistent with theories of bounded rationality, most of the "factual" comments seemed to engage in framing. At the CFPB, there was a greater tendency to offer case studies, which are also unsurprising tools from the behavioral perspective. Surprisingly, from the perspective of credible signalling models of lobbying, very few of the comments portrayed themselves as offering quantitative data, scientific analysis, or other pieces of "hard data" that might overcome the credibility problems caused by the outside interests obvious conflicts of interest.

In evaluating the rareness of threatening comments, we are confronted with a choice: either using these tactics does not bring sufficient benefit, or its usage is sufficiently constrained in ways we cannot observe. In our view, both explanations are probable. The sticks that the principals can provide may be strong, but commenters do not vicariously obtain even a fraction of their power. In the case of Congress, getting the attention of a single Congressperson is hard enough, but to get Congress to open its oversight toolbox requires concerted Congressional action. Even the Goldmans of the world do not have the means to get all their regulatory matters at the top of the Congressional agenda given the competition from other actors and groups, and so they must focus their own Congressional lobbying efforts on only the most salient examples. In the case of litigation, a Court can in theory force the agency back to square one in its rulemaking, but we know that most of the time that plaintiffs do bring their cases to judgment, they wind up with nothing more than expensive legal bills. Presumably, most of the cases that might exist, but do not reach the decision-stage, would be even weaker and have less probability of delivering the regulatory benefit than the ones that are brought. The financial agencies must understand that most of the legal threats confronting them are not going to end up in Court, so face little reason to cave to them, especially since capitulating today may lead to less valuable information tomorrow. On the constraint side, there must be numerous potential downsides that prevent firms and interests from resorting to threatening tactics: for example, damage to reputation or relationships, the possibility of retribution in unrelated areas, and also the direct costs of hiring counsel or Congressional lobbyists.

One unfortunate corollary of the rareness of threatening comments, especially by individual firms, is that it is difficult to achieve the large scale necessary to analyze the relationship between the use of these tactics and economic resources. With just a few positive examples of any particular kind of threat, detecting any relationship is difficult. Given the volume of commenting activity that occurs in the federal government, our estimates imply that there are surely enough comments out there to theoretically conduct such a study, the only problem is finding them. While computational text analysis or machine learning might help with sorting through such materials, truly effective usage of these methods requires substantial training data. If we had enough training data, we would already have what we need to detect a substantial effect.

In interpreting these findings, it is also important to consider the effect of the sample design. The typical comment is on one of a handful of rules that received a large number of comments. It is possible that hard ball tactics are more common on such rulemaking dockets because businesses have greater stakes in these issues. We are doubtful of this supposition because, in our experience, the usual reason that a docket has upwards of several hundred comments is because many ordinary citizens or sole proprietor-ships have decided to become involved in rulemaking. Such commenters usually submit relatively short comments that we might describe as preferential or factual, but any threats they make would be particularly empty. Many rules appear to have large economic stakes and receive surprisingly few comments. Since our goal is to understand what drives administrative decision-making in most rulemakings, our approach to sample selection seems to be the right one.

Our findings also shed substantial light on the thematic questions about the nature of administrative process that began our inquiry. By exploring the tactics of commenters, we have learned that at least in the financial regulatory space the advocacy environment looks very much like the authors of the Administrative Procedures Act would have expected. Analysis of comment letters does not suggest that sussing out missing private data is the only way (or even a particularly good way) to achieve favorable regulatory outcomes. Such analysis does suggest, however, that the financial agencies are at least trying to make regulation that responds to the conflicting mandates and preferences in their environment. Fears that rule-making has become overly judicialized, or that large-firms use qualitatively different tools to achieve better outcomes, appear unfounded on the basis of the data we collect.

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