The Politics of the Regulatory Policymaking Process: Three Essays on Governments, Markets, and Effective Regulatory Governance

by

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Sanford School of Public Policy of Duke University

2018
ABSTRACT

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Abstract

This dissertation comprises three articles:

“Rethinking Stakeholder Participation in Regulatory Governance: A Historical-Institutional Analysis and Proposed Theoretical Model” (Chapter 2/Article 1): The regulatory policymaking process provides myriad opportunities for stakeholder participation. While policymakers have invested considerable resources in engaging stakeholders in regulatory policymaking, comparatively few resources have been invested in evaluating the effectiveness of participation processes. Similarly, although there is a burgeoning literature on stakeholder participation in regulatory policymaking, the topic of participatory effectiveness is under-explored. A more holistic understanding of the causal chain connecting participatory institutional design, stakeholder participation, and regulatory policy outcomes would contribute to the theory and practice of regulatory governance by illuminating the conditions under which interactions among regulators and external stakeholders promote or hinder effective regulatory policy. Based on a historical-institutional analysis of participatory institutional design in the United States over the last century and a review of the extant interdisciplinary theoretical and empirical literature, this article proposes a novel causal process model of participatory effectiveness. This model both formalizes a theoretical
approach to defining participatory effectiveness and informs empirical approaches to measuring the effectiveness of participation in regulatory policymaking.

“Technocracy, Democracy, and Public Policy: An Evaluation of Public Participation in Retrospective Regulatory Review” (Chapter 3/Article 2): In 2011 and 2012, President Obama issued a series of Executive Orders (EOs) mandating that U.S. federal agencies engage in “retrospective review” of their existing regulations. While prospective assessment of regulations is a well-established feature of the U.S. regulatory policy cycle, EOs 13563, 13579, and 13610 recognize that retrospective assessment is not yet institutionalized. This article presents the first systematic assessment of participation in U.S. retrospective regulatory review. Drawing on content analysis of an original dataset of government documents and public input, this article analyzes participatory institutional design, the level and composition of resulting participation, and the effectiveness of participation processes. The results suggest that participation processes were effective with respect to the purposes of participation identified in the EOs and extant literature: policy learning and process legitimacy. These findings offer preliminary evidence that under certain circumstances regulatory agencies may use participation to enhance technocratic expertise and promote democratic accountability.
“Banking on Burden Reduction: How the Global Financial Crisis Shaped Stakeholder Participation in Banking Regulation” (Chapter 4/Article 3): The Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) of 1996 requires the Federal Financial Institutions Examination Council (FFIEC)—an interagency council composed of U.S. banking regulators—to conduct decennial retrospective reviews of existing banking regulations, with an emphasis on reducing regulatory burden. EGRPRA reviews provide a lens to study government-market interactions before and after the global financial crisis (GFC) of 2007-2009. Through comparative case studies of EGRPRA reviews in 2007 and 2017, this article documents how banking regulatory review processes and stakeholder participation in banking regulation have changed over the last ten years. Using within-case process tracing and content analysis of an original dataset of government documents and public input, this article analyzes the extent to which changes in review processes, participation, and outcomes can be attributed to the policy shock of the GFC and/or shifting political, regulatory, and/or market contexts. The results suggest government-market interactions have changed considerably since the GFC, and that regulatory politics explain many of these changes. While retrospective review and stakeholder participation therein may enable more effective and legitimate
regulations and rulemaking processes, much work remains to realize these potential benefits in banking regulation.
For my grandmother, Mary Ann Wewerka
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1. Introduction

In response to major market failures in the 2000s—such as the global financial crisis (GFC) of 2007-2009—politicians and the public called for more effective government regulation of markets. These calls for re-regulation were answered through sweeping reforms, ending approximately 30 years of deregulation. Yet, this commitment to implementing effective regulatory governance has largely outpaced the scholarship on effective regulatory governance (Balleisen and Moss 2010). This disconnect between theory and practice is even more critical now, as the Trump administration seeks to radically reform the regulatory state without empirical evidence regarding the potential consequences for the public interest. Recognizing the importance of this critical juncture, my research explores the intersection of governments and markets through the lens of stakeholder participation in regulatory policymaking, at both the U.S. federal and international levels, and with a substantive focus on financial regulation. My research aims to inform theory and practice by evaluating how interactions among regulators and external stakeholders in the regulatory policymaking process impact the effectiveness of regulatory policy outcomes.

This dissertation comprises three articles on the causes and consequences of stakeholder participation in regulatory policymaking across distinct institutional
contexts. The first article (Chapter 2) evaluates how participation in regulatory policymaking has evolved over the last century and proposes a model for evaluating the effectiveness of participation processes. The second article (Chapter 3) evaluates the effectiveness of stakeholder participation in institutionalizing ex post impact assessment. The third article (Chapter 4) evaluates how the GFC shaped banking regulatory processes and stakeholder participation in banking regulation, and explores the implications for the effectiveness of post-GFC financial regulatory governance.

Although each article is presented as a standalone chapter, the articles are theoretically and methodologically additive. The first article (Chapter 2) identifies several gaps in the literature on stakeholder participation in regulatory policymaking. The second and third articles (Chapters 3 and 4, respectively) address a key gap identified in the first article (Chapter 2)—inattention to the causal paths connecting participatory institutional design, stakeholder participation, and regulatory policy outcomes—and analyze this relationship in under-explored institutional contexts: participation in retrospective review (Chapters 3 and 4), participation in cross-sector regulation (Chapter 3), and participation in financial regulation (Chapter 4). Additionally, the model proposed in the first article (Chapter 2) informs the methodological approaches in the second and third articles (Chapters 3 and 4).
In each of the articles in this dissertation, I employ a systems approach to the study of regulatory governance. This approach accounts for the interactions among the policy, political, and procedural determinants of regulatory effectiveness and contextualizes these interactions within their complex regulatory, political, and market systems. This approach is further informed by my interdisciplinary academic training and professional experiences; I draw on theories from public policy, political science, law, economics, management, history, and complexity science. My approach is also mixed-methods and I utilize original empirical datasets and novel primary sources. Applying this interdisciplinary, mixed-methods, systems approach to the study of government-market interaction via regulatory policymaking advances the academic literature and generates actionable findings for policymakers. Thus, this dissertation seeks to inform the theory and practice of effective regulatory governance, and in so doing, realize Duke’s (2017, 9) commitment to “knowledge in the service of society.”
2. Rethinking Stakeholder Participation in Regulatory Governance: A Historical-Institutional Analysis and Proposed Theoretical Model

2.1. Introduction

Perhaps no theory of regulatory governance has greater resonance with policymakers, politicians, and the public than regulatory capture (Huntington 1952; Bernstein 1955; Stigler 1971; Posner 1974; Peltzman 1976). While scholars agree that business interests enjoy considerable political power, the extent to which regulatory capture exists, and the implications for public policy, are increasingly contested in the academic literature. As Kerwin, Furlong, and West (2010, 600) observe, “nowhere has more rhetorical heat been generated amid less empirical light than on debates over businesses’ influence on public policy.” Underlying the debate about regulatory capture is a great deal of uncertainty regarding the process by which regulatory policy outcomes become captured and, this article argues, a missed opportunity to not only prevent regulatory capture but also improve regulatory policy through participatory institutional design.

In their seminal edited volume on the topic, Carpenter and Moss (2014, 13) define regulatory capture as: “the result or process by which regulation, in law or
application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.” This definition highlights an important distinction, which is often obscured by the rhetorical appeal of capture: the problem is not regulatory capture per se, but rather, the problem is public policy that deviates from the public interest. Regulatory capture is one potential cause of this deviation—by diverting policy outcomes from the public interest toward a private interest—but it is by no means the only cause. The implication of this distinction is that improving the quality of regulatory policy requires more than diagnosing instances of capture, itself a thorny task that cannot be reduced to correlating the preferences of regulated entities and policy outcomes. Instead, it requires understanding the conditions under which interactions among regulators and external stakeholders promote or hinder effective regulatory policy.

Stakeholder participation in regulatory policymaking—the process by which external stakeholders access and influence the bureaucracy—provides an important window into the interactions among regulators and external stakeholders. While there is a burgeoning literature on stakeholder participation in regulatory policymaking, the topic of participatory effectiveness is underexplored. A more holistic understanding of the causal chain connecting participatory institutional design, stakeholder participation,
and regulatory policy outcomes would contribute to the theory and practice of regulatory governance by illuminating the conditions under which interactions among regulators and external stakeholders promote or hinder effective regulatory policy. This article begins to address this opportunity by developing an analytical framework for defining and measuring participatory effectiveness. While it may not be possible to define participation absolutely as effective or ineffective, this article argues that it is possible to evaluate effectiveness contextually, that is, vis-à-vis the purposes of participation as conceptualized in government policy and in practice.

Evaluating participatory effectiveness requires identification of the purposes of participation and the mechanisms by which participation might realize these purposes. This article derives the purposes of participation from a historical-institutional analysis of participatory institutional design in the United States over the last century. It then identifies the mechanisms through which participation might realize these purposes from a review of the extant interdisciplinary theoretical and empirical literature on participation in regulatory policymaking. Drawing on this analysis of purposes and mechanisms, the article proposes a novel causal process model of participatory effectiveness. This model both formalizes a theoretical approach to defining participatory effectiveness and informs empirical approaches to measuring the
effectiveness of participation in regulatory policymaking. The article then describes how future research connecting the proposed causal process model to analyses of institutional design might enable scholars and practitioners to not only evaluate, but also promote, participatory effectiveness through participatory institutional design.

2.2. Participation in Regulatory Policymaking

Kerwin and Furlong (2010, xi) refer to rulemaking as regulatory agencies’ “single most important function.” Given that rules vastly outnumber statutes, are significantly more specific than statutes, and have a more immediate effect than statutes, one might argue that rulemaking is one of the federal government’s most important functions (Furlong and Kerwin 2005). Public participation in rulemaking involves regulatory agency dissemination of information and engagement of external stakeholders in the process translating enabling legislation into regulatory policy. While there are numerous ways in which policymakers interact with constituents, participation in regulatory policymaking is based on a specific set of principles and procedures that are codified in statutes, presidential and agency directives, and judicial decisions (i.e., participatory institutional design). This section briefly describes the current practice of stakeholder participation in U.S. rulemaking (depicted in Figure 1 below) before turning to an analysis of its legal and political origins (depicted in Figure 2 below). The latter analysis
provides legibility into the purposes of participation in regulatory policymaking, as conceptualized in government policy and in practice.
Figure 1: Stakeholder Participation in the U.S. Regulatory Policy Cycle

1 Key: Advanced Notice of Proposed Rulemaking (ANPRM), Office of Management and Budget (OMB)
Office of Information and Regulatory Affairs (OIRA), Regulatory Impact Assessment (RIA), Congressional Review Act (CRA)
*Independent regulatory agencies are not subject to OMB OIRA review
** Economically significant defined as $100 million or more annual impact
Figure 1 depicts how the stages of the rulemaking process (white rectangular boxes) fit within the broader regulatory policy cycle (dark grey arrows) and the opportunities for participation in each stage (white arrows and boxes). These opportunities for participation exist at each stage of the regulatory policy cycle, across the three branches of government, and through multiple modes. The light gray box in Figure 1 distinguishes the informal rulemaking process—in which participants engage directly with regulatory agencies and the U.S. regulatory oversight body, the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA)—from engagement with the legislative and judicial branches.

Stakeholder engagement with regulatory agencies and the regulatory oversight body may occur at each stage of the regulatory policy cycle, including the inception of rulemaking, throughout the iterative rulemaking process, upon promulgation of a final rule, and during retrospective review of existing rules. Although the focus of this article is on participation in the development of regulations, stakeholders may also play an important role in the implementation of regulations—and, as explored below, participation in rulemaking may affect implementation, which may in turn affect rule effectiveness via compliance. As Figure 1 depicts, the modes of participation are also varied, including submission of written comments or petitions, participation in hearings
and public meetings, and deliberative engagement through advisory committees and negotiated rulemaking processes.

2.2.1. Origins of Participation in Regulatory Policymaking

To understand why the myriad opportunities for participation depicted in Figure 1 exist, it is useful to explore their legal and political origins. Beginning with the emergence of the “statutory right” to participation in 1940s, this section traces the evolution of administrative procedure related to participation over the last 75 years, a period in which opportunities to participate have expanded considerably (Croley 2008, 138). Figure 2 below provides a timeline (horizontal axis) of major government actions related to participation, accounting for the origins of institutional changes (vertical axis) as well as the shifting conceptualizations of the purpose of participation and who has a stake in regulatory processes (top); each of these developments is discussed in the sections below.

While there is no analogous statutory right to participation at the international level, it should be noted that international organizations have increasingly incorporated participation into their policymaking processes. Furthermore, scholars have observed that the emerging body of global administrative law literature reflects many of the principles in U.S. administrative law (Barr and Miller 2006; Kingsbury, Krisch, and Stewart 2005; Stewart 2005).
While not attempting to offer a full causal explanation for each development, this section attempts to position reforms related to participation within the broader critiques of the bureaucracy that they purportedly addressed. To preview the findings, the historical evolution of American administrative procedure reveals a persistent struggle to balance regulatory agency democratic accountability and bureaucratic autonomy—

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3 A table version of this diagram is available in Appendix A: Major Government Actions Addressing Participation in Regulatory Policymaking (1941-2017).
which enables technocratic, rather than political, decision-making—and a longstanding role for participation as the solution to perceived deficits in regulatory accountability and expertise. Yet, just as the origins of institutional change shifted over this period—from reports commissioned by the president and Congress to statutes and judicial decisions to presidential directives—so too did the purposes of participation.

2.2.1.1. Regulated Entities Gain the Right to Participate

While engagement with external stakeholders played an important role in early regulatory agencies’ policymaking processes, it was not until the New Deal era—a period in which the shape and size of the bureaucracy shifted dramatically—that participation became the subject of administration-wide study and policy (Grisinger 2012; McCraw 1984). Approximately 55 years after the establishment of the inaugural American regulatory agency, the Interstate Commerce Commission, the Attorney General’s Committee on Administrative Procedure (1941) conducted the first analysis of participatory regulatory policymaking. The Committee surveyed agency personnel and found stakeholder participation to be quite common, and the modes of participation diverse (e.g., oral and written comments, consultation during informational investigations, stakeholder conferences, and advisory committees). While this engagement enabled regulatory agencies to proactively resolve problems and mitigate
uncertainty in implementation, participants tended to be only those with significant economic interests. This finding comported with the vision of the architects of the regulatory state, such as James Landis, who believed that participation should only be promoted insofar as it contributed to technocratic expertise; the underlying logic was that technocratic decision-making would legitimize the bureaucracy (Benjamin 2006; Cuéllar 2015). Thus, in the years following the New Deal, participation was largely ad hoc and consisted of informal interactions among regulators and regulated entities aimed at enhancing the technical merits and feasibility of regulatory policy.

The reports generated by the Committee on Administrative Procedure provided additional sources of evidence for reformers who sought greater procedural protections from New Deal regulatory agencies (Balleisen 2015). Republicans and conservative Democrats in Congress, as well as the American Bar Association, responded to concerns from the business community about regulatory fairness by advocating for the inclusion of procedural due process for regulatory policymaking and greater judicial oversight of promulgated rules (Ernst 2009). These calls for oversight of the rapidly growing administrative state were answered via the passage of the Administrative Procedure Act (APA) of 1946, which institutionalized participation and transparency in the regulatory policymaking process. Described by Kenneth Culp Davis (1970, 238) as “one of the
greatest inventions of modern government,” the APA codifies stakeholder consultation in both rulemaking and adjudication. For rulemaking, the primary focus of this article, the APA requires that agencies publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register and accept public comments on the proposed rule.\(^4\) Notably, the APA does not dictate how agencies must utilize public comments, but rather states “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose” (5 U.S.C. § 553[c]). The APA also provides stakeholders the “right to petition for the issuance, amendment, or repeal of a rule” (5 U.S.C. § 553[e]). Finally, the APA empowers the courts to review agency rules, providing another mechanism, judicial challenge, for stakeholders to engage in the regulatory policy cycle.

The APA was a “cease-fire agreement” in the battle over control of New Deal regulatory agencies (Shepherd 1995). By formalizing transparency and participation processes in the shadow of judicial review, the APA positioned participation—both ex

\(^4\) The APA includes exemptions to the notice and comment provision, including for certain policy areas (e.g., military and foreign affairs, agency operations, public property), general policy statements, and rules for which the agency determines “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest” (i.e., the “good cause” exemption). For certain rulemakings, the underlying statutes also require hearings, which are described in 5 U.S.C. §§ 556-557.
ante participation in the rulemaking process and ex post participation via judicial review—as a mechanism of democratic accountability. Although the APA afforded broad opportunities for participation, it was “predicated on protecting persons whose legal rights were affected by agency action,” meaning that the businesses that advocated for its adoption were also its most immediate beneficiaries (Funk 2009, 174). Furthermore, courts remained quite deferential to agencies in the decades following the APA; in the “after-glow” of the New Deal, judges and judicial scholars alike viewed administrative agencies as sufficiently apolitical and technocratic to be inherently public interested (Allen 2009; Merrill 1997, 1056). Thus, while the APA shifted participation from informal interactions among regulators and stakeholders for gathering information to formal participation processes for ensuring democratic accountability, it was largely regulated entities that were understood to have a stake in regulatory processes.

2.2.1.2. Unintended Consequences of Procedural Fairness: Inefficiency and Industry Influence

In the 1950s and early-1960s, prevalent critiques of the regulatory process shifted from fairness to efficiency, focusing on regulatory agency backlogs, red tape, and functional redundancy; issues that many attribute to the expansion of procedural requirements in the previous decade (Grisinger 2012). As Figure 2 depicts, these
concerns were explored in a series of government reports commissioned over the next two decades. For example, the reports of the Commissions on Organization of the Executive Branch of the Government (1955; 1949) detailed widespread bureaucratic inefficiency, while James Landis’ (1960) “Report on Regulatory Agencies to the President-Elect” criticized bureaucratic effectiveness, particularly technical and organizational capacity.

Despite Landis’ earlier commitment to interaction among regulators and regulated entities in the policymaking process, the Landis Report was also centrally concerned with the influence of regulated entities over the rulemaking process (Novak 2014). This aspect of the Landis Report reflected a much broader concern emerging in academic and political circles about the opacity of the regulatory process and the capacity of bureaucrats to promote the public interest. Although dating back to at least Federalist No. 10, it was during this period that regulatory capture became a common explanation—on both the left (e.g., Green and Nader 1973; Kolko 1965) and the right (e.g., Huntington 1952; Bernstein 1955; Stigler 1971; Posner 1974; Peltzman 1976)—for suboptimal policymaking. The pervasiveness of capture theory is also apparent in the shift—beginning in 1967, with the decision in Abbott Laboratories v. Gardner—toward a
more stringent application of the arbitrary and capricious standard in judicial review of agency actions (Allen 2009; Merrill 1997).

2.2.1.3. Regulatory Expansion and the “Participation Revolution”

By the 1970s, there was widespread skepticism about the capacity of unelected technocrats to effectively govern coupled with a rapid expansion of regulatory authority, particularly in the areas of environment, labor, and health. As with the New Deal Era, several oversight mechanisms were introduced to address these concerns. Public participation was central to these reforms, and a series of congressional, judicial, and presidential actions fueled the “participation revolution” (Kerwin and Furlong 2010, 176). As Grisinger (2012, 13) notes, “the ‘problem’ of the administrative state—once that of powerless citizens against a powerful state—had become quite the reverse.”

Beginning with the National Environmental Policy Act of 1969 and continuing throughout the next two decades, Congress included participation provisions in hundreds of statutes covering a wide range of policy issues. The modes of participation expanded under these statutes, including longer comment periods and greater use of hearings and meetings. In addition, Congress passed the Federal Advisory Committee Act (FACA) of 1972, which required procedural transparency and balanced interest representation for stakeholder advisory bodies. Concerns about bureaucratic opacity
also led to a series of transparency reforms—such as the Freedom of Information Act (FOIA) of 1967 and the Government in the Sunshine Act (Sunshine Act) of 1976—which fostered greater public access to government documents, meetings, and deliberations.

Viewing the more deferential approach to judicial review in the preceding decades as insufficient to protect liberty and property in the growing regulatory state, the courts also shaped participation in the 1970s through the adoption of “hard look review”—which involved greater judicial scrutiny of agency decision-making—and a shift toward more pluralistic interest representation in the administrative process. The era of hard look review was in part spurred by concerns about regulatory capture, but also driven by the perception that the expanded use of rulemaking required additional avenues of democratic representation and that the benefits of regulation increasingly resembled rights, requiring stronger judicial protection (Merrill 1997; Reich 1964; Stewart 1975). Scholars have also argued that hard look review was an inevitable consequence of the surge in administrative law cases in the 1970s and the accompanying increase in the practice of judicial review (Garry 2017). This shift toward more judicial scrutiny of agency decisions is exemplified by Citizens to Preserve Overton Park, Inc. v. Volpe (1971)—which called for “searching and careful” review of agency actions—and Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual
Automobile Insurance Co. (1983)—which called for a “rational connection between facts and judgment” in agency decisions. In addition to this increasingly strong presumption of judicial review, there was a series of doctrinal developments that enlarged the class of interests entitled to participate in a range of regulatory processes, including administrative hearings pursuant to the due process clause, formal policymaking pursuant to statute or regulation, and judicial review of agency actions (Stewart 1975). This shift toward what Stewart (1975, 1716) deems the “interest representation model of administrative law” was compounded through a series of decisions that shaped participation in rulemaking procedures. For example, in United States v. Nova Scotia Food Products Corp (1977), a rule was struck down because the agency failed to provide documentation of the scientific basis for the rule, to address an alternative proposal, and to respond to a comment raising a potential issue with the rule. Similarly, in Home Box Office, Inc. v. Federal Communications Commission (1977), the D.C. Circuit extended the Sunshine Act’s prohibition on ex parte communication in formal rulemaking to

5 There were also cases, such as Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), which signaled the limits of judicial intervention in administrative agency practices beyond what was prescribed by the APA.
informal rulemaking, thereby only allowing undisclosed ex parte communication prior to a NPRM (Funk 2009).  

Thus, while legislative and judicial reforms in 1970s further entrenched the view that participation promoted democratic accountability, these reforms created a more pluralistic system of oversight, expanding the notion of to whom regulatory agencies were accountable to include not only regulated entities but also interest groups representing consumers, environmental activists, and labor unions. This expansion also reflected the emergence of regulatory policies that operated across the entire economy and society, rather than a single sector. Yet, these reforms also had unintended consequences. For example, while proponents claimed that forcing agencies to “justify their actions and consider alternatives” would result in better policy outcomes, hard look review also created ossification, a problem that had been central to concerns of the preceding decades (Allen 2009, 1914). A paradox created by judicial precedent in this era is judicial deference to agencies in interpretations of law—as established in Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc. (1984)—and judicial scrutiny of agency decisions in matters of fact and policy—as established in Motor Vehicle

Subsequent judicial decisions have narrowed the doctrine on ex parte communication.
Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co (1983). Similarly, scholars have argued that legislative reforms such as FACA, FOIA, and the Sunshine Act were not particularly successful at increasing procedural transparency and broadening participation (Funk 2009). Thus, participatory reforms in this period focused primarily on expanding democratic accountability, but in so doing revealed the tension between democratic accountability and technocratic expertise.

2.2.1.4. Regulatory Contraction and the Rise of Executive Oversight

Beginning in the late 1970s, administrative reforms began to focus on greater executive oversight of regulation—through both centralized coordination and cost-benefit analysis—and the regulatory agenda shifted markedly toward deregulation. The Senate Committee on Governmental Affairs’ (1977) finding that regulated industry predominated regulatory proceedings fueled a growing skepticism of the regulatory state. These concerns about the efficacy of regulatory agencies coupled with a faltering economy spurred presidential action on regulation. President Carter’s (1978) Executive Order (EO) 12044 “Improving Government Regulation” expanded the notice and comment period, established Advance Notice of Proposed Rulemaking (ANPRM), and required agencies to produce semiannual regulatory agendas. These reforms aimed to correct information asymmetries inherent to participation in rulemaking by embedding...
information disclosure into decision-making routines (Weil et al. 2006). EO 12044 was also the first of a series of presidential directives requiring federal agencies to engage in retrospective review, which was one tool employed in a broader deregulatory program aimed at addressing stagflation (Balleisen 2015). Shortly before leaving office, President Carter signed into law two important statutes that codified roles for public participation in regulatory impact assessment (RIA) and laid the groundwork for centralized regulatory review. The Regulatory Flexibility Act of 1980 called for periodic retrospective review of existing rules that “have a significant economic impact upon a substantial number of small entities” (5 U.S.C. § 610[a]). In conducting the reviews, agencies are directed to consider “the nature of complaints or comments received concerning the rule from the public” (5 U.S.C. § 610[b][2]). In addition, the Paperwork Reduction Act of 1980 established the U.S. regulatory oversight body, OIRA, within the OMB.

Under Presidents Reagan and H.W. Bush, public participation was largely framed as a tool, among other administrative procedures, for reducing regulatory burdens as part of the deregulatory agenda that President Carter began (Merrill 1997). Paradoxically, while regulatory capture was used as a justification for deregulation, it was largely agencies whose policies were “least odious to business” that were
deregulated in this period (Horwitz 1986, 147). President Reagan’s (1981) EO 12291 “Federal Regulation” empowered OIRA to prospectively review all economically significant rules and accompanying RIAs to ensure coherence with presidential policy agendas and directed the “Presidential Task Force on Regulatory Relief,” led by Vice President H.W. Bush, to conduct a retrospective review of existing rules. EO 12291 directed agencies to give “full attention” to public comments in general, and in particular to those comments from regulated entities (Reagan 1981, 13196). President Reagan’s (1985) EO 12498 “Regulatory Planning Process” directed regulatory agencies to produce annual regulatory programs detailing agencies’ ongoing regulatory relief efforts. This focus on reducing regulatory burden continued throughout the President H.W. Bush administration. President H.W. Bush’s (1992) memorandum on “Reducing the Burden of Government Regulation,” called for a moratorium on new rules as well as a 90-day review of existing rules, conducted in consultation with stakeholders. While many of the reforms in this period occurred through executive directive, there was one important statutory development related to participation: negotiated rulemaking—a mode of participation developed in the 1980s—was codified in the Negotiated Rulemaking Act (NRA) of 1990.
Thus, while democratic accountability continued to be a proximate goal of administrative procedure, the tools for achieving this accountability expanded from Congress and the courts to the executive between the late 1970s and early 1990s. This period also marked the beginning of a persistent trend toward greater executive oversight of regulatory policymaking to promote coherence with presidential policy agendas and reduce redundancy and conflicts in rules issued by different agencies. As Funk (2009) describes, many reforms in this period, including negotiated rulemaking, cost-benefit analysis, and centralized oversight of regulation, can be understood as a reaction to the interest representation model of the preceding decade. Participation played a key role in these reforms, returning to a purpose of participation that had not featured centrally in the preceding decades: enhancing regulatory expertise. Yet, unlike in the early administrative state, in which regulated entities provided information about how to regulate effectively, participation in this era often centered on regulatory reform and deregulation.

2.2.1.5. Public Participation and Centralized Coordination of Regulation

Although participation continued to play a significant role in President Clinton’s administration, the policies passed suggest a broader conceptualization of to whom bureaucratic regulatory agencies are accountable and the types of stakeholders that may
enhance technocratic expertise. This trend continued through the G.W. Bush and Obama administrations, as did the trend toward centralization of regulatory oversight.

President Clinton’s (1993) EO 12866 “Regulatory Planning and Review,” which replaced EO 12291, increased the transparency of OIRA’s regulatory review functions, including its review of RIAs for all economically significant rules. For example, EO 12866 empowers members of the public to request meetings with OIRA officials during interagency reviews. The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 mandated that select RIAs consider impacts to small businesses, creating potential for engagement via stakeholder panels. Passed as part of the SBREFA, the Congressional Review Act (CRA) granted Congress the ability to overturn certain rules. Finally, the Information Quality Act of 2000 provided stakeholders with a mechanism to make requests regarding the quality and utility of information disseminated during rulemaking.

During the G.W. Bush administration, expansions in information technology and OIRA’s role affected opportunities for participation in regulatory policymaking. The E-Government Act of 2002 sought to expand access to information and reduce the costs of participation via information technology. Specifically, pursuant to the Act and under the oversight of the Environmental Protection Agency (EPA), the federal government
implemented the eRulemaking Program, which provides an integrated web-based platform to access all publicly available regulatory policymaking materials and to submit comments. Scholars and policymakers were optimistic that the internet would revolutionize rulemaking—for example, by enhancing democratic legitimacy through increased public access to information (Coglianese 2004)—but the empirical evidence about the efficacy of these reforms in mixed, as discussed subsequently. President G.W. Bush (2007) also amended EO 12866 via EO 13422, which broadened OIRA’s scope to include guidance documents. In addition, OIRA began to use prompt letters, which were often based on public suggestions, to shape agencies’ rulemaking and retrospective review agendas (Graham, Noe, and Branch 2005).

When President Obama took office in 2009, participation in regulatory policymaking was a well-established tool to ensure accountability and provide expertise. Early in the administration, President Obama (2009a, 5977) engaged the public in shaping the administration’s regulatory agenda, foreshadowing a role envisaged by the administration in implementing that agenda. Between January 2011 and May 2012, President Obama issued a series of orders mandating that U.S. federal agencies integrate

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7 President Obama repealed EO 13422, but a subsequent memorandum clarified that OIRA would continue to review guidance documents.
retrospective analysis into their regulatory policymaking processes. EO 13563 “Improving Regulation and Regulatory Review,” EO 13579 “Regulation and Independent Regulatory Agencies,” and EO 13610 “Identifying and Reducing Regulatory Burdens,” outline robust roles for public participation in rulemaking and retrospective regulatory review (Obama 2011a; 2011b; 2012). In addition to institutionalizing a new mode of participation, these EOs explicitly describe the purposes of participation as enhancing agency technocratic expertise and promoting democratic accountability.\(^8\)

2.2.1.6. Deconstruction of the Administrative State?

While there are strong signals that President Trump’s administration would like to fundamentally reform regulatory policy—such as the White House’s former chief strategist’s promise to deconstruct the administrative state (Rucker and Costa 2017)—the administration has faced difficulty implementing reforms that require congressional action, even with unified government. Executive action, on the other hand, has been plentiful, and thus far includes orders and memoranda on reorganizing the executive branch, freezing both the hiring of administrative personnel and the issuance of new

\(^8\) For an empirical evaluation of these EOs, see: Chapter 3/Article 2 or DeMenno (2017).
rules, and enumerating deregulatory agendas for specific sectors, such as financial services. In addition, President Trump’s (2017a) EO 13771 “Reducing Regulation and Controlling Regulatory Costs,” issued on January 30, 2017 imposes a regulatory cap for 2017, a two-out-one-in cost offset for new rules, and an annual regulatory cost budget for executive agencies. On February 24, 2017, President Trump (2017b) issued EO 13777 “Enforcing the Regulatory Reform Agenda,” which describes how EO 13771 and other regulatory reform initiatives are to be implemented. In short, agencies are directed to designate a Regulatory Reform Officer to lead reform efforts. Participation features prominently in EO 13777, with Section 3(e) directing Regulatory Reform Task Forces to seek “input and other assistance” from stakeholders in implementing reforms (Trump 2017b, 12286). Interestingly, while much of the rhetoric of the Trump administration has been populist in nature, the reference to participation in EO 13777 eschews President Obama’s (2011a, 3821) reference to participation by “the public as a whole,” instead defining stakeholders as “entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations” (Trump 2017b, 12286). Thus, while the enduring effects of EO 13771 and 13777 are uncertain, the language of the orders suggests that participation will continue to play a role in both promoting democratic accountability
and enhancing technocratic expertise in the Trump administration. However, it remains to be seen whether the trend toward promoting public, as opposed to regulated entity, participation continues.

2.2.2. Summary of Purposes

Throughout the history traced in this section, reforms designed to address a particular problem—such as opacity—created other problems—such as ossification—which in turn led to additional reforms that created additional problems. As the problems that participation sought to address shifted, so did the purposes. While only briefly documented in this section, the feedback loops observed in participatory institutional design reflect feedback loops in regulatory governance in this period more broadly (Balleisen 2015; Eisner 1994).

Following the passage of the APA, participation ensured that the growing administrative state was accountable to those perceived to be most affected by its actions: regulated entities. However, proceduralization created ossification, and greater accountability to regulated entities created concerns about capture. These concerns, coupled with rapid expansion of the scope of regulation, led to the participation revolution of the 1970s, which created a more pluralistic system of oversight and enlarged the class of interests to whom regulatory agencies were accountable. In the
1980s and early 1990s, the purpose of participation expanded to include not only ensuring accountability but also providing expertise, while the understanding of who had a stake in regulatory processes contracted to focus more narrowly on participation by regulated entities in regulatory reform and deregulation. During the 1990s, executive and congressional oversight of regulatory policymaking expanded, as did the conceptualization of to whom bureaucratic regulatory agencies were accountable and the types of stakeholders that could contribute expertise. This conceptualization of the purposes of participation continued through the 2000s, as information technology enabled greater procedural transparency. The role of participation in regulation, and of the regulatory state more broadly, remains somewhat uncertain under the current administration, but initiatives to date suggest that regulated entities will play a substantial role in deregulation. Thus, the historical evolution of American administrative procedure reveals a persistent struggle to balance regulatory agency democratic accountability and bureaucratic autonomy—which enables technocratic, rather than political, decision-making—and a longstanding role for participation as the solution to perceived accountability and expertise deficits.
2.3. Evaluations of Participation in Regulatory Policymaking

Public participation in regulatory policymaking gained salience among researchers in the 1970s, as concerns about regulated entities’ undue political influence reverberated through Congress, the courts, and academia. Despite its importance in theory and practice, the empirical literature on participation in regulatory policy is far less developed than studies of participation in other policy processes, such as legislative policymaking (Baumgartner et al. 2009; Croley 2008; Kerwin and Furlong 2010; Kerwin, Furlong, and West 2010; West 2004). With the exception of a few important contributions in the area of environmental policy, it was not until the mid-1990s that systematic studies of participation in regulatory policymaking began to appear in the academic literature (Cropper et al. 1992; Magat, Krupnick, and Harrington 1986). These studies, described in more detail below, analyze when and how participation occurs, and, to a lesser extent, the implications for regulatory policy. With respect to the latter, the theoretical literature is far richer than the empirical literature, which tends to focus on a narrower conceptualization of the consequences of participation than the theoretical literature envisages. Scholars have noted the importance of studying participation contextually; as such, this section begins by briefly reviewing the contexts in which participation has been studied, summarizing the literature across regulatory
policymaking mode, regulatory policy cycle stage, and policy area (Kerwin, Furlong, and West 2010). It then summarizes the literature with respect to consequences, detailing how scholars have defined and measured the effects of participation. 9

2.3.1. Participation in Context

As Figure 1 depicts above, there are myriad opportunities for participation throughout the regulatory policy cycle and across multiple modes. Most studies, however, focus on the rule development stage, in which regulatory policy priorities are translated into regulatory proposals and final rules. Although there are multiple modes of participation in rulemaking, most studies focus on participation via notice and comment processes (Balla 1998; 2004; Balla and Daniels 2007; Cuéllar 2005; Golden 1998; Krawiec 2013; West 2004; J. W. Yackee and Yackee 2006; S. W. Yackee 2006b; 2006a). Several studies also analyze the agenda setting stage, including pre-proposal comment periods and consultations (Naughton et al. 2009; Nelson and Yackee 2012; West and Raso 2013; S. W. Yackee 2012), participation via negotiated rulemaking (Coglianese 1997; 9

The contextual literature review is limited to empirical studies of participation in the U.S. federal regulatory policy cycle; a complete list of studies is available in Appendix B: Empirical Studies of Participation in U.S. Regulatory Policymaking by Regulatory Policy Process Stage, Participation Mode, and Policy Area. The analysis of the consequences of participation in regulatory governance draws on both empirical and theoretical studies of the U.S. federal rulemaking process, as well as participation in regulatory policymaking in other institutional contexts.
Freeman and Langbein 2000; Langbein and Kerwin 2000), and participation via advisory committees (Croley and Funk 1997; Lavertu and Weimer 2011; Moffitt 2010; 2014). While some studies undertake a multi-stage or multi-mode approach, very few engage in “cradle-to-grave” analysis—that is, tracing participation throughout the regulatory policy cycle for a particular issue (Furlong 1997, 341). Two notable exceptions are Wagner, Barnes, and Peters’ (2011) study of participation for EPA rules on industrial emissions standards and the surveys of interest groups conducted by Furlong and Kerwin (1997; 2005).

Existing analyses of participation cover a range of policy areas, but more commonly focus on social issues—e.g., environment, health, and labor—than economic issues—e.g., finance and communications. In addition to this emphasis on social regulation, only a few studies consider issue salience and technical complexity (McKay and Yackee 2007; Nixon, Howard, and DeWitt 2002; S. W. Yackee 2006b). Furthermore, with the exception of studies that survey stakeholders, most analyses focus on only a handful of agencies, and thus are not representative of the federal government as a whole, nor do they capture variation across participation in different policy areas (Furlong 1997; Furlong and Kerwin 2005). Thus, while the empirical literature covers all stages of the regulatory policy cycle and spans multiple modes, it is concentrated
primarily in the notice and comment phase of rulemaking. These studies—which rely on content analysis of comments, interviews, and surveys—provide invaluable insight into patterns of participation. However, the scope and policy area focus of these studies may limit generalizability.

**2.3.2. Consequences of Participation**

Different theories of regulation are based on different assumptions about the purposes of governments and markets, which in turn affect how these theories understand the role of participation.\(^\text{10}\) For example, according to regulatory capture theory, participation is a mechanism by which interest groups translate economic power into political power to extract regulatory rents (e.g., Stigler 1971). The neopluralist theory relies on many of the same behavioral assumptions as capture theory, but argues that interest groups will compete in the regulatory process, resulting in more efficient policy outcomes (e.g., Becker 1983). In contrast, the public interest theory posits that participation is a mechanism by which stakeholders reveal their preferences and regulators build awareness of, and support for, public-interested outcomes (e.g., Levine and Forrence 1990). Similarly, according to the civic republicanism theory, participation

\(^{10}\)For a full discussion of these theories, see: Croley (2008).
enables deliberation about regulatory values, with regulators as mediators and aggregators of the information provided by stakeholders (e.g., Ayres and Braithwaite 1992). Finally, according to the administrative process theory, participation, and administrative procedure more broadly, empowers regulators to carry out public-interested agendas by providing information about the technical quality and political feasibility of rules (Croley 2008). While these diverse theories provide a range of testable implications, empirical analyses generally do not purport to advance a particular theory.

Despite the lack of a common theoretical core, much of the existing literature on the consequences of participation in rulemaking fits into two broad categories. The first category includes studies that measure the consequences of participation with respect to advancing participant interests. The second category includes studies that measure the consequences of participation with respect to advancing the public interest. This section reviews the existing literature on the consequences of participation in rulemaking and then summarizes the mechanisms suggested by this literature.

2.3.2.1. Advancing Participant Interests

Perspectives on stakeholder influence in regulatory policymaking vary considerably among scholars. At one end of the spectrum are those who believe business interests dominate the regulatory policymaking process by merit of their superior
resources and ability to provide information needed by regulators, which in turn translates into a form of epistemic capture (Wagner, Barnes, and Peters 2011). At the other end of the spectrum are those who believe the participation revolution resulted in sufficiently equitable access and diffuse influence among public and private interest groups (Wagner, Barnes, and Peters 2011). The empirical evidence does not wholly substantiate either view. Even the literature on regulatory capture, which has been a prominent theory among public choice scholars and policymakers since the 1970s, has been found to too often take business interest influence as a given, creating a body of empirical evidence that does not live up to the weight of its theoretical claims (Balleisen and Moss 2010; Croley 2008; Leight 2010; Levine and Forrence 1990; Moss and Decker 2014; Novak 2014). The extant literature uses two primary measures to evaluate the efficacy of participation from the perspective of participants: influence and satisfaction.

In the late 1990s, Furlong (1997, 340) observed that “the most obvious and perhaps most important variable that future research needs to address is influence.” Yet, thirteen years later, Kerwin, Furlong, and West (2010, 593) characterize the literature on influence in regulatory policymaking as “surprisingly sparse.” Although participant influence is the dependent variable in the majority of empirical studies—and is measured through either surveying participant perceptions or by correlating the content
of comments with changes in rules—these studies vary considerably in their findings regarding who participates, who influences, and the degree of influence (Furlong 1997; Furlong and Kerwin 2005; Golden 1998; J. W. Yackee and Yackee 2006). For example, using interviews, both Golden (2003) and Yackee (2012) find that participants are influential in the agenda setting/pre-proposal stage, but Golden (2003) finds that special interest groups dominate, while Yackee (2012) finds relatively equal participation among government interests, business interests, and nonbusiness/nongovernment interests. In the rulemaking stage, most studies find that business interests are the most frequent participants (Golden 1998; Krawiec 2013; J. W. Yackee and Yackee 2006; S. W. Yackee 2006b). However, some studies find more balanced representation, with robust engagement by the general public (Cuéllar 2005) and public interest groups (Croley and Funk 1997). While some studies find a clear bias toward business in rule changes in response to participants (S. W. Yackee 2006b), other studies do not find any evidence of such a bias, finding instead that it is the quantity of comments (Golden 1998) or the degree of consensus among comments (Kirilenko, Mankad, and Michailidis 2014; McKay and Yackee 2007; J. W. Yackee and Yackee 2006), rather than participant identity, that predicts influence. With respect to the degree of influence, some studies find minor changes as a result of participation (Golden 1998; Shapiro 2013), while others find more
substantial changes (Cuéllar 2005; S. W. Yackee 2006b). Finally, surveys of interest groups suggest that these entities’ perceived influence increases with both the modes of access and frequency of use of those modes (Furlong 1997; Furlong and Kerwin 2005). Furthermore, certain modes (e.g., ex parte communication) are perceived to be more effective than others (e.g., advisory committees) with respect to realizing participants’ policy preferences (Furlong 1997; Furlong and Kerwin 2005).

As Croley (2008, 133) observes, taken as a whole the empirical evidence on participation and influence in regulatory policymaking is “inconclusive.” While there is clear evidence that business interests are active participants, researchers reach dissimilar conclusions regarding the degree of business influence relative to other actors (Kerwin, Furlong, and West 2010). Furthermore, while understanding the relative influence of actors certainly has policy implications, much of the extant literature relies on assumptions that might warrant reconsideration; for example, that participant influence is the goal of participation, that rule changes are in the desired direction of influence, that public and private interests (or business and non-business interests) can be clearly delineated, and that the outcome is more important than the substance of participation.

Analyses of more deliberative modes of participation use participant satisfaction, rather than influence, to measure efficacy. At the U.S. federal level, these studies are
generally confined to the study of negotiated rulemaking, which, as discussed above, was established in the 1980s to resolve policy debates prospectively in the rulemaking process, rather than retrospectively, in the judicial review process (Harter 1982). For example, Langbein and Kerwin (2000) find that negotiated rulemaking generates greater participant satisfaction with both the regulatory policymaking process and regulatory policy outcomes than conventional rulemaking. While satisfaction does not necessarily imply improved rule quality, it may capture the legitimating effect of participation, which is important if reducing conflict and fostering consensus are goals of the rule development process (Freeman and Langbein 2000; Langbein and Kerwin 2000). However, Coglianese (1997) finds no difference in the level of litigation across negotiated and traditional rulemaking, nor the timeliness of rulemaking. These results suggest that satisfaction needs to be accompanied by measures of the quality of the resulting rules. As Coglianese (2002a, 4) states, “evaluation researchers should resist relying on participant surveys to evaluate public participation techniques, and instead, should focus attention directly on the effectiveness, efficiency, and equity of the decisions that result from different forms of public participation.” Thus, while there is some evidence that participation may enable participants to exert influence over, and
enhance satisfaction with, regulatory policy outcomes, the underlying causal processes and implications for regulatory policy effectiveness are not well understood.

2.3.2.2. Advancing the Public Interest

Although much of the literature on participation in regulatory policymaking focuses on advancing participant interests, another strand of the literature focuses on how participation might advance the public interest. The theoretical literature far outpaces the empirical literature in this vein, with existing empirical studies relying largely on in-depth case studies and meta-analyses. These studies describe participation as serving much broader purposes than studies that focus on influence (e.g., Beierle 1999). While the public interest can be understood to encompass a range of normative concepts, the literature generally, and this article specifically, understand advancing the public interest to be synonymous with improving regulatory policy. Two ways in which participation might improve regulatory policy emerge from this literature: enhancing regulatory expertise and promoting regulatory legitimacy.

While motivations for stakeholder engagement vary, Alemanno (2015, 119) identifies improving the “evidence base of regulations” through the collection of information and resources from stakeholders as a common rationale. Similarly, Nash and Walters (2015, 2) survey the literature on participation from a wide range of
jurisdictions and policy settings, and find that public engagement in regulatory policymaking is often described as facilitating “constructive information sharing.” These observations are supported by my own survey of the literature; numerous studies find that regulatory agencies engage external stakeholders when there is uncertainty regarding the evidence base of regulatory policy (Carpenter 2002; Lee 2014; Moffitt 2010; 2014; Neshkova and Guo 2012). This literature suggests two mechanisms by which stakeholder participation might enhance regulatory expertise. First, stakeholders provide information about the substantive impacts of policies, which I refer to as technical information. Second, stakeholders provide information about the distributional impacts of policies and the preferences of those impacted, which I refer to as political information.

The extant literature suggests that participation can contribute to agency expertise through the provision of technical information; this information can mitigate uncertainty regarding the consequences of a particular action/inaction, identify issues related to the choice of policy instruments, and provide other relevant contextual information (Coglianese 1997; Coglianese, Kilmartin, and Mendelson 2008; Fung 2006; Irvin and Stansbury 2004; Kerwin and Furlong 2010; West 2004). Stakeholders often possess firsthand knowledge of specific policy domains, and participation provides a
mechanism to collect this diffuse expertise (Biber and Brosi 2010). While it is frequently observed that a “symbiotic” relationship exists between resource-constrained regulatory agencies and technically-expert interest groups (Kerwin, Furlong, and West 2010, 593), Farina, Newhart, and Hedit (2012, 148) argue that historically under-voiced stakeholders may provide critical “information about impacts, problems, enforceability, contributory causes, unintended consequences, etc.” based upon “lived experience in the complex reality” into which policies are implemented.

The extant literature also suggests that participants may provide political information, which enables the identification of the stakeholders affected by a policy as well as the degree of support or opposition among those stakeholders (Coglianese 1997). This information, in turn, helps agencies understand the “political costs and benefits associated with various actions” (McCubbins, Noll, and Weingast 1987, 258). As such, political information can serve as a proxy for the relative value that should be placed upon technical information, thereby enabling regulatory agencies to prioritize changes and plan implementation and enforcement strategies (Kerwin and Furlong 2010).

Empirical studies have begun to evaluate the theoretical literature’s claims regarding the potential for participation to enhance regulatory expertise. For example, Moffitt (2014) operationalizes measures of participatory impact on pharmaceutical
regulation as the number of post-marketing challenges—a measure of policy success—and GAO reviews—a measure of political success. Similarly, Croley (2008) finds that participation in Food and Drug Administration rulemaking processes provided invaluable information about the technical and political merits of proposed rules. While participation might simultaneously enhance regulatory expertise and realize participant preferences, the studies in this subset of the literature are distinct from those in the prior section in that they focus on advancing public, rather than private, interests.

In addition to information provision, Alemanno (2015, 119) identifies “render more legitimate the outcome of the regulatory process” as another common rationale for stakeholder participation. Similarly, Nash and Walters (2015, 2) find that participation is often described in the literature as enhancing the “legitimacy of regulatory decisions and organizations.” Participation in rulemaking has long served a legitimating function; as Harter (1982, 17) observes: “To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency’s decision.” Conceptually, legitimacy can be both process or outcome oriented (March and Olsen 2009). For example, Scharpf (1999, 6) distinguishes between input legitimacy, defined as “government by the people,” and output legitimacy, defined as “government for the
people.” Relating these concepts to participation in rulemaking, input legitimacy entails the opportunity for all affected stakeholders to access the regulatory process (i.e., the representativeness of participation processes) while output legitimacy entails agencies producing policies that are consistent with participants’ interests (i.e., the responsiveness of participation processes). Throughput legitimacy—defined by Schmidt (2012, 2) as “governance processes with the people”—connects input and output legitimacy.

While these conceptualizations clearly envisage a role for participation in enhancing regulatory legitimacy, empirical evaluations do not test these concepts directly, relying instead on participant perceptions of accessibility and influence. In addition to the normative value of procedural legitimacy, empirical evidence suggests there is a relationship between the perceived legitimacy of policymaking processes and the perceived legitimacy of policy outcomes, which in turn affects compliance (Murphy, Tyler, and Curtis 2009). For example, empirical evidence across a range of institutional contexts suggests that compliance is driven, at least in part, by the perceived representativeness and responsiveness of an organization to its stakeholders (Biber and Brosi 2010). Several studies suggest that accessibility is sufficient to promote perceptions of procedural legitimacy, but that inclusiveness is a necessary condition (Ansell and
For example, Markell and Tyler (2007, 27) find that “people react favorably to the fairness of procedures and show that these fairness judgments are distinct from the desire to obtain a particular outcome.” Similarly, in a study of negotiated rulemaking, Freeman and Langbein (2000, 67-68) find that “involvement in a process promotes perceptions of legitimacy among participants, independently of whether outcomes ultimately favor these participants.” However, other studies find that perceived influence over outcomes more strongly predicts perceptions of legitimacy, and in turn, compliance (Makkai and Braithwaite 1996). Similarly, Moffitt (2014) finds that promotion of bureaucratic reputation is most likely when there is two-way learning, that is, deliberative engagement between regulators and external stakeholders. Thus, the literature suggests that regulatory agencies and stakeholders may co-produce legitimacy; regulatory agencies create opportunities for access and influence through institutional design choices, but it is the act of participating that affects stakeholder perceptions of input, throughput, and output legitimacy.

2.3.3. Summary of Mechanisms

The burgeoning empirical literature provides invaluable insights into patterns and consequences of participation in regulatory policymaking. Although there is
considerable debate about the role of participation, evaluations of its consequences can be grouped into two broad categories. The first are those studies that evaluate the extent to which participation advances the interests of participants, most commonly evaluated in terms of participant influence. Given the longstanding concern with capture identified above, it is puzzling that empirical studies of participant influence are relatively sparse and that the findings of the extant literature are so divergent with respect to influence. Considering the literature both contextually and consequentially suggests that these findings might be partially explained by the scope of the study—for example, certain policy areas may be predisposed to greater influence by a given set of stakeholders—and the method employed—for example, content analysis of comments may offer more precise estimates of influence than analyses of submitter identity, but the former are difficult to scale-up.

A second group of studies evaluates the extent to which participation contributes to the public interest. While advancing participant interests and advancing the public interest are not necessarily mutually exclusive, studies of the latter are distinct in that participation is evaluated with respect to its contribution to the evidence base or legitimacy of regulatory policies. This literature suggests two mechanisms through which participation might realize the purposes of participation identified above,
enhancing technocratic expertise and promoting democratic accountability. First, participation may enhance technocratic expertise by providing information that contributes to a policy’s evidence base, which I refer to as policy learning. Second, participation may promote democratic accountability by providing opportunities for external stakeholders to access and influence regulatory processes, which I refer to as process legitimacy.

2.4. An Analytical Framework for Evaluating Participatory Effectiveness

While numerous regulatory guidelines emphasize the importance of evaluating participatory effectiveness, a recent survey of OECD countries finds that there is a “striking imbalance between the amount of resources that governments invest in engaging stakeholders in policymaking and the efforts aimed at evaluating the effectiveness of these mechanisms” (Alemanno 2015, 142; OECD 2015a). Scholars of regulatory governance are well positioned to inform theory and practice by developing approaches to evaluate the effectiveness of participation. This section draws on the historical-institutional analysis and the review of the extant empirical and theoretical literature presented above to develop an analytical framework, formalized in a causal process model, for evaluating participatory effectiveness. The section then describes
how this framework addresses the theoretical and empirical challenges associated with defining and measuring, respectively, participatory effectiveness.

2.4.1. Theoretical Approach

This section describes an analytical framework for defining and measuring participatory effectiveness, which is formalized in a causal process model in the next section. The framework draws on Büthe’s (2014, 3) discussion of causal process tracing, defined as “scrutinizing the presence and operation of the theoretically expected causal mechanism in one or more instances of the explanandum.” In exploring the relationships among causes and causal mechanisms, it also draws on Mackie’s (1965, 245) discussion of “INUS” causal conditions, defined as “Insufficient but Necessary parts of a condition that is itself Unnecessary but Sufficient.” The model depicted below utilizes these concepts to visually depict the hypothesized causal relationships connecting stakeholder participation (i.e., the independent variable) and regulatory policy outcomes (i.e., the dependent variable). In so doing, the model embodies a contextual approach to defining participatory effectiveness and, as discussed in the next section, an incremental approach to measuring participatory effectiveness.

This framework is based on a contextualized definition of the purposes of participation. As discussed in above, there is a longstanding requirement that U.S.
regulatory agencies balance democratic accountability and technocratic expertise. The evolution of participatory institutional design, documented above, suggests that participation has, at least at times, been framed as a tool to both enhance technocratic expertise and promote democratic accountability, albeit with shifting norms about to whom agencies are accountable. Thus, while advocating that evaluations should be tailored to specific institutional contexts, this article posits that participation processes are effective when they enhance technocratic expertise and/or promote democratic accountability.

While technocratic expertise and democratic accountability are of intrinsic value—in that they comport with good governance norms—they are also of instrumental value—in that they enable effective regulatory policy. The efficacy of a given policy is based on the accuracy and completeness of its evidence base, which is a function of the promulgating agency’s technocratic expertise. Policy effectiveness, on the other hand, is a function of both the efficacy of a given policy and its implementation, and empirical evidence suggests implementation depends, at least partially, on the perceived democratic accountability of the promulgating agency (Biber and Brosi 2010; Coglianese, Kilmartin, and Mendelson 2008; Makkai and Braithwaite 1996).
The literature provides legibility into the causal mechanisms through which participation may achieve these purposes. The extant literature suggests participation can enhance agency expertise through the provision of information about the impacts of a given policy and the degree of support or opposition among affected stakeholders for a given policy (Biber and Brosi 2010; Coglianese 1997; Coglianese, Kilmartin, and Mendelson 2008; Farina, Newhart, and Heidt 2012; Fung 2006; Irvin and Stansbury 2004; Kerwin and Furlong 2010; McCubbins, Noll, and Weingast 1987; West 2004). The literature also suggests that engaging stakeholders in regulatory policymaking can promote accountability by creating opportunities for participants to access the policymaking process and influence policy outcomes (Ansell and Gash 2008; Ayres and Braithwaite 1992; Biber and Brosi 2010; Coglianese, Kilmartin, and Mendelson 2008; Freeman and Langbein 2000; Makkai and Braithwaite 1996; Murphy, Tyler, and Curtis 2009; Tyler 2006). Drawing on this literature, policy learning and process legitimacy are the hypothesized mechanisms through which participation may enhance technocratic expertise and promote democratic accountability, respectively.

### 2.4.2. Causal Process Model

Figure 3 below formalizes the analytical framework via a proposed causal process model of participatory effectiveness. The dependent variable, regulatory policy...
is both subjective and contextual. For stakeholders, the preferred outcome is a policy more in line with preferences, relative to some baseline. For agencies seeking to align regulatory policy with the public interest, the preferred regulatory policy (Y) is informed by technocratic expertise (D) and is made through processes that are perceived to be democratically accountable (E). Stakeholder participation (X) is the independent variable. The hypothesized causal mechanisms through which participation enhances agency technocratic expertise (D) and promotes democratic accountability (E) are policy learning (B) and process legitimacy (C), respectively. While both causal paths are hypothesized to involve co-production among stakeholders and regulatory agencies, the model focuses on actions by stakeholders with agency actions discussed briefly in the accompanying text.

11 Note that this does not necessarily imply policy change, as stakeholders may prefer to preserve the status quo.
As Figure 3 depicts, the first element of the hypothesized causal process is establishing standing (A), which entails participants’ identification of their public or private stake. This variable accounts for the shifting conceptualizations—both over time and across policy areas—of who has a stake in rulemaking processes. The model then depicts the two paths by which stakeholder participation (X) may lead to the desired regulatory policy (Y), defined in this context by technocratic expertise (D) and democratic accountability (E).
Policy learning (B) is the causal mechanism through which participation may enhance technocratic expertise (D), and in turn, the efficacy of regulatory policy outcomes. Policy learning entails improving the accuracy and completeness of the evidence base for a policy relative to an agency’s baseline. The literature suggests that agencies and stakeholders co-produce policy learning; stakeholders provide information and agencies may in turn use that information to update the evidence base for a given policy. The extant literatures suggests two ways in which participants enhance agency expertise through the provision of information: information about the impacts of a given policy and information about the degree of support or opposition among affected stakeholders for a given policy (Biber and Brosi 2010; Coglianese 1997; Coglianese, Kilmartin, and Mendelson 2008; Farina, Newhart, and Heidt 2012; Fung 2006; Irvin and Stansbury 2004; Kerwin and Furlong 2010; Lavertu and Weimer 2011; McCubbins, Noll, and Weingast 1987; West 2004). Thus, the model depicts two types of information that may enable policy learning: technical information (B₁) and political information (B₂). Technical information (B₁) enhances technocratic expertise by mitigating agency uncertainty regarding the substantive effects of a policy and/or by providing suggestions for policy changes to maximize a given objective. Political information (B₂) mitigates uncertainty regarding whom a policy impacts and/or the degree of
support/opposition for a given policy. As such, political information can serve as a proxy for the relative value an agency should place upon technical information.

As noted above, stakeholders and regulatory agencies co-produce policy learning. The provision of technical information (B₁) or political information (B₂) is an insufficient but necessary part of a condition—agency use of information provided by stakeholders to update the evidence based for a given regulatory policy—which itself is unnecessary but sufficient for policy learning (B). The relative importance of technical information (B₁) and political information (B₂) is therefore hypothesized to depend on an agency’s baseline. The literature also suggests that participation may enable learning by stakeholders, which can affect the acceptability of, and compliance with, a given outcome (Beierle and Cayford 2002; Croley 2008; Freeman and Langbein 2000; Moffitt 2014). While learning by stakeholders is not a necessary condition for policy learning, it may be an unnecessary but sufficient condition for process legitimacy; this relationship is depicted by the two-headed arrow between model variables A and B in Figure 3.

Process legitimacy (C) is the causal mechanism through which participation may promote the perceived democratic accountability (E) of regulatory processes, and in turn, the legitimacy of regulatory policy outcomes. Process legitimacy entails the assessment by stakeholders of the representativeness and responsiveness of regulatory
policymaking processes. The extant literature suggests that regulatory agencies and stakeholders also co-produce process legitimacy (Ansell and Gash 2008; Ayres and Braithwaite 1992; Biber and Brosi 2010; Coglianese, Kilmartin, and Mendelson 2008; Freeman and Langbein 2000; Makkai and Braithwaite 1996; Murphy, Tyler, and Curtis 2009; Tyler 2006). Regulatory agencies create opportunities for access and influence through various institutional design choices, but it is the act of participating that affects stakeholder perceptions of the two components of process legitimacy: representativeness and responsiveness. Representativeness (C1) promotes perceived democratic accountability by providing stakeholders with the opportunity to access the rulemaking process while responsiveness (C2) promotes perceived democratic accountability by providing stakeholders with the opportunity to influence policy outcomes. Furthermore, policies that are made through processes that are deemed to be legitimate are more likely to themselves be deemed legitimate, which may in turn affect compliance (Murphy, Tyler, and Curtis 2009); this relationship is depicted by the dashed arrow between model variables C2 and B2 in Figure 3.

According to this hypothesized causal process model, policy learning (B) is a necessary condition for enhancing technocratic expertise (D). Similarly, process legitimacy (C) is a necessary condition for promoting perceived democratic
accountability (E). However, technocratic expertise (D) and democratic accountability (E) are independently sufficient conditions for regulatory policy (Y). As such, policy learning (B) and process legitimacy (C) are each independently sufficient conditions for regulatory policy (Y). As noted above, establishing standing (A), is a necessary condition for policy learning (B) and process legitimacy (C). Thus, A and B or A and C are independently sufficient conditions for Y.

2.4.3. Applying the Model to Empirical Evaluations of Participatory Effectiveness

In formalizing the causal pathways connecting stakeholder participation (X) and regulatory policy (Y), the model presented in Figure 3 provides an analytical framework for evaluation that is attentive to the challenges associated with defining and measuring participatory effectiveness. The sections below briefly describe these challenges and how empirical applications of the model can address these challenges.

The first challenge associated with evaluating participatory effectiveness is defining the concept against which effectiveness is measured. Stakeholder engagement is complex and value-laden, making defining evaluation criteria particularly difficult (Alemanno 2015). Doing so requires adjudicating among conflicting normative beliefs about the goals of the regulatory process and the role of participation in achieving those
goals. As described above, different theories of regulation are based on diverse assumptions about the purpose of government regulation and the role of participation therein. It is worth noting that participatory effectiveness—the effectiveness of participation in regulatory policymaking—is distinct from the concept of regulatory effectiveness—the effectiveness of rules—and the two may or may not be related conceptually or in practice. Furthermore, as with bureaucratic institutional design more broadly, evaluations may be instrumental—and will vary based on the policy objectives and context—or deontological—and will vary based on the values of decision-makers (Olsen 2006). Thus, even if there is consensus about the purpose of the rulemaking process, who conducts the evaluation may affect evaluation criteria.

The model presented in Figure 3 takes a contextual approach to defining participatory effectiveness. Rather than seek to define participation absolutely as effective or ineffective, the model evaluates effectiveness vis-à-vis the purposes of participation as conceptualized in a particular institutional context. Drawing on public interest theory and administrative process theory, this article seeks to explore the relationship between participation in regulatory policymaking and effective regulatory policy outcomes, and therefore relies on government policies—analyzed within their historical, legal, and political context and synthesized with the academic literature—to
identify the intended purposes of participation. While some scholars have conducted empirical evaluations in this vein, many empirical studies employ narrower conceptualizations of the purposes of participation than government policy and the theoretical literature suggest it might serve. By identifying technocratic expertise and democratic accountability as general purposes of participation, the model presented in Figure 3 provides a definitional baseline for measuring effectiveness across a wide range of participation processes in U.S. regulatory policymaking.

Once a definition of effectiveness is established, the remaining evaluation challenge is developing a measurement strategy. There are two reasons measurement might be particularly difficult for participation in regulatory policymaking. First, it may not be possible to measure the outcome of interest directly. Much of the theoretical literature discusses concepts that are exceedingly difficult to operationalize or that rely on counterfactuals that are unobservable (Fearon 1991). Alemanno (2015, 144) observes that there is a “paucity of reliable measurement tools,” and Coglianese (2002b) notes the inattention to the effectiveness of regulatory policy outcomes in existing evaluations. Second, even if the outcome of interest can be measured directly, the causal path connecting the outcome and hypothesized cause may be unobservable. Much of the extant literature examines participant influence via rule change, which is relatively
straightforward to measure by coding the text of proposed and final rules and correlating rule changes with comments. Yet, even when a well-controlled and statistically significant effect is observed, most scholars do not fully explicate the causal path connecting participation and rule change; potential causal mechanisms are often suggested but seldom directly tested. As Büthe (2014) argues, causal claims without an examination of the causal process undermine the potential for translational impact of academic research because policymakers cannot design effective interventions without insights into causal processes.

While not attempting to fully resolve these measurement issues, which will necessarily vary by application context, this article posits that qualitative approaches to causal inference provide a partial methodological solution. The model presented in Figure 3 embodies two key concepts from qualitative causal inference—causal processes/mechanisms and necessary/sufficient conditions—which enable an incremental measurement approach that helps overcome the aforementioned challenges. With respect to operationalizing unobservable concepts, subject matter expert elicitation can inform identification strategy. For example, regulators involved with stakeholder engagement may be able to either identify cases in which the outcome of interest is clearly un/observable or inform a coding strategy for a large-N dataset, which could in
turn be used for case selection (Seawright and Gerring 2008). With respect to uncertainty regarding the operation of causal mechanisms, within-case process tracing—defined as “the examination of intermediate steps in a process to make inferences about the hypotheses on how the process took place and whether and how it generated the outcome of interest”—may provide legibility into causal mechanisms “in action” (George and Bennett 2005, 6; Bennett and Checkel 2014, 9; Brady and Collier 2010). Causal process mapping enables the identification and measurement of incremental steps in the causal chain (Mahoney 2012). For example, while it may be difficult to measure technocratic expertise directly, it is possible to measure policy learning (e.g., through interviews with regulators regarding changes between proposed and final rules) and the provision of technical and political information (e.g., through the coding of submitted comments), which in conjunction provide a proxy measure for enhanced technocratic expertise. This measure is imperfect, but considerably advances existing approaches in the literature and better aligns with the needs of policymakers. Thus, the model presented in Figure 3 provides a foundation for evaluating participatory
effectiveness, but empirical applications will necessarily inform iterative refinement of the model.\textsuperscript{12}

\textbf{2.5. Can Participatory Institutional Design Promote Effective Participation?}

Aligning evaluations of participation with regulatory policy objectives and exploring the causal processes that distinguish effective from ineffective participation would make important contributions to the literature. Yet, there is also an opportunity to contribute to the practice of regulatory governance by not only explicating the causal relationship between participation and regulatory policy outcomes, but also the causal relationship between institutional design and regulatory policy outcomes via participation. The causal process model of participatory effectiveness presented in Figure 3 assumes that participation is a function of stakeholders’ incentives to participate and agencies’ creation of opportunities to participate. Incentives to participate may be influenced by a range of factors, including information and access costs, issue salience and complexity, and participants’ perceived efficacy. While regulatory agencies have limited ability to affect these factors—e.g., an agency can lower

\textsuperscript{12} For an empirical application of this model, see: Chapter 3/Article 2 or DeMenn\textsuperscript{o} (2017). For an extension of this model to global rule- and standard-setting processes, see: DeMeno and Büthe (2018).
information costs but generally cannot significantly alter the salience of an issue for a given stakeholder—they can directly shape opportunities to participate. Through attentiveness to both the goals of participation processes and the effects of various institutional design choices, agencies can design better participation processes. This section briefly reviews the empirical literature on participatory institutional design and then suggests areas for future research on the causal chain connecting participatory institutional design, stakeholder participation, and regulatory policy outcomes.

2.5.1. Evaluations of Participatory Institutional Design

Although scholars have long recognized that bureaucratic institutional design affects bureaucratic performance, it has been subject to less systematic study than other elements of the bureaucracy (Olsen 2006). Studies of participatory institutional design can be grouped into two categories: exogenous institutional designs—generally involving political principals prescribing administrative procedures to control bureaucratic agents—and endogenous institutional designs—generally involving agencies deciding how, when, and for which purposes to engage stakeholders in the regulatory policymaking process.
2.5.1.1. Exogenous Designs

Much of the political science literature on the bureaucracy focuses on how various political actors exercise power in the policymaking process. The regulatory state is most often framed as a principal-agent problem in which Congress is the principal and the bureaucracy is the agent (Calvert, McCubbins, and Weingast 1989; Epstein and O’Halloran 1994; Huber and McCarty 2004; Huber, Shipan, and Pfahler 2001; McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1987; 1989; Volden 2002). Many studies in this literature focus on when and why Congress delegates decision-making to bureaucratic agencies; these studies are not directly concerned with participatory institutional design, but speak more broadly to the competing demands for technocratic expertise and democratic accountability created by delegation (Epstein and O’Halloran 1994; Huber, Shipan, and Pfahler 2001).

In contrast to studies of why Congress delegates, another group of studies analyze how Congress uses administrative procedure, including participation, to foster bureaucratic political accountability. For example, McCubbins and Schwartz (1984) propose a model of fire-alarm oversight of the bureaucracy, in which Congress transfers the costs of monitoring the bureaucracy to external stakeholders via congressionally established rules, procedures, and informal practices; the authors argue that fire-alarm
oversight tends to be effective and cite as evidence the presence of a “subgovernmental triangle” and legislation that dictates greater information dissemination and procedural transparency than would otherwise be required (McCubbins and Schwartz 1984, 173). In subsequent articles, McCubbins, Noll, and Weingast (1987; 1989) argue that due to the costs of monitoring and limited scope of enforcement actions, political principals will turn to administrative procedure, which limits agency action by shaping agents’ institutional environments. McCubbins, Noll, and Weingast (1987, 255; 1989) cite the proliferation of legislation that constrains agencies beyond what is required by the APA as evidence, arguing that these measures effectively “stack the deck” toward Congress’ preferred constituency: enfranchised interest groups.

Although the president and the judiciary have also sought to exert control over the bureaucracy, the empirical political science literature has largely focused on Congress. Scholars of administrative law have questioned the explanatory power of this literature, particularly given that principal-agent models generally do not account for the limits that Supreme Court jurisprudence has placed on congressional and presidential control of administrative policy (Mashaw 2010). Other legal scholars, however, have argued that administrative law could borrow from the political institutions literature, arguing that the former literature too often evaluates agency
operation subject to a given institutional structure, rather than considering the origins of that structure and implications for outcomes of interest (Weiser 2009).

2.5.1.2. Endogenous Designs

In contrast to studies of institutional design as a tool of political control, another set of studies examines how institutional design choices made within the bureaucracy—including the timing and mode of engagement, the use of information technology, and transparency initiatives—affect the level, composition, and quality of participation (Fiorino 1990; Fishkin 2009; Fung 2006; Kerwin and Furlong 2010). Several studies consider how different participatory modes may promote or hinder desired outcomes. For example, Fung (2006) draws on a wide range of empirical evidence to demonstrate how the scope of participation, type of communication/decision-making, and degree of stakeholder authority affect the legitimacy, justice, and effectiveness of regulatory processes. Fung (2006) argues that legitimacy can be improved by making participation more deliberative and inclusive, while justice can be improved by increasing the authority of participants. Similarly, drawing on Fung and Wright’s (2001, 7) earlier work on “empowered deliberative democracy,” effectiveness-enhancing participation involves deliberation and negotiation among stakeholders with specialized expertise and relatively high levels of authority.
Other studies map modes of participation along various dimensions. For example, Fiorino (1990) evaluates public hearings, initiatives, public surveys, negotiated rulemaking, and citizen review panels against four criteria: direct engagement, sharing of authority, discussion, and basis of quality. Similarly, Nash and Walters (2015) evaluate public comments, hearings, advisory committees, citizen panels, polling, and negotiated rulemaking based on three criteria: inclusiveness, degree of interaction, and authority. In perhaps the most comprehensive study, Beierle (1998) evaluates the myriad modes used in U.S. environmental rulemaking against a range of policy objectives, such as information exchange, reducing conflict, and cost-effectiveness. Finally, using in-depth case studies, Croley (2008, 264) finds that notice and comment rulemaking can be used to “expose and test” the scientific, economic, and political merits of proposed rules while consultation with academic experts can be used to draft effective proposed rules, suggesting that that different objectives—refining versus developing rules, respectively—are amenable to different modes and stages of engagement.

In addition to these analyses of different modes of participation, many recent studies of participatory institutional design focus on the efficacy of two broad procedural reforms: the integration of information technology into regulatory policymaking processes and the implementation of transparency initiatives. Several
studies consider how the movement of notice and comment procedures online affect the level of participation (Balla 2004; Balla and Daniels 2007; Beierle 2003; Benjamin 2006; Brandon and Carlitz 2002; Carlitz and Gunn 2002; Coglianese 2004; 2006; 2012; de Figueiredo 2006; OECD 2001; 2003; 2009). For example, based on an analysis of the Department of Transportation’s (DOT) implementation of an electronic docket system in 1998, Balla and Daniels (2007, 60) find that the average number of comments is higher but that the patterns of participation are “remarkably consistent” before and after implementation. Synthesizing a range of empirical studies on the topic, Coglianese (2006) similarly finds that although eRulemaking has lowered the costs of learning about, and commenting on, rules, it has not increased the overall level of participation. An important insight to be drawn from the eRulemaking experience is that lowering information costs may not be sufficient because there are considerable barriers associated with processing available information and formulating responses (Coglianese 2006; Wagner 2013).

While scholars generally agree that eRulemaking has not democratized the rulemaking process, concluding that it reduced access costs but did not substantially alter awareness or information costs—, it has facilitated a greater number of mass-comment events (i.e., the mass submission of form letters in notice and comment
procedures). Many scholars agree that participation in rulemaking is fundamentally different than participation in electoral democracy—in which quantity not quality matters because participants need only choose among outcomes rather than provide reasoning for such choices—but scholars disagree regarding the role of mass comments. For example, Farina, Newhart, and Heidt (2012) argue that more public participation is only desirable insofar as it adds “value” while Mendelson (2012) suggests mass comments may help agencies better anticipate the level of public acceptance/resistance and signal the need to modify outreach or engagement approaches. Some have suggested that there is an optimal level of participation, beyond which the marginal costs of soliciting and processing public input is greater than the benefits (Coglianese, Kilmartin, and Mendelson 2008). Others have advocated for a more contextualized approach, suggesting that there may be tradeoffs in quantity and quality—for example, mass participation may promote democratic legitimacy but hinder in-depth deliberation (Rossi 2001). Thus, the literature has made clear that participatory institutional designs that leverage information technology must involve a “purposeful and continuous effort to balance the quantity and quality of participation” (Farina, Epstein, and Heidt 2012, 124).
Another set of studies considers transparency reforms. While transparency was once an end, it is now a tool by which other ends are achieved, including democratic accountability (Kosack and Fung 2014). Just as information technology has been used to facilitate participation, it also has been used to facilitate transparency (Coglianese 2012). While scholars have argued that transparency can enhance the level and quality of participation, the empirical evidence is mixed (Coglianese, Kilmartin, and Mendelson 2008). For example, Welch (2012) finds that greater participation is associated with greater transparency, but the effect is unidirectional: participation produces greater transparency, but transparency does not produce greater participation. Furthermore, some argue that greater transparency may negatively affect participation insofar as participants, particularly regulated entities, may be unwilling to disclose information to regulators if the information will be made available to the general public (Coglianese, Kilmartin, and Mendelson 2008; Funk 2009). For those who value inclusiveness, ex parte exchanges among regulators and regulated entities are problematic. Yet, Coglianese, Zeckhauser, and Parson (2004, 279) argue that forms of participation that might resemble regulatory capture may be desirable for the public interest, “if in the process firms cede information that permits regulators to craft more effective and efficient regulatory policies.”
2.5.2. Implications for Participatory Institutional Design

Across these studies of institutional design, two themes emerge. First, even operating within the constraints set by Congress, the president, and the courts, agencies have considerable autonomy in selecting the modes and timing of participation. For example, the APA dictates the mode—written comments—of participation for informal rulemakings. Yet, agencies have autonomy in determining the timing of notice and comment (e.g., issuing an ANPRM), the duration (e.g., extending beyond the 60-day comment period required in most cases), outreach strategies in addition to Federal Register notices (e.g., utilizing social media), and whether to employ other modes of engagement (e.g., scheduling a public meeting). As such, externally imposed participatory institutional design can be understood as a minimum standard, which agencies have flexibility in deciding how to meet and may expand upon. Furthermore, innovation in participatory institutional design that originates within agencies may be subsequently codified by statute, thereby institutionalizing bureaucratic entrepreneurship and learning. For example, EPA and DOT piloted the use of negotiated rulemaking beginning in the early 1980s, yet the legislation supporting the practice, the NRA, was not enacted until 1990.
Second, there is no strictly preferable mode and selecting a mode necessarily involves tradeoffs. For example, because notice and comment procedures occur after agencies have established a proposed rule, use of this mode may limit the ability of information from stakeholders to fundamentally shape proposed rules (West 2009). Therefore, in deciding whether to engage in pre-proposal stakeholder consultation, agencies might evaluate the importance of collecting information from external stakeholders in developing proposals versus autonomy in developing initial drafts. Similarly, while negotiated rulemaking facilitates deliberation to a greater extent than other modes, it is also less inclusive (Fung 2006). Therefore, when selecting between ANPRM and negotiated rulemaking for pre-proposal consultation, agencies might consider the relative importance of broad-based participation versus in-depth deliberation. With respect to the use of information technology and transparency initiatives, there may be tradeoffs between the quantity and quality of participation and between the degree of transparency and level of information provision afforded by confidentiality protections, respectively.

Although a few studies explore the relationship between participatory institutional design and regulatory policy outcomes, there are considerable opportunities to conduct additional empirical work in this vein. Specifically, future
research should consider how institutional design choices affect not only the nature of participation, but also how participation in turn affects regulatory policy outcomes. Such evaluations should also account for the broader context—including political, regulatory, and market conditions—in which regulatory processes unfold. In addition, there are opportunities to integrate the literature on exogenous and endogenous institutional design, given that, as Moffitt (2010) notes, the political institutions literature largely fails to account for bureaucratic preferences for transparency, participation, and other procedural constraints. Similarly, McCubbins and Schwartz (1984) offer the important caveat that the definition of effectiveness applied to their study of fire-alarm oversight is based on degree of compliance with legislative goals, not ensuring the public interest, which depends predominantly on the substance of legislative goals. In contrast, studies of participatory institutional design largely focus on endogenously defined policy objectives, which may or may not align with the policy objectives of political principals (Ansell and Gash 2008; Fiorino 1990; Fishkin 2009; Fung 2006; 2015; Fung and Wright 2001; Wagner 2013). Thus, future analyses should account for the interaction of context and consequence in exploring the causal chain connecting participatory institutional design, stakeholder participation, and regulatory policy outcomes.
2.6. **Conclusion**

“One of the things I learned—I didn’t expect this at OIRA, but once I learned it, boy, did I take it as a fundamental part of my job—is that the rulemaking process depends critically, or even urgently, on the information provided by people outside of government.” – Cass Sunstein (2013)

“My message this afternoon is simple: when it comes to undue industry influence, our rulemaking process is broken from start to finish. At every stage—from the months before a rule is proposed to the final decision of a court hearing a challenge to that rule—the existing process is loaded with opportunities for powerful industry groups to tilt the scales in their favor.” – Senator Elizabeth Warren (2016)

The regulatory policymaking process—in which enabling legislation is translated into regulation—provides myriad opportunities for stakeholder access and influence. As the quote from former OIRA Administrator and law professor Cass Sunstein (2013) illustrates, participation can add tremendous value to regulatory processes. At the same time, as the quote from Senator and former law professor Elizabeth Warren (2016) emphasizes, participation can cause significant problems, ranging from administrative delays to regulatory capture. The challenge for regulatory agencies is determining how to use participation strategically to promote effective regulatory policy. While policymakers have invested considerable resources in engaging stakeholders in
regulatory processes, comparatively few resources have been invested in evaluating participatory effectiveness (Alemanno 2015).

Scholars of regulatory governance are well positioned to explore not only how to prevent regulatory capture, but also how to improve the effectiveness of regulatory policy. Yet, there is widespread consensus that the literature on participation in rulemaking is underdeveloped (Baumgartner et al. 2009; Croley 2008; Kerwin and Furlong 2010; Kerwin, Furlong, and West 2010; West 2004). In particular, there is a mismatch between the rich theoretical literature and the relatively sparse empirical literature, much of which focuses on political control and participant influence. Relatedly, there is an opportunity to think more broadly about the relationship between institutional design and participation.

A more holistic understanding of the causal chain connecting participatory institutional design, stakeholder participation, and regulatory policy outcomes would contribute to the theory and practice of regulatory governance by illuminating the conditions under which interactions among regulators and external stakeholders promote or hinder effective regulatory policy. This article begins to address this opportunity by developing an analytical framework for defining and measuring participatory effectiveness. The approach to defining participatory effectiveness is
contextual: drawing on a historical-institutional analysis of participatory institutional design in the United States over the last century, this article identifies enhancing technocratic expertise and promoting democratic accountability as the purposes of participation. The approach to measuring participatory effectiveness is incremental: drawing on a review of extant interdisciplinary theoretical and empirical literature on participation in regulatory policymaking, this article identifies policy learning and process legitimacy as the hypothesized mechanisms through which participation may enhance technocratic expertise and promote democratic accountability, respectively. Based on this analysis of purposes and mechanisms, the article proposes a novel causal process model of participatory effectiveness. Future scholarly work connecting this model to analyses of institutional design would enable practitioners to not only evaluate, but also promote, participatory effectiveness through institutional design.
3. Technocracy, Democracy, and Public Policy: An Evaluation of Public Participation in Retrospective Regulatory Review

3.1. Introduction

In 2011 and 2012, President Obama issued a series of executive orders (EOs) mandating that U.S. federal agencies engage in “retrospective review” of their existing stock of regulations. While prospective, or ex ante, assessment of regulations is a well-established feature of the U.S. regulatory policy cycle, EOs 13563, 13579, and 13610 recognize that despite longstanding presidential and congressional attention, retrospective, or ex post, assessment is not yet institutionalized. Public participation is a key component of the retrospective review processes prescribed in the EOs, and plays an important role in regulatory governance more broadly. Despite the growing prevalence and perceived impact of participation in regulatory policymaking, there remains considerable scholarly and practitioner debate about the purposes of participation in regulatory policymaking, how best to evaluate the effectiveness of participation

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1 A revised version of Chapter 3/Article 2 was previously published as “DeMenno, Mercy B. 2017. ‘Technocracy, Democracy, and Public Policy: An Evaluation of Public Participation in Retrospective Regulatory Review.’ Regulation & Governance 18(7): 543,” Copyright 2017 by John Wiley and Sons. A pre-publication version is reprinted in this dissertation with permission from John Wiley and Sons (License Number: 4261140685876) but is not covered by the Creative Commons license that applies to the rest of this dissertation.
processes, and the efficacy of various institutional design innovations aimed at improving participatory effectiveness. This debate relates to more fundamental tensions between technocracy and democracy in the modern regulatory state.

This article represents the first systematic assessment of participation in U.S. retrospective regulatory review. Utilizing mixed-methods content analysis of an original dataset of government documents and public input, this article seeks to evaluate participation in U.S. federal agencies’ retrospective review processes pursuant to EOs 13563, 13579, and 13610. Specifically, it asks three questions. First, how did U.S. regulatory agencies engage the public in the development and implementation of retrospective regulatory review? Second, how did the public respond to these opportunities to participate in retrospective regulatory review? Third, how effective was public participation in retrospective regulatory review?

The article proceeds as follows. Section 3.2 provides a brief overview of the history of retrospective review and its current role in the U.S. regulatory policy cycle. It then discusses how this article contributes to both the literature on retrospective review and the literature on participation in regulatory policymaking. Section 3.3 describes the theoretical framework and hypotheses used to explore the research questions above. This section describes the strategy for measuring the effectiveness of participation
processes, which, consistent with the analytical framework described in Chapter 2/Article 1, defines effectiveness vis-à-vis the purposes of participation identified in the EOs and extant literature. Section 3.4 discusses the methodology and data sources. Section 3.5 details the findings of the empirical assessment. To preview the findings, retrospective review participation processes largely reflected the modes of stakeholder outreach and engagement employed in prospective regulatory policymaking, but relative to rulemaking resulted in comparatively lower levels of participation and a somewhat more balanced composition of participants. The results also suggest that participation processes were effective with respect to the purposes of participation identified in the EOs and extant literature: policy learning and process legitimacy. These findings offer evidence that under certain circumstances regulatory agencies may use participation to enhance technocratic expertise and promote democratic accountability, and in so doing provide a preliminary empirical validation of the model proposed in Chapter 2/Article 1. Section 3.6 concludes and proposes areas for future research.

### 3.2. Background and Literature

Regulatory impact assessment is a fundamental component of regulatory policymaking in the United States and numerous other jurisdictions. Prospective review, or ex ante impact assessment, seeks to anticipate the impacts of proposed rules, which
enables policymakers to apply various decision frameworks, such as cost-benefit or cost-effectiveness analysis. In contrast, retrospective review, also referred to as ex post impact assessment, involves the analysis of existing regulations. Retrospective review may serve a variety of purposes, ranging from ensuring the efficiency of regulatory processes to enhancing the effectiveness of existing rules. Retrospective review may result in deregulation (e.g., eliminating rules to reduce administrative burdens), rule revision or promulgation (e.g., updating or issuing rules to reflect new scientific evidence), or preservation of the status quo (e.g., confirming that a rule serves its intended purpose). Common across these purposes and outcomes is the recognition that changed circumstances—technical, political, or economic—justify periodic review of existing regulations.

3.2.1. Origins of Retrospective Review and the U.S. Regulatory Policy Cycle

Beginning in 1978 with President Carter, all U.S. administrations have called for retrospective review, generally coordinated by the U.S. regulatory oversight body, the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA). In addition, numerous congressional statutes and agency initiatives include requirements for retrospective review. These statutes include both administration-wide
reviews of certain types of impacts and of specific programs. Despite its parallel emergence in U.S. administrative procedure, retrospective review is far less integrated into the regulatory policy cycle than prospective review, creating a policy window in 2011/2012 for EOs 13563, 13579, and 13610, which seek, inter alia, to institutionalize retrospective review.

### 3.2.2. Executive Orders 13563, 13579, and 13610

The groundwork for EOs 13563, 13579, and 13610 was laid early in the Obama administration. In his inaugural address, President Obama (2009b) stated, “[t]he question we ask today is not whether our government is too big or too small, but whether it works.” As a progressive Democrat elected during the worst economic downturn since the Great Depression, President Obama was faced with the challenge of enhancing the effectiveness of government programs and regulations without creating the perception of undue regulatory burden. Part of President Obama’s strategy, having also inherited the prior administration’s regulatory agenda, was to design a regulatory agenda that both reflected the administration’s policy priorities and responded to the broader political and economic context.

President Obama’s initial actions on regulatory reform focused on prospective review. In a memorandum titled “Regulatory Review,” President Obama (2009a, 5977)
directed the OMB to produce recommendations for a new EO on regulatory review. In response, the acting Administrator of OIRA published a notice in the Federal Register regarding the development of these recommendations and requesting public feedback on improving U.S. regulatory governance (Neyland 2009). The emphasis on public participation in the development of President Obama’s regulatory agenda foreshadows a broader role envisaged by the administration in implementing the resulting EOs.

Between January 2011 and May 2012, President Obama issued a series of EOs mandating that U.S. federal agencies integrate retrospective review into their regulatory policymaking processes. On January 18, 2011, President Obama issued EO 13563 “Improving Regulation and Regulatory Review,” which sets out general requirements for executive agencies related to public participation and mandates that federal agencies engage in systematic retrospective regulatory reviews. Specifically, EO 13563 directs all federal agencies to develop plans (within 120 days) describing how the agency intends to periodically review existing significant regulations to determine whether any should be “modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives” (Obama 2011a, 3822). Shortly after EO 13563, on July 11, 2011, President Obama issued EO 13579 “Regulation and Independent Regulatory Agencies,” which encourages
independent regulatory agencies to participate in the retrospective review mandate in EO 13563 (Obama 2011b). Subsequent OIRA guidance memos specify that the participation provisions set out in EO 13563 apply to retrospective review processes pursuant to EO 13563 and EO 13579, and note that retrospective review should be integrated into the regulatory policy cycle, rather than conducted as a one-off effort (Sunstein 2011e; 2011b). On May 10, 2012, President Obama (Obama 2012, 28469) issued EO 13610 “Identifying and Reducing Regulatory Burdens,” which describes the role of retrospective review in “challenging economic times,” with an emphasis on streamlining existing regulations. Reinforcing the prior guidance memos, EO 13610 also acknowledges that despite many agencies’ longstanding practices of engaging in periodic retrospective review, agencies needed to take additional action “to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations” (Obama 2012, 28469). Thus, EOs 13563, 13579, and 13610 build upon prior review efforts, but are unique in that they seek to institutionalize retrospective review and to extend retrospective review to independent agencies.

While EOs 13563, 13579, and 13610 and the accompanying guidance memos describe enhancing regulatory effectiveness as a benefit of retrospective regulatory
review, these documents primarily emphasize reducing regulatory burden. The Obama administration has also quantified the successes of retrospective review efforts in terms of burden reductions, stating in 2015, for example, that U.S. federal agencies’ retrospective initiatives would save $22 billion dollars and eliminate 100 million hours of paperwork burden in the next five years (Shelanski 2015a, 2015b). This emphasis on reducing regulatory burden is responsive to the economic and political context in which the EOs were promulgated, however, it also reflects a broader trend in the implementation of retrospective review. For example, analyses of prior retrospective review efforts, in the United States and among Organisation for Economic Co-operation and Development (OECD) countries more broadly, find that reducing administrative burden is among the most common justifications for reviews (Aldy 2014; OECD 2015a).

3.2.3. Evaluations of Retrospective Review

There are relatively few evaluations of U.S. retrospective review efforts in the academic literature (Berman and Logsdon 2012; Bull 2015; Coglianese 2013; Eisner and Kaleta 1996; Furlong 1995; Lutter 2013) and many of the evaluations of retrospective review efforts have been conducted by, or on behalf of, government agencies (ACUS 1995; 2014; Aldy 2014; GAO 2007; 2014). While evaluations of current retrospective review efforts are nascent, scholars have generally celebrated the concept of
retrospective review, but criticized the implementation of review processes. For example, although the Obama administration stated that the EOs fundamentally reshaped the regulatory policymaking process—former OIRA Administrator Cass Sunstein (2013, 1846) referred to EO 13563 as a “mini-constitution for the regulatory state”—scholars have expressed skepticism that the EOs are alone sufficient for institutionalization. For example, Coglianese (2013, 59) observes “retrospective review is today where prospective analysis was in the 1970s: ad hoc and largely unmanaged.” Similarly, Bull (2015, 15) notes that while it may be too soon to evaluate the most recent EOs, initiatives to date “have been insufficient to spur a strong commitment to periodic reassessment of existing regulations on the part of agencies.” Several studies are also critical of the methodologies employed in reviews. For example, counter to Greenstone’s (2009) vision for retrospective review processes that enable a culture of experimentation and evaluation, Lutter (2013) finds that retrospective reviews are seldom based on detailed cost-benefit analyses. Notwithstanding these criticisms, U.S. regulatory agencies continue to, at least nominally, engage in periodic retrospective regulatory review and OIRA (2016) has committed to “further institutionalize retrospective review in order to make government work more efficiently and effectively for the American people.” As such, the recent efforts to institutionalize retrospective review present an
important opportunity for scholars to contribute to the theory and practice of regulatory governance.

3.2.4. Evaluations of Participation in Regulatory Policymaking

Consistent with prior review efforts, participation is a key component of the retrospective review processes prescribed in EOs 13563, 13579, and 13610. As with opportunities for participation in prospective regulatory policymaking, participation in retrospective review originates in the Administrative Procedure Act (APA) of 1946, which provides a mechanism—through petition for rule amendment or repeal (5 U.S.C. § 553[e])—for stakeholders to initiate retrospective review of an existing rule (Eisner and Kaleta 1996). Since the APA, numerous statutes and presidential review initiatives have included provisions related to stakeholder participation in retrospective review. The stated purpose of participation varies somewhat, but participation is most often used in the selection of rules for review—for example, through notice and comment procedures analogous to those used in rulemaking (5 U.S.C. §§ 553[b]-[c]). While the focus of this article is on participation in U.S. retrospective review efforts, it is worth noting that as with the diffusion of retrospective review generally, stakeholder participation in ex post review is also increasingly common internationally. For example, among the 34 OECD
countries and the European Commission, 30 jurisdictions have mechanisms by which
the public can provide feedback on existing regulations (OECD 2015a, 136).

Furthermore, across both government reports and academic studies,
recommendations regarding the ongoing implementation of retrospective review
frequently highlight the importance of participation. For example, recent
recommendations from the Administrative Conference of the United States (ACUS)
(2014) suggest that agencies use public input to prioritize reviews, building on earlier
recommendations in which ACUS (1995) refers to public input as a “crucial” component
of reviews. Similarly, recent proposals for institutionalizing retrospective review
through an expanded role for OIRA (Coglianese 2013), use of petitions (Bull 2015), and
an independent “regulatory impact council” (Mandel and Carew 2013) all envisage a
robust role for public participation.

Despite its prominence in practice, participation in U.S. retrospective review has
received little scholarly attention. As described in detail in Chapter 2/Article 1, most
studies of participation in the U.S. regulatory policy cycle focus on the rulemaking
process, in which regulatory policy priorities are translated into regulatory proposals
and final rules; these studies most often analyze participation via notice and comment
procedures (Balla 1998; 2014; Balla and Daniels 2007; Cuéllar 2005; Golden 1998; Krawiec
2013; West 2004; J. W. Yackee and Yackee 2006; S. W. Yackee 2006). Other studies analyze the agenda setting stage via pre-proposal comment periods (Naughton et al. 2009; West and Raso 2013; S. W. Yackee 2012), negotiated rulemaking (Coglianese 1997; Freeman and Langbein 2000; Langbein and Kerwin 2000), and advisory committees (Croley and Funk 1997; Moffitt 2014). Positioned within the regulatory policy cycle, retrospective review is the last stage of the regulatory process but may also re-start the regulatory policy cycle via rule revision. Thus, participation in retrospective review may affect the evaluation, agenda setting, and rule development stages. As such, analyzing participation in retrospective review may contribute to a small but important literature that examines participation in regulation “cradle-to-grave” (Furlong 1997; Furlong and Kerwin 2005; Wagner, Barnes, and Peters 2011).

In addition to contributing to the literature, analyses of the causes and consequences of participation in review processes may inform future retrospective review efforts. While existing evaluations of retrospective review generally find that agencies perceive participation to be important, these studies stop short of empirically evaluating the consequences of participation or exploring the underlying causal process. For example, in a 1993 survey of federal officials regarding retrospective review, Eisner and Kaleta (1996, 156) find that agencies had “varying success with public involvement,
but most thought that under the right circumstances public participation can be quite helpful.” Similarly, in its report on retrospective reviews between 2001 and 2006, the Government Accountability Office (GAO) (2007, 43) emphasized the importance of participation in retrospective review and stated that “the lack of public participation in the retrospective review process was a barrier to the usefulness of the reviews.” Yet, to my knowledge no studies to date seek to systematically explore participation in U.S. retrospective review processes, suggesting an opportunity to inform the theory and practice of stakeholder engagement in regulation.

3.3. **Research Questions**

This article seeks to evaluate participation in U.S. federal agencies’ retrospective review processes pursuant to EOs 13563, 13579, and 13610. Specifically, it asks three questions. First, how did U.S. regulatory agencies engage the public in the development and implementation of retrospective regulatory review? Second, how did the public respond to these opportunities to participate in retrospective regulatory review? Third, how effective was public participation in retrospective regulatory review? The first two

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2 There are several government (OECD 2015b) and academic (Lodge and Wegrich 2015) evaluations of participation in retrospective review in other jurisdictions.
questions relate to the extant literature on participatory institutional design and participation in rulemaking, respectively. The third question derives from the assumption that President Obama’s (2009b) assertion that what matters is not the size of government but “whether it works” can and should be applied to evaluations of participation. As such, this article evaluates not only who participated and through which modes, but also whether participation processes were effective with respect to the purposes of participation identified in the EOs and extant literature.

### 3.3.1. Participatory Institutional Design

The design of stakeholder engagement and outreach mechanisms has garnered attention from both scholars and policymakers. Prior studies find that participatory institutional design may affect the level, composition, and quality of participation (Ansell and Gash 2008; Fung 2006; Fung and Wright 2001; Wagner 2013). Retrospective review provides a unique opportunity to evaluate participatory institutional design because agencies had autonomy in selecting the modes of engagement and outreach. Unlike rulemaking, in which certain modes of engagement may be required by statute, the EOs and accompanying memos encouraged agencies to use a variety of methods to engage stakeholders, such as “public meetings, Federal Register notices, social media, or other kinds of outreach to the public” (Sunstein 2011c, 1-2). Given this autonomy in
designing review processes, and the fact that agencies were required to implement the EOs without supplemental resources, it follows that agencies’ approaches to participation in retrospective review will depend on their existing participation infrastructure. As such, I expect that the modes of stakeholder outreach and engagement in retrospective review will reflect the modes of stakeholder outreach and engagement in rulemaking.

3.3.2. Level and Composition of Participation

Much of the extant literature on participation in rulemaking focuses on the level of participation and composition of participants in regulatory processes. Although retrospective review affords stakeholders with broad opportunities to influence both substantive (i.e., rules to review) and procedural (i.e., structure of review processes) issues, I hypothesize that it is less salient than prospective rulemaking, in which certain rules receive considerable political and media attention. As such, I expect that relative to participation in rulemaking, the level of participation in retrospective review will be comparatively low.

Given the emphasis on burden reduction in the EOs and guidance memos, as well as several prior studies documenting the preponderance of business participants in rulemaking (Golden 1998; Yackee 2006; Yackee and Yackee 2006; Krawiec 2013; Kerwin
and Furlong 2010), I hypothesize that regulated entities will have both the greatest awareness of retrospective review efforts and the greatest incentives to participate. As such, I expect that the majority of participants in retrospective review will be regulated entities or their representatives (e.g., trade associations).

### 3.3.3. Participatory Effectiveness

The extant literature on participation in regulatory policymaking reflects the theoretical and empirical challenges posed by defining and measuring, respectively, the “effectiveness” of participation processes (Croley 2008). As Chapter 2/Article 1 demonstrates, while it may not be possible to define participation absolutely as “effective” or “ineffective,” it is possible to evaluate participation processes contextually; that is, vis-à-vis the stated purposes of participation. These evaluations can provide critical information for policymakers seeking to achieve policy objectives via participation (OECD 2015b). Government policy—analyzed within its historical, legal, and political context and synthesized with the academic literature—provides legibility into the purposes of participation. Drawing on the analytical framework described in Chapter 2/Article 1, I utilize the purposes of participation in retrospective regulatory review defined in policy documents related to retrospective review—EOs 13563, 13579, and 13610 as well as the accompanying OIRA guidance memos (Sunstein 2011d; 2011a;
2011b; 2011c; 2011e)—as the basis for evaluating effectiveness. These documents emphasize two purposes of participation: policy learning and process legitimacy. Described in more detail below, this emphasis is consistent with the extant literature, which suggests participation may enhance technocratic expertise through policy learning and promote democratic accountability through process legitimacy. In addition to being consistent with the literature on participation in regulatory policymaking, these purposes address criticisms of government evaluations of prior retrospective review (Eisner and Kaleta 1996; GAO 2007).

3.3.3.1. Policy Learning

The 2011/2012 EOs and guidance memos identify policy learning as a purpose of participation in retrospective review. As described in Chapter 2/Article 1, policy learning entails improving the accuracy and completeness of the evidence base for a given policy relative to an agency’s baseline. The EOs instruct agencies to facilitate “meaningful” opportunities for participation (Obama 2011a) and an “open exchange” of information to “improve the content of rules” (Sunstein 2011b, 1-2). The guidance memos call for participation in designing retrospective review processes as well as in selecting rules to review. Participation is described as particularly useful for identifying “rules that might be modified, streamlined, expanded, or repealed” (Sunstein 2011b, 5)
because the public possesses “important information about the actual effects of existing regulations” (Obama 2012, 28469). As such, agencies are instructed to use participation to solicit “ideas about alternatives, relevant costs and benefits (both quantitative and qualitative), and potential flexibilities” (Sunstein 2011b, 1-2).

Drawing on the literature review presented in the Chapter 2/Article 1, participation may enable policy learning through the provision of information about the impacts of a given policy and the degree of support or opposition among affected stakeholders for a given policy (Coglianese, Kilmartin, and Mendelson 2008; Farina, Newhart, and Heidt 2012; Fung 2006; Kerwin and Furlong 2010; McCubbins, Noll, and Weingast 1987; West 2004). Therefore, to evaluate whether participation contributed to policy learning, I analyzed the extent to which participants provided technical or political information. As described in Chapter 2/Article 1, technical information comprises information about the effects of a given policy or process in/action. In the context of retrospective review, this information may be substantive or procedural. In contrast, political information comprises information about whom a given policy or
process impacts and the degree of support or opposition for a given policy or process. Given the tradeoff between the magnitude and immediacy of the benefits associated with influencing procedure versus substance, I expect that most technical and political information will focus on specific policies for review (i.e., substantive information) rather than review processes (i.e., procedural information).

While in theory any affected entity may provide technical and political information, I expect that membership organizations, such as public interest groups or trade associations, will do so more frequently than other participants because of their ability to aggregate technical and political information from diffuse constituencies (Baumgartner et al. 2009; Olson 1965). In so doing, these organizations can overcome collective action problems and, through repeat engagement, enjoy declining marginal costs of lobbying for a given issue. As such, I expect that membership organizations will provide more technical and political information than other types of participants, such as individual citizens and firms.

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3 It should be noted that several studies also find that participation facilitates learning by stakeholders, which can in turn affect the acceptability of, and compliance with, a given outcome (Croley 2009; Freeman and Langbein 2000; Moffitt 2014). However, this article analyzes the provision of information by stakeholders and therefore more directly speaks to the literature on policy learning than that on participant learning.
3.3.3.2. Process Legitimacy

The 2011/2012 EOs and guidance memos also identify process legitimacy as a purpose of participation in retrospective review. As described in Chapter 2/Article 1, process legitimacy entails the assessment by stakeholders of the representativeness and responsiveness of regulatory agencies and their policymaking processes. The EOs specifically emphasize three elements of process legitimacy: transparency, representativeness, and responsiveness. At each step in the review process, agencies are directed to make all documents related to reviews accessible to stakeholders (Sunstein 2011c, 1-2). To ensure retrospective review participation processes are representative of affected stakeholders, agencies are instructed to “reach out to stakeholders with an interest in the rules mentioned in the preliminary plans to ensure that diverse views are considered” (Sunstein 2011b, 5). In addition, agencies are directed to develop “mechanisms to promote public consultation about existing rules on a continuing basis” (Sunstein 2011b, 5). The EOs and guidance memos focus not only on accessibility, but also on responsiveness to stakeholders, encouraging agencies to “revise their plans in ways that are responsive to the public input received” (Sunstein 2011c, 1-2).

Drawing on the literature review presented in the Chapter 2/Article 1, regulatory agencies and stakeholders co-produce process legitimacy; regulatory agencies create
opportunities for access and influence through various institutional design choices, but it is the act of participating that affects stakeholder perceptions of the two components of process legitimacy: representativeness and responsiveness (Ansell and Gash 2008; Ayres and Braithwaite 1992; Coglianese, Kilmartin, and Mendelson 2008; Freeman and Langbein 2000; Makkai and Braithwaite 1996). Moreover, policies that are made through processes deemed to be legitimate are more likely to themselves be deemed legitimate (Murphy, Tyler, and Curtis 2009), which may in turn affect compliance. Thus, the literature suggests that participation may enhance both input and output legitimacy (Scharpf 1999). While input and output legitimacy focus on participants’ perceptions of the accessibility of policymaking processes and the effectiveness of policy outcomes, respectively, throughput legitimacy focuses on the efficacy of the processes connecting input and output legitimacy (Schmidt 2012). In evaluating the representativeness and responsiveness of review processes, this paper more directly speaks to the literature on throughput legitimacy than that on input or output legitimacy.

To evaluate whether participation contributed to policy learning, I analyzed the representatives and responsiveness of review processes. Because agencies implemented retrospective review with existing resources, it follows that review processes, and the opportunities for participation therein, will vary based on agencies’ institutionalized
expertise in retrospective review. As such, I expect that agencies with greater prior experience conducting retrospective review will develop the most robust systems for ensuring representativeness and responsiveness. Furthermore, I expect that those agencies that have previously employed innovative approaches to public participation will be better positioned to develop review processes that are representative of, and responsive to, stakeholders.

3.4. Data and Methodology

This article utilizes mixed-methods content analysis of an original dataset of government documents and public input. While agencies engage in retrospective review for a variety of purposes, this study is limited to retrospective reviews pursued in response to the EOs. Both EO 13563 and EO 13579 require that agencies produce documents detailing how agencies planned to conduct and institutionalize retrospective reviews and enumerating the first set of rules selected for review. Therefore, the development of plans distinguishes those agencies that engaged in retrospective review pursuant to statutory and other mandates from those responding to the EOs. The first drafts of these documents, or “Preliminary Plans,” were published in May 2011 and the revised drafts, or “Final Plans,” were published in August 2011. Although agencies continue to produce biannual updates regarding periodic reviews, the emphasis of this
analysis is on the period between January and August 2011, in which agencies consulted external stakeholders regarding the development and implementation of retrospective review processes.

In total, 39 agencies participated in retrospective review pursuant to the EOs between January and August 2011. For each of these agencies, I collected preliminary data to better understand the scope of retrospective review activity (see: Appendix C: Summary of Retrospective Review Activity for U.S. Federal Agencies [n=39]). From a GAO (2014) survey, I collected the total number of planned and completed retrospective reviews, which provides a measure of the approximate level of review activity within each agency. The number of planned reviews ranges considerably but seems to roughly map onto the level of agency regulatory activity; those agencies with relatively few reviews fulfill largely programmatic, rather than regulatory, functions. I also collected information about participation in retrospective review, including both descriptive information about agencies’ approaches to engaging the public in review efforts and the reported level of public response. In addition to collecting reported levels of participation from agency plans, I collected documentation of participation related to EOs 13563, 13579, and 13610 from the federal rulemaking website and agency websites.
Discussed in more detail below, the modes of engagement and the level of stakeholder response varied across agencies.

This preliminary evaluation of agency websites, dockets, and plans revealed considerable variation in the extent to which agencies responded to the EOs. Many independent and smaller programmatic agencies did not fully document retrospective review processes or participation processes. The EOs encourage retrospective review throughout the federal bureaucracy, but only mandate that executive agencies participate. Therefore, to ensure all agencies included in the analysis are clearly within the purview of the EOs—executive agencies that issue economically significant regulations—I limited the sample to the 15 cabinet departments and the Environmental Protection Agency (EPA). From this list of 16, I eliminated four because comments were not available online and two others because the agencies received fewer comments than my minimum sample size. The remaining 10 agencies, which compose my sample, represent a wide range of policy issues and a large proportion of all federal regulatory activity: Department of Agriculture (USDA), Department of Education (ED), Department of Energy (DOE), Department of Homeland Security (DHS), Department of Housing and Urban Development (HUD), Department of Interior (DOI), Department of Justice (DOJ), Department of Transportation (DOT), Department of Treasury (TREAS),
For each agency in the sample, I downloaded agency plans, biannual updates (through 2015), and related materials from the federal rulemaking website and agency websites. I also downloaded all available public input from the federal rulemaking website and agency websites, including all publicly available comments. I conducted all content analysis using NVivo, which enabled collection of both descriptive data for each individual occurrence and a dichotomous indicator for each source document.

3.5. Results

3.5.1. Participatory Institutional Design

To analyze how agencies implemented the public participation provisions in the EOs, I coded agency plans—which document how each agency planned to conduct retrospective reviews and enumerated the initial list of rules selected for review—for the stated purpose of participation, the institutional design choices related to the modes of engagement and outreach, and the timeline for participation. Consistent with the intention set out in the EOs, agencies sought public input regarding both how review processes should be structured and which rules should be prioritized for review. In defining the purpose of participation in retrospective review, agency plans refer to both policy learning and process legitimacy. For example, the DOI (2011, 14) plan states:
“... public participation is a foundational principle to creating more effective, less costly, more flexible, and less burdensome regulations. Those who must comply with regulations often have information that can improve the regulations and contribute to better results. Moreover, increased compliance can result when regulated entities have an opportunity to participate in the development of the regulations they will need to abide by.”

Some agencies placed greater emphasis on substantive rather than procedural feedback, while others approached the process more holistically, asking for procedural information not only about retrospective review, but also to better align their rulemaking processes with the values outlined in the EOs. Figure 4 provides Venn diagrams of agencies’ most common modes of stakeholder outreach—Federal Register notice; dedicated website; and targeted stakeholder notification—and engagement—notice and comment period; public or individual meeting, hearing, or forum; and Idea Scale website.
As Figure 4 depicts, agencies utilized various modes of outreach and engagement for retrospective review, and most agencies employed multiple modes. These modes of outreach and engagement generally reflect those used in rulemaking. For example, common across all agencies was the use of a notice and comment period, publicized through the Federal Register and administered through electronic dockets. Most agencies conducted multiple notice and comment periods—preceding the issuance of the Preliminary Plans in May 2011 and Final Plans in August 2011—although USDA and ED elected to have only a single comment period. Consistent with outreach strategies employed in rulemaking, all agencies provided detailed questions to
participants in their requests for information, and many provided supplemental guidance. Several agencies utilized more deliberative methods, which are also employed in rulemaking, such as stakeholder meetings and listening sessions. However, other agencies went beyond those statutorily mandated modes for rulemaking by allowing for comment “reply periods” and utilizing social media to facilitate deliberative electronic engagement. For example, DHS and DOT created retrospective review portals on an online crowdsourcing platform called IdeaScale, which enables internal and external stakeholders to submit and reply to ideas via commenting and voting. In addition, many subordinate bureaus engaged in targeted stakeholder outreach and dialogue. Finally, many plans describe ongoing opportunities for participation in retrospective review.

Thus, while certain agencies utilized retrospective review as an opportunity to experiment with novel outreach and engagement approaches, retrospective review participation processes generally closely resemble those employed in rulemaking. This finding suggests that promoting innovation in participatory institutional design may require not only agency autonomy in selecting the modes of outreach and engagement, but also additional resources to design and implement alternative approaches.
3.5.2. Level and Composition of Participation

Table 1 depicts the reported level of participation across modes. While it is difficult to assess the relative level of participation via modes such as IdeaScale, the number of comments—3,227 across the 10 agencies in the sample and 4,065 across all 39 agencies in the population—is significantly lower than agencies receive for many rulemakings. For example, DOT received 102 comments on its retrospective review plans, which in theory covered all economically significant rules. Yet, Balla and Daniels’ (2006) analysis of 210 DOT rulemakings from 2001-2003 finds that the mean number of comments received per rule is 628. It should be noted that the median number of comments is often lower than the mean number of comments at the agency level for a given timeframe because certain rules are necessarily more salient than others. For example, in 2014 the Federal Communications Commission’s net neutrality regulation generated 3.7 million comments while the EPA’s greenhouse gas emissions rule for electric generating units produced 2.5 million comments (Balla and Dudley 2015). The comparatively low public salience of retrospective review—which, as described above is reflected in the paucity of political and media attention—may explain the low level of participation, particularly relative to prospective rulemaking.
Table 1: Level of Participation in Retrospective Review Across Modes

<table>
<thead>
<tr>
<th>Agency</th>
<th>Level and Mode</th>
</tr>
</thead>
<tbody>
<tr>
<td>DHS</td>
<td>50 comments</td>
</tr>
<tr>
<td></td>
<td>178 IdeaScale users (98 ideas, 76 comments)</td>
</tr>
<tr>
<td>DOE</td>
<td>29 comments</td>
</tr>
<tr>
<td>DOI</td>
<td>43 comments</td>
</tr>
<tr>
<td>DOJ</td>
<td>17 comments</td>
</tr>
<tr>
<td>DOT</td>
<td>102 comments</td>
</tr>
<tr>
<td></td>
<td>79 IdeaScale users (53 ideas, 13 comments)</td>
</tr>
<tr>
<td></td>
<td>263 participants in public meeting (21 spoke)</td>
</tr>
<tr>
<td>ED</td>
<td>30 comments</td>
</tr>
<tr>
<td></td>
<td>8 external participants in stakeholder forum</td>
</tr>
<tr>
<td>EPA</td>
<td>&gt;800 comments</td>
</tr>
<tr>
<td></td>
<td>600 participants across public forums</td>
</tr>
<tr>
<td>HUD</td>
<td>42 comments</td>
</tr>
<tr>
<td>TREAS</td>
<td>14 comments</td>
</tr>
<tr>
<td>USDA</td>
<td>&gt;2100 comments</td>
</tr>
</tbody>
</table>

Given that participation via the submission of written comments was common to all agencies, it is the mode of participation used to analyze effectiveness. Notably, while the sample only includes 10 of the 39 agencies purportedly participating in retrospective review, these agencies represent 85% (n=2,285) of the publicly available comments. For the preliminary analysis of participation, discussed in more detail below, I took a stratified random sample of 100 comments, selecting 10 comments from each of the 10
agencies in the sample. Table 2 depicts the number of comments by submitter category in this sample.

<table>
<thead>
<tr>
<th>Submitter Category</th>
<th>Total Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Firm</td>
<td>12</td>
</tr>
<tr>
<td>Trade Association/Firm Consortium</td>
<td>26</td>
</tr>
<tr>
<td>Professional Association</td>
<td>5</td>
</tr>
<tr>
<td>Think Tank/Foundation/Academic Research Group</td>
<td>2</td>
</tr>
<tr>
<td>Public Interest/Non-Commercial Advocacy Group</td>
<td>10</td>
</tr>
<tr>
<td>State/Local/Tribal Government</td>
<td>13</td>
</tr>
<tr>
<td>Cross-Sector Coalition/Quasi-Governmental Entity</td>
<td>7</td>
</tr>
<tr>
<td>Individual</td>
<td>18</td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
</tr>
</tbody>
</table>

As Table 2 depicts, of the 100 comments in the sample, 43% are from business

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4 Although the number of comments varied across agencies, I sampled a consistent number of comments from each agency because my goal was to evaluate participation in retrospective review processes across the federal government pursuant to the 2011/2012 EOIs. I started with a sample of 10 comments per agency to capture sufficient variation in agency characteristics, such as policy issue areas; taking a larger sample of comments per agency would have limited the number of agencies in the sample. I considered subsequently over-sampling high-comment agencies, however, the preliminary analysis suggested that the initial sample achieves adequate data saturation. For example, the preliminary analysis of USDA and EPA confirmed that the initial samples are sufficiently representative of the population of comments for each agency because: (1) the USDA comments in the initial sample are substantively similar to each other and (2) the EPA comments in the initial sample are descriptively similar to a prior analysis of EPA’s retrospective review processes, which was based on a larger sample of comments (Berman and Logsdon 2012).
interests, 32% are from government and public interests, and individual comments and those that I was unable to categorize make up the remaining 25%. At first glance, Table 2 might suggest that the majority of participants are not regulated entities or their representatives because business interests compose less than half of all comments. To further probe this issue, it is useful to examine not only the total number of comments in each submitter category, but also their distribution across agencies; Figure 5 provides this breakdown.

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5 The submitter categories that represent business interests are: Firm, Trade Association/Firm Consortium, and Professional Association.
6 The submitter categories that represent government and public interests are: Think Tank/Foundation/Academic Research Group, Public Interest/Non-Commercial Advocacy Group, State/Local/Tribal Government, and Cross-Sector Coalition/Quasi-Governmental Entity.
7 The Other category includes comments that were either anonymous or did not fit into the existing categories nor merit their own category (e.g., comments from universities).
For DOE, DOI, DOT, and TREAS, business interests (depicted in blue in Figure 5) make up the majority of comments. Content analysis of these comments revealed that submitters represent the interests of regulated entities. However, I also find that for certain agencies, submitter categories representing non-business interests are also regulated entities. For example, all the USDA comments are from individuals, but most submitters are farmers, whose activity, such as acreage reporting, is regulated by USDA.
Similarly, many HUD comments represent government interests that administer federally funded housing programs, and as such are subject to HUD administrative rules. Thus, while the majority of participants are regulated entities, regulated entity is not synonymous with business interest, particularly for agencies that regulate individuals or fund state/local programs.

3.5.3. Policy Learning

To evaluate whether retrospective review participation processes promote policy learning, I analyzed the extent to which participants provided technical and political information in written comments. Drawing on prior studies of participation in regulatory policymaking—which find that considerable analytical leverage can be gained by analyzing the substance of participation (Cuéllar 2005; J. W. Yackee and Yackee 2006)—I conducted this analysis by manually coding each comment in the sample for the inclusion of technical or political information.

3.5.3.1. Technical Information

As described in Chapter 2/Article 1, technical information comprises information about the effects of a policy or process. Unlike the provision of information in prospective regulatory policymaking, technical information in retrospective review processes includes both substantive and procedural information. For the purposes of
this analysis, substantive information encompasses information about the impacts of a specific policy, nomination of a policy for review, or a suggested revision to an existing policy.

Across the sample of 100 comments, 83% provide substantive information. Of those, all but six comments specify a policy for review. Comments signal an awareness of the broader political context of retrospective review; for example, a comment from an agricultural trade association uses language from the EOs to substantiate its recommendations. In many cases, comments describe the impacts of rules “as lived;” for example, a comment from a private university details an administrator’s experience with student visa requirements, identifying a number of impacts believed to be inconsistent with the intention of the rules. Many comments, particularly from business interests, focus on reducing burdens by easing requirements or adopting private standards. Others, particularly those representing state government agencies for housing and education, emphasize enhancing state autonomy in the management of federally funded programs. For example, one comment from a state housing authority

8 DOI-2011-0001-0006
9 DHS-2011-0015-0011
10 e.g., DOE-HQ-2011-0014-0007, DOE-HQ-2011-0014-0005
describes how missing HUD guidance inhibits service delivery and suggests revisions to address these issues. Thus, for some policy areas, reducing administrative burden does not involve deregulation but rather venue-shifting to increase the (perceived) efficiency of service delivery.

Procedural information encompasses feedback and recommendations related to retrospective review processes. For the purposes of this analysis, the procedural information variable only includes content related to retrospective review. Across the sample of 100 comments, 33% offer procedural information about retrospective review processes. Comments include recommendations regarding a range of issues, such as quantifying costs and benefits, stakeholder engagement, and review prioritization. For example, a comment from a coalition of state educators describes a process and recommends data for evaluating redundancy among education reporting requirements. Similarly, a comment from a public interest group provides several recommendations to promote procedural transparency in retrospective review processes and suggests data sources that DOJ might draw on to conduct evaluations based on

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11 HUD-2011-0037-0031
12 ED-2011-OGC-0004-0027
maximizing net benefits, rather than reducing burdens.\textsuperscript{13} This comment touches on a concern expressed in several comments from public interests and research groups: retrospective review by design may be inherently deregulatory because of the emphasis on reducing burdens rather than maximizing net benefits.\textsuperscript{14} In addition, several comments from public interest groups express concerns that retrospective review might detract from other regulatory and enforcement functions.\textsuperscript{15} In contrast, some comments frame retrospective review as an opportunity to increase the stringency of rules. For example, a comment from a cross-sector organization dedicated to energy efficiency suggests that DOE adopt continuous and adaptive impact assessments of energy efficiency standards.\textsuperscript{16} Figure 6 below summarizes the percentage of comments from each submitter category and interest type—business (blue), public/government (green), and other/individual (orange)—that communicates substantive or procedural information.

\textsuperscript{13} DOJ-LA-2011-0016-0009
\textsuperscript{14} e.g., ED-2011-OGC-0004-0014, ED-2011-OGC-004-0011, DOJ- LA-2011-0016-0008
\textsuperscript{15} e.g., DOJ-OAG-2011-0003-0010, DOJ-OAG-2011-0003-0011, DOJ-LA-2011-0016-0005
\textsuperscript{16} DOE-HQ-2011-0014-0009
Figure 6: Comments Containing Substantive or Procedural Information by Submitter Category (n=100)

In total, 92% of the 100 comments in the sample contain technical information (i.e., substantive and/or procedural information). While more comments include substantive than procedural information, it is notable that a third of comments provide procedural information. Procedural issues are less salient and malleable than substantive issues and are generally not subject to public consultation. With respect to the identity of participants, at least 50% of comments across each of the submitter categories contain substantive information, with those defined above as regulated
entities providing the most substantive information. Given that one of the stated goals of retrospective review is to reduce administrative burden for regulated entities, this finding is consistent with the notion that substantive information may lead to policy learning by enabling agencies to better understand which rules stakeholders perceive to be the most burdensome. The provision of procedural information is more varied, with membership organizations representing business and public/government interests providing the majority of procedural information. This breakdown may be explained by the tradeoff between the magnitude and immediacy of benefits associated with influencing procedure (as opposed to substance): membership organizations are better positioned to bear the costs of lobbying for issues that do not produce immediate returns. These organizations are also able to aggregate the diffuse experiences of members, and, through repeat engagement, enjoy declining marginal costs of lobbying for a given issue. For example, membership organizations included previously submitted comments, analyses, and other materials in support of their retrospective review comments.17 Thus, although there is some variation across submitter categories, the vast majority of comments provide technical information regarding both procedural,  

17 e.g., DOE-HQ-2011-0014-0009
and to a greater extent, substantive, issues.

3.5.3.2. Political Information

In addition to technical information, participation processes may also enable policy learning through the provision of political information. As described in Chapter 2/Article 1, political information comprises information about whom a given policy or process impacts and the degree of support or opposition for a given policy or process. I coded both information about distributional impacts and evidence of repeat engagement as political information. Evidence of repeat engagement is used as a proxy for preference intensity because comments that state approval or disapproval often also include a justification grounded in a discussion of distributional impacts. In addition, given that one potential use of political information is the identification of implementation issues, such as a potential judicial challenge, citing prior engagement may be an important signal for agencies. For example, a comment from a cross-sector coalition includes over 200 pages of material from prior lobbying efforts; clearly this is a stronger signal than a stated preference for/against the inclusion of a given rule in retrospective review.

Of the 100 comments in the sample, 78% include political information. Figure 7

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18 HUD-2011-0037-0024
below depicts the number of comments by submitter category and interest type—
business (blue), public/government (green), and other/individual (orange)—containing
political information. Figure 7 also includes the number of comments that include
technical information, which is a combination of substantive and procedural
information.

![Figure 7: Comments Contributing to Policy Learning by Submitter Category (n=100)](image)

In total, 95% of the comments in the sample include technical or political
information. This figure leaves little variation to explain. For example, I find that while a
slight minority of participants are membership organizations (48%), these participants contribute to policy learning to a slightly greater extent than other types of participants, with 54% of all political information and 52% of all technical information provided by membership organizations.19 While these statistics provide useful aggregate trends, greater analytical leverage is gained by examining the substance of comments. For example, comments from membership organizations, representing both public and business interests, tend to be longer, more formal, and more legalistic. However, I also find that many relatively short and simple comments from individuals include both technical and political information. For example, one comment from a firm identifies an issue, its impact on a group of stakeholders, and suggests a revision in just six sentences.20 This preliminary finding suggests that the provision of technical and political information is not conditional on identity (i.e., submitter category or interest type).

19 Membership organizations include: Trade Association/Firm Consortium, Professional Association, Public Interest/Non-Commercial Advocacy Group, and Cross-Sector Coalition/Quasi-Governmental Entity. Non-membership organizations include: Firm, Think Tank/Foundation/Academic Research Group, State/Local/Tribal Government, Individual, and Other.

20 DOT-OST-2011-0025-0005
3.5.3.3. Implications for Policy Learning

As described above, participation processes may enable policy learning, which in turn enhances technocratic expertise. Although the vast majority of comments in the sample include technical or political information, actual policy learning requires (1) that the information provided mitigates technical or political uncertainty regarding a policy or process and (2) that an agency chooses to act upon information provided through participation. This article seeks only to analyze the first condition (i.e., the provision of information necessary for policy learning) and therefore it is worth noting the use of a dichotomous indicator for both technical and political information weights all comments equally and therefore does not capture, for example, whether a comment provides a detailed analysis of impacts or simply nominates a rule for review without justification. Yet, given the broader political context of retrospective review, agencies might prefer the identification of a minor change over a detailed recommendation because it is easier to demonstrate responsiveness to the former. Furthermore, the fact that many participants cite prior lobbying efforts suggests that while the information provided by certain submitter categories might be comparatively more “sophisticated,” these comments may not include novel information, and therefore would not enable an agency to update its prior evidence base.
3.5.4. Process Legitimacy

To evaluate whether retrospective review participation processes were representative of, and responsive to, stakeholders, I coded comments and agency plans for the balance of interest types and submitter categories and agencies’ stated uses of participation, respectively. In so doing, I conducted a “systems level” assessment of legitimacy—which relies on measures of system performance—rather than a “grassroots” assessment of legitimacy—which relies on participants’ perceptions (Weatherford 1992, 150-151).

3.5.4.1. Representativeness

To evaluate the extent to which retrospective review processes were both accessible to, and representative of, the range of potential stakeholders, I analyzed the composition of participants across interest types and submitter categories. Prior studies find that notions of procedural fairness—a concept closely related to input legitimacy—are driven by the representativeness of regulatory processes; thus, for participation processes to foster input legitimacy, they must be perceived to be representative of all affected interests (Ansell and Gash 2008; Ayres and Braithwaite 1992; Markell and Tyler 2007). Given the broad scope of retrospective review, almost any member of the public could potentially be affected by an existing rule and would therefore have a “stake” in
review processes. While the focus on burden reduction suggests that regulated entities might be more invested in review processes than the general public, to foster process legitimacy review processes should be accessible to, and representative of, all affected stakeholders.

Figure 8 depicts the composition of submitter categories and interest types—business interests (blue), public/government interests (green), and individual/other interests (orange)—represented in retrospective review participation processes. This preliminary analysis suggests that retrospective review processes were representative of a wide range of stakeholders. While regulated entities participate to a greater extent than other types of entities—such as think tanks, foundations, and academic research groups—most agencies’ plans also emphasize the role of regulated entities in retrospective review, particularly in identifying sources of regulatory burden. For example, the DHS (2011, 35) final plan states:

“Because the impacts and effects of a rule tend to be widely dispersed in society, members of the public—especially the regulated entities of our rulemakings—are likely to have useful information, data, and perspectives on the benefits and burdens of our existing regulations.”

Business and public/government interests most commonly participated through membership organizations; however, non-membership organizations (e.g., individuals,
firms) also participated. In addition to participation by a wide range of submitter categories, the distribution across interest types—business (43%), government/public (32%), and other/individual (25%)—is relatively balanced compared to participation in rulemaking. Several prior studies of participation in rulemaking find that business interests represent the majority of participants; for example, across 40 rules Yackee and Yackee (2006) find that 57% of comments are from business interests while Golden (1998) finds that between 66.7% and 100% of comments for the 11 rules examined in her study are from business interests. Similarly, based on a survey of interest groups, Furlong and Kerwin (2005) find that business interests participate in rulemaking twice as often as public interest groups. The finding that the majority, albeit a small majority, of comments are from non-business interests is surprising given both the extant literature and the structure of retrospective review processes. This finding suggests the need for a more nuanced view of “regulated entities” than much of the literature currently adopts.
The relatively balanced composition of participating submitter categories, interest types, and organization types suggests that agencies created broad opportunities for access. As Figure 5 above depicts, the composition of interests across agencies is less balanced, however, the composition of stakeholders affected by each agency’s regulations is also diverse. Therefore, it is possible that agency institutional design choices drove variation in representativeness, but these differences may also reflect the...
composition of stakeholders. For example, it is unclear whether DHS’ relatively balanced sample of participants is a result of the broad scope of DHS’ regulatory authority or of its use of targeted stakeholder notifications. Overall, however, participation processes appear to be relatively representative of affected stakeholders, albeit with low levels of participation compared to rulemaking.

3.5.4.2. Responsiveness

The second component of process legitimacy is responsiveness, which entails the opportunity for stakeholders to not only access regulatory processes, but also to influence outcomes. To evaluate the extent to which review processes were responsive to participants, I coded agency documents for the stated role that comments played in shaping both retrospective review processes and the rules selected for review and/or revision. Ideally, I would be able to draw a connection between specific comments and agency decisions. However, the data provided in the comments—which often do not refer to specific rules—and in the agency plans—which generally do not attribute changes to specific comments—are insufficient to make this connection. In addition, it is difficult to infer influence based on a correlation between comment content and rule change (Carpenter 2014). Instead, I developed measures of responsiveness based on agencies’ stated uses of participation, summarized in Table 3.
### Table 3: Level of Review and Participation with Responsiveness Measures

<table>
<thead>
<tr>
<th>Agency</th>
<th>Reviews Planned 2011-2013</th>
<th>Total Reported Comments</th>
<th>Total Reported Participation via Other Modes</th>
<th>Public Input Listed as Criterion for Review Process/Rules (A)</th>
<th>Public Input Summarized in Plans (B)</th>
<th>Responses to Public Input in Plans (C)</th>
<th>Public Input Linked to Review Process/Rules (D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DHS</td>
<td>21</td>
<td>50</td>
<td>178 IdeaScale users</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>DOE</td>
<td>18</td>
<td>29</td>
<td>.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>DOI</td>
<td>16</td>
<td>43</td>
<td>.</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>DOJ</td>
<td>2</td>
<td>17</td>
<td>.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>DOT</td>
<td>98</td>
<td>102</td>
<td>79 IdeaScale users 263 meeting participants</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ED</td>
<td>15</td>
<td>30</td>
<td>8 stakeholder forum participants</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>EPA</td>
<td>37</td>
<td>&gt;800</td>
<td>600 meeting participants</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>HUD</td>
<td>17</td>
<td>42</td>
<td>.</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>TREAS</td>
<td>18</td>
<td>14</td>
<td>.</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>USDA</td>
<td>13</td>
<td>&gt;2100</td>
<td>.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td></td>
<td></td>
<td></td>
<td>100%</td>
<td>80%</td>
<td>60%</td>
<td>80%</td>
</tr>
</tbody>
</table>

The first measure of responsiveness evaluates how agencies described the uses of public participation (column A in Table 3). I find that all 10 agencies’ final plans state that public participation either shaped review processes or was used as a criterion for...
prioritizing rules to review. For example, some agencies noted that their plans responded, both procedurally and substantively, to public comments. Other agency plans list stakeholder input among the factors considered in selecting and prioritizing rules for review.

The second measure of responsiveness evaluates how agencies described participation; rather than capturing the quantity of participation, this measure captures how agencies documented the substance of participation (column B in Table 3). As noted above, all agencies’ final plans describe the level of participation via the submission of comments, and four final plans (i.e., EPA, DOT, ED, DHS) describe the level of participation via other modes of participation. Eight of the 10 agencies’ final plans also describe the substance of comments, and six offer responses (column C in Table 3). For some agencies, responses justified the exclusion of certain public input; for example, the DHS final plan identifies recommendations that would require statutory changes, while the HUD final plan omits feedback related to procedural issues outside of the scope of retrospective review. In contrast, the DOT final plan—which lists the “nature and extent of public complaints or suggestions” as its first review criterion (DOT 2011, 12)—distinguishes among those comments that would be addressed immediately, those that required further study, and those that required no further action. While many plans
describe the overall composition of participants, DOT is the only agency that attributed comments to submitter categories or organizations.

The final measure of responsiveness evaluates whether retrospective review processes or rules are directly linked to public input (column D in Table 3). In total, eight of the 10 agencies’ final plans attribute specific procedural or substantive decisions to comments. However, there is considerable variation in the consistency and documentation of these linkages. For example, the DOJ final plan attributes specific elements of DOJ’s retrospective review procedure to comments and the DOE and DOI plans each attribute several rules selected for review to comments. In contrast, ED and USDA plans each only attribute one rule selected for review to comments, but in both cases, the rule selected for review is frequently referenced in the sample of comments.

As with their approaches to institutional design, DOT and EPA most clearly demonstrate responsiveness. Both agencies provided justification for all rules selected for review and included public input among these justifications. The DOT final plan includes an appendix that lists all public feedback, actions taken, and specific burden reductions. Many of DOT’s actions are attributed to submitter organizations; however, DOT also combined feedback from internal stakeholders with input from external stakeholders and combined existing retrospective review efforts with those pursuant to
the EOs. The EPA final plan, on the other hand, provides a list of the 16 early and 19 long-term retrospective review actions pursuant to the EOs, detailing elsewhere in the document information about existing review processes and participation. According to its final plan, approximately 75% of all EPA reviews were selected based on public input. For some rules, the EPA plan cites a specific comment, while for others it summarizes the nature of public input. However, it is difficult to assess the counterfactual, that is, to determine whether these actions would have been pursued in the absence of public participation.

Of the agencies in the sample, DOT and EPA have the greatest prior experience with retrospective review, but they also have considerable experience with innovative stakeholder engagement practices. DOT engages in 10 year reviews of all rules and EPA’s (2011, 14) preliminary plan states, “of the approximately 200 active actions that are listed in EPA’s Spring 2011 Semiannual Regulatory Agenda, roughly 60% are reviews of existing regulations.” The level of planned retrospective review, reported in Table 3, is also highest for EPA and DOT. However, while all agencies included in the sample engage stakeholders in rulemaking pursuant to the APA, EPA and DOT have long been recognized for their innovative approaches to stakeholder engagement. For example, DOT’s Federal Aviation Administration piloted the use of negotiated
rulemaking several years prior to the enactment of the Negotiated Rulemaking Act of 1990 (5 U.S.C. §§ 561-570) (Copeland 2006). Therefore, it is difficult to infer whether institutionalized expertise in retrospective review, in stakeholder engagement, or some combination of both accounts for DOT and EPA’s documentation of responsiveness.

3.5.4.3. Implications for Process Legitimacy

As described above, participation may promote process legitimacy, and in so doing promote democratic accountability. Most agencies in the sample created robust systems for participation in their retrospective review processes, and the distribution of participants across submitter categories, as well as organization and interest types, suggests these efforts were successful in ensuring relatively representative participation processes. While there is variation across agencies, this variation appears to reflect the composition of stakeholders. The finding that participation processes are relatively representative is noteworthy because prior studies find that perceptions of procedural fairness are often correlated with perceptions of the representativeness of policymaking processes (Markell and Tyler 2007; Ansell and Gash 2008; Ayres and Braithwaite 1992).

Using a variety of indicators, I also find that participation processes were responsive to participants. While most agency plans provide some evidence of responsiveness, there is variation in both the level and documentation of
responsiveness. Furthermore, stakeholder perceptions of regulatory accountability may be driven to a greater extent by which feedback an agency acts upon, rather than the average level of responsiveness. In the case of USDA and ED, for example, only one rule is attributed to public input, but in both cases, content analysis suggests that the selected rules are highly salient among participants. While this might seem to support the finding in prior studies that it is the degree of consensus in comments that drives responsiveness (McKay and Yackee 2007; Yackee and Yackee 2006), retrospective review is unique in that consensus may refer to the nomination of a particular rule for review but does not necessarily reflect agreement regarding the nature of the revision. In addition, perhaps because of the short timeframe for the issuance of plans, many agencies stated that they would address issues raised by comments in subsequent rounds of reviews, suggesting that tracing actual stakeholder influence, as opposed to stated stakeholder influence, may require an analysis of a smaller sample of agencies over a longer timeframe.

3.6. Conclusion

Elliott (1992, 1492) famously observed that “[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real
life takes place in other venues.” The preceding analysis of participation processes pursuant to EOs 13563, 13579, and 13610 suggests a slightly more optimistic view of participation via notice and comment in retrospective regulatory review.

With respect to institutional design, the diverse modes of stakeholder outreach and engagement employed in retrospective review incorporated some innovative approaches (e.g., IdeaScale), but in many instances reflected the modes of stakeholder outreach and engagement employed in rulemaking. This finding suggests that promoting innovation in participatory institutional design may require not only agency autonomy, but also supplemental resources. The relatively low level of participation suggests that neither agencies’ institutional design approaches nor scholars’ enthusiasm for ex post impact assessment was sufficient to spur broad public interest in retrospective review processes. Although the level of participation was relatively low, the composition of participants was relatively balanced, particularly compared to participation in notice and comment rulemaking. Furthermore, the finding that regulated entities encompass a broad range of interests suggests that equating regulated entity and business interest, and thereby dichotomizing the “public” and “private” interest in regulatory policymaking, is perhaps overly simplistic.
Drawing on the analytical framework described in Chapter 2/Article 1, I find that participation processes were effective with respect to the purposes of participation identified in the EOs and extant literature: policy learning and process legitimacy. With respect to policy learning, the majority of comments included technical and political information. Although more comments provided substantive than procedural information, it is notable that a third of comments contained information about retrospective review procedures. This finding suggests that despite its comparatively low salience among the general public, certain stakeholders are invested in retrospective review, and in procedural issues more generally. With respect to process legitimacy, agencies created broad opportunities for access and influence. However, there is considerable variation in the levels of representativeness and responsiveness across agencies. Agencies with institutionalized expertise related to retrospective review provided the most robust documentation of responsiveness to stakeholders, but these agencies also have considerable prior experience with innovative participation processes.

This study has several limitations, including a relatively small sample size and reliance on inference from primary sources. Future research could address these issues by taking a larger sample of comments or other evidence of participation and by
incorporating semi-structured interviews with agency personnel and stakeholders. In addition, future research might also employ in-depth case studies to evaluate the relationships between institutional design, stakeholder participation, and regulatory policy outcomes. For example, USDA and EPA received the vast majority of comments, but differed in measures of policy learning and process legitimacy. Process tracing within a set of comparative case studies would provide legibility into several questions that are relevant for policymakers, such as whether approaches to institutional design affected the composition of participants or whether variation in the level of participant influence was related to the substance of comments.

Recent government statements suggest that retrospective review will continue to be a policy priority, both in the United States (OIRA 2016) and internationally (OECD 2015a), and that participation will be an enduring component. It remains be seen whether participation in retrospective regulatory review, and indeed, the incorporation of retrospective regulatory review into the regulatory policy cycle, leads to more effective regulatory policy. In the meantime, if we assume that effective regulatory policy can be defined contextually as a function of the promulgating agency’s technocratic expertise and democratic accountability, then this analysis offers preliminary evidence that under certain circumstances regulatory agencies may use
participation to enhance regulatory effectiveness via policy learning and process legitimacy.

4.1. Introduction

The Federal Deposit Insurance Corporation’s (FDIC) 2003 annual report included the photo below (Figure 9) of bank regulators and bank lobbyists using a chainsaw to reduce a stack of “regulations” and gardening shears to cut “red-tape.” In the aftermath of the 2007-2009 global financial crisis (GFC), this photo is problematic; although there is some debate about the precise causes of the GFC, there is bipartisan consensus that deregulation and gaps in regulation were partially responsible for the crisis and ensuing recession (Financial Crisis Inquiry Commission 2011). Yet, at the time of publication, this photo symbolized a success story of government and industry co-production of more efficient financial regulation. Even more striking is that the very governance process that brought together regulators and regulated entities to review the stock of existing banking regulations was repeated a decade after this photo was taken, and just four years after the GFC. While in retrospect the effort represented in this photo seems to have advanced neither the effectiveness nor legitimacy of banking regulatory
governance, this article asks whether the same can be said of the governance process it represented: retrospective review of existing regulation.

![Figure 9: Photo from the 2003 FDIC Annual Report Captioned “Determined to Cut Red Tape and Reduce Regulatory Burden”](image)

The Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) of 1996 requires the Federal Financial Institutions Examination Council (FFIEC)—an interagency council composed of U.S. banking regulators—to conduct decennial

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1 Pictured left to right are OTS Director James Gilleran, Jim McLaughlin of the American Bankers Association, Harry Doherty of America’s Community Bankers, FDIC Vice Chairman John Reich, and Ken Guenther of the Independent Community Bankers of America (FDIC 2004, 13).
retrospective reviews of existing banking regulations. FFIEC has completed two reviews to date, one in 2007 and the other in 2017. EGRPRA reviews provide a lens to study government-market interactions before and after the GFC. Through comparative case studies of EGRPRA reviews in 2007 and 2017, this article documents how banking regulatory review processes and stakeholder participation in banking regulation have changed over the last ten years. Using within-case process tracing and content analysis of an original dataset of government documents and public input, the article analyzes the extent to which changes in review processes, participation, and outcomes can be attributed to the policy shock of the GFC and/or shifting political, regulatory, and/or market contexts. It concludes with an evaluation of the role of retrospective review and stakeholder participation in promoting effective and legitimate banking regulations and rulemaking processes. To preview the findings, the results suggest government-market interactions have changed considerably since the GFC, and that regulatory politics explain many of these changes. While retrospective review and stakeholder participation therein may enable more effective and legitimate regulations and rulemaking processes, much work remains to realize these potential benefits in banking regulation.
4.2. **Background and Contributions to the Literature**

EGRPRA review processes sit at the intersection of three key regulatory governance issues. First, the role of coordination bodies in complex networked regulatory systems. Second, the role of periodic retrospective review of existing regulations. Third, the role of public participation in the regulatory policymaking process. Exploring each of these issues in the context of banking regulation generates theoretical implications for the interdisciplinary literatures on financial regulatory governance, regulatory impact assessment, and stakeholder participation in rulemaking. This section describes how EGRPRA review processes encompass each of these governance issues and summarizes the contributions of this article to these literatures.

4.2.1. **Financial Regulatory Governance: FFIEC’s Role in Regulatory Coordination of Banking Regulation**

The U.S. financial regulatory system is notoriously complex and embedded in a highly interconnected global financial regulatory system. Depicted Figure 10 below, there are myriad regulators spanning both the public and private sectors and the national and international levels. Depicted by dashed lines in Figure 10, inter-agency bodies have emerged to address coordination challenges arising from particular risks, business functions, and sub-sectors within the financial regulatory system. FFIEC,
depicted in blue in Figure 10, is one such body. Established in 1979, FFIEC is a formal interagency body charged with developing “uniform principles, standards, and report forms for the federal examination of financial institutions” regulated by its members (depicted by blue dashed lines in Figure 10): the Board of Governors of the Federal Reserve System (FRB), FDIC, the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau (CFPB), the National Credit Union Administration (NCUA), and state banking regulators (represented by the State Liaison Committee); the Office of Thrift Supervision (OTS) was a member prior to its dissolution (FFIEC 2017a).

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2 FFIEC was established pursuant to title X of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (12 U.S.C.§ 3301). FFIEC’s authority and composition were amended by subsequent statutes, including the Housing and Community Development Act of 1980, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) of 1996, and the Financial Services Regulatory Relief Act (FSRRA) of 2006.
The degree of privatization is measured by both member composition and proximity to political principals while the degree of globalization is measured by the number of membership jurisdictions. Global private organizations (upper left quadrant) include: International Association of Insurance Supervisors (IAIS), International Organization of Securities Commissions (IOSCO), International Accounting Standards Board (IASB), and International Securities and Derivatives Association (ISDA). Global public organizations (upper right quadrant) include a combination of intergovernmental organizations and transnational regulatory networks: Financial Stability Board (FSB), Basel Committee on Banking Supervision (BCBS), Committee on
While this complex and interconnected financial regulatory system enables the bureaucratic specialization and autonomy required to regulate the complex and interconnected financial market system, it also creates the potential for fragmentation and duplication (Ahdieh 2015; Freeman and Rossi 2012; GAO 2011; 2016a; 2016b). Banking regulators possess a high degree of technocratic expertise enabled by regulatory specialization related to the characteristics of regulated institutions (e.g., charter, business model). There is also bureaucratic autonomy among financial regulators with different objectives (e.g., micro and macro-prudential stability, chartering and supervision, consumer protection) and political autonomy among regulators and their...
political principals (e.g., independent funding, insulated leadership). Yet, many have argued that this diverse regulatory landscape creates fragmentation and duplication (GAO 2016b), resulting in regulatory policy that is both inefficient and vulnerable to regulatory arbitrage. Policymakers have proposed various solutions, ranging from consolidation (e.g., following the model of the United Kingdom’s former Financial Services Authority) to a forum for coordination (e.g., the design of the Financial Stability Oversight Council [FSOC]).

Bodies such as FFIEC represent a middle ground, with members maintaining their individual agency authority but united by a mandate to coordinate in the development, implementation, and review of banking regulations and examination standards. Scholars are divided regarding the merits of coordination without regulatory consolidation—or, with the persistence of regulatory conflict or competition (Ahdieh 2015; Barr, Jackson, and Tahyar 2016; GAO 2011; Gersen 2013; Kohn 2014; Levitin 2014; The Volcker Alliance 2016). Much of the existing literature focuses on coordination bodies that emerged in response to the GFC—for example, FSOC (Allen 2015; Barr 2015; Pan 2015; Schwarcz and Zaring 2016) and the Financial Stability Board (FSB) (Ahdieh 2011; Brummer and Smallcomb 2015; Carrasco 2010; Zaring 2012)—making FFIEC an interesting case given its establishment prior to not only the GFC but also the Savings
and Loan crisis of the 1980s. Thus, evaluating FFIEC’s operations and efficacy with respect to a specific statutory mandate has the potential to contribute to the theory and practice of financial regulatory governance with relation to the role of coordination bodies.

4.2.2. Regulatory Impact Assessment: EGRPRA’s Requirement for Retrospective Review of Banking Regulation

While much of FFIEC’s mandate focuses on prospective rulemaking and examination, it also occupies a unique role among U.S. financial regulators in that it is charged with conducting systematic retrospective reviews of existing regulations. EGRPRA—sponsored by Senator Shelby (R-AL) and passed with bipartisan support as part of an omnibus bill in the 104th Congress—requires FFIEC and its member agencies to conduct retrospective reviews of existing regulations at least once every ten years. The purpose of these reviews is to “…identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions” (12 U.S.C. § 3311). EGRPRA directs FFIEC to produce both a Federal Register notice and a report to Congress documenting review processes and outcomes.

Retrospective review is an increasingly common aspect of the regulatory policy cycle in the United States and across other OECD countries and international rule- and
standard-setters more broadly (OECD 2015; 2016). In the United States, retrospective reviews encompass a variety of institutional forms, including: episodic crisis-driven lookbacks, such as the CFPB’s review of inherited rules pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) of 2010; periodic reviews for a particular type for burden, such as the Regulatory Flexibility Act of 1980’s Section 610 requirement for decennial reviews of rules with a significant economic impact on a substantial number of small entities; reviews of a particular policy area within a given timeframe, such as the Federal Communication Commissions’ biennial regulatory review requirement pursuant to the Communications Act of 1934 (as amended); and administration-wide stock-takes, such as executive agency retrospective reviews pursuant to Executive Orders (EO) 13563, 13579, and 13610 of 2011/2012.

Notwithstanding its prominent role in regulatory policymaking, U.S. retrospective review has been the subject of relatively little academic study (Berman and Logsdon 2012; Bull 2015; Coglianese 2013; DeMenno 2017; Eisner and Kaleta 1996; Furlong 1995; Lutter 2013; Wiener and Ribeiro 2016). Furthermore, existing studies tend to focus on administration-wide stock-takes, and in so doing fail to account for both the political economy of congressionally mandated-reviews and review processes conducted by independent agencies, which are not subject to EOs. As such, the EGRPRA
review mandate provides an opportunity to evaluate how independent regulatory agencies balance the simultaneous demands for short-term political responsiveness (e.g., reducing regulatory burden) with long-term technocratic mandates (e.g., promoting resilience in the financial system). In so doing, such an evaluation has the potential to contribute to the theory and practice of regulatory impact assessment.

4.2.3. Stakeholder Participation in Regulatory Policymaking: EGRPRA’s Participation Mandate for FFIEC Retrospective Reviews

The review processes prescribed in EGRPRA rely heavily on public participation. FFIEC is directed to use notice and comment procedures to seek input on existing rules and to publish a summary of comments received as well as responses to significant issues that are raised in comments. Public participation is a fundamental component of U.S. retrospective review efforts and, as with the diffusion of retrospective review, is also common across other OECD countries’ and international rule- and standard-setters’ retrospective review processes more broadly (OECD 2015; 2016). However, EGRPRA’s requirement that FFIEC respond to comments goes further than the public participation requirements in other retrospective review initiatives and in rulemaking, in which
agencies are generally required to consider, but not respond to, comments.\textsuperscript{4} Moreover, in many other retrospective review initiatives public input is used to select rules for review, and thus the role of public consultation only after rules are selected for review is somewhat unusual.

While the empirical literature on public participation in regulation has burgeoned over the last three decades, most studies focus on participation in the rulemaking process (Balla 1998; 2014; Balla and Daniels 2007; Coglianese 1997; Croley 2008; Croley and Funk 1997; Cuéllar 2005; Golden 1998; Moffitt 2014; West 2004; West and Raso 2013; J. W. Yackee and Yackee 2006; S. W. Yackee and Lowery 2006), rather than in the retrospective review of existing rules. Furthermore, among existing empirical studies of participation in U.S. regulatory policymaking, only a handful focus on financial regulation (Krawiec 2013; Liboger and Carpenter 2018; Nixon, Howard, and

\textsuperscript{4} For example, EOs 13563 and 13579 call for an “open exchange of information and perspectives” and “a meaningful opportunity to comment” for administration-wide retrospective reviews, but do not dictate how agencies must respond to comments (Obama 2011, 3821). Similarly, The Administrative Procedure Act (APA) of 1946, which is the primary legislative foundation for participation in U.S. rulemaking, does not dictate how agencies must utilize public comments, but rather states “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose” (5 U.S.C. § 553[c]). The APA also provides stakeholders the “right to petition for the issuance, amendment, or repeal of a rule” (5 U.S.C. § 553[e]), thereby providing a mechanism to initiate retrospective review. However, subsequent judicial challenges (e.g., United States v. Nova Scotia Food Products Corp [1977]) have created incentives for agencies to respond to comments more directly.
DeWitt 2002; Young and Pagliari 2015). Scholarship on participation in financial regulation underscores its distinctiveness compared to other issues, notably its technical complexity, opacity, and the relationship among regulators and regulated entities. As Baxter (2012, 560) notes, “it is in the world of complex financial regulation that our democratic norms supporting public participation and our desire to be sure that ‘technocrats’ who really understand the industry they are trying to regulate come into direct conflict.” In addition, the concentration of economic power among a relatively small number of firms and the quasi-governmental role that large banks play in the United States create a unique relationship among regulators and regulated entities, in which the latter are generally understood to wield considerable political power.5

Interest group theory—which provides the theoretical foundation for most empirical studies of participation—suggests engagement in rulemaking will vary based on the concentration of costs and benefits among stakeholders (Wilson 1989) as well as the technical complexity and public salience of the issue area (Gormley 1986). In banking regulation, both the degree of technical complexity and the concentration of costs and

5 The U.S. Supreme Court first established in Davis v. Elmira Savings Bank (161 U.S. 275 [1896])—and has reinforced in numerous subsequent cases—that national banks are “instrumentalities of the federal government.”
diffusion of benefits—regulated entities must internalize the costs of regulation upon compliance whereas benefits to consumers and to the public more broadly are diffuse, and for certain areas may only be observable after a failure—produce a collective action problem for stakeholders other than regulated entities (Baxter 2012; Olson 1965). However, the literature suggests that increasing salience relative to complexity can help overcome these collective action problems (Gormley 1986). Therefore, the GFC might be a sufficient “policy shock” (Balleisen, Bennear, Krawiec, and Wiener 2017b) to create broader participation in post-GFC banking regulation (Baumgartner and Jones 2010; Birkland 1998; Birkland and Warnement 2017; Kingdon 1984; Sabatier 1988). This broader engagement may in turn produce a “countervailing power” dynamic among participants with divergent interests (Galbraith 1954; Wittman 2010). Thus, an examination of how participation in banking regulation has changed over the last ten years provides an opportunity to explore empirically some of the key issues raised in the theoretical literature on participation in financial regulation (Baxter 2011; Kwak 2014; Pagliari 2012) and in so doing contribute to the theory and practice of stakeholder participation in regulatory policymaking.
4.3. **Research Questions and Methodology**

This article takes stock of EGRPRA retrospective reviews in 2007 and 2017, comparing the processes, participation, and outcomes of reviews. It then analyzes the potential causes of variation across the two reviews. Implications for the effectiveness and legitimacy of banking regulations and rulemaking processes are considered throughout the evaluation of both the consequences and causes. The research questions are as follows and are depicted graphically in Figure 11 below:

1. How did FFIEC conduct retrospective reviews pursuant to EGRPRA and how do retrospective review processes in 2007 and 2017 differ?

2. How did stakeholders participate in retrospective review processes pursuant to EGRPRA and to what extent do the level, composition, and substance of participation in 2007 and 2017 differ?

3. What, if any, evidence is there of the effects of EGRPRA and/or participation therein on banking regulation, and how do outcomes of reviews in 2007 and 2017 differ?

4. To what extent does the policy shock of the GFC and/or shifting regulatory, political, and/or market contexts explain variation in:

   4.1. How FFIEC conducted retrospective reviews (Research Question 1)?

   4.2. How stakeholders participated in retrospective reviews (Research Question 2)?
4.3. The outcomes of retrospective reviews (Research Question 3)?

![Research Design Schematic]

Figure 11: Research Design Schematic
The considerable causal complexity associated with the dynamics explored in this article make it particularly well suited to qualitative approaches to causal inference. The article utilizes comparative case studies and within-case process tracing, drawing on an original dataset of government documents and public input. A variety of secondary sources, including relevant literature, prior government reports, and interest group and media publications are also incorporated.

The descriptive questions (Research Questions 1-3) are answered via comparative case studies, which draw primarily on multi-method content analysis of an original dataset of FFIEC reports (totaling over 500 pages); FFIEC supplemental materials (e.g., transmission letters to Congress, Federal Register Notices, government websites); descriptive data for all public comments (n=954); the text of all available public comments (n=859); two sets of unattributed summaries from outreach sessions in 2007; and six sets of full transcripts from outreach sessions in 2017. All content analysis was conducted in NVivo, which enabled collection of both descriptive data for each occurrence and a dichotomous indicator for each source (i.e., plan or comment). To enable comparison across the two periods, public comments are used as the primary
data source for the analysis of participation. In addition to the quantitative indicators and qualitative evidence from the content analysis, secondary data are incorporated to contextualize findings from the content analysis and to benchmark the findings based on other retrospective review and financial regulatory processes.

Having established the differences between the two periods overall and with respect to processes (Research Question 1), participation (Research Question 2), and outcomes (Research Question 3), the article then seeks to explain the causes of this variation (Research Question 4). Specifically, it evaluates the explanatory power of the policy shock of the GFC along with three other hypothesized explanatory variables: political context, regulatory context, and market context. Recognizing the considerable causal complexity associated with these potential explanations, the article offers a preliminary analysis and outlines areas for future research. It then turns to a discussion

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6 EGRPRA processes in both 2007 and 2017 incorporated participation via written comments and outreach sessions. Only the former provides a comparable basis across the two periods because outreach sessions were not recorded, nor are transcripts available, for 2007. FFIEC published an unattributed summary of major issues from outreach sessions for 2007 whereas in 2017 FFIEC did not produce a summary, but published video recordings and transcripts for all sessions. As such, while input from outreach sessions is described in certain instances, all comparative quantitative indicators are based on comments. All content analysis of comments includes form letters, but a replicated analysis without form letters is available in Appendix D: Replicated Analysis of EGRPRA Comments With and Without Form Letters.
of the implications of these findings for the effectiveness and legitimacy of banking regulations and rulemaking processes.

4.4. **Results**

4.4.1. **Review Processes: FFIEC’s Approach to Retrospective Review**

This section analyzes how FFIEC conducted retrospective reviews pursuant to EGRPRA and takes stock of the similarities and differences in the 2007 and 2017 review processes.

4.4.1.1. **2007 Review Process**

The 2007 EGRPRA review began in June 2003 and the final report was published in July 2007. The process was overseen by FFIEC Chairman John Reich, of FDIC and OTS, and included (for at least a portion of the review process) the following FFIEC members: James E. Gilleran, FDIC; Susan Schmidt Bies, FRB; John D. Hawke, Jr. and John C. Dugan, OCC; and Donald E. Powell and Sheila C. Bair, FDIC. NCUA is a member of FFIEC but does not fall within the “federal banking agencies” definition in EGRPRA and is therefore not subject to the retrospective review mandate.\(^7\)

\(^7\)NCUA, led by Dennis Dollar and JoAnn Johnson, conducted a separate voluntary decennial review; the NCUA 2007 review is not included in this analysis.
Between June 2003 and January 2006, FFIEC published six Federal Register notices seeking comments on the 13 categories of rules: (1) Applications and Reporting; (2) Powers and Activities; (3) International Operations; (4) Lending (Consumer Protection); (5) Deposit Accounts/Relationships (Consumer Protection); (6) Anti-Money Laundering (AML); (7) Safety and Soundness; (8) Securities; (9) Banking Operations; (10) Directors, Officers and Employees; (11) Rules of Procedure; (12) Prompt Corrective Action; and (13) Disclosure and Reporting of Community Reinvestment Act (CRA)-Related Agreements. During this period FFIEC also held 16 outreach sessions in various locations around the country, with 10 banker sessions, three consumer/community group sessions, and three joint banker and consumer/community group sessions. Finally, FFIEC established a website that provided information about the EGRPRA review process, including submitted comments and summaries of outreach sessions.

The 2007 review emphasized three regulatory priorities. First, maintaining rigorous safety and soundness standards for the financial services industry. Second, protecting important consumer rights. Third, assuring a “level-playing field” in the

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8 June 16, 2003: Agencies’ overall regulatory review plan and (1-3) (68 FR 35589); January 20, 2004: (4) (69 FR 2852); July 20, 2004: (5) (69 FR 43347); February 3, 2005: (6-8) (70 FR 5571); August 11, 2005: (9-11) (70 FR 46779); and January 4, 2006: (12-13) (71 FR 287).

9 The website established for the 2007 EGRPRA review is no longer active.
financial services industry (FFIEC 2007, 1). These regulatory priorities were weighed against regulatory burdens. For example, FFIEC Chairman John Reich noted in the 2007 EGRPRA report that outdated, unnecessary, or unduly burdensome regulations divert industry resources away from lending and providing services, ultimately driving up costs for consumers.

The 2007 report is motivated by the notion that regulation had increased substantially—the report notes that regulators adopted more than 900 rules in the 17 preceding years—and that this accumulated regulatory burden hurt the financial services industry. The report notes that smaller community banks “bear a disproportionate share of the burden” and that regulation has “become an important causal factor in recent years in accelerating industry consolidation” (FFIEC 2007, 1). This claim is substantiated with anecdotal evidence about regulatory burden driving mergers and acquisitions of small and community banks as well as data about the relatively large number of small and community banks (93% of the banking industry) and their relatively small share of industry assets (12.5%) and profits (11.25%). Notably, both of these propositions are contested. First, many scholars and policymakers agree that the period from 1990-2007 was one of substantial deregulation and that the number of rules promulgated is a poor proxy for the level of regulatory burden (Carey 2016; Financial
Crisis Inquiry Commission 2011; Taub 2014). Second, many have argued that the performance of small and community banks and changing business models, rather than regulatory burden, have driven consolidation via mergers and acquisition (Hoskins and Labonte 2015). Furthermore consolidation in the community banking industry has increased steadily since the 1980s as a result of regulatory changes (e.g., expanding state branching and interstate banking), the globalization of financial markets, and the rapid expansion of financial technology, all of which reshaped the business model for banking (Kowalik et al. 2015; Schoppers 2014). Nonetheless, the 2007 EGRPRA review clearly focused on reducing unnecessary regulatory burden, with a particular emphasis on reducing burden for small and community banks.

4.4.1.2. 2017 Review Process

The 2017 review began in June 2014 and the final report was published in March 2017. The process was overseen by FFIEC Chairman Daniel Tarullo of the FRB, and included two other FFIEC members: Martin J. Gruenberg, FDIC and Thomas J. Curry, OCC. Although both NCUA and CFPB are also members of FFIEC, neither fall within
the “federal banking agencies” definition in EGRPRA, and therefore neither are subject
to the retrospective review mandate.\textsuperscript{10}

Between June 2014 and December 2015, FFIEC published four Federal Register
notices seeking comments on 12 categories of rules: (1) Applications and Reporting; (2)
Powers and Activities; (3) International Operations; (4) Banking Operations; (5) Capital;
(6) Community Reinvestment Act; (7) Consumer Protection; (8) Directors, Officers and
Employees; (9) Money Laundering; (10) Rules of Procedure; (11) Safety and Soundness;
and (12) Securities.\textsuperscript{11} During this period, FFIEC also held six outreach sessions, one each
at the Los Angeles, Dallas, Boston, Kansas City, and Chicago Federal Reserve Banks, as
well as one at the FRB in Washington, DC. The outreach sessions were live-streamed
and involved senior management from FFIEC’s member agencies. Outreach session
videos and other information about the review are published on FFIEC’s website.\textsuperscript{12}

\textsuperscript{10} NCUA, led by Debbie Matz, conducted a separate voluntary decennial review and CFPB, led by Richard
Cordray, conducted a separate review process pursuant to the Dodd-Frank Act; neither the NCUA nor
CFPB 2017 reviews are included in this analysis.
\textsuperscript{11} June 4- September 2, 2014: (1-3) (79 FR 32172); February 13-May 14, 2015: (4-6) (80 FR 7980); June 5-
September 3, 2015: (7-9) and newly listed rules (80 FR 32046); and December 23, 2015-March 22, 2016: (10-12)
(81 FR 1923).
\textsuperscript{12} This website is still active: https://egrpra.ffiec.gov/.
The 2017 review emphasized two regulatory priorities. First, reducing regulatory burden, especially on community banks. Second, ensuring that the financial system remains safe and sound. FFIEC asked participants to consider the following review criteria in their comments on individual rules: need for statutory change; need and purpose of the regulation; overarching approaches/flexibility; effect on competition; reporting, recordkeeping, and disclosure requirements; unique characteristics of a type of institution; clarity; burden on community banks and other smaller, insured depository institutions; and scope of rules. Because the 2017 review focused on evaluating regulatory burden relative to system stability, the emphasis on reducing burdens for small and community banks was predicated on the assumption that they do not present the same risks to the system as large banks. Notably, the appropriateness of bank size as a proxy for riskiness has been the subject of considerable debate (Hoskins and Labonte 2015; OFR 2017); a fact which is underscored by FFIEC’s note in its final report that of the more than 500 bank failures during the GFC, most were community banks (FFIEC 2017b).

4.4.1.3. Comparing Review Processes in 2007 and 2017

The 2007 and 2017 reviews followed similar processes but differed somewhat in scope and more substantially in priorities. The 2017 review was shorter than the 2007
review, with fewer Federal Register notices and outreach sessions. However, the 2017 review covered slightly more rules (145) than the 2007 review (131), and the resulting report was 60% longer than the 2007 report. While the two reviews involved the same agencies, there was less turnover in the leadership of those agencies, and in turn, less turnover in FFIEC membership, in 2017 than 2007. Finally, while both reviews focused on burden reduction relative to other regulatory goals—with a particular emphasis on reducing burden on small and community banks—the 2007 process primarily weighed regulatory burden against industry performance whereas the 2017 process primarily weighed regulatory burden against system stability. Similarly, while FFIEC member agencies’ commitment to the public interest was explicit in both reports, the 2007 process focused on expanding access to lending and other financial services while the 2017 process focused on consumer protection in accessing financial services, suggesting different conceptions of how best to promote the public interest. Furthermore, while both reports necessarily centered on EGRPRA’s burden reduction mandate, the 2007 report was more overtly critical of regulation and more explicitly focused on reducing regulatory burden, while the 2017 report emphasized the benefits of regulation and the need to evaluate burden reductions against other regulatory objectives. Thus, while FFIEC’s retrospective review institutional design was similar in 2007 and 2017, the
ideological premise—and in turn, regulatory priorities and tradeoffs—of reviews was dissimilar across the two periods.

**4.4.2. Participation in Reviews: Level, Composition, and Substance of Participation**

This section analyzes how stakeholders participated in retrospective review processes pursuant to EGRPRA and the extent to which the level, composition, and substance—including the rules, policies, and issue areas raised; recommendations provided; and type of evidence used to substantiate recommendations—of participation differed between 2007 and 2017.

**4.4.2.1. Level of Participation**

Retrospective review affords stakeholders with a unique opportunity to provide input on the existing stock of regulations and procedures that may affect the future flow of regulations. Although participation in retrospective review theoretically offers broader opportunities for influence than rulemaking, prior studies find that average levels of participation in retrospective review tend to be lower than average levels of participation in rulemaking (DeMenno 2017). Consistent with prior literature, the overall level of participation across EGRPRA reviews was low relative to rulemaking. FFIEC
reportedly received approximately 1,080 comments across both periods. In contrast, a single rulemaking pursuant to the Dodd-Frank Act generated approximately 8,000 comments (Krawiec 2013).

Perhaps more interesting is the variation in participation between the two periods. In 2007, FFIEC reported receiving approximately 850 comments across six Federal Register notices and approximately 500 participants across 16 outreach sessions. In 2017, FFIEC reported receiving approximately 230 comments across four Federal Register notices and approximately 120 participants across six outreach sessions. Thus, in aggregate terms, and in the average levels of participation per Federal Register notice or per outreach session, participation was substantially higher in 2007 than 2017.

4.4.2.2. Composition of Participants

While analyses of participation in retrospective review suggest these processes tend to be more balanced across public and private interests than rulemaking (DeMenno 2017), the technical complexity, concentration of costs, and diffusion of benefits associated with financial regulation suggest participation may necessarily be less

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13 All approximate figures are based on FFIEC summaries in EGRPRA reports and all exact figures are based on original empirical analysis. Unless otherwise stated, all comment analysis includes form letters.
balanced than other issue areas.14 Across both the 2007 and 2017 EGRPRA reviews, the majority of participants were private interests. These private and public interests can be further disaggregated by submitter category (Table 4).15

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<td>Think Tank or Policy Research Organization</td>
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<td>Employee</td>
<td>Insured depository institution or other financial institution offering intermediation services (e.g., Savings and Loans, thrifts, mortgage lenders), or their representatives.</td>
<td>Association representing the commercial sector or a consortium of firms. Professional Services Provider: Appraisal, accounting, legal, and other firm or individual that provide banks with professional services, or their representatives. Cross-Sector Coalition or Quasi-Governmental Entity: Private association of public entities or coalition of public and private sector entities. Government: Federal, state, or local government agency or official. Think Tank or Policy Research Organization: Organization primarily involved in policy research. Consumer, Community, or Public-Interest Organization: Organization primarily involved in policy advocacy for consumer, community, or public interests. Consumer or Citizen: Individual representing his/her own non-commercial interests.</td>
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<td>2007 (n=591)</td>
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<td>2017 (n=228)</td>
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<td>9.6%</td>
<td>23.7%</td>
<td>54.8%</td>
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14 This generalization does not hold for all rules. For example, the most participants in rulemaking pursuant to Section 619 of the Dodd-Frank Act (i.e., the Volcker Rule) were individuals, although there were a substantial number of form letters organized by public interest groups.
15 Bank or Bank Employee: Insured depository institution or other financial institution offering intermediation services (e.g., Savings and Loans, thrifts, mortgage lenders), or their representatives. Trade, Industry, or Professional Association: Association representing the commercial sector or a consortium of firms. Professional Services Provider: Appraisal, accounting, legal, and other firm or individual that provide banks with professional services, or their representatives. Cross-Sector Coalition or Quasi-Governmental Entity: Private association of public entities or coalition of public and private sector entities. Government: Federal, state, or local government agency or official. Think Tank or Policy Research Organization: Organization primarily involved in policy research. Consumer, Community, or Public-Interest Organization: Organization primarily involved in policy advocacy for consumer, community, or public interests. Consumer or Citizen: Individual representing his/her own non-commercial interests.
Private interests accounted for 97% of participants in 2007 (n=591) and 88% of participants in 2017 (n=228). In 2007, 92% of comments were from banks or bank employees (hereinafter “banks”), and of these 541 comments, 81% represented small or community banks. In 2017, only 10% of comments were from banks, and of these 22 comments there was a mix of small, midsize, and large banks. While there was approximately 30% consolidation in the banking industry between the two periods, this change in the total number of banks does not alone explain the significant decrease in participation by banks between the two periods.

The next largest category of private interests was trade, industry, and professional associations (hereinafter “trade associations”), which made up only 5% of participants in 2007. In 2007, 100% of these 27 trade association comments represented the banking industry. In 2017, 24% of participants were trade associations, of which 70% of comments represented the banking industry. Thus, while more banks participated

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16 Coding for bank size is based on disclosures in comments related to bank category or banks assets and encompasses the following categories: Bank Without Details: self-identification as “bank/er” without identification of bank size. Small or Community Bank: ≤1B assets or self-identification as “small bank/er” or “community bank/er.” Midsize Bank: >1B ≤50B assets or self-identification as a “midsize bank/er.” Large Bank: >50B assets or self-identification as large bank or systemically important bank (e.g., GSIB, SIFI).
through trade associations in 2017 than 2007, this shift does not fully account for the decrease in the representation of the banking industry across the two periods.

The difference in private interest submitter composition between the two periods is better explained by the increased participation of professional services providers, which jumped from 1% of participants in 2007 to 55% of participants in 2017. Of the 125 comments from professional service providers in 2017, 96% were from appraisal professionals, who provide appraisals for real estate assets as part of banks’ lending processes. Increased participation by the appraisal industry is also apparent in the trade associations category; in 2017, 20% of trade association comments were from coalitions of appraisal professionals. Thus, the vast majority of participants in both periods were private interests, but in 2007 these interests largely represented small and community banks whereas in 2017 these interests represented appraisal professionals, and, to a lesser extent, banks of various sizes.

Public interests accounted for 3% of participants in 2007 (n=591) and 12% of participants in 2017 (n=228). The largest share of these public interests in 2007 was cross-sector coalitions and quasi-governmental entities, which also made up nearly half of public interest participants in 2017. In both periods, these comments were primarily from coalitions of public and private entities working on issues related to community
reinvestment and affordable housing. There was scant participation by think tank or policy research organizations, governments, and consumers or citizens in both periods, although each represented a larger percentage of participants in 2017 than 2007.

The most striking change in public interest participation across these two periods is the increased representation by consumer, community, or public interest organizations (hereinafter “public interest groups”). In 2007, public interest groups represented less than 1% of participants, but in 2017, these organizations represented 5% of participants. Thus, while public interests represented a relatively small share of comments in both periods, there was a substantial increase in the number of public interest groups, in absolute and in relative terms, between 2007 and 2017.

4.4.2.3. Substance of Participation: Rules, Policies, and Issues Raised in Comments

The scope of EGRPRA reviews, as noted above, is the existing cumulative stock of banking regulations promulgated individually or jointly by FFIEC member agencies. In accordance with the EGRPRA mandate, FFIEC grouped these rules and requested comments on 13 categories of rules through six Federal Register notices for the 2007 review and 12 categories of rules through four Federal Register notices for the 2017 review. Submitted comments discussed a wide range of rules, policies, and issues, and most comments discussed more than one area. Figure 12 depicts the number of
comments by submitter category—with public interests depicted in shades of gray and private interest depicted in shades of blue—for each Federal Register notice and the corresponding rule categories.¹⁷

¹⁷ Comments are used as the unit of analysis throughout this paper. However, it should be noted that comments varied substantially in length and substance and that the scope of rules, polices, and issues discussed also varied considerably, with some comments on entire statutes and others on a single line in a particular rule.
In 2007, comments covered 131 regulations in 12 of the 13 proposed categories.\textsuperscript{18}

In total, 54\% of comments focused on consumer protection rules related to lending (359 comments).

\textsuperscript{18} According to FFIEC, the outreach sessions covered a similar set of issues, with the 10 most common topics covering: (1) Bank Secrecy Act, including Suspicious Activity Reports (SARs) and Currency Transaction Reports (CTRs); (2) USA PATRIOT Act and “Know Your Customer” Requirements; (3) Withdrawal Limits...
comments) and deposit accounts/relationships (108 comments). The vast majority of lending comments came from small and community banks and addressed mortgage lending requirements, such as regulations pursuant to the Truth-in-Lending Act (TILA) of 1968, the Flood Disaster Protection Act of 1973, the Real Estate Settlement Procedures Act, of 1973, the Home Mortgage Disclosure Act (HMDA) of 1975, and the Community Reinvestment Act (CRA) of 1977. For example, many banks and a few public interest groups commented on the three-day “right of recession” requirement in Regulation Z pursuant to TILA. Unsurprisingly, for the “right of recession” issue and other lending issues, banks and public interest groups tended to offer opposite perspectives.

Another area that garnered substantial attention in 2007 was the Bank Secrecy Act (BSA) of 1970; over 125 comments addressed issues related to related to anti-money laundering (AML) regulations, such as currency transaction reporting (CTR) thresholds and processes for suspicious activity reporting (SAR). Rules promulgated in response to 9/11—such as the “Know Your Customer” requirement mandated in the Uniting and

[on Money Market Deposit Accounts (Regulation D); (4) Home Mortgage Disclosure Act (HMDA); (5) Community Reinvestment Act (CRA); (6) Truth-in-Lending Act (Regulation Z) and the Real Estate Settlement Procedures Act (RESPA); (7) Three-Day Right of Rescission; (8) Extensions of Credit to Insiders (Regulation O); (9) Flood Insurance; and (10) Privacy Notices.]
Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001—also garnered substantial attention. Finally, many comments focused on burdens deriving from the frequency and perceived redundancy of safety and soundness examinations.

While they did not receive comparatively large shares of comments, a few issues raised in the 2007 comments are particularly notable in light of subsequent regulatory and market failures. First, several comments from lenders questioned the value of real estate appraisals in mortgage transactions, arguing that lenders were sufficiently knowledgeable and disciplined to provide the necessary information to consumers; inflated real estate appraisals were a contributor to the real estate bubble that precipitated the crisis, and in 2007 a coalition of appraisers submitted a petition to FFIEC signed by over 11,000 appraisers and arguing that lenders were pressuring appraisers to inflate the estimated value of real estate assets (Financial Crisis Inquiry Commission 2011). Second, several comments lamented that bank directors were forced to take on too many compliance and management functions, thereby diverting attention from more strategic business functions; weak corporate governance and insufficient board oversight have been central to a range of regulatory failures since the crisis, including Wells Fargo’s opening of millions of fraudulent customer accounts over a period of
many years. Finally, many comments focused on the burden on small and community banks and the need for tiered regulatory approaches; reducing regulatory burden on small and community banks through tiered regulation is central to current financial reform legislation.  

In 2017, real estate appraisals, BSA, capital, call reports, CRA, and safety and soundness bank examinations received the most comments. In total, 57% of comments focused on safety and soundness and the vast majority of these comments were from appraisal professionals and related to the threshold at which appraisals are required for residential and commercial mortgages as well as the market for appraisal services. Although a few comments addressed appraisal thresholds in 2007, comments in 2007 were from banks advocating for raising the thresholds whereas in 2017 most of the comments were from appraisers advocating to maintain the current threshold. The GFC and the role of appraisals in preventing real estate asset bubbles loomed large in comments from appraisal professionals in 2017.  
The second largest category was powers and activities, and comments largely focused on rules related to community development corporations and projects. For these

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20 Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (S. 2155)
issues, banks and quasi-governmental community development corporations tended to be aligned, while public interest groups generally offered the opposing perspective. Many comments focused on the complexity of call reports and of capital regimes, as well as the frequency of safety and soundness bank examinations. As with the 2007 review, there were also several comments related to regulations pursuant to CRA (e.g., geographic areas) and BSA (e.g., thresholds for currency transaction reporting).

Finally, many comments focused on procedural or crosscutting issues. Several comments from industry groups recommended expanding the scope of reviews to include other regulatory agencies (e.g., CFPB, Financial Crimes Enforcement Network [FinCEN]) or rules pursuant to particular statutes (e.g., the Dodd-Frank Act). Other comments discussed review methodology, for example, calling for assessments of cumulative burden and individual rule burden, use of quantitative cost-benefit analysis in rulemaking and in review, commitment to strengthening rules not only reducing burden, broader public participation in rulemaking and review processes, and greater interagency coordination and rule harmonization.

\[\text{\textsuperscript{21}FFIEC-2014-0001-0016}\]
\[\text{\textsuperscript{22}FFIEC-2014-0001-0042}\]
Several issues—such as CRA, BSA, examination burden, and burden on bank boards—generated substantial shares of comments in both 2007 and 2017. However, the most consistent thread connecting comments within and across reviews neither related to perceived regulatory (in)effectiveness nor perceived burden relative to benefits, but rather to the perceived (un)fairness of bank regulation relative to the regulation of other institutions. Arguments about fairness across both time periods took three forms. First, banks emphasized the perceived institutional mismatch between “banking functions” and “policing functions” related to AML and flood insurance, suggesting that the FinCEN and Federal Emergency Management Agency (FEMA), respectively, should take responsibility for these functions instead of banks.23 Second, in both 2007 and 2017, banks argued that regulatory burdens placed upon small and community banks were unfair relative to those of large banks. In 2007, the primary argument was that small and community banks do not have the economies of scale necessary to internalize increasingly large compliance functions, resulting in managerial staff focusing on compliance rather than other duties. In 2017, arguments about compliance burden persisted, but more commonly arguments centered on small and community banks’

23 FFIEC-2014-0001-0038
regulatory burdens relative to their risks. As noted above, the relationship between bank size and risk is controversial (Hoskins and Labonte 2015; OFR 2017). Finally, in both 2007 and 2017, comments described the unfair regulatory burden placed on banks relative to other financial institutions offering competing services. In 2007, these comments focused on the need for more stringent regulation of independent mortgage lenders and credit unions. In 2017, these comments focused more broadly on the range of institutions characterized as “shadow banks” that offer intermediation services outside of the banking regulatory framework established under the Dodd-Frank Act. Thus, while in both periods regulatory fairness was a dominant theme, the baseline against which fairness was assessed shifted across the two periods.

4.4.2.4. Substance of Participation: Revisions Suggested in Comments

Consistent with the processes dictated by EGRPRA and the resulting Federal Register notices, the vast majority of comments included suggestions for revisions. As Figure 13 depicts, these suggestions can be categorized as decreasing regulation, increasing regulation, preserving the status quo, procedural, or other. These categories

24 Decrease Regulation: Suggestion to rescind rule or decrease rule stringency or scope (e.g., removing requirement, raising a threshold). Increase Regulation: Suggestion to promulgate rule or increase rule...
are not mutually exclusive because comments often raise more than one issue and offer more than one suggestion.

**Figure 13: Number of Comments by Suggested Revision (n=819)**

stringency or scope (e.g., adding requirement, lowering threshold). Preserve Status Quo: Suggestion to preserve rule or expression of support for rule as is. Procedural: Suggestion related to EGRERA or rulemaking process. Other: Suggestion that is neither pro- nor de-regulatory (e.g., reconciling requirements, clarifying language) or comment that suggests a review with no recommendations for revision.
In 2007, the most commonly suggested revisions were deregulatory, with revisions that were neither de- nor pro-regulatory (i.e., “other”) comprising the other largest category; notably most of the comments that included several recommendations to decrease regulation also included at least one recommendations coded as other. In 2017, the most common recommendations were to preserve the status quo, with decrease regulation and other making up the second and third largest categories, respectively.

Perhaps not surprisingly, recommendations varied by submitter category. Public interests—depicted in shades of gray in Figure 13—generally recommended increasing regulation or preserving the status quo while private interests—depicted in shades of blue in Figure 13—generally recommended decreasing regulation or suggested revisions that were neither clearly pro- nor de-regulatory. Among the latter category, trade association comments framed recommendations as less clearly deregulatory than those from banks, especially smaller banks, which were more explicit in their calls for reducing regulation and regulatory burden. Banks also provided a variety of solutions to “level the playing field” for different institutions, such as tiered regulation by bank size,
consolidation of charters and regulatory authority, and creation of barriers to entry for credit unions.  

Many comments included suggestions that were neither clearly pro- nor de-regulatory. Some of these comments related to relatively narrow issues, for example requests for clarification or interpretative guidance for specific rules and the adoption of web-based technologies for the submission of certain reporting forms. However, in both periods participants expressed concerns related to more systemic issues—such as inconsistencies in examination processes—and made various suggestions to address these inconsistencies—ranging from providing more guidance and training for examiners to providing examiners with greater interpretative authority. Several comments also recommended regulatory consolidation, coordination, and cooperation to address problems arising from multiple banking regulators operating at the state, federal, and international levels. These comments related to implementation reinforced one of the potential benefits of retrospective review: understanding how a rule “as lived” may differ from a rule “as written.” There were also a handful of procedural recommendations related to review processes in both rounds. As noted above, these

comments generally discussed the scope of review—for example, the inclusion of rules pursuant to the Dodd-Frank Act in 2017 and the integration of review processes for FFIEC, NCUA, and CFPB. Two of the most prominent banking trade associations, the American Bankers Association (ABA) and Independent Community Bankers of America (ICBA), also provided very detailed procedural comments. For example, ICBA suggested the development of a website to continuously track the 10 “most burdensome” rules.26

While it is not surprising that banks sought to decrease their regulatory burden and public interest groups sought to preserve or increase the stringency of regulation, the relative level of public and private participation suggests that the outcomes of reviews, to the extent they are based on public participation, will necessarily be deregulatory. While FFIEC purportedly balanced burden reductions with other regulatory objectives—such as safety and soundness and consumer protection—the imbalance of perspectives and the relationship between the GFC and deregulation raises concerns about the ability of regulatory agencies to deregulate while maintaining system resilience. However, for certain issues there were conflicting preferences among private

26FFIEC-2014-0001-0036
interests, suggesting a potential countervailing power dynamic (Galbraith 1954; Wittman 2010). For example, in the case of appraisal thresholds in 2017, lenders sought to decrease regulation (by raising the threshold at which appraisals are required) while appraisal professionals sought to preserve the status quo (maintaining the current threshold); both submitter categories framed their recommendations as promoting the public interest. This finding suggests that the capital unity hypothesis (Young and Pagliari 2015) may not hold for the banking sector as uniformly as it does for other financial services sectors.

4.4.2.5. Substance of Participation: Evidence Provided in Comments

EGRPRA directs FFIEC to solicit comments on “outdated, unnecessary, or unduly burdensome” regulations (12 U.S.C. § 3311). Depicted in Figure 13 and Figure 14, comments used a variety of evidence to justify recommendations. In 2007, the

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Benefits: Discussion of benefits associated with a current or proposed rule, policy, or issue for either the submitter and/or an identified set of stakeholders (e.g., consumers). For a proposed new regulation or regulatory change, the benefit could be described as the consequences of not regulating. Burdens: Discussion of burdens or costs associated with rule, policy, or issue for either the submitter and/or an identified set of stakeholders (e.g., lenders) (Operational Cost: Costs associated with compliance. Opportunity Cost: Costs associated with forgone opportunities. Relative Burden: Comments about the relative burdens faced by institutions based on their size or type [i.e., relative to other financial institutions, not relative to benefit]). Outdated or Unnecessary: Discussion of redundancy, inconsistency, or other issues requiring updating and/or the reasoning that a rule, policy, or issue, as written, is unnecessary, ineffective.
The majority of comments argued that rules are burdensome, followed by outdated or unnecessary as the next largest category of evidence. In 2017, the majority of comments argued that rules are beneficial, with outdated or unnecessary and burdens also being somewhat common.

![Figure 14: Number of Comments by Evidence Type (n=819)](image)

or producing unintended consequences. Other: Evidence that does not fit into the categories above, such as misalignment with legislative intent or issues of fairness not relative to other financial institutions.
As with recommendations, evidence provided varied by submitter category. Private interests—depicted in shades of blue Figure 14—focused on burdens while public interests—depicted in shades of gray in Figure 14—focused on benefits; the former tended to be very specific and the latter tended to be more general, reflecting the relatively concentrated costs and diffuse benefits of banking regulation. Public interest comments were more defensive, arguing to preserve the status quo based on benefits, and in some cases, statutory interpretation.28 Although private interests’ justifications generally focused on burdens, arguments varied qualitatively. For example, small and community banks often described their own compliance burdens, while large banks and trade associations described how regulatory burden negatively affects the entire industry, and in turn, customers. There was also variation across banks and other types of private interests. For example, in 2017 professional service providers most frequently employed arguments about the benefits of preserving the status quo, whereas trade associations most often employed arguments about burdens or outdated or unnecessary requirements when seeking to decrease regulation.

28 Arguments about statutory interpretation are coded as “other” evidence.
With respect to the types of burdens identified (Figure 15), operational costs (i.e., compliance costs) were more frequently identified than other types of burdens. While there was some discussion of unintended consequences, there were relatively few arguments about opportunity costs. Of the few opportunity cost arguments, the most common examples related to resource tradeoffs between compliance and customer service. A few comments also mentioned market exit and a few others discussed how boards of directors’ compliance responsibilities detract from management functions. Even after the crisis, which made apparent immense externalities associated with financial systemic risk, arguments about burdens tended to focus on first-order effects.
Although not garnering the majority of comments, the issue of relative burden appeared to be important to bank participants in both periods. In both 2007 and 2017, there were concerns about the competitiveness of bank versus non-bank institutions (e.g., “shadow banks,” credit unions) and about small versus large banks. For example, in 2017 comments argued that regulations pursuant to the Dodd-Frank Act placed inordinate burden on banks while credit unions and Fintech companies get off scot-

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29 The sample size is the number of comments that provided evidence related to burdens.
Both before and after the GFC, small and community banks argued that their regulatory burdens were inordinate and undue given their compliance resources (2007) and their relative riskiness (2017). While this concern about relative burden is not surprising in 2017, it is striking that the exact same arguments were used in 2007 given that in 2017 small and community banks generally identified the regulatory framework established pursuant to the Dodd-Frank Act as the source of this inordinate burden.

4.4.2.6. Comparing Participation in 2007 and 2017

The overall level of participation in the EGRPRA reviews was low relative to rulemaking, but participation was substantially higher in 2007 than 2017, in aggregate terms, and in the average levels of participation per Federal Register notice or per outreach session. In both periods, most participants were private interests, although participation was more balanced across public and private interest and submitter categories in 2017 than 2007. Notably, participation by certain groups, such as think tanks and government, was almost non-existent in both periods. While analyses of participation in retrospective review suggest review processes tend to be more balanced across public and private interests and across various submitter categories than

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30 FFIEC-2014-0001-0095
rulemaking (DeMenno 2017), the particular design of EGRPRA reviews may explain the imbalance; EGRPRA is narrowly focused on banking regulation and explicitly emphasized burden reductions, suggesting banks and other regulated entities will have the greatest awareness of, and incentives to participate in, EGRPRA reviews. Similarly, because FFIEC is an interagency body composed of representatives of major government stakeholders at the local and national levels, it makes sense that government participation via notice and comment was lower than in other retrospective review processes. Nonetheless, EGRPRA processes seemed to become more balanced over time, as a greater diversity of regulated entities participated (i.e., banks and professional service providers) and interest groups mobilized for both regulated entities (i.e., trade associations) and consumers (i.e., public interest groups).

With respect to the substance of participation, there was a wide range of issue areas, recommendations, and evidence included in comments. In 2007, the most frequently commented issues related to consumer protection whereas in 2017 they related to safety and soundness. Across both periods, issues of regulatory fairness persisted. In 2007, the most common recommendation was for deregulation whereas in 2017 the most common recommendation was for preserving the status quo. In general, public interests sought to preserve or increase regulation while private interests sought
to reduce regulation. This finding generally comports with the literature on participation in rulemaking. However, the findings that private participants were divided on certain issues—such as real estate appraisals—and that areas of emphasis varied by financial institution type—such as small versus large banks and banks versus non-bank lenders—are particularly noteworthy given that recent literature suggests industry lobbying in financial regulation tends to be homogenous in preferences relative to other industries (Young and Pagliari 2015).

Finally, in providing justifications for recommendations, there was a greater emphasis on burdens in 2007 and a greater emphasis on benefits in 2017. The types of evidence provided varied by submitter category, with private interests generally commenting on burdens and public interests generally commenting on benefits. As with recommendations, there was interesting within-sector variation. However, a wide variety of entities seemed to be united behind a shared concern about relative burden. Particularly common in both periods were arguments from small and community banks that their regulatory burdens were inordinate and undue given their compliance resources (2007) and their relative riskiness (2017). The similarity in arguments across the two periods is notable since many have argued that it is regulation pursuant to the Dodd-Frank Act that created this unfair burden on small and community banks. Indeed,
relief for small and community banks has become an increasingly popular and bipartisan basis upon which sweeping financial reforms are gaining traction in the current Congress.\textsuperscript{31}

\textbf{4.4.3. Outcomes of EGRPRA Reviews and the Role of Participation Therein}

As stipulated by EGRPRA, FFIEC produced detailed reports documenting review processes and the individual and inter-agency outcomes in both 2007 and 2017. Depicted in Figure 16 below, review outcomes ranged from no action to rule revision/rescission, with several alternatives along this spectrum. As with other retrospective reviews, quantifying the outcomes of EGRPRA reviews is difficult for at least two reasons. First, establishing a consistent unit of analysis is challenging because comments and revisions vary in scope from an entire statute to a single line in a particular rule or guidance document. Second, coincidence between issues raised in review processes and outcomes does not itself imply causality. Nonetheless, by holding these issues constant across the two EGRPRA reviews, it is possible to compare the outcomes of the 2007 and 2017 processes.

\textsuperscript{31} Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (S. 2155)
Figure 16: Type of EGRPRA Review Outcomes Identified in Plans

### 4.4.3.1. 2007 Outcomes

In 2007, outcomes focused more on referral and deferral than action. For at least seven issue areas, FFIEC determined revisions raised in comments were outside of both FFIEC’s inter-agency and FFIEC member agencies’ authority. FFIEC referred most of these issues to Congress (e.g., reforming the National Flood Insurance Program), but also referred a few issues (e.g., AML comments) to other agencies (e.g., FinCEN). In many instances, FFIEC recommended a specific action or expressed a willingness to
work with other entities in addressing referred issues. In addition, the 2007 report repeatedly called for legislative action to reduce regulatory burden and celebrated the collaboration between FFIEC and the 109th Congress on the passage of the Financial Services Regulatory Relief Act (FSRRA) of 2006. FFIEC also determined no action was needed for several issues raised in comments. For example, although several comments related to HMDA, FFIEC noted that it was too soon after implementation to evaluate rule effectiveness relative to burden. For capital rules, FFIEC determined the existing framework did not rise to the level of “unduly burdensome” because it afforded a choice among the existing Basel I rules, the standardized approach, or the Basel II advanced approaches.

There were three issues for which the 2007 FFIEC plan outlined regulatory changes, although only one—OTS’s revision of application and reporting requirements for savings associations—was described as originating solely from the EGRPRA review process, with the others purportedly resulting from a combination of the EGRPRA review and other initiatives. Finally, the 2007 plan also included a detailed list of “current initiatives,” which demonstrated progress on various issues without necessarily addressing comments. Similarly, the plan referenced other review initiatives outside of the EGRPRA process that aligned with EGRPRA’s overall burden reduction
mandate, such as those pursuant to the Riegle Community Development and Regulatory Improvement Act (Riegle-Neal Act) of 1994.

The 2007 report included a detailed summary of all recommendations received in comments and outreach sessions, organized by issue areas. These summaries included some attribution to broad submitter categories, most commonly “industry group” or “consumer group.” The report provided the volume of comments received for certain rules, particularly those that received a relatively large share of comments (e.g., BSA/AML), and noted the issues for which form letter comments predominated. These summaries also highlighted the very limited evidence offered in comments. The only issue areas that included data to substantiate claims were right of recession, CTR thresholds, and SAR processes. While the summary of comments was distinct from the summary of review outcomes, the report repeatedly framed review outcomes as directly responding to comments. Furthermore, given the very limited use of other types of inputs (e.g., empirical ex post impact assessment), it is reasonable to glean that to the extent EGRPRA produced actions that would not have otherwise been pursued, those actions were a result, at least partially, of public input.
4.4.3.2. 2017 Outcomes

In 2017, outcomes were more action-oriented, with the frequent issuance of clarifying materials as well as the revision of at least seven rules. The major issue areas addressed in 2017 were: capital, regulatory reporting, real estate appraisals, examination frequency for and safety and soundness, and BSA. Clarifying materials were issued for appraisal waiver processes, use of evaluations as alternatives to appraisals, and flood insurance guidance documents. Rule changes included the development of a community bank call report and raising the appraisal threshold for commercial real estate loans. FFIEC referred issues related to the frequency of safety and soundness examinations to Congress, which in turn passed legislation enabling FFIEC to modify relevant regulations. As with the 2007 review, FFIEC referred issues related to AML to FinCEN. The 2017 report also identified several ongoing issues, including reviewing the major assets interlock thresholds and simplification of capital rules. Like the 2007 report, the 2017 report highlighted review initiatives beyond the scope of EGRPRA as well as other agency initiatives to reduce regulatory burden, such as the FDIC’s ongoing review of

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32 Section 83001 of Fixing America’s Surface Transportation Act (FAST Act) of 2015
examination and supervisory processes, which resulted in the rescission of several rules inherited from OTS.

The 2017 report also included a detailed summary of all recommendations received in comments and outreach sessions, organized by issue area. Relative to the 2007 report, the 2017 summary is more detailed in terms of the number of comments received and attribution to submitter categories. As with the 2007 report, there was very little evidence other than that provided in comments, although the 2017 report is perhaps slightly more deliberative in its adjudication of conflicting participant input. For example, with respect to appraisal thresholds, FFIEC described how the comments against increasing the threshold far outnumbers those in favor of increasing it, yet based on the evidence provided in the latter, FFIEC decided to develop a proposal to raise the commercial threshold and is considering changing thresholds for real estate secured business loans, but not residential loans due to concerns about safety and soundness and consumer protection. Thus, as with 2007, outcomes in 2017 responded to comments, but the 2017 report suggests FFIEC considered the quantity of comments and the quality of evidence provided within comments.
4.4.3.3. Comparing Outcomes in 2007 and 2017

Recognizing that it is difficult to infer causation from review initiatives and outcomes, and perhaps even more difficult to draw causal inferences between participation in reviews and outcomes (Carpenter 2014), is possible to examine how the outcomes of reviews and the role of participation therein changed across the two EGRPRA reviews. On balance, the 2017 review produced more actions by FFIEC whereas the 2007 review produced more referrals to other entities. In both periods, FFIEC responded directly to comments and did not appear to use input other than comments in review processes. Thus, to the extent EGRPRA produced actions that would not have otherwise been pursued, it is reasonable to attribute those actions, at least partially, to public input.

Relative to other U.S. review efforts, such as those pursuant to EOs 13563, 13579, and 13610, the EGRPRA review mandate is somewhat more procedurally prescriptive and the resulting reviews were somewhat more transparent, perhaps reflecting the differences in political accountability to regulatory oversight bodies (i.e., the Office of Information and Regulation Affairs) and legislatures (i.e., the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs)
as well as the distinctiveness of banking relative to other regulatory issues (Berman and Logsdon 2012; DeMenno 2017).

Prior retrospective review efforts have been criticized for their lack of methodological rigor (Lutter 2013), with reports documenting inputs and outputs, but providing less legibility into review processes, data, or methodologies. EGRPRA reviews seem to rely exclusively on public input, drawing the criticism of the Government Accountability Office (GAO), which recently recommended that future EGRPRA reviews include “quantitative rationales” and assess cumulative burden (GAO 2018a, i). Yet, it is not clear that banking regulators would even have the data required to conduct more quantitative or comprehensive retrospective impact assessment given that cost-benefit analysis is generally not required upon promulgation of bank regulations. Indeed, the role of ex ante impact assessment in banking regulation is politically controversial and methodologically complicated (Coates 2015; Gordon 2014; Posner and Weyl 2015). The latter is compounded by the unique structure of the banking sector, which creates substantial challenges with quantifying the benefits and costs of particular outcomes (e.g., because risks generated at the institutional level are borne at the system level) and the probability of those outcomes (e.g., because the supervisory model in banking enables examiners to continuously shape regulation through implementation).
It should also be noted that although banking regulators generally do not forecast or track quantitative benefits and costs of individual regulations, neither do regulated entities: the comments suggest that most banks do not systematically collect data on their individual or cumulative regulatory burdens.33

4.4.4. Causes of Variation Between 2007 and 2017

EGRPRA review processes, participation, and outcomes differed between 2007 and 2017. This section provides an analysis of the extent to which the policy shock of the GFC explains this variation, relative to three other variables identified via contextual analysis: political context, regulatory context, and market context.

4.4.4.1. Potential Explanatory Variables

The timing of the EGRPRA reviews is notable because of the substantial changes that occurred in the ten-year period between the reviews. The most obvious difference, and the first potential explanatory variable, is the policy shock of the GFC. The 2007 EGRPRA review began four years before the GFC, while the 2017 review began four years after the GFC. Crises can serve as focusing events by illuminating otherwise

33 One exception is trade associations’ periodic surveys of regulatory burdens; however, these surveys rely on self-reporting and are not systematic (e.g., FFIEC-2014-0001-0015, FFIEC-2003-0001-0001).
unobservable consequences of regulatory and market failure (Balleisen, Bennear, Krawiec, and Wiener 2017b) and in so doing can affect the policy agenda and the policy community for a given issue (Baumgartner and Jones 2010; Birkland 1998; Birkland and Warnement 2017; Kingdon 1984; Sabatier 1988). While there are several ways in which the policy shock of the GFC might directly explain the variation in review processes, participation, and outcomes across the two EGRPRA reviews, it is also plausible that the policy shock of the crisis affected the political context, regulatory context, or market context, which in turn may explain the variation. These potential causal paths are depicted above in Figure 11.

The second potential explanatory variable is political context. The 2007 review was carried out during a Republican administration and President George W. Bush appointed all but one of the FFIEC members involved in the review. Government was unified during this period, with Republicans controlling the House of Representatives and the Senate for the duration of the FFIEC review (108th and 109th Congress), meaning that FFIEC members reported on the outcomes of the EGRPRA review to a Congress in which members of their own party were in the majority. The 2017 review occurred during a Democratic administration and President Barack H. Obama appointed all of the FFIEC members involved in the review. However, government was divided during the
2017 review, with Republicans controlling the House of Representatives and Democrats controlling the Senate in the 113th Congress (2013-2015) and Republicans controlling both chambers in the 114th Congress (2015-2017), meaning that FFIEC members reported on the outcomes of the EGRPRA review to a Congress in which members of their own party were in the minority. Thus, the two review periods are distinct in political ideology—conservative (2007) versus liberal (2017)—and the balance of political power—unified government (2007) versus divided government (2017).

The third potential explanatory variable is regulatory context. The 2007 review occurred during a period of deregulation in the financial services industry broadly, and in banking specifically (e.g., the Riegle-Neal Act, Gramm-Leach-Bliley Act of 1999, FSRRA). Steady market performance and persistent financial innovation created the basis for a regulatory regime based on faith in the sufficiency and desirability of market discipline. While bank regulators pursued micro-prudential safety and soundness regulations, these objectives were evaluated against potential costs to the international competitiveness and profitability of U.S. financial institutions, and in turn, their perceived private and public benefit. In addition to international regulatory competition (e.g., capital frameworks pursuant to Basel II), there was domestic regulatory competition among bank regulators at the federal level and among state and federal
regulators. In contrast, the 2017 review occurred during a period of re-regulation, as agencies implemented sweeping reforms under the legislative authority of the Dodd-Frank Act. In response to the GFC, bank regulators pursued a combination of micro-prudential, macro-prudential, and consumer protection regulations. The benefits of these regulations were weighed against the potential burdens, although these tradeoffs were perhaps less explicit than before the crisis. While bank regulation is still highly fragmented, there was a greater emphasis on domestic and international coordination in response to the GFC (DeMenno 2018b). Thus, the two review periods are distinct in terms of the dominant regulatory objectives and tradeoffs, which in turn shaped regulatory priorities and strategies.

The fourth potential explanatory variable is market context, which encompasses not only regulated institutions, but also the broader policy community, including interest groups and the public. With respect to regulated institutions, there was considerable consolidation in the banking industry between EGRPRA reviews, with approximately 30% fewer banks in Q1 of 2017 than Q1 of 2007. The number of small and community banks decreased substantially in this period, while the number of large

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34 See: “Total number of U.S. banks” (FRED 2018).
banks increased, as did the level of assets held by all commercial banks.\textsuperscript{35} As described above, this consolidation reflects bank failures during the crisis as well as the continuation the trend of consolidation and mergers that began in 1980s; as described above, the latter reflects the evolving business model of banking as a result of financial regulatory changes (e.g., expanding state branching and interstate banking), the globalization of financial markets, and the rapid expansion of financial technology (Kowalik et al. 2015; Schoppers 2014). Although there was a substantial performance trough from 2008-2009, a comparison of performance indicators in Q1 of 2007 and Q1 of 2017 suggests the banking industry has predominantly recovered.\textsuperscript{36}

While the composition of the banking industry has changed, its representation in political processes was largely consistent in both periods. The banking industry’s political efforts are highly organized, and the American Bankers Association (ABA) and the Independent Community Bankers Association (ICBA) were the preeminent lobbying

\textsuperscript{35}See: “U.S. commercial banks with average assets under $1b” and “U.S. banks with total assets over $20B” (FRED 2018).

\textsuperscript{36}See: “Return on average assets for all U.S. banks” (1.24 in Q1 of 2007 and 1.02 in Q1 of 2017); average “Net interest margin for all U.S. banks” (3.33 in Q1 of 2007 and 3.10 in Q1 of 2017); and “Return on average equity for all U.S. banks” (12.10 in Q1 of 2007 and 9.15 in Q1 of 2017) (FRED 2018).
organizations in both periods.\textsuperscript{37} In contrast, before the GFC there was no clear constituency representing the public interest in financial regulation, particularly for financial stability (Balleisen, Bennear, Krawiec, and Wiener 2017a), but in the wake of the GFC, several organizations representing the public interest in financial regulation formed, notable examples are Better Markets and Americans for Financial Reform.

Finally, public awareness and opinion of financial regulation changed drastically in the two periods. In 2007, there was bipartisan and public faith in financial markets’ self-disciplining capacity, and financial regulation had low public salience. In 2017, faith in market discipline was more variable and partisan, and financial regulation was comparatively more salient as measured by survey data, news media publications, and Google searches.\textsuperscript{38} This trend is further supported by evidence from psychology, which suggests risk perceptions, and in turn attentiveness to risk regulation, can be shaped by

\textsuperscript{37} In addition to their predominance in EGRPRA processes, ABA and ICBA were consistently the highest spending lobbying organizations for commercial banks throughout both review periods (Open Secrets 2018).

\textsuperscript{38} See: Pew Research Center (2009; 2017) survey data on public support for financial regulation before and after the GFC policy response and Pew Research Center (2013) survey data on the growing partisan divide over financial regulation. Young (2013) also provides evidence of increased salience via the publication of more news articles on financial regulation relative to all articles published on regulation between the 2007 and 2017 reviews. Finally, a simple Google trends analysis reveals that while there was generally more interest in financial regulation during the 2007 review than the 2017 review, there was a substantial peak between the GFC and passage of the Dodd-Frank Act, suggesting greater public awareness overall in the second review period.
a variety of cognitive biases. Most notably, after a crisis event the availability heuristic may cause individuals to update their perceptions of the probability of future crises (Tversky and Kahneman 1974; Weber 2017). Together these differences are consistent with Birkland’s (1998) observation that a focusing event can affect the nature of the policy and the policy community via “group mobilization” and “issue expansion.”

4.4.4.2. Explanatory Power

Summarized in Table 5 below are the key differences in review processes (Section 4.4.1.3), participation (Section 4.4.2.6), and outcomes (Section 4.4.3.3) and the power of each potential explanatory variable. A check mark indicates that the finding is consistent with the explanatory variable, an x indicates the finding is inconsistent with the explanatory variable, and a dash indicates the finding is neither consistent nor inconsistent with the explanatory variable.
Table 5: Summary of Explanatory Power

<table>
<thead>
<tr>
<th>Category</th>
<th>Finding</th>
<th>Policy Shock</th>
<th>Political</th>
<th>Regulatory</th>
<th>Market</th>
</tr>
</thead>
<tbody>
<tr>
<td>Process</td>
<td>Greater emphasis on deregulation in 2007 than 2017</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
</tr>
<tr>
<td>Participation</td>
<td>Greater participation in 2007 than 2017</td>
<td>✗</td>
<td>–</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Participation</td>
<td>Less balanced participation (across interest types and submitter category) in 2007 than 2017</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
<td>✓</td>
</tr>
<tr>
<td>Participation</td>
<td>More recommendations for deregulation (with evidence of burdens) in 2007 and preserving status quo (with evidence of benefits) in 2017</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Outcome</td>
<td>More referrals in 2007 and more regulatory actions in 2017</td>
<td>–</td>
<td>✓</td>
<td>✗</td>
<td>–</td>
</tr>
</tbody>
</table>

4.4.4.2.1. **Explanatory Power: Variation in Review Processes**

The greater emphasis on deregulation in 2007 than 2017 is consistent with the policy shock of the GFC as well as the political context and regulatory context. As described above, evidence from psychology and political science (Balleisen, Bennear, Krawiec, and Wiener 2017b) suggests that policy shocks, like financial crises, increase the acceptability of risk regulation by affecting public and political perceptions of both
the consequences and probability of market failures. Thus, a greater emphasis on re-regulation after the crisis is consistent with policy shock explanatory variable.

This change in the emphasis of review processes is also explained by differences in the political and regulatory contexts across the two periods, and particularly by the intersection of political and regulatory context. The ways in which political ideologies can shape regulatory priorities is exemplified by the leaders of the two processes: 2007 FFIEC Chairman and G.W. Bush appointee John Reich—pictured in Figure 9—was a major advocate of deregulation, whereas 2017 FFIEC Chairman and Obama appointee Daniel Tarullo—who served as the de facto Vice Chair for Supervision, a position created in the Dodd-Frank Act specifically to strengthen regulatory oversight of bank holding companies—was a central player in post-GFC re-regulation. Thus, the emphasis on deregulation in 2007 and re-regulation in 2017 is consistent with both the ideologies of political principals and the priorities of appointees. It is of course difficult to assess the extent to which political appointments and regulatory priorities would have produced these results in the absence of the GFC, and thus there may be multiple causal paths.

While this analysis focuses on variation over time, it is notable that there was consensus across both periods regarding reducing regulatory burden for small and
community banks. The political power of small and community banks—because of their electoral leverage (i.e., small and community banks are in almost every congressional district and are also highly organized in national lobbying efforts) and relatively untarnished post-GFC reputations relative to Wall Street banks—perhaps best explains this emphasis.

4.4.4.2.2. Explanatory Power: Variation in Participation

The changes in the level of participation between the two periods are surprising given the regulatory context in 2017—a period of re-regulation pursuant to the Dodd-Frank Act and thus the EGRPRA review represented a unique opportunity for regulated entities to advocate for deregulation—and market context—notably the increased salience of financial regulation among a broader set of stakeholders between the two reviews. Furthermore, in the period between the reviews there was a persistent trend toward more participation in regulatory policy facilitated by information technology, making this pattern even more surprising (Balla 2004).

Thus, none of the proposed explanatory variables provide a compelling explanation for why participation was lower in 2017 than 2007. However, given that participation in retrospective review is generally substantially lower than participation in rulemaking (DeMenno 2017), perhaps rather than asking “why so little” participation
in 2017, we should ask “why so much” participation in 2007. One hypothesis is that banks and other regulated entities actively sought regulatory relief via the passage of EGRPRA and were therefore aware of the first review process; subsequently, enthusiasm may have dissipated as result of dissatisfaction with the outcomes of the 2007 review. There is some evidence in comments from 2017 that participants, particularly trade associations and their members, were dissatisfied with the 2007 process.39 Another hypothesis is that the institutional design of FFIEC review processes—particularly the more explicit focus on reducing regulatory burden in 2007, which may have signaled a greater receptivity to comments from regulated entities—affected the level of participation. Adjudicating among these competing explanations may require interviews with a representative sample of participating and non-participating stakeholders.

The overall composition of participants was more balanced in 2017 than 2007, driven by three trends in submitter categories: (1) a dramatic decrease in the number of banks participating in 2017 relative to 2007; (2) a substantial increase in the number of

39 For example, ICBA observed that while banking agencies perceived the first EGRPRA review to be successful, changes as a result of the 2007 review “…hardly made an impact on the overall regulatory burden that now confronts community banking” (FFIEC-2014-0001-0036).
professional service providers participating in 2017 relative to 2007; and (3) an increase in interest group participation, for both private and public interests, in 2017 relative to 2007. These changes are partially explained by the policy shock of the GFC and partially explained by variation in the political and market contexts.

With respect to the first composition trend, the decrease in bank participation cannot be fully explained by market context (i.e., consolidation in the banking industry) or the regulatory context (i.e., banks had greater incentives to capitalize on opportunities to advocate for deregulation in 2017 than 2007). Yet, prior literature suggests that political context might explain the change in bank participation. For example, Young (2013) finds that in the post-crisis era, the financial services industry has moved toward more “subtle” forms of advocacy, with particular mobilization in the implementation stage. Thus, recognizing their limited political capital post-GFC, banks might have elected to work through their trade associations in 2017 to a greater extent than in 2007, resulting in fewer individual bank participants. A competing hypothesis is that after the GFC banks that implemented regulatory reforms pursuant to the Dodd-Frank Act had fewer incentives to lobby for deregulatory reforms since their compliance programs entail considerable sunk costs and create competitive advantages relative to new market entrants. While this hypothesis is partially supported by the timing of bank
participation—banks participated more in earlier stages of the 2017 EGRPRA review, when their implementation of compliance programs was presumably nascent—, it is possible that the design of the review processes—i.e., the pre-defined issues areas for each round—drove this pattern.

With respect to the second composition trend, the increase in professional service providers is more puzzling given that the issue of real estate appraisal thresholds pre-dated the GFC and was well aligned with the consumer protection orientation of the 2007 review. However, appraisers may have seen an opportunity to shift venues—from aggregated petitions submitted directly to regulators to disaggregated form letters submitted as EGRPRA comments—and to reframe real estate appraisals—as a safety and soundness issue—in order to more effectively advocate in the post-GFC political and regulatory contexts.40

With respect to the third composition trend, the increase in participation by interest groups was driven by both private and public interest groups. The increase in trade associations reflects the increased mobilization of more diverse industry representation in 2017 (e.g., appraisal professionals account for 20% of trade associations

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40 Appraisers were quite active during the 2007 review, but this activism was pursued through a petition campaign rather than through the EGRPRA process (Financial Crisis Inquiry Commission 2011).
in 2017) and, potentially, banks’ increased use of trade associations to represent their interests, although both of these hypotheses warrant further investigation. The rise of public interest participation is consistent with theories of the effects of policy shocks on interest group mobilization. Because the beneficiaries of strong financial regulation did not form a coherent community of practice before the GFC, the post-GFC market context reflected an increase in the number of public interest groups focused on financial regulation (e.g., 27% of public interest group comments in 2017 came from groups that did not exist in 2007) and greater engagement by consumer groups on issues of financial regulation (e.g., 36% of public interest group comments in 2017 came from groups that existed but did not participate in 2007). Thus, a combination of the policy shock of the GFC, political context, and market context explains the variation in the composition of participants between the two reviews. As with the level of participation, interviews could provide greater legibility into the causal paths underlying these explanations.

While comments raised a variety of issues and provided a variety of recommendations in both periods, there were more calls for deregulation in 2007—generally grounded in evidence of undue burdens or the outdated/unnecessary nature of rules—and more calls for preserving the status quo in 2017—generally grounded in evidence of benefits. Of the factors included in this analysis, the four hypothesized
explanatory variables perhaps best jointly explain the substance of participation, albeit with uncertainty about the causal path(s) connecting these variables. First, the policy shock of the GFC illuminated the importance of regulation—at both the system and institution levels—and the potential consequences of allowing markets to self-discipline. The 2017 EGRPRA review began just a few years into the implementation of sweeping reforms designed to address the regulatory and market failures that enabled the GFC. Democratic appointees in the Obama administration were largely united in their commitment to re-regulation in response to the GFC, as opposed to Republican appointees in the G.W. Bush administration that were united in their commitment to easing regulatory burden in response to a period of sustained market performance. In addition, many of the targets of deregulation in 2007 shifted to the CFPB, which was outside of the 2017 EGRPRA process. Thus, given the political and regulatory contexts, it makes sense that participants would focus their efforts defensively in 2017 and offensively in 2007, although it should be noted that many of the issues raised in 2017 were also raised in 2007. Finally, the market context shifted to include a greater diversity of interests who grounded arguments in evidence about the benefits of strong regulation, including more public interests—who generally advocated for increasing regulation—and greater mobilization of appraisal professionals—who generally
advocated for preserving the status quo. Thus, each of the four explanatory variables, at least partially, explain differences in the substance of participation between the 2007 and 2017 reviews.

4.4.4.2.3. Explanatory Power: Variation in Outcomes

Although EGRPRA processes did not result in a large number of outcomes relative to the number of rules reviewed, they were fairly productive compared to other review processes. In 2017, FFIEC initiated more regulatory actions (e.g., rule revision, issuance of clarifying guidance) whereas in 2007 FFIEC acted on relatively few issues but made many referrals to Congress. At first glance, this outcome is counterintuitive given the regulatory and market contexts of the two periods and the GFC. However, political context—and the ways in which the balance of political power affects regulatory strategies—provides a partial explanation. The literature suggests that in periods of united government—such as 2007—regulators work with Congress to make substantial legislative changes, whereas in periods of divided government—such as 2017—regulators have an incentive to deter congressional action and preserve agency power (Godwin and Ilderton 2014; J. W. Yackee and Yackee 2009). Thus, regulators in 2017 may have viewed EGRPRA as a way to demonstrate responsiveness to concerns about regulatory burden with relatively small concessions, thereby fending off larger
deregulatory efforts. Regulators’ partial action on real estate appraisals, for example, could be understood as an attempt to provide some regulatory relief (i.e., by raising appraisal thresholds for commercial loans) while preserving control over issues more central to regulatory safety and soundness priorities (i.e., by preserving appraisal thresholds for residential loans) from future challenges. Thus, acting on a few issues raised in EGRPRA reviews may be understood as small concessions as part of a broader strategy to insulate the regulatory agenda, although interviews with regulators could further inform this potential explanation.

4.4.4.3. Summary of Causal Evidence and Areas for Future Research

This section analyzes the extent to which the policy shock of the GFC, political context, regulatory context, and market context individually and jointly explain variation in 2007 and 2017 EGRPRA review processes, participation, and outcomes. Two themes emerge from this preliminary analysis. First, it is difficult to disentangle the causal pathways connecting the hypothesized explanatory variables to the outcomes (as Figure 11 depicts). As such, it is difficult to assess the counterfactual; for example, the extent to which regulatory context can be understood as part of a causal path independent of the policy shock of the GFC. Second, if we assume generally that a positive finding (check) outweighs a negative finding (x), Table 5 suggests political
context provides the strongest explanation for variation across processes, participation, and outcomes. This finding suggests that although financial regulation is by design relatively technocratic, studies of financial regulatory policy—including those on regulatory governance, impact assessment, and stakeholder participation—must nonetheless be attentive to regulatory politics—i.e., the ways in which political ideology and the balance of political power shape regulatory priorities and strategies.

This preliminary analysis illuminates promising areas for future research. As noted above, interviews with regulators and a representative sample of participating and non-participating stakeholders could provide the evidence necessary to adjudicate among competing causal hypotheses. In addition, structured process tracing over a longer timeframe would provide greater legibility into how EGRPRA reviews and participation therein influence the effectiveness and legitimacy of banking regulations and rulemaking processes. Process tracing could draw on data from interviews as well as media and trade association publications related to both reviews. In addition, because certain findings—such as the level of participation—are not well explained by any of the hypothesized causes, future research may establish a broader set of explanatory variables. Finally, given the considerable causal complexity within and across reviews,
future research should explore the interactions among the explanatory variables in the columns in Table 5 and among the outcome variables in the rows in Table 5.

4.5. Conclusion

EGRPRA reviews provide a lens to study government-market interactions in the regulatory process before and after the GFC. The comparative case studies of the 2007 and 2017 reviews generate several implications for the theory and practice of financial regulatory governance, retrospective regulatory impact assessment, and stakeholder participation in financial regulation.

With respect to the regulatory governance of banking, EGRPRA reviews highlight the challenge of regulatory coordination and the importance of regulatory politics. FFIEC appears to play a significant, but perhaps underappreciated, role in coordinating—and to some extent, consolidating—banking regulation. Particularly as other coordination bodies—such as FSOC—lose regulatory power and political support, examination of FFIEC’s operations and efficacy may contribute to scholarly and applied understanding of effective regulatory cooperation in federalist or internationally networked regulatory systems. With respect to regulatory politics, two related findings
are notable. First, except for one comment stating that foreclosure rates were at an all-time high, there was no indication in the 2007 comments or FFIEC report of the crisis that would unfold shortly after its publication. As former Treasury Secretary Timothy Geithner (2015) observed, before the crisis banks and their examiners largely focused compliance resources on AML and consumer protection regulations, and as a result, systemic risk was seldom considered. This finding underscores the technical and political difficulty associated with anticipating and regulating issues that pose immediate costs but protracted benefits. Given the increasingly polarized nature of financial regulation and the misaligned incentives of regulated entities, it is incumbent that regulators remain attentive to the accumulation, and aggressive in the mitigation, of systemic risk. Second, many of the issues targeted for deregulation in current legislation designed to address the burdens purportedly resulting from post-GFC reforms were discussed in the 2007 EGRPRA review. Most salient among these issues is tiered regulatory regimes for small and community banks, which became the issue of bipartisan consensus upon which sweeping financial reforms are based (e.g., changes to fair lending practices, stress testing, and leverage ratios). Both before and after the

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41 FFIEC 2003-0002-0123
42 Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (S. 2155)
regularly framework established pursuant to the Dodd-Frank Act, small and community
banks argued that their regulatory burdens were inordinate and undue given their
compliance resources (2007) and their relative riskiness (2017). Thus, while debating the
merits of regulation by size is reasonable (Hoskins and Labonte 2015; OFR 2017), doing
so based on a correlation with post-GFC performance is not. While not directly related to
retrospective review, this finding also suggests areas for future theoretical work, such as
whether “fairness” should be considered in banking regulation and whether burden
should be assessed relative to potentially unquantifiable benefits. This finding also
highlights the changing political economy of banking regulation and the increasing
political power of small and community banks relative to large banks.

With respect to regulatory impact assessment, this analysis provides legibility
into how regulatory agencies balance the simultaneous demands for short-term political
responsiveness (e.g., reducing regulatory burden) with long-term technocratic mandates
(e.g., promoting resilience in the financial system). While there were few outcomes
relative to the number of rules reviewed, EGRPRA reviews appear to result in
comparatively greater policy changes than many administration-wide stock-takes,
although there is complexity in the causal relationship between reviews and outcomes
and challenges with the unit of analysis. One hypothesis is that government-wide stock-
takes may serve more political than substantive roles, providing administrations with a way for interests to be heard without fundamentally changing policy, whereas sector-specific reviews may result in the degree of information exchange and deliberation required to enhance the effectiveness of regulatory policies and rulemaking processes. The banking sector may be particularly well suited to periodic stock-takes because implementation through supervision and interaction among interagency regulations dictate that rules “as lived” will necessarily be different from rules “as written.” There is some anecdotal support for this proposition. For example, in a survey of agency officials on mandatory and discretionary retrospective reviews, GAO (2007) found the latter was generally more productive than the former, except in the case of EGRPRA, which an FFIEC member agency deemed to be substantially more productive than other types of reviews. Similarly, given the increasingly partisan nature of financial regulation, retrospective regulatory review may serve as a substitute for technical correction bills, which have historically followed large regulatory reform legislation.

As Chapters 2 and 3 in this dissertation highlight, retrospective review and participation in regulatory policymaking may enhance the effectiveness and promote the legitimacy of regulatory policies and rulemaking processes. With respect to regulatory effectiveness, stakeholder participation in retrospective review can enable
policy learning by providing information about the divergence between rules “as written” and rules “as lived.” There is some evidence of policy learning via EGRPRA reviews; for example, GAO (2007, 96) finds the EGRPRA review helped FFIEC members “reduce burden while also being valuable because there is a need for regulatory decisions to reflect current realities.” Another potential opportunity for policy learning unique to EGRPRA may be in the review of interagency rules and the review of interactions among individual agency rules in implementation. For this reason, GAO (2018b; 2018a) has called for integration of CFPB, NCUA, and FFIEC EGRPRA reviews; however, a legislative proposal to the same effect suggests the purpose of this proposal may be limiting CFPB’s authority rather than enhancing regulatory effectiveness via coordination.43 With respect to potential legitimating effects, the evidence is more limited. First, while many private interest participants celebrated review processes in 2007, in 2017 these participants criticized the 2007 reviews for not resulting in sufficient burden reductions.44 At the same time, public interest groups expressed concerns that reviews were narrowly focused on burden reduction. While review processes seemed to be relatively transparent and accessible, they were not particularly representative of the

43 Financial Regulatory Improvement Act of 2015 (S. 1484)
44 FFIEC-2014-0001-0036, 2014-0001-0093; FFIEC-2003-1-009
broad range of potentially affected stakeholders, suggesting limited input legitimacy. Reviews appeared to be responsive to participants, although the finding that participants were not representative of affected stakeholders, and that reviews included little outside data, suggests mixed evidence of output legitimacy.

With respect to participation in financial regulation more broadly, the results suggest that some progress has been made over the last ten years, but participation remains largely skewed toward regulated entities. As noted throughout this article, the technical complexity, concentration of costs, and diffusion of benefits associated with financial regulation creates a considerable collective action problem for stakeholders other than regulated entities. One potential solution to these dynamics is “personnel is policy:” ensuring regulators serve as representatives of the public interest when considering tradeoffs between burden reductions and other regulatory objectives. However, even the most public-interested civil servant needs good information, and it is apparent from EGRPRA reviews that there is a dearth of data other than that provided by regulated industry, suggesting a potential risk of epistemic capture (Baxter 2011; Kwak 2014; Pagliari 2012). Another solution is the mobilization of a more robust community of practice around financial stability; such a group could serve as a source of countervailing power (Galbraith 1954; Wittman 2010). The policy shock of the GFC
provided an opportunity to overcome some of the collective action problems inherent to financial regulation. Yet, as we move toward the tenth anniversary of the crisis peak, and as proposals based on collective amnesia about the causes of the crisis become more politically viable, it is perhaps important to reassess how to maintain this momentum.

Work on post-crisis framing and moral narratives (Mayer 2014; 2017), which have been effectively applied after crises in other policy domains, might inform public relations strategies for financial stability as the “shock” of the GFC fades.

Outgoing FDIC Chairman Martin Gruenberg (2017) recently observed, “the seeds of banking crises are sown by the decisions banks and bank policymakers make when they have maximum confidence that the horizon is clear.” Similarly, a recent International Monetary Fund paper finds that throughout history and across market economies, the politics of post-financial crisis booms tend to drive deregulation, and this pro-cyclical approach to financial regulation, in turn, tends to drive future financial crises (Dagher 2018). Retrospective review of banking regulation may be an important tool for policymakers to ensure banking regulation remains responsive to emergent risks in increasingly interconnected and complex financial market systems. Given the complexity and opacity of financial markets, participation may be an integral component of retrospective review. Yet, this analysis of EGRPRA reviews suggests that
while government-market interactions have changed considerably since the GFC, much work remains for retrospective review and stakeholder participation therein to enable more effective and legitimate banking regulations and rulemaking processes.
5. Conclusion

This dissertation explores the intersection of governments and markets through the lens of stakeholder participation in regulatory policymaking. It comprises three articles on the causes and consequences of stakeholder participation in regulatory policymaking across distinct institutional contexts. By evaluating how interactions among regulators and external stakeholders in the regulatory policymaking process impact the effectiveness of regulatory policy outcomes, this dissertation seeks to inform the theory and practice of effective regulatory governance, and in so doing, realize Duke’s (2017, 9) commitment to “knowledge in the service of society.”

The first article (Chapter 2) evaluates the evolution of stakeholder participation in regulatory policymaking and presents an analytical framework for evaluating participation processes. Based on a historical-institutional analysis of participatory institutional design in the United States over the last century and a review of the extant interdisciplinary theoretical and empirical literature, the article proposes a novel causal process model. This model both formalizes a theoretical approach to defining participatory effectiveness and informs empirical approaches to measuring the effectiveness of participation in regulatory policymaking. The results suggest that while it may not be possible to define participation absolutely as effective or ineffective, it is
possible to evaluate effectiveness contextually, that is, vis-à-vis the purposes of participation as conceptualized in government policy and in practice.

The second article (Chapter 3) evaluates the effectiveness of stakeholder participation in institutionalizing ex post impact assessment. Drawing on content analysis of an original dataset of government documents and public input, the article analyzes participatory institutional design, the level and composition of resulting participation, and the effectiveness of participation processes. The results suggest that participation processes were effective with respect to the purposes of participation identified in government documents and the extant literature: policy learning and process legitimacy. These findings offer evidence that under certain circumstances regulatory agencies may use participation to enhance technocratic expertise and promote democratic accountability, and in so doing provide a preliminary empirical validation of the model proposed in the first article (Chapter 2).

The third article (Chapter 4) evaluates how the global financial crisis (GFC) shaped banking regulatory processes and stakeholder participation in banking regulation, and explores the implications for the effectiveness of post-GFC financial regulatory governance. Using comparative case studies, within case process tracing, and content analysis of an original dataset of government documents and public input, the
article analyzes the extent to which changes in banking regulatory review processes, participation, and outcomes can be attributed to the policy shock of the GFC and/or shifting political, regulatory, and/or market contexts. The results suggest government-market interactions have changed considerably since the GFC, and that regulatory politics explain many of these changes. While retrospective review and stakeholder participation therein may enable more effective and legitimate regulations and rulemaking processes, much work remains to realize these potential benefits in banking regulation. These findings underscore the importance, as noted in the first article (Chapter 2), of both context and consequence in the causal chain connecting stakeholder participation and regulatory policy outcomes.

Synthesizing the findings of these articles yields several implications for the design and evaluation of stakeholder participation in regulatory policymaking. With respect to participatory institutional design, the articles in this dissertation highlight the importance of context. When designing participation processes, policymakers should be attentive to the purpose of participation (Chapter 2/Article 1); the regulatory policy cycle stage (Chapter 2/Article 1); the salience and complexity of the regulatory issue (Chapter 3/Article 2); and the broader political, regulatory, and market conditions (Chapter 4/Article 3). Doing so enables identification of the modes and timing of stakeholder
outreach and engagement that most efficiently balance the potential benefits of participation with the potential costs. When evaluating participatory processes, scholars and policymakers should consider both the consequences of participation as well as the causes. Understanding the underlying causal processes can enable not only evaluation, but also promotion, of participatory effectiveness through participatory institutional design. Thus, just as retrospective review of regulation may inform the design of subsequent rules, the iterative practice of design, implementation, and evaluation of stakeholder participation processes may inform the development of more effective regulatory policymaking processes, and in turn, regulatory policy outcomes.
Appendix A: Major Government Actions Addressing Participation in Regulatory Policymaking (1941-2017)

<table>
<thead>
<tr>
<th>Date</th>
<th>Type</th>
<th>Title</th>
</tr>
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<tbody>
<tr>
<td>1941</td>
<td>Government Report</td>
<td>United States Attorney General’s Committee on Administrative Procedure</td>
</tr>
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<td>1960</td>
<td>Government Report</td>
<td>Report on Regulatory Agencies to the President-Elect</td>
</tr>
<tr>
<td>1977</td>
<td>Government Report</td>
<td>Senate Committee on Governmental Affairs</td>
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<tr>
<td>Year</td>
<td>Type</td>
<td>Title</td>
</tr>
<tr>
<td>------</td>
<td>-------------------</td>
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</tr>
<tr>
<td>1985</td>
<td>Presidential</td>
<td>EO 12498: Regulatory Planning Process (50 FR 1036)</td>
</tr>
<tr>
<td>1992</td>
<td>Presidential</td>
<td>Memorandum on Reducing the Burden of Government Regulation</td>
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<tr>
<td>1993</td>
<td>Presidential</td>
<td>EO 12866: Regulatory Planning and Review (58 FR 51735)</td>
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<td>2007</td>
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<td>EO 13422: Further Amendment to Executive Order 12866 on Regulatory Planning and Review (72 FR 2763)</td>
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<td>2011</td>
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<td>EO 13579: Regulation and Independent Regulatory Agencies (76 FR 41587)</td>
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<td>EO 13610: Identifying and Reducing Regulatory Burdens (77 FR 28469)</td>
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## Appendix B: Empirical Studies of Participation in U.S. Regulatory Policymaking by Regulatory Policy Process Stage, Participation Mode, and Policy Area

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<th>Citation</th>
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### Appendix C: Summary of Retrospective Review Activity for U.S. Federal Agencies (n=39)

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<th>Reviews Completed by August 2013 (GAO 2014)</th>
<th>Total Comments Reported in Agency Plans</th>
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† Independent agency per 44 U.S.C. § 3502(5) or organic/enabling statute
‡ Included in initial sample
Appendix D: Replicated Analysis of EGRPRA Comments With and Without Form Letters

Replicated analysis with form letters includes all data in sample (n=891). Replicated analysis without form letters excludes all form letters except the first occurrence of each form letter (n=397). Recall that number of comments by submitter category and by issue area are mutually exclusive, but all other categories are not mutually exclusive because comments may include more than one recommendation or type of evidence.

Number of Comments by Submitter Category

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## Number of Comments by Issue Area

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<td>8.2% 37.3% 17.3% 28.6% 7.7% 0.9%</td>
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<td>18 82 38 63 17 2</td>
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<td>AML; Safety and Soundness; Securities</td>
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<td>18 82 38 63 17 2</td>
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### 2017 With (n=228) and Without (n= 159) Form Letters

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<td>Consumer Protection; Directors, Officers and Employees; Money Laundering; Newly Listed Rules</td>
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<td>27.0% 12.6% 6.3% 54.1%</td>
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<td>Rules of Procedure; Safety and Soundness; Securities</td>
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232
**Number of Comments by Revisions Suggested**

*With Form Letters (n=819)*

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*Without Form Letters (n=397)*

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<th>Increase Regulation</th>
<th>Preserve Status Quo</th>
<th>Procedural</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(n=220)</td>
<td>145</td>
<td>13</td>
<td>14</td>
<td>19</td>
<td>102</td>
</tr>
<tr>
<td>2017</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(n=159)</td>
<td>61</td>
<td>18</td>
<td>68</td>
<td>32</td>
<td>61</td>
</tr>
</tbody>
</table>

233
Number of Comments by Evidence Type Provided

**Evidence Type With Form Letters (n=819)**

<table>
<thead>
<tr>
<th></th>
<th>Benefits</th>
<th>Burdens</th>
<th>Outdated or Unnecessary</th>
<th>Other Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>122</td>
<td>485</td>
<td>462</td>
<td>26</td>
</tr>
<tr>
<td>(n=591)</td>
<td>20.6%</td>
<td>82.1%</td>
<td>78.2%</td>
<td>4.4%</td>
</tr>
<tr>
<td>2017</td>
<td>171</td>
<td>56</td>
<td>64</td>
<td>19</td>
</tr>
<tr>
<td>(n=228)</td>
<td>75.0%</td>
<td>24.6%</td>
<td>28.1%</td>
<td>8.3%</td>
</tr>
</tbody>
</table>

**Disaggregation of Burdens With Form Letters (n=541)**

<table>
<thead>
<tr>
<th></th>
<th>Operational Cost</th>
<th>Opportunity Cost</th>
<th>Relative Burden</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>460</td>
<td>11</td>
<td>315</td>
</tr>
<tr>
<td>(n=485)</td>
<td>94.8%</td>
<td>2.3%</td>
<td>64.9%</td>
</tr>
<tr>
<td>2017</td>
<td>40</td>
<td>18</td>
<td>19</td>
</tr>
<tr>
<td>(n=56)</td>
<td>71.4%</td>
<td>32.1%</td>
<td>33.9%</td>
</tr>
</tbody>
</table>

**Evidence Type Without Form Letters (n=397)**

<table>
<thead>
<tr>
<th></th>
<th>Benefits</th>
<th>Burdens</th>
<th>Outdated or Unnecessary</th>
<th>Other Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>36</td>
<td>120</td>
<td>141</td>
<td>25</td>
</tr>
<tr>
<td>(n=220)</td>
<td>16.4%</td>
<td>54.5%</td>
<td>64.1%</td>
<td>11.4%</td>
</tr>
<tr>
<td>2017</td>
<td>104</td>
<td>55</td>
<td>63</td>
<td>19</td>
</tr>
<tr>
<td>(n=159)</td>
<td>65.4%</td>
<td>34.6%</td>
<td>39.6%</td>
<td>11.9%</td>
</tr>
</tbody>
</table>

**Disaggregation of Burdens Without Form Letters (n=175)**

<table>
<thead>
<tr>
<th></th>
<th>Operational Cost</th>
<th>Opportunity Cost</th>
<th>Relative Burden</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>95</td>
<td>11</td>
<td>50</td>
</tr>
<tr>
<td>(n=120)</td>
<td>79.2%</td>
<td>9.2%</td>
<td>41.7%</td>
</tr>
<tr>
<td>2017</td>
<td>39</td>
<td>17</td>
<td>18</td>
</tr>
<tr>
<td>(n=55)</td>
<td>70.9%</td>
<td>30.9%</td>
<td>32.7%</td>
</tr>
</tbody>
</table>
References


Bush, George W. 2007. Executive Order 13422—Further Amendment to Executive Order 12866 on Regulatory Planning and Review. 72 Federal Register 2763.


Trump, Donald J. 2017b. Executive Order 13777—Enforcing the Regulatory Reform Agenda. 82 Federal Register 12285.


Wittman, Donald. 2010. “The End of Special Interests Theory and the Beginning of a
Cambridge; New York: Cambridge University Press.


Biography

Mercy Berman DeMenno was born in Albuquerque, New Mexico. Mercy graduated summa cum laude from the University of New Mexico in 2010 with a Bachelor of Arts (BA) degree in Political Science and a University Honors Program Distinction in International Studies. As an undergraduate student, she was a Regents’ Scholar and was inducted into the Honor Society of Phi Kappa Phi and the Phi Beta Kappa Society. Mercy also led several student organizations, including serving as president of College Democrats.

In 2011, Mercy received a Master of Business Administration (MBA) with a concentration in Policy and Planning from the University of New Mexico’s Anderson School of Management. As a graduate student, she was an Anderson-Roberts Fellow, a Graduate Studies Star Scholar, and valedictorian of her MBA cohort. Mercy also led several student organizations, including serving as president of Net Impact.

In 2016, Mercy received a Master of Arts (MA) in Public Policy from Duke University’s Sanford School of Public Policy, where she will also receive a Doctor of Philosophy (PhD) in 2018. At Duke, Mercy was a Joel L. Fleishman Civil Society Fellow, a Rethinking Regulation Program Graduate Scholar, a Kenan Institute for Ethics Graduate Fellow, and an Affiliate of Duke Law’s Global Financial Markets Center. She
also co-chaired the Bass Connections Student Advisory Council and founded and led the Rethinking Regulation Graduate Student Working Group.

Mercy’s research has been published in peer-reviewed journals and academic books and delivered to policymakers in technical reports and policy briefs. Beyond her academic work, Mercy has substantial professional policy analysis and strategy experience spanning the state, federal, and international levels.