

An Empirical Window into Retrospective Review

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Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 **N.Y.U. L. Rev.** 183 (2017), available at [SSRN](#).

Retrospective review remains a hot topic in administrative law. [The Administrative Conference of the United States](#) and the [American Bar Association](#) have both recently advanced recommendations to improve agency review of existing regulations. As I have explored [elsewhere](#), the Portman-Heitkamp [Regulatory Accountability Act](#) would amend the Administrative Procedure Act to encourage retrospective review. The Obama Administration [had](#) also [encouraged](#) it, and the Trump Administration has embraced an even more aggressive form of retrospective review in its “one-in, two-out” regulatory budgeting [executive order](#).

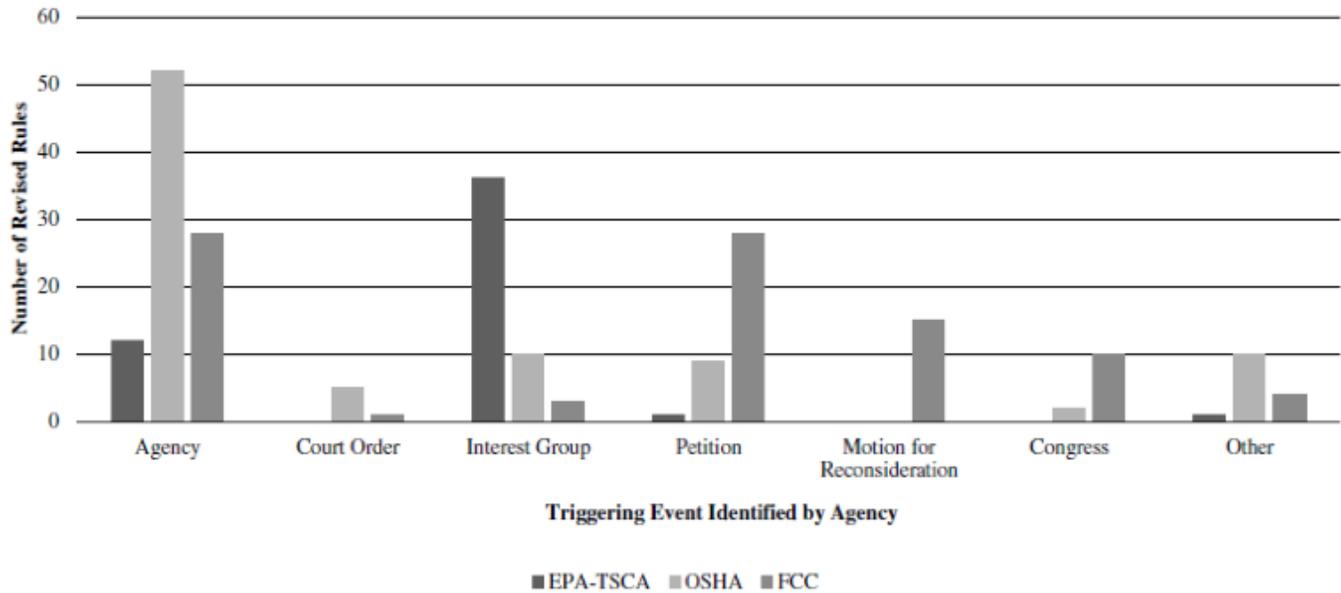
Despite bipartisan calls for more-rigorous retrospective review, we have little empirical insight into how agencies review regulations today. Enter a groundbreaking new study by [Wendy Wagner](#), [William West](#), [Thomas McGarity](#), and [Lisa Peters](#).¹ In *Dynamic Rulemaking*, which was published in the *NYU Law Review*, the authors present the findings of their study of the rulemaking process with respect to four programs at three agencies: the Environmental Protection Agency (EPA), the Federal Communications Commission (FCC), and the Occupational Safety and Health Administration (OSHA). In total, they analyze 183 parent rules and all 462 revisions of those rules since the 1970s. This article is a must-read for those of us interested in agency rulemaking.

The study’s headline is that the agencies revised nearly three-fourths of original rules at least once (73%), if not multiple times. Indeed, revised rules (462 rules) outnumbered parent rules (183 rules) by a factor of 2.5. In other words, for decades the EPA, FCC, and OSHA have been involved in substantial retrospective review of existing rules. Or, as the authors put it, “[t]he rich revision activity reveals a vibrant ‘culture’ of dynamic rulemaking that occurs without formal commands or directives, even in settings where those formal requirements are in place.” (P. 217.)

The depth and breadth of the authors’ analysis serve as a model for others to emulate. For example, they code for the extent of revision at issue, the means of soliciting public input, the apparent impetus for the revised rule, and the adequacy of the agency’s explanation for rule revision—just to name a few. They have also published online a dozen case studies on a small, medium, and large dynamic rulemaking from each agency program: [EPA Air Toxics Small/Medium Rules](#), [EPA Air Toxics Large Rule](#), [EPA TSCA Rules](#), [FCC Rules](#), [OSHA Rules](#). These case studies are great resources for the classroom and for further research. But perhaps more importantly, they provide important qualitative texture for the study’s quantitative findings.

Consider one set of findings: the impetus for rule revision. As detailed in Figure 7, the preambles of the revised rules indicate that interest group input as well as petitions for rulemaking and motions for reconsideration triggered many revisions, whereas congressional, presidential, or judicial oversight appeared to play a lesser role. (P. 218, reproduced with permission below.)

FIGURE 7. NUMBER OF REVISED RULES WITHIN EACH AGENCY PROGRAM EXPLICITLY LINKED TO VARIOUS TRIGGERING EVENTS



As the authors explain, however, their qualitative case studies reveal that “courts were nevertheless an important force behind some of the more significant changes.” (P. 218.) The influence of Congress or the President on dynamic rulemaking, the authors note, “was slim or nonexistent in the vast majority of cases”—though the case studies illustrate several examples of congressional influence. (P. 219.) Notwithstanding presidential mandates for retrospective review in certain circumstances, moreover, the authors find that such an express requirement “was rarely cited as a trigger for revision.” (P. 220.) This wonderful mix of quantitative and qualitative analysis provides a much richer description.

What should we make of this phenomenon of “dynamic rulemaking”?

After developing a helpful typology of dynamic rulemaking in Part III, Part IV of the article sketches out the virtues and vices of dynamic rulemaking. As for the virtues, such dynamism underscores that the studied agencies are constantly reevaluating the wisdom of existing rules and modifying them to take account of changed circumstances, unexpected outcomes, and unintended consequences. These findings have obvious and important implications for theories of agency ossification in rulemaking.

As for the vices, dynamic rulemaking may take place through less-transparent processes than the original rule—often without public comment or centralized presidential review. One of the authors’ more provocative conclusions is that “at least some of this dynamism occurs in response to information provided formally or informally by regulated parties, with the diffuse public potentially on the losing end of the stick.” (P. 241.)

From these findings, the authors seem to express skepticism about calls for more-formalized, agency-wide retrospective review. In the Introduction, for instance, they contend that calls for more-formalized “retrospective review reflect the assumption that agencies are not already actively engaged in revising their regulations in light of real-world implementation experience and changes in the physical,

economic, and political environments.” (Pp. 186-87.) In the Conclusion, they similarly argue that “the largely reactive process of dynamic rulemaking is arguably more efficient and reliable mechanism for identifying ‘unnecessary regulatory burdens’ than resource-intensive lookback requirements.” (Pp. 260-61.)

But those of us who support more-formalized, agency-wide retrospective review may alternatively read the study’s findings to provide some significant empirical support. After all, the study demonstrates that federal agencies can (and at least three do) engage in retrospective review on an ongoing basis. The study shows that the agencies believe their rules should not be static, but must be routinely updated. At the same time, however, the study reveals that retrospective review differs in substantial respects at the EPA, FCC, and OSHA. And, as noted above, the authors suggest that interest-group pressures may distort informal retrospective review.

That last finding merits further examination. If interest groups drive agency rule revision contrary to the public interest, more-formalized, agency-wide retrospective review is all the more important. But the same is true if this interest-group distortion turns out to be less of a problem than the authors suggest and many agencies already engage in effective retrospective review of their entire regulatory scheme. Under those circumstances, a more-formalized review process should not impose significant burdens on those successful agencies while producing substantial benefits for any agencies not already engaged in effective retrospective review through less-formal means.

In all events, the authors are cautious in advancing arguments for or against more-formalized retrospective review based on their study, refusing to generalize their findings beyond rulemaking with respect to the four programs at the three agencies analyzed in their study. Such caution is admirable. Perhaps most agencies already engage in the level of dynamic retrospective review this study uncovers at the EPA, FCC, and OSHA. That would be excellent news, especially if interest group pressure does not distort such review in a way that undermines the public interest. Although the authors’ study does not endeavor to assess the state of dynamic rulemaking across the modern administrative state more generally, it provides a critical empirical window into how three agencies approach retrospective review today.

Much more empirical and theoretical work needs to be done, and I hope this pioneering study will spark that further inquiry.

1. Professor Wagner presented an early draft of this paper at a terrific [empirical rulemaking conference](#) that I attended in February 2015, hosted by Susan and Jason Yackee at the University of Wisconsin.

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