Rulemaking's Puzzles

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Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 **Admin. L. Rev.** 1 (2015), available at SSRN.

It is puzzling. Administrative agencies continue to produce thousands of rules each year in the face of an accumulation of procedural requirements that administrative law scholars say have ossified rulemaking and even led some agencies to retreat from rulemaking altogether.

How can this be? How can federal regulatory output be "rising steadily for decades" notwithstanding procedures that have created a supposedly "confusing labyrinth through which agencies seeking to adopt rules must grope"? As someone who has long been puzzled by the seeming contradiction between expectations and reality, I liked reading Connor Raso's recent article, *Agency Avoidance of Rulemaking Procedures*, because it offers a persuasive, even if partial, answer to a core conundrum about rulemaking, along with thoughtfully-analyzed, supportive empirical evidence.

To see how much there is to like about Raso's study, the reader will need to be familiar with the concept known as rulemaking ossification. For decades, administrative law scholars have lamented ossification and the corresponding loss of an earlier era of simple rulemaking. They have believed that agencies, besieged by procedural steps and intrusive, uncertain judicial review, have come to be nearly as burdened by so-called informal rulemaking as they had previously been with its more formal adjudicatory counterparts.

Rulemaking has purportedly grown slow and cumbersome. And yet, despite the nearly universal acceptance of the view of an ossified regulatory process, empirically-oriented scholars such as Anne Joseph O'Connell, Susan Yackee and Jason Yackee, and me have shown quite clearly that agencies continue to produce a large number of rules even in a supposed era of rulemaking retreat.

Again, how can this be? If agencies have retreated from rulemaking, or even if rulemaking has just slowed down substantially, then this should mean fewer rules, not a continued outpouring. Rulemaking's puzzle persists. How do we solve it? This is where Raso's interesting new study comes in. He shows that rulemaking procedures in practice are not as burdensome as they seem because agencies are able to avoid certain procedural steps. In other words, what looks to be layer upon layer of procedures *on the books* does not equate to heavy procedural burdens *in action*.

Consider that Raso finds that:

- In more than 92% of federal rulemakings from 1996-2012, agencies did not produce the analyses that the Regulatory Flexibility Act (RFA) requires for rules that will have a "significant economic impact on a substantial number of small entities." Sixty-two percent of "major rules"—those that by definition should have the most substantial impacts—also lacked these analyses.
- In more than 99% of rulemakings during the same period, agencies did not produce written statements that the Unfunded Mandates Reform Act (UMRA) requires for rules that would impose annual private sector costs greater than $100 million. Even about 80% of all major rules lacked

these statements. ("Major rules" are defined as those that would have $100 million in annual economic impacts, which encompass both benefits as well as costs.)
- Agencies even avoided the defining feature of informal rulemaking—its notice and comment requirements under the Administrative Procedure Act (APA)—in nearly 52% of the proceedings completed during this same period.

Such seemingly widespread avoidance behavior arises, according to Raso, because of exceptions and ambiguities in the procedural "requirements" themselves. It is not necessarily the case that agencies are violating the law. On the contrary, by their very terms administrative law statutes often contain exceptions; they are not intended to apply to each and every rule. As already noted, RFA and UMRA only apply to rules with certain kinds of expected impacts (although Raso suggests that agency avoidance occurs even with high-impact rules). The APA also contains express exceptions to its notice-and-comment requirements, such as a catch-all exception for "good cause." Especially with vague terms like "good cause," procedural standards and exceptions sometimes admit room for interpretation. Raso suggests that agencies at times exploit ambiguities to claim that they have no obligation to follow a procedure they would rather not follow.

Raso is certainly not the first to call attention to agency avoidance of rulemaking requirements. But with this latest study of his, and with another study of his, he has clearly done more than anyone else to document systematically the extent to which procedural requirements are not applying to—or are at least not being applied to—a substantial number of agency rulemakings.

In this respect, Raso's contribution may well be viewed as compatible with a recent defense Richard Pierce has made of the ossification thesis. In contrast with earlier scholarship, Pierce argues there is no general ossification of rulemaking; rather, he argues, there exists only an ossification of a subset rulemakings that "raise controversial issues where the stakes are high."

Pierce's qualification marks an important shift in nearly twenty years of legal scholarship about rulemaking's ossification, which from the earliest days appeared to have been about rulemaking generally and not just a subsample of the most difficult rulemakings. For example, Jerry Mashaw and David Harfst, in their widely admired research on rulemaking at the National Highway Traffic Safety Administration (NHTSA), compared NHTSA's "total rulemaking output" before and after the agency's loss in the courts.

But we need not dwell on how much of a retreat or concession Pierce appears to have made because, even on its face, it is not clear what a narrowing of ossification's domain accomplishes in terms of solving the basic puzzle. Agencies, after all, continue not just to produce a large number of rules, but also to produce many rules with great economic impact. The rules adopted in the Obama Administration, for example, have been estimated to generate notably greater costs and benefits than those adopted in the preceding Bush Administration. In the absence of evidence that the economic impacts of regulation have systematically declined, skepticism about ossification, even in its qualified sense, would seem to be justified.

Moreover, if procedurally-induced ossification applies only to rules that, in Pierce's words, "raise controversial issues where the stakes are high," then we have to struggle mightily to accept that the "long time" and "extensive commitment of agency resources" that these rules appear to demand—in other words, their ossification—stems from procedural hurdles and judicial review rather than their controversial, high-stakes nature. Heightened controversy and high stakes, after all, matter greatly in slowing down or impeding decisions in any institutional setting, even those lacking in rulemaking's procedural hurdles and judicial oversight.

Of course, Raso does not sort out how much rulemaking may be delayed by controversy, by procedures, or by an interaction of both—nor does he pretend to. Rather he argues, appropriately, for "a more nuanced empirical analysis of how rulemaking procedures may plausibly contribute to ossification." This means scholars should not be too quick to overstate the extent to which adding new procedures will seriously impede agencies from regulating.

A central part of Raso's nuanced account centers on litigation risk, so in this respect his work may seem to resonate well with proponents of the ossification hypothesis. Raso argues that agency avoidance decreases as the threat increases of successful litigation against agencies on procedural grounds. For each of the statutes under examination—the APA, RFA, and UMRA—Raso admirably seeks to go beyond anecdotes and identify the number of reported cases raising issues of procedural compliance as well as tally up the percentage of agency losses in these cases. He concludes that the litigation risk associated with procedural compliance with the APA is "moderate," while the litigation risks under RFA and UMRA are "little." These characterizations seem to correspond in roughly inverse fashion to the levels of avoidance Raso reports: 52% of rules do not follow notice and comment under the APA, compared with 92% and 99% of rules lacking analyses called for under the RFA and UMRA, respectively.

Raso's conclusions are intuitively appealing and his evidence suggestive. Of course, the precise relationship between litigation and avoidance is not necessarily so easy to nail down. Despite data on tens of thousands of rules and hundreds of lawsuits, Raso's litigation risk theory is essentially tested with only a "sample" size of three, the cases of the APA, RFA, UMRA. Moreover, his characterization of litigation risk as "little" or "moderate" is highly qualitative. Raso does report that courts entertained claims of procedural noncompliance with RFA in 72 cases, which "constituted less than one-third of 1% of the 24,787 finalized rules listed in the *Unified Agenda* during this period" (.002). But then, the 156 APA procedural avoidance cases in this same period seem extremely "little" too, amounting to less than two-thirds of one percent of all the rules (.006). Raso also tells us that, among this tiny fraction of APA cases, the agency prevailed 67% of the time. Even though qualitatively the courts' reasoning in the APA cases may have seemed somewhat less predictable, the line separating "little" litigation risks and "moderate" ones appears to be a very fine one indeed.

Virtually any thoughtful and innovative empirical study, like Raso's is, will raise questions and invite further analysis. Some more puzzles await further exploration. For example, even though Raso refers to a study showing that the EPA and FCC face the highest litigation risk, he reports that these agencies have surprisingly different APA avoidance rates: 15% for the FCC and 45% for EPA. (His treatment of litigation risk also never controls for the underlying *potential* number of lawsuits, a limiting factor in understanding actual risk, and it relies on those cases that resulted in reported decisions, not also those resulting in settlements.) Moreover, despite the adoption of amendments to the RFA in 1996 that authorized judicial review of agency avoidance of the statute's procedural requirements, the rate at which most agencies conducted "reg-flex" analyses basically remained constant over time.

Still, what is refreshing about Raso's approach is the careful, dispassionate way he marshals data to tackle an important question. We could benefit from more research like this throughout the field of administrative law. Raso also offers a valuable lesson about the power of procedures: as with a metal chain, they will only be as strong as their weakest link—or their most flexible exception. In addition to his empirical findings, Raso provides his readers with an especially thoughtful account of the jurisprudential and political challenges in achieving legal precision in procedural exemptions, and he further explains how the ambiguities in many procedural statutes contribute to inconsistent judicial outcomes.

If Raso is right that litigation risk is key to explaining compliance with rulemaking procedures, this should matter greatly in contemporary debates over regulatory reform. Most critics of the House-passed

Regulatory Accountability Act (RAA) have fixated on its benefit-cost requirements and the ways it would impose still more formal procedures on an already procedurally-burdened regulatory state. Yet following Raso's focus on litigation risk, critics of the RAA might instead wish to call more attention to the provision it contains which would impose both the opportunity for immediate judicial review as well as additional procedural obligations whenever an agency invokes an exception to notice-and-comment requirements to issue an interim rule. That provision in the RAA, perhaps more than any other one, could well be what most determines whether the bill, if ever signed into law, would deliver the benefits its advocates promise—or would result in the costs its opponents fear.

Then again, the relationship between procedural change and administrative behavior remains far from well understood. After all, as I already noted, the addition of a statutory provision authorizing judicial review of exceptions to RFA requirements apparently made very little difference in decreasing agency avoidance under that statute. Raso suggests that part of the explanation may stem from case law under the RFA that remains, after nearly two decades, still "lenient, undeveloped, and ambiguous." We cannot be sure that the RAA, if it ever became law, would not succumb to similar slippage. Political scientist Stuart Shapiro's research even suggests that procedural regulatory reforms never work as intended.

Overall, Raso's recent article serves as another reminder that administrative law operates in a highly complex, dynamic organizational and political environment. It really shouldn't be surprising that things are not always as they should seem, at least not if expectations are based on simplistic conceptions of the behavioral effects of administrative procedures. Perhaps in the end, the real puzzle to be solved is why so many lawmakers, advocates, and scholars continue to place so much confidence in their beliefs about how rulemaking procedures will affect regulatory outcomes, whether for good or for ill.

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