White Shoes, Hidden Hands: Lawyers, Lobbying, and the Administrative State

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Chapter 2 - Growth of Administrative State and Stakeholder Engagement

Introduction

Almost 40 years ago, a team of scholars working at the intersection of interest group politics and the sociology of the legal profession observed that in Washington DC, "lawyers predominate in fields in which the primary institutional actors are the courts or regulatory agencies… the subfields in which lawyers are underrepresented are those in which the principal activity takes place in Congress" (Nelson et al. 1988). They found, for example, that 28% of special interest advocates in the Congress-focused policy domain of agriculture have a JD, while 42% had a JD in the court and agency-oriented area of labor policy. To be sure, some might wonder whether it is really right for Nelson and coauthors to say that lawyers are an *underrepresented profession* if only *one in four* lobbyists has that background. Indeed, data from the Bureau of Labor Statistics suggests that roughly one in two-hundred Americans is employed as a lawyer. In a crass statistical sense, therefore, lawyers appear hugely *over*-represented in all areas of policy advocacy, even in those areas where they are fewest and farthest between. Nevertheless, Nelson and coauthors' point about relative prevalence is well-taken: lawyers seem likely to play a more dominant role in institutional contexts that favor their background.

At times, the reasons why some institutional venues privilege certain interests and modes of influence-seeking appear fairly obvious. Reelection-minded politicians in Congress rely heavily on advocates with connections to electorally significant constituencies. Lawyers seem to have no special advantage in attempting to speak for such groups, indeed they likely have important disadvantages relative to other professions, and Nelson and coauthors' data bears that out. "When an issue comes up about milk, for example, I want to know . . . what members of the National Milk Producers think," long-serving Senator Bob Dole (Rep. Kansas) is reported to have said, "That's because I know the Milk Producers Federation represents dairy farmers. I may not always agree with them but I know what Dairy Farmers think by talking to them. This holds for any livestock or commodity group" (Hansen 1991). By contrast, the most favorable context for lawyer advocates is certainly the judiciary. License to practice constraints make it difficult or impossible for individuals from any other profession to directly engage with judges who nevertheless make policies with wide-ranging and important effects. Indeed, in 2013, the Supreme Court adopted rules forbidding non-lawyers from arguing before them, although why the Court did so then is a bit of a mystery, since the last time a non-lawyers argued before them was in 1978.[1]

In regulatory politics, the structural sources of lawyer's apparent advantage is less obvious. Formal barriers to entry for non-lawyers are often absent, particularly around rulemaking. Lacking a connection to an electorally relevant constituency is obviously less of a liability before a policymaker that does not run for office, but one suspects there is more of a positive explanation for why lawyers get so much traction and less of a negative explanation for why other sorts of lobbyists get so little. Many would presume that lawyers dominate in regulatory arenas because of the technical and subject-matter expertise that lawyers carry. Yet on its own, this answer is also unsatisfying. As Nelson and coauthors write, "lawyers have no monopoly (and probably no comparative advantange) with respect to substantive knowledge" of policy issues on which they advocate (Nelson et al. 1988, 295). Indeed, some would go further and argue that the very limited formal training most lawyers receive in techniques of policy analysis, scientific or econometric methods, or financial modeling, would place them at a disadvantage relative to other professions where most members do have some or even a great deal of training in these analytical methods. In the next chapter, I shall discuss more fully the question of why lawyers predominate in regulatory domains, and with what effect. Here, I wish to assume the fact that the regulatory terrain is relatively favorable as a stylized fact, and instead focus on the fact that whether policy is made *in Congress* or *in the regulatory agencies* is not a fixed or static decision. Rather the terrain of conflict is itself an policy choice, one laden with important downstream consequences for who emerges victorious in political conflict and why. Moreover, *the organization of federal policymaking has changed in ways that make lawyer-lobbying systematically more important across many areas, and that direction of change is particularly accute in policy areas related to finance.*

As we shall see, the argument that I am making about the changing organization of federal policymaking is not self-evident, by any means, atlhough in many areas of scholarship (and also in important parts of the federal judicary), it is a fact that is routinely assumed. The political science litearture in particular, however, raises important conceptual doubts and pieces of evidence that must be addressed. In this chapter, I will discuss the empirical evidence for and against the claim that the location of policy activity has moved in fundamental ways toward the executive branch. I will also argue through a careful analysis of over-time changes in financial policymaking that much of the quantitative evidence rejecting the rise of the administrative state is misleading in important ways, and that in particular the growing reliance on regulatory agencies. While financial policy is perhaps an outlier in terms of the extent to which Congress abdicates its policymaking responsibilities, that in fact makes it a good case for seeing how and why quantitative measures of bureaucratic delegation can miss.

If the organization of government has changed so as to locate ever greater policymaking authority in the executive branch, then two natural questions are why is that happening and is it inevitable? Several secular trends across policy areas are commonly identified with the rise of bureaucratic policymaking responsibility, including increasing technological complexity, greater public and interest group demands for federal policy, and rising polarization. Turning to the case of financial policymaking, I find evidence to support all these secular explanations that are likely to apply broadly across many policy areas. That said, there is also an important role that bureaucrats and interest groups play in insulating the agency's policymaking activities from meddling and oversight. In financial policymaking, we see that the rise of agency power relative to Congress has often been a choice engineered by the agencies in close coordination with their regulated industries. As

[1] For what its worth, the individual who argued that case, Sam Sloan, was a college dropout and sometime seucrities dealer, who appeared on his own behalf and secured a unanimous verdict. His opponent in that argument, Harvey Pitt, would go on to become the Chairman of the SEC (Hallman 2020).

far as the inevitability question, the best evidence is comparative. Other comparably wealthy countries have not experienced the same degree of growth in administrative policymaking relative to administrative policymaking, in general or in the financial regulatory domain, despite exposure to very similar trends toward increasingly complex technology, financial systems, and so forth. While the growing role of lawyer-lobbying in the United States has multiple causes, this comparative evdience suggests the degree of delegation is not an inevitable or unavoidable outcome.

If the organization of federal policymaking has resulted in the concentration of greater policymaking authority in the executive branch, it follows that a different sort of interest group politics around these agencies should emerge (Lowi 1979). Indeed, the legal academic literature has rung it hands at great length about the "democratic deficit" that follows from the rising administrative state, which organizationally expresses itself very directly in the changing nature of lobbying and the changing professional identities of lobbyists. Yet a natural question is whether and to what extent stakeholder engagement and governance may have changed so as to compensate and "keep up" with the changing organization of policymaking. The simple answer is that it has not kept up, in the financial agencies or anywhere really, although there have been important efforts to do so. The result is that the regulatory lobbying sector has grown increasingly important, yet remains startlingly unregulated, and seemingly as "above politics" as the very regulators they lobby.

The Increasingly Administrative Organization of US Policymaking

- US Supreme Court assuming that the delegation has gotten out of control.
- Discussion of much qualitative literature routinely assuming the growth.
- Frustrating debates in political science.
  - Empirical evidence
  - Conceptual doubts
- More recently updated approaches. Conclusion about what seems more persusive.

The Rise of the Financial Regulatory State

- What is financial regulation? What could it be?
- When and why did financial regulation in the United States change? How could financial regulation have taken on a more Congression-heavy role?
- How does the history of financial regulation look from the perspective of quantitative political science?

Financial regulation represents a case study in the evolution of delegation. Theoretically, there are numerous goals that financial regulation may have and functions that financial regulators may serve. (**barrFinancialRegulationLaw2016?**) emphasize the protection of public claimants such as bank depositors, the reduction of externalities that follow from the failures of financial institutions, and the advancement of other equity or economic goals, such as ensuring interest rates are fair, credit is broadly accessible for all social groups, and promoting homeownership. Not mentioned, but also closely connected, are typical goals of monetary policy, which is to say right-sizing the supply of money depending on the economic circumstances. To the extent that political scientists have focused on financial regulators, they have typically emphasized the role of these actors in monetary policy due to the fraught distributive issues that monetary policies raise as well as tight connection between monetary policy, economic conditions for investors and workers, the political fortunes of incumbent politicians (**christopheradolphBankersBureaucratsCentral2013?**; **adolphMiss-**

ingPoliticsCentral2018?; **jacobsFedPowerHow2016?**; **sarahbinderMythIndependenceHow2017?**). Today, monetary policy is most frequently and directly influenced by central banks through the manipulation of interest rates on interbank loans on overnight loans from their reserve balances, but financial regulatory policies such as reserve or capital requriements also influence how much money each bank can lend. Even policies affecting bank profitability such as usury laws or checking fees can also be expected to influence lending practices and the availability of money. Adding the goals of monetary policy to the goals of financial regulation listed above does not, however, fully cover the to-do list of contemporary financial regulators. For example, providing mechanisms for the settling transactions, either directly or by supervising private schemes, is a task which the Federal Reserve and many other central banks are involved. Helping checks clear does not fit all that easily in the buckets of protecting financial market civilians, preventing runs, advancing equity, or getting the supply of money right, and we are still at the water's edge – integration with foreign markets is also an important challenge that finance and finacial regulators consider. Clearly, "other economic goals" is a rubric that contains multitudes.

If the potential goals and tasks of financial regulation seem so many and varied that they are hard to state, even more head-spinning are the possibilities for organizing government and regulation to undertake these tasks. Eddy and Howell on sectoral regulation versus functoinal regulation. The consolidated department of financial regulation versus non-consolidated question. Similar is Schooner's notion of risk based regulation. Notably, these are all very broadly delegatory concepts that we are discussing. That observation raises questions, how if at all could the regulation of finance be anything __but__ an intensely and extensively delegated exercise? Was the evolution merely the inevitable result of an increasingly large and varied financial system, or was it a political and policy choice?

To answer these questions, the best evidence is comparative across time and across institutional contexts. Starting first with history, we can look at the regulatory tasks that one important US financial regulator, the Federal Reserve, undertakes and when it started to do it. Of course, figuring out what any regulatory body (or any agent really) was doing at any particular time in an objective and systematic way is no easy feat, but as an illustration it makes sense to think about the distinct regulations that the Federal Reserve adopts and enforces. Currently, the Federal Reserve has a Regulation A ("Extensions of Credit by Federal Reserve Banks"), a Regulation B ("Equal Credit Opportunity Act"), all the way down to a Regulation ZZ ("Regulations Implementing the Adjustable Interest Rate (LIBOR) Act"). These regulations all appear under Subchapter A ("Board of Governors of the Federal Reserve") of Chapter II of Title 12 of the Code of Federal Regulations, and any such regulations do appear in this location, and that has been the case for as long as the Code of Federal Regulations has existed (first printing 1936). In fact, a number of these regulations (e.g. Regulation A) do go all the way back to 1914 when the Fed was established. By tracking what Fed regulations appear over time in the Code of Federal REgulations, we can get a sense of how the work of this financial regulator has changed over time.

Figure ? illustrates in granular detail the expansion of the Federal Reserve's policymaking authority over the past 60 years, relying on an indexing document produced by the compilers of the CFR called the Lists of Sections Affected.[2] Each row in the Figure represents a distinct regulation, a circle marks the initiation of that responsibility, an arrow continues to the right indicating how far into time the Fed has had that authority (in most cases through to the present), and x-marks have been added to indicate points when the Fed has

[2]The 1964-1973 edition of the List of Sections Affected is the first to indicate whether parts are getting added, repealed, or modified, before that we can see what sections are affected but not in what way, which makes these earlier editions less useful for our purposes

done something to change its regulations. For the most part and viewed in this way, the tasks of the Fed appear as a one way ratchet: once the regulatory agency starts undertaking a task, it rarely stops, even if it may frequently adjust its approach in ways that large or small. Moreover, Figure also illustrates the extent to which the agency follows the secular trends driving overall regulation. Some regulatory tasks seem to respond to technologies and forms of economic organizations that did not exist previously (e.g. the London Interbank Offer Rate did not exist before the 1970s), others respond to increasing public demands for regulation by the powerful social movements of the 1960s and 1970s (e.g. the Equal Credit Opportunity Act, the Truth in Lending Act"). In a few cases, the Federal Reserve has stopped undertaking regulatory tasks, but not because the US federal government has stopped doing those tasks. In each case, a different financial regulatory agency picked up the responsibility, so the scope of delegated financial regulatory policymaking has not shrunk – it has merely changed venues. Even noted "rollbacks" of regulation such as the Gramm-Leech-Billey Act of 1999, infamous for repealing the separation of commercial and investment banks, did not obviously halt the pace of regulatory policymaking at the Federal Reserve.

Comparative Explanations and Developments

- Why the secular growth of administrative state?
  - Technology and complexity
  - Public demands
  - Polarization
- Why the growth of the financial regulatory state?
  - All the above
  - Interest group explanations
- National comparative trends
  - Secular trends (Kosti's work)
  - In financial regulation

The Evolution and Regulation of Stakeholder Governance

- The Pre-APA world
- APA
- Adjudication versus rulemaking
- Super lawyers of the past
- Kabuki theater/meetings/rule development.
- Hard-look review and legalization
- Reg Neg
- Cost benefit analysis
- Congressional review act
- Notice and spam
- Regulatory body shops and related notions.

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