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# THE POLITICAL ECONOMY OF STATE-LEVEL ADMINISTRATIVE PROCEDURE ACTS\*

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## ABSTRACT

One of the most important developments in theories of American bureaucracy has been the claim that organizational procedures that are enacted by public officials have a significant impact on the nature of both bureaucratic control and performance. This development has been accompanied, however, by limited empirical investigation. We address this gap by examining the conditions under which administrative procedure acts (APAs) are adopted by the states. In particular, we test five hypotheses derived from the literature as to when a state-level APA (SLAPA) will be adopted. In general, two conditions increase the likelihood that a SLAPA will be adopted: (1) when Democratic legislative supermajorities face a Republican governor and (2) when Democratic control is perceived to be temporary. These results indicate that existing theories emphasizing agency and dynamic effects are empirically valid, albeit with an important qualification: there is a distinctive partisan bias in the usefulness of administrative procedures for these purposes.

## I. INTRODUCTION

**M**OST students of public policy are ultimately interested in policy outcomes. Increasingly, however, scholars of the economics of regulation, law and economics, and political science have argued that the process followed in developing administrative law and policy can determine the policy outcomes that emanate from these processes. Despite these claims, however, little empirical evidence exists that actually demonstrates these effects. Further, this problem is accentuated by the fact that in order to evaluate the effects of such institutional features, it is necessary first to understand why the institutions are created in the first place.

In this paper, we take the first step in making such an evaluation by examining the political conditions behind the adoption of administrative procedure acts (APAs). These acts created a set of superordinate requirements—including rules of notice, standing, information gathering, and judicial re-

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view—that every agency must follow in making policy decisions. For example, Arizona’s APA of 1952 requires that agencies file notice of a proposed rule with the secretary of state at least 20 days prior to adoption of the rule and, further, that interested parties be allowed to comment and testify about the proposal.

We focus on these acts because of all the administrative laws, none have been more significant than the federal Administrative Procedure Act of 1946 and the similar state-level administrative procedure acts (SLAPAs).<sup>1</sup> The literature on APAs has pointed to a number of ways that these rules might affect policy outcomes. Legal scholars, for example, have argued that APAs ensure that public bureaus will follow due process and limit bias in the creation of rules.<sup>2</sup> Other scholars, however, reach almost the opposite conclusion: they argue that administrative procedures are used by policy-motivated public officials to bias agency decision making toward these officials’ preferred policies. They argue that by introducing strict limits on agency discretion, procedures ensure that outcomes will be closer to an elected officials’ ideal than if the agency had unlimited options.<sup>3</sup> A third view contends that the role administrative procedures play must be understood in a dynamic context.<sup>4</sup> According to this argument, these procedures create a “lock-in” effect—constraining both future politicians and their agents—

<sup>1</sup> Kenneth C. Davis, *Administrative Law Treatise* (1978); Arthur E. Bonfield, *State Administrative Rule Making* (1986); Mat McCubbins, Roger Noll, & Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 *J. L. Econ. & Org.* 180 (1999).

<sup>2</sup> Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *Cornell L. Rev.* 1 (1982); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J. L. Econ. & Org.* 81 (1985); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 *Va. L. Rev.* 219 (1986); Walter Gellhorn & Kenneth C. Davis, *Present at the Creation: Regulatory Reform before 1946*, 38 *Admin. L. Rev.* 511 (1986).

<sup>3</sup> Mat McCubbins, Roger Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *J. L. Econ. & Org.* 243 (1987); Mat McCubbins, Roger Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431 (1989); David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 *Am. J. Pol. Sci.* 697 (1994); David Epstein & Sharyn O’Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 *J. Pol.* 373 (1996); David Epstein & Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (1999); John D. Huber & Charles R. Shipan, *Statutory Delegation to Bureaucrats in Parliamentary Systems* (Working paper, Univ. Iowa, Dep’t Pol. Sci. 2001); John D. Huber, Charles R. Shipan, & Madelaine Pfahler, *Legislatures and Statutory Control of the Bureaucracy*, 45 *Am. J. Pol. Sci.* 330 (2001);

<sup>4</sup> Terry M. Moe, *The Politics of Bureaucratic Structure, in Can the Government Govern?* 267 (John E. Chubb & Paul E. Peterson eds. 1989); Terry M. Moe, *The Politics of Structural Choice: Towards a Theory of Public Bureaucracy, in Organization Theory: From Chester Barnard to the Present and Beyond* 116 (Oliver E. Williamson ed. 1990); McCubbins, Noll, & Weingast, *supra* note 1; Rui J. P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty and Policy Insulation*, 96 *Am. Pol. Sci. Rev.* 321 (2002); Richard G. Vanden Bergh & Rui J. P. de Figueiredo, Jr., *Political Uncertainty and Administrative Procedures, in Uncertainty in American Politics* 48 (Barry Burden ed. 2003).

and therefore act as a mechanism whereby current majorities can ensure, at a cost, that future majorities will not upset their policy intentions.

Despite the claim that APAs have a material effect on policy outcomes, scant empirical evidence demonstrates this. Further, in order to test properly for the effects of a particular institution, it is necessary to know how those institutions get selected. In the absence of such a model of selection, the posited effects could well be spurious. This paper is a first step in empirically evaluating the effect of APAs by addressing the selection question. Namely, we analyze the conditions under which state governments adopted SLAPAs. While every state eventually adopted an APA, this occurred over a 40-year period—from 1941, when North Dakota adopted its APA, to 1984, when Kansas and Kentucky adopted theirs. This variation creates a natural experiment that we believe will help close the empirical gap in the literature.

On the basis of the existing theoretical literature, we test five hypotheses that are formed from the combination of two dimensions. First, we distinguish partisan and nonpartisan theories. The latter posits that both parties can use administrative procedures equally effectively, whereas the former contends that the APA was specifically favorable to only one of the parties, making it a functional instrument only for that party. Second, we distinguish static from dynamic arguments. This dimension captures the theoretical tension between explanations that are based on actors optimizing current policy benefits and far-sighted policy makers maximizing streams of ongoing policy benefits.

We find that two factors have the greatest impact on the adoption of SLAPAs. First, Democratic legislatures will adopt them when they have a veto-proof majority and face a Republican governor. Second, Democratic legislative supermajorities or unified Democratic governments will adopt SLAPAs when they fear the future loss of power. Both results provide an important caveat to existing theory that, in large part, views administrative procedures as an unbiased instrument. Our results indicate the opposite, that despite a dual set of conditions under which they might be adopted, SLAPAs seem to have a markedly Democratic bias.

The paper proceeds as follows. In Section II, we outline the hypotheses developed from the existing theoretical literature. In Section III, we lay out the sources, structure, and measures for our data. Here we describe the cross-sectional panel data set we collected, which includes observations for all 50 U.S. states over the period from 1930 to 1984 and measures of political, institutional, and environmental variables. In Section IV, we provide descriptive statistics and analysis. In Section V, we describe the econometric procedure used to test the hypotheses. In Section VI, we discuss the results and suggest directions for future research.

## II. EFFECTS OF ADMINISTRATIVE PROCEDURE ACTS AND IMPLICATIONS FOR ADOPTION

Consider the partisan versus nonpartisan explanations alluded to above. The partisan view holds that political liberals advance their interests by creating administrative procedures that must be followed by all agencies. There are two reasons why the adoption of a SLAPA might be in the interest of political liberals. First, according to the legal literature, adoption of formal rules of administrative procedure increases the basic rights of due process and representation in the rule making and administration of public policy.<sup>5</sup> To the extent that Democrats were purely ideologically motivated and embraced an agenda to pursue civil and legal rights in the post-World War II period, Democrats were more likely to pass APAs.

In the latter part of the nineteenth century and the first half of the twentieth century, many scholars observed that there were asymmetries in the interest group environment of government agencies.<sup>6</sup> One of the main effects of the adoption of the specific elements of both the state and federal APAs—through rules of standing, requirements for public hearings, and subsidies to groups for developing standards—was to enfranchise groups previously excluded from the administrative policy-making process.<sup>7</sup> By making it easier for groups typically represented by Democrats—consumers and environmentalists, for example—to participate in a process that had largely been dominated by the regular constituency of Republicans, a SLAPA increases the likelihood that constituent interests of Democrats would obtain favorable policy outcomes. By this argument, undivided control by Democrats or supermajority

<sup>5</sup> Aranson, Gellhorn, & Robinson, *supra* note 2; Mashaw, *supra* note 2.

<sup>6</sup> Marver H. Bernstein, *Regulating Business by Independent Commission* (1955); George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J. Law & Econ.* 211 (1976); Lawrence S. Rothenberg, *Regulation, Organizations and Politics: Motor Freight Policy at the Interstate Commerce Commission* (1994).

<sup>7</sup> Rui J. P. de Figueiredo, Jr., Pablo T. Spiller, & Santiago Urbiztondo, *An Informational Perspective on Administrative Procedures*, 15 *J. L. Econ. & Org.* 283 (1999). As de Figueiredo, Spiller, & Urbiztondo points out, "One of the central properties of administrative procedures is to enable participation in the regulatory process of interest groups that previously were, for technical or incentive reasons, unable to participate. . . . [They] aid the participation of a number of previously excluded groups" (p. 285). Indeed, an examination of specific SLAPAs reveals that these procedures, in general, rarely excluded any groups and instead simply facilitate the participation of previously disenfranchised groups. Section 3 of the Massachusetts code on administrative procedure, for example, ensures that "prior to the adoption, amendment, or repeal of any regulation . . . the agency shall give notice and afford interested persons and opportunity to present data, views, or arguments" (Mass. Gen. L., ch. 30A, § 3). Similarly, the South Carolina code provides that before promulgating any rule, an agency must notify all parties and provide appropriate information to them (S.C. Code Ann., tit. 1, ch. 23, §§ 1-23-110 & 1-23-111).

control of the legislature by Democrats will, on average, increase the probability that a SLAPA will be adopted.<sup>8</sup>

The extant literature suggests two additional hypotheses by focusing on the separation of powers. According to this argument, elected officials are motivated purely by current policy outcomes that will help their reelection. This stream of literature argues that administrative procedures constrain executive policy making, thereby favoring the legislature. Therefore, agency discretion will be severely constrained through the use of administrative procedures when there is a significant divergence of policy preferences between the legislature and the executive.<sup>9</sup>

This claim, of course, ignores partisan concerns. If procedures have an inherent partisan bias, then we have a second hypothesis that reflects the separation of powers. Namely, supermajority legislative control by the Democrats when there is a Republican governor will, on average, increase the probability that a SLAPA will be adopted.

Notably, however, there is research that eschews the partisan flavor of the first two hypotheses. This literature does not suggest that administrative procedures benefit only liberal interest groups. Instead, it argues that administrative procedures can benefit both parties. If, as the papers by David Epstein and Sharyn O'Halloran and by John Huber and Charles Shipan both posit, there are no partisan biases in the use of procedures, then both political parties will be equally likely to adopt such procedures when there is a divided government.<sup>10</sup> Thus we have a competing hypothesis that a divided government will, on average, increase the probability that a SLAPA will be adopted.

All of the theories discussed thus far assume that politicians are primarily motivated by concerns for current policies. Others, however, have argued that the calculus is more forward-looking. If public officials are concerned with both current and expected future political circumstances, then they will value durable policies. According to this argument, administrative procedures are durable and can be used to insulate the current political majority against future changes in policy when control over public authority changes.

For this result to hold, Rui de Figueiredo identifies three conditions that define such an insulating mechanism.<sup>11</sup> First, it must be costly to those in power. If the mechanism is costless, then there will be no variation in adoption; it will be a dominant strategy for groups to adopt these measures.

<sup>8</sup> It might be argued that the reverse is true, that an APA has a particularly Republican flavor by making regulation more difficult to pass. Although this is not an argument that has been made in the literature, it is one that our empirical specification will be able to evaluate.

<sup>9</sup> Epstein & O'Halloran, *Administrative Procedures*, *supra* note 3; Epstein & O'Halloran, *Delegating Powers*, *supra* note 3; Huber & Shipan, *supra* note 3.

<sup>10</sup> Epstein & O'Halloran, *Administrative Procedures*, *supra* note 3; Epstein & O'Halloran, *Delegating Powers*, *supra* note 3; Huber & Shipan, *supra* note 3.

<sup>11</sup> de Figueiredo, *supra* note 4. See also Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information*, 98 *Am. Pol. Sci. Rev.* 231 (2004).

Second, the mechanism must increase benefits to future political minorities. This condition provides an incentive for the group to pay the costs when in power in exchange for gaining benefits when out of power. Finally, the mechanism must be (politically) durable; in other words, adoption itself must change the political landscape to make repeal less likely than adoption itself. Otherwise, even if weak groups institute such mechanisms when they gain a temporary moment of control, their action will be reversed when they lose power. In fact, SLAPAs exhibit each of these three characteristics.

Passing a SLAPA imposes costs on the enacting coalition. First, the enacting coalition incurs fixed costs (for example, time and political capital) to pass an act. Second, an APA constrains the action of the existing legislature. In constraining the majority then, SLAPAs also transfer gains to the minority. A legislature or executive is willing to bear these costs only if they expect to be in the minority in the future.<sup>12</sup>

The incentive to bear these costs depends on procedures being durable. The political conditions for repeal of a SLAPA *ex post* are not the same as those for adoption *ex ante*. State-level APAs enable the organization of previously unrepresented and unorganized interest groups. Because a SLAPA reduces the fixed costs of organizing, it is easier for previously excluded groups to participate. This means that the previously excluded groups have a greater incentive and greater capability to fight against repeal than they did for adoption, making repeal more difficult than adoption. In other words, the passage of the SLAPA changes the competitive political structure that makes repeal less likely than adoption.<sup>13</sup>

As a final step in positing dynamic predictions, we consider partisan differences. If a SLAPA is a uniquely Democratic instrument, we would predict that adoption of a SLAPA will be more likely when Democrats are in power and they perceive their future electoral prospects to be weak. As discussed above, however, others theorize that administrative procedures create benefits for both Republican and Democratic minorities. If these theories are correct, then any government that has control in the current period but perceives that it will lose its control in the future will have an incentive to adopt such an act.<sup>14</sup> Thus, we posit that adoption of a SLAPA will be more likely when

<sup>12</sup> Pablo T. Spiller, *Agency Discretion under Judicial Review*, 16 *Mathematical Computer Modeling* 185 (1992); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 *J. Legal Stud.* 347 (1997).

<sup>13</sup> As discussed further below, the durability of SLAPAs affects the appropriate empirical methodology employed to test our hypotheses.

<sup>14</sup> This is precisely the argument made by McCubbins, Noll, & Weingast, *supra* note 1, concerning adoption of the federal APA of 1946. It argues that the passage of the act in 1946 was no accident. Democrats, who feared losing control of the White House in 1948, passed the act as a way of securing the policies they had enacted under the New Deal. By passing the APA, Democrats empowered their constituents and thereby insulated against future agencies controlled by a Republican president adjusting policy and eliminating the gains Democrats had made in economic regulation. Up to this point, the McCubbins, Noll, & Weingast argument is

TABLE 1  
ADOPTION DATES OF STATE-LEVEL ADMINISTRATIVE  
PROCEDURE ACTS

State	Year	State	Year
North Dakota	1941	Oklahoma	1963
Michigan	1943	Georgia	1964
Ohio	1943	West Virginia	1964
Wisconsin	1943	Idaho	1965
Connecticut	1945	Nevada	1965
Indiana	1945	Louisiana	1966
Missouri	1945	South Dakota	1966
Nebraska	1945	Arkansas	1967
Pennsylvania	1945	Vermont	1967
Minnesota	1946	New Jersey	1968
California	1947	New Mexico	1969
Iowa	1951	Montana	1971
Arizona	1952	New Hampshire	1973
Massachusetts	1954	North Carolina	1973
Rhode Island	1956	Utah	1973
Maryland	1957	Tennessee	1974
Oregon	1957	Illinois	1975
Wyoming	1957	New York	1975
Alaska	1959	Texas	1975
Colorado	1959	Virginia	1975
Washington	1959	Mississippi	1976
Delaware	1960	South Carolina	1977
Florida	1961	Alabama	1981
Hawaii	1961	Kansas	1984
Maine	1961	Kentucky	1984

either party is in power and perceives its future electoral prospects to be weak.

### III. DATA AND MEASUREMENT

*Data.* To test the five predictions developed above, we use three types of data. First, for our dependent variable, we obtained the date of enactment of generic APAs in the states (see Table 1). We gathered current statute citations from the ABA Administrative Procedure Database, which was created by Florida State University.<sup>15</sup> From these citations, we were able to track the legislative history for each act by referring to the statutory code for each law (see Table A1 for a list of citations to statutes). We also verified these

consistent with the dynamic partisan hypothesis. In its view, however, the APA works in favor of minorities of either party. This implies the counterfactual that the Republicans, if faced with similar political conditions of temporary control, would have acted the same way. McCubbins, Noll, & Weingast, *supra* note 1; McCubbins, Noll, & Weingast, *Administrative Procedures*, *supra* note 3; McCubbins, Noll, & Weingast, *Structure and Process*, *supra* note 3.

<sup>15</sup> See State Resources: State Administrative Procedure Acts (<http://www.law.fsu.edu/library/admin/admin3.html>).



classifications using law review articles that tracked developments of state-level administrative law.<sup>16</sup>

The second type of data measure the political factors expected to affect the adoption of SLAPAs. This information is gathered for the time period 1930–84 to coincide with the policy innovation date (1941) and the date the last two states enacted their SLAPAs (Kansas and Kentucky). We gathered data on two main political factors. First, we gathered data on the partisan makeup of both houses of the legislature and the governor for each year. The data were obtained from the Inter-university Consortium for Political and Social Research (ICPSR) data set entitled *Partisan Divisions of American State Governments*.<sup>17</sup> Second, we account for variations in the supermajority veto override rules for each state by using data from *The Book of the States*.<sup>18</sup> Finally, we obtain data on state government expenditures from the data set in a study by de Figueiredo.<sup>19</sup>

*Measurement.* To test the hypotheses developed, we construct several measures. First, we use the dates in Table 1 to construct a dummy variable for whether a SLAPA was passed by state  $i$  in year  $t$ .

Next we construct the independent variables. We create a dummy variable that is equal to one if the governor is a Democrat and zero if he or she is a Republican. We construct two dummies that measure partisan control of the policy-making apparatus. The first of these equals one if the Democrats have political control—because the Democrats either have unified control over both houses of the legislature and the governorship or there is a Republican governor but the Democrats have sufficient supermajority control over both houses to override a veto—and zero otherwise. A second dummy reflects Republican party control.

The next set of independent variables captures the dynamic dimension by measuring expected future party weakness as the proportion of the last 10 years that the party was out of power. There is one dummy variable for each party. These measures of historical weakness imply that elected officials base their subjective estimates of winning future elections on previous results.<sup>20</sup>

<sup>16</sup> N. L. Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 *Iowa L. Rev.* 252 (1948); F. Heady, *Administrative Procedure Legislation in the States* (1952); F. E. Cooper, *State Administrative Law* (1965); Bonfield, *supra* note 1.

<sup>17</sup> W. Dean Burnham, *Partisan Division of American State Governments, 1834–1985* (1992). These data have been corrected following de Figueiredo (Rui J. P. de Figueiredo, Jr., *Endogenous Budget Institutions and Political Insulation: Why States Adopt the Item Veto*, 87 *J. Pub. Econ.* 2677 (2003)) on the basis of the information from *Council of State Governments, The Book of the States* (1935–94).

<sup>18</sup> Council of State Governments, *supra* note 17.

<sup>19</sup> de Figueiredo, *supra* note 17.

<sup>20</sup> As an alternative, we also constructed prospective measures of expected future party weakness. Implicitly, elected officials' subjective assessment of their electoral prospects could be based on a rational expectation of the future. For Democrats (Republicans), the prospective measure is calculated as 1 minus the share of the following 10 years that Democrats (Repub-

TABLE 2  
DESCRIPTIVE STATISTICS

Variable	Mean	Standard Deviation
Adoption	.041	.199
Democratic Governor	.610	.488
Democratic Control	.496	.500
Republican Control	.301	.459
Historical Democratic Weakness <sup>a</sup>	.474	.469
Historical Republican Weakness <sup>a</sup>	.723	.363
Expenditure Growth	.106	.169

NOTE.—Year and region dummy variables are excluded.  $N = 1,065$ .

<sup>a</sup> Since these are scored in terms of weakness, they sum to more than 1.

We also construct a number of control variables. These include the growth of government per capita spending, as a general control for government activity, in addition to year and region fixed effects.<sup>21</sup>

#### IV. DESCRIPTIVE STATISTICS

To begin, Table 2 presents descriptive statistics for each of the measures we use. Perhaps more instructive, Table 3 describes the frequency of different regime types and the frequency of adoption of a SLAPA by each regime. In each column is a different type of political control. The rows represent either a Democratic or Republican governor. Values presented are the proportion of times in our data set that there was the combination of control of the legislature and governorship represented by that cell.<sup>22</sup> In parentheses is the frequency of adopting a SLAPA given that combination. This is equivalent to an estimate for the hazard rate as a function of the political environment.

Three results stand out from the analysis. First, the probability that Democratic majorities adopt SLAPAs is higher than the probability that Republicans adopt them (8.3 percent versus 4.8 percent, respectively). Second, when there is a Democratic supermajority facing a Republican governor, the likelihood of adoption is substantially higher than the sample average (19.1

licans) had control of the political institutions. We present our analysis using only the historical measures. However, we obtain substantively similar results with the prospective measures.

<sup>21</sup> We follow the ICPSR regional categories in constructing these dummy variables. Specifically, the regions consist of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut; New York, New Jersey, and Pennsylvania; Ohio, Indiana, Illinois, Michigan, and Wisconsin; Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas; Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, and Florida; Kentucky, Tennessee, Alabama, Mississippi, and Louisiana; Arkansas, Oklahoma, and Texas; Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada; and Washington, Oregon, California, Alaska, and Hawaii.

<sup>22</sup> Note that we include observations only up to the point when a SLAPA was adopted (inclusive).

TABLE 3  
PARTISAN DISTRIBUTION OF OFFICES AND ADOPTION OF  
STATE-LEVEL ADMINISTRATIVE PROCEDURE ACT

Governor	Democratic Majority	Democratic Supermajority	Republican Majority	Republican Supermajority	Divided	Total
Democrat	2.0 (14.3)	43.2 (1.5)	5.4 (5.2)	3.1 (6.1)	7.3 (6.4)	61.0 (3.7)
Republican	2.5 (3.7)	4.4 (19.1)	14.1 (4.7)	13.0 (4.3)	5.0 (1.9)	39.0 (4.8)
Total	4.5 (8.3)	47.6 (3.2)	19.5 (4.8)	16.1 (4.7)	12.3 (4.6)	100.0 (4.1)

NOTE.—Data are percentage of state in sample, with the percentage of times in that state in which a SLAPA is adopted in parentheses.

percent versus 4.1 percent). This provides initial evidence in favor of the argument of Epstein and O'Halloran and of Huber and Shipan, that when there is divergence in the preferences of the legislature and governor, the likelihood of adoption increases dramatically.<sup>23</sup> Finally, when there is a simple Democratic majority and a Democratic governor, the frequency of adoption is 14.3 percent. In this case, a unified government passes a SLAPA. While it is not possible to make conclusive inferences from this descriptive analysis, one potential explanation is that weaker Democratic majorities have a higher chance of losing power and, therefore, take advantage of unified control to lock in benefits in the event they lose power. Of course, in order to test this hypothesis it is necessary to examine the data in a more sophisticated manner, a task to which we now turn.

## V. MODEL SPECIFICATION AND HYPOTHESIS TESTS

We test the hypotheses concerning SLAPAs using a one-way transition, discrete hazard analysis. We make a number of assumptions about the process of adoption. First, we assume that the transition is one-way. In other words, we assume that once a provision is adopted, it will remain. Consequently, we eliminate all observations that occur after the SLAPA has been adopted. While this is clearly not institutionally necessary, states can reverse the adoption of a SLAPA, but no state has ever repealed a SLAPA.<sup>24</sup> Our second assumption is that the hazard function can be represented by a standard normal cumulative distribution function.

Given these two assumptions, we represent the event history model as a

<sup>23</sup> Epstein & O'Halloran, *Administrative Procedures*, *supra* note 3; Epstein & O'Halloran, *Delegating Powers*, *supra* note 3; Huber & Shipan, *supra* note 3.

<sup>24</sup> We can further think about this as a test of first-time adoption of this policy. While no state has repealed a SLAPA, some states have amended their SLAPAs over time. We leave the study of the timing and character of amendments for future research.

standard probit that we condition on the event not yet having occurred.<sup>25</sup> Putting all of these assumptions together, we can construct a formal representation of this model. For a vector of covariates  $\mathbf{x}$ , we have

$$P(y_{it} = 1 | \mathbf{x}_{it}, y_{is} = 0 \text{ for } s < t) = \Phi(\beta' \mathbf{x}_{it}),$$

which can be estimated by the usual maximum-likelihood methods for a probit model.

A few points are worth noting about the implementation of this model. First, the panel nature of the data means that there exists the possibility of both heteroskedasticity and autocorrelation, which lead to inconsistent estimates of the standard errors. Therefore, to eliminate this potential problem, we recalculate the standard errors of the estimates using an adaptation of the method suggested by Whitney Newey and Kenneth West.<sup>26</sup> Second, two states—Alaska and Hawaii—were excluded because they passed a SLAPA within the first 9 years of statehood. Finally, because of their nonpartisan state politics, Nebraska and Minnesota were also excluded.

Given the above specification, we can return to the hypotheses developed in Section II to determine what would constitute evidence for each. Table 4 provides a summary of the formal hypothesis tests. For evidence that Democrats are more likely to pass a SLAPA, we would expect the coefficient of Democratic control to be positive. The second hypothesis states that when Democratic legislatures face Republican governors, they will be more likely to pass an APA. For this hypothesis to hold, we would expect that the coefficient of the interaction between Democratic control and a Republican governor to be positive. The third hypothesis states that both Republican and Democratic legislatures will be more likely to pass APAs when they face a governor of the opposite party. If this hypothesis holds, we would expect positive coefficients for the interaction between Democratic control and a Republican governor and the interaction between Republican control and a Democratic governor. For the more dynamic partisan hypothesis, we would expect that when the Democrats are in power and perceive that they have weak electoral prospects, the likelihood of adoption would increase and the

<sup>25</sup> Note that this probit model can be interpreted as a traditional hazard model. For an explicit derivation of the associated functions, see de Figueiredo, *supra* note 17. See also Kazuo Yamaguchi, *Event History Analysis* (1991); Hans-Peter Blossfeld, Alfred Hamerle, & Karl Ulrich Mayer, *Event History Analysis: Statistical Theory and Application in the Social Sciences* (1989); Ronald Kiefer, *Economic Duration Data and Hazard Functions*, 26 *J. Econ. Literature* 646 (1988).

<sup>26</sup> Whitney K. Newey & Kenneth D. West, *A Simple, Positive Semi-definite, Heteroskedasticity and Autocorrelation Consistent Covariance Matrix*, 55 *Econometrica* 703 (1987). See also William H. Greene, *Econometric Analysis* (2d ed. 1993); Halbert White, *A Heteroskedasticity-Consistent Covariance Matrix Estimator and a Direct Test for Heteroskedasticity*, 48 *Econometrica* 817 (1980); Halbert White & Ian Domowitz, *Nonlinear Regression with Dependent Observations*, 52 *Econometrica* 143 (1984); de Figueiredo, *supra* note 17. Details on the implementation of this procedure are available from the authors upon request.

TABLE 4  
SUMMARY OF HYPOTHESIS TESTS

Hypothesis	Statistical Test: Variable and Sign
Democrats adopt SLAPAs when given the opportunity	Democratic Control > 0
SLAPAs are more likely to be adopted when there is a Democratic supermajority and Republican governor	Democratic Control × Republican Governor > 0
SLAPAs are more likely to be adopted when there is a Democratic (Republican) supermajority and Republican (Democratic) governor	Democratic Control × Republican Governor and Republican Control × Democratic Governor > 0
Democrats adopt SLAPAs when they are in control and perceive future prospects to be weak	Democratic Control × Historical Democratic Weakness > 0
Democrats or Republicans adopt SLAPAs when they are in control and perceive future prospects to be weak	Republican Control × Historical Republican Weakness > 0

NOTE.—SLAPAs: state-level administrative procedure acts.

coefficient of the interaction between Democratic control and historical Democratic weakness would be positive. Finally, the nonpartisan version of this hypothesis states that either party would be equally likely to adopt an APA when they are in power but foresee their opponents in power in the future. Positive coefficients for the interaction of Democratic control and historical Democratic weakness and the interaction of Republican control and historical Republican weakness would be consistent with this final hypothesis.

## VI. RESULTS AND CONCLUSIONS

Using the specification outlined, we estimate five models that allow us to test each of the hypotheses above and to determine the robustness of the findings. Model 1 includes only the dummy variables for control by either the Democrats or Republicans and a set of dummy variables for each year.<sup>27</sup> Model 2 adds the main effects and interactions to test for the effect of divided government and a set of dummy variables for each year. Model 3 includes variables for all five hypotheses listed above, the control variables for expenditure growth, and a set of dummy variables for each year. Model 4 is the same as model 3 but includes dummy variables for each region rather than for years.<sup>28</sup> Model 5 is the same as model 3 with the constraint that the

<sup>27</sup> While this (semiparametric) method allows for a fairly general form of duration dependence, we also estimate each of the following models explicitly with duration and obtain substantively identical results.

<sup>28</sup> One observation that might occur to readers is that we do not use both region and year dummies simultaneously (namely, we do not use two-way fixed effects). Because our model is nonlinear, this would create an incidental parameters problem given the nonlinear model

TABLE 5  
EXPLAINING STATE-LEVEL ADMINISTRATIVE PROCEDURE ACT ADOPTION ESTIMATES

	Model 1	Model 2	Model 3	Model 4	Model 5
Constant	-2.341	-2.584	-2.468	-1.793	-2.563
Democratic Governor		.390 (.386)	.473 (.409)	.355 (.363)	.375 (.392)
Democratic Control	-.211 (.203)	-.623** (.236)	-1.202* (.550)	-.536 (.505)	-.681 (.466)
Republican Control	.228 (.219)	.448 (.369)	.521 (.653)	.080 (.577)	.076 (.624)
Democratic Control × Republican Governor		1.649** (.461)	1.719** (.483)	1.502** (.446)	1.626** (.487)
Republican Control × Democratic Governor		-.216 (.606)	-.269 (.654)	-.197 (.542)	-.128 (.668)
Historical Democratic Weakness			-.337 (.587)	.017 (.534)	
Historical Republican Weakness			.366 (.670)	.191 (.595)	
Democratic Control × Historical Democratic Weakness			1.670* (.721)	1.364* (.638)	
Republican Control × Historical Republican Weakness			.267 (.801)	.447 (.693)	
Historical Democratic Weakness + Historical Republican Weakness					.092 (.530)
Democratic Control × Historical Democratic Weakness + Republican Control × Historical Republican Weakness					.947 (.535)
Expenditure growth			-2.053* (1.047)	-.498 (.432)	-2.184* (1.065)
Regional dummies	No	No	No	Yes	No
Year dummies	Yes	Yes	Yes	No	Yes
Log likelihood	-143.48	-134.58	-129.25	-165.46	-129.87

NOTE.—The dependent variable is  $P(\text{ADOPT} = 1)$ . Standard errors are in parentheses; standard errors were calculated to correct for heteroskedasticity and autocorrelation according to Whitney K. Newey & Kenneth D. West, A Simple, Positive Semi-definite, Heteroskedasticity and Autocorrelation Consistent Covariance Matrix, 55 *Econometrica* 703 (1987).  $N = 1,065$ .

\* Significant at the 5% level, two-tailed test.

\*\* Significant at the 1% level, two-tailed test.

coefficients of the interactions between a party's control and future weakness are equivalent.

We now turn to an assessment of the results that are provided in Table 5. The first hypothesis states that Democrats will be more likely to pass an APA

specification. See, for example, Gary Chamberlain, *Analysis of Covariance with Qualitative Data*, 47 *Rev. Econ. Stud.* 225 (1980). As an alternative, therefore, we also used a specification in which temporal effects were controlled for duration (years from year 0) and region fixed effects. For these models, the substantive conclusions about each of the hypotheses were the same.

when they have an opportunity, either from undivided control or veto-proof majorities in the legislature. In general, this hypothesis does not hold. In model 1, which does not include any other controls, the coefficient on Democratic control is not significant. In the other models, this coefficient is either insignificant or negative, which indicates that when Democrats have control, they are not more likely to pass an APA, unless other conditions hold as well.

The second hypothesis posits that the passage of an APA is more likely when there is Democratic supermajority control of the legislature and divided government. To evaluate this hypothesis, we examine the coefficient of the interaction between Democratic control and a Republican governor (which indicates supermajority control of the legislature by the Democrats). This coefficient is positive and significant in each model, which indicates robust support for this hypothesis.

The nonpartisan version of this hypothesis states that both Democratic and Republican legislative supermajorities will pass APAs when facing a governor of the opposite party. Here we test whether the coefficients of the interaction of Democratic control and a Republican governor and the interaction of Republican control and a Democratic governor are equally positive and significant. By inspection, it is possible to reject this hypothesis since the coefficient of the interaction of Republican control and a Democratic governor is never positive and never statistically significant.<sup>29</sup>

The final two hypotheses address dynamic processes. The partisan version states that when Democrats are in power, either through undivided control of both the legislature and the executive or through supermajority control of the legislature, then an APA will be passed when they perceive their future prospects to be weak. We test the hypothesis that the interaction between Democratic control and party weakness should be positive. In this case, in model 3 we find there to be support for this hypothesis, as the coefficient is indeed positive and significant. Further, this result is robust. Controls for expenditures, time dependence (model 3), and regional effects (model 4) do not affect this result.<sup>30,31</sup>

<sup>29</sup> As a formal test of this hypothesis, one can test whether the coefficient of the interaction of Democratic control and a Republican governor is equal to the coefficient of the interaction of Republican control and a Democratic governor. This is rejected for every model.

<sup>30</sup> As one additional test, which we do not report here, we tested whether it matters if the form of weakness in the future is either an undivided Republican government or divided government. Here the results do not distinguish between these two forms. As the probability that there will be Democratic control decreases, Democrats are more likely to adopt an APA.

<sup>31</sup> This result is robust to a number of alternative specifications. We also ran the model using the prospective measure of electoral prospects discussed in note 20 *supra*, and when we did so, we obtained substantively similar results. A second concern that arises is whether these results, despite the control for regional effects, are simply a function of late adoption by southern states (post-Civil Rights Act of 1964), an empirical reality that is evidenced in Table 1. However, to examine this possibility we also estimated the model excluding the South entirely. Again, we obtained results very similar to those presented in Table 5. A final concern is whether the

TABLE 6  
 PREDICTED PROBABILITY OF ADOPTING A STATE-LEVEL  
 ADMINISTRATIVE PROCEDURE ACT

	Democrats	Republicans	Neither
Governor:			
Democrat	.14	.04	.05
Republican	.57	.03	.02
Historical position:			
Weak	.37	.05	
Average	.17	.03	
Strong	.06	.02	

NOTE.—Predicted probabilities are based on model 4. Partisan variables were held to zero or one for the cells indicated; other values were held at averages with the exception of the year fixed effect, which is one for the average adoption year (1956) and zero otherwise; the historical position is based on  $\pm 1$  standard deviation from the mean.

The second dynamic hypothesis posits that both parties will pass SLAPAs when they gain complete but temporary control. Model 4 provides some evidence against this hypothesis, as the coefficient on Republican control and future weakness is not significant. To further test this hypothesis, in model 5 we constrain the coefficients of the partisan interaction terms of control and historical weakness to be equal. In this model, we end up with an insignificant coefficient on the dynamic variable. Comparing this result with model 3, however, we notice that this result is likely driven by the positive effect of the Democratic variables being offset by the noise in the Republican variables. This leads us to favor the partisan version of the dynamic hypothesis.

Although the evidence from the econometric analysis is very strong, with a nonlinear specification the magnitude of these effects on the probability of adopting a SLAPA is not obvious. Therefore, to interpret magnitude, in Table 6 we provide the predicted probabilities for a number of different cases. In the first two rows of the table we show the probability of a SLAPA being adopted as a function of which party controls the legislature and governorship. The analysis provides further support for the hypothesis that Democrats will pass an APA when facing a Republican governor. The probability of a Democratic legislature passing a SLAPA increases from .14 when there is a Democratic governor to .57 when the governor is a Republican. With Republican control of the legislature, however, the probability of a SLAPA being passed is both much lower and the same regardless of divided or unified control. In the bottom three rows of the table, we examine the relationship between control and historical weakness. The effects again are dramatic.

results are driven by our choice of specification of the hazard function. We also estimated the models using alternative specifications of the hazard model (for example, Weibull) and find, again, substantively similar results.



When there is Democratic control, the probability of adopting a SLAPA increases from .06 when there has been historical Democratic strength to .37 when there has been historical weakness. The historical position of the Republican party has a weaker effect on Republican adoption.

In these tests, the pattern is stark: regardless of the specification, two conditions account best for the adoption of an APA at the state level. First, when Democrats have a supermajority in the legislature, they adopt an APA when facing a Republican governor. This result provides an important confirmation of one of the main theoretical contributions concerning administrative procedures: that governments are more likely to constrain the bureaucracy when there is a divergence in preferences between the legislature and the executive.<sup>32</sup> Second, when Democrats are in control, either through a supermajority in the legislature or through undivided majority control of the legislature and control of the governorship, they will pass an APA when they anticipate losing control (consistently) in the future. In this sense, the APA can also be interpreted as an “insulation” mechanism in which a political group that sees its power as temporary passes durable, minority-favoring institutions when given the opportunity.<sup>33</sup> This result is consistent with the literature that holds that when institutions are *ex post* durable and impose costs on current majorities, groups may trade benefits in the current period for expected benefits in future periods.<sup>34</sup> Finally, the findings also depart significantly from the existing arguments in an important way. In particular, all of the previous scholarship takes the use of procedures to be unbiased by party: as a means of constraint, both Republicans and Democrats are equally likely to use such procedural restrictions. Our results show that this is not the case, that the specific institutional instrument is not unbiased with respect to party, and highlights the importance of examining both the partisan and the interinstitutional effects of APAs simultaneously.

<sup>32</sup> Epstein & O’Halloran, *Administrative Procedures*, *supra* note 3; Epstein & O’Halloran, *Delegating Powers*, *supra* note 3; Huber & Shipan, *supra* note 3; Huber, Shipan, & Pfahler, *supra* note 3; McCubbins, Noll, & Weingast, *Administrative Procedures*, *supra* note 3; McCubbins, Noll, & Weingast, *Structure and Process*, *supra* note 3; McCubbins, Noll, & Weingast, *supra* note 1.

<sup>33</sup> Given that we show that two of the five hypotheses hold, one might ask what the relative impact of the two sets of conditions is on the adoption of APAs. One simple way to make such a comparison is to compare the point estimates of the coefficients. Here the ratio of the effect (in model 4) of Democratic supermajority control when there is divided government—notably taking account of the main effect as well and the effect of Democratic control (either undivided government or supermajority control and the Democrats having been “shut out” for the previous nine periods)—is 2.65, which indicates that the effect of divided government is over two-and-a-half times that of political dynamics.

<sup>34</sup> See de Figueiredo, *supra* note 4; de Figueiredo, *supra* note 17; Vanden Bergh & de Figueiredo, *supra* note 4; Moe, *Politics of Bureaucratic Structure*, *supra* note 4; Moe, *Politics of Structural Choice*, *supra* note 4.

## APPENDIX

TABLE A1  
CITATIONS TO LAWS CREATING THE STATE-LEVEL  
ADMINISTRATIVE PROCEDURE ACT

State	Statutory Citation
Alabama	Acts 1981, no. 81-855, p. 1,534, §§ 1-27
Alaska	SLA 1959, ch. 143
Arizona	Laws 1952, ch. 97, §§ 1-11
Arkansas	Acts 1967, no. 434, §§ 1-15
California	Stats. 1947, ch. 1175, 1425; Cal. Gov. Code §§ 11370-3, 11421-7, 11440, 11445
Colorado	Laws 1959 H.B. 212, §§ 1-8
Connecticut	Public Acts no. 67, 1945
Delaware	60 Del. Laws, ch. 585, § 1
Florida	Laws 1961, ch. 61-280, § 1-6; Laws 1961, chs. 61-292
Georgia	Acts 1964, pp. 338-56
Hawaii	L. 1961, ch. 103, § 1-20
Idaho	1965, ch. 274, §§ 1-14
Illinois	P.A. 79-1083, Art. I, § 1-21 (1975)
Indiana	Acts 1945, ch. 120
Iowa	Acts 1951 (54 G.A.) ch. 51, §§ 1-11
Kansas	L. 1984, ch. 313, §§ 1-36; ch. 338, §§ 1-27
Kentucky	Enact. Acts 1984, ch. 417, §§ 1-35
Louisiana	Acts 1966, no. 382, §§ 1-17
Maine	Laws 1961, ch. 394, § 1
Maryland	An. Code 1957, art. 40, § 40A; art. 41, §§ 244-256; art. 76A, §§ 8-15
Massachusetts	St. 1954, ch. 681, § 1
Michigan	P.A. 1943, no. 88
Minnesota	Minn. Stat. Ann. § 15.041-9 (1946)
Mississippi	Law, 1976, ch. 487, §§ 1-10
Missouri	L. 1945 p. 1,504, §§ 1-14
Montana	Enacted §§ 1-24, ch. 2, Extra Laws 1971
Nebraska	Laws 1945 ch. 255, §§ 1-6, p. 795
Nevada	1965, pp. 962-65
New Hampshire	1973, 507:1-4
New Jersey	L. 1968 ch. 410, §§ 1-17
New Mexico	Laws 1969, ch. 252
New York	Laws 1975, ch. 167, § 1
North Carolina	1973, ch. 1,331, § 1
North Dakota	S. Laws 1941, ch. 240, §§ 1-22
Ohio	1943 Ohio Gen. Code Ann §§ 154-61 to 154-73
Oklahoma	Laws 1963, ch. 371, §§ 1-27
Oregon	1957, ch. 717, §§ 1-14
Pennsylvania	1945 Pamphlet Laws 1388, no. 442
Rhode Island	G.L. 1956, §§ 42-35-1 to 42-35-18
South Carolina	1977 Act no 176, arts. I and II
South Dakota	SL 1966, ch. 159
Tennessee	Acts 1974, ch. 725, §§ 1-18
Texas	Act 1975, 64th Leg., p. 136, ch. 61; Vernon's Ann. Civ. St. art. 6252-13a
Utah	Laws 1973, ch. 172
Vermont	1967, no. 360 (Adj. Sess.), §§ 1-18

TABLE A1 (Continued)

State	Statutory Citation
Virginia	1975, ch. 503
Washington	Laws 1959, ch. 234, §§ 1–20
West Virginia	1964, ch. 1
Wisconsin	St. 1943, § 227
Wyoming	W.S. 1957, §§ 9–276

NOTE.—Citations are to the original, precodified statutes.

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