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Administrative Law: The Trouble with Counting

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The Trouble with Counting[1]

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Regulation counting has become a cornerstone of U.S. deregulatory policy with the issuance of Executive Order 13,771 ("the EO"), "Reducing Regulation and Controlling Regulatory Costs." To promote deregulatory goals, the EO requires administrative agencies to repeal two regulations for every one they propose or issue, leading many to refer to it as the "2-for-1" Order. The Office of Management and Budget ("OMB") has published detailed guidance instructing agencies how to implement the EO, which constrains their ability to promulgate new regulations under their statutory mandates.[2]

The idea of regulation counting that motivates the EO emerges from a larger intellectual project arguing that economic growth is being hampered by the "sheer quantity of regulations."[3] In a string of studies,[4] researchers have attempted to establish this relationship by counting regulations and correlating these counts to various macroeconomic outcomes of interest, like U.S. employment, productivity, and competitiveness.

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1. Summarized and excerpted from Jodi L. Short, *The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93 (2018).

2. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO. NO. M-17-21, MEMORANDUM: IMPLEMENTING EXECUTIVE ORDER 13,771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" (2017) (hereinafter "OMB GUIDANCE").

3. Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997-2012*, 11 REG. & GOVERNANCE 109, 110 (2017).

4. *See, e.g.*, Al-Ubaydli & McLaughlin, *supra* note 3, at 110; Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE (2017); Brent Coffey, et al., *Regulators and Redskins*, 153 PUB. CHOICE 191 (2012); John W. Dawson & John J. Seater, *Federal Regulation and Aggregate Economic Growth*, 18 J. ECON. GROWTH 137 (2013); Casey B. Mulligan & Andrei Shleifer, *The Extent of the Market and the Supply of Regulation*, 120 Q. J. ECON. 1445 (2005); J. B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001).

This intellectual project appears to have two principal aims. The first is political. Regulation-counting studies radically simplify complex regulatory phenomena to make criticisms of regulation salient to lawmakers and the general public and to bolster political support for deregulatory policies. The second is empirical and, ultimately, legal. By producing scholarly literature documenting a correlation between the number of regulations and negative economic outcomes, antiregulatory scholars and advocates generate a body of empirical research that agencies and courts can rely on in implementing and upholding the legality of deregulatory counting policies like 2-for-1.

Courts should not be fooled. Regulation counting is not a rational basis for regulatory policy. The Administrative Procedure Act requires agencies to articulate a rational connection between the facts before the agency and the policy choices made by the agency. Administrative decisions that lack a rational foundation are "arbitrary and capricious" and must be struck down by reviewing courts.[5] Agencies often cite empirical studies to demonstrate the rationality of their decisions, and reviewing courts will find agency decisions arbitrary and capricious if they are not sufficiently justified by the empirical evidence before the agency.[6]

The logic of regulation-counting studies that empirically tie regulation counts to macroeconomic outcomes appears calculated to resonate with widely accepted efficiency rationales for cost-benefit analysis ("CBA"). CBA, instituted through a series of executive orders issued by presidents dating back to Jimmy Carter,[7] rests on the premise that agencies should exercise statutory discretion to make policy decisions that maximize aggregate welfare, meaning the benefits of regulation net its costs.[8] There currently is broad scholarly and political consensus that "Presidents can legitimately influence the development of regulations—at least when the goal is to ensure that the regulations promote societal welfare to the extent permitted by law."[9]

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5. 5 U.S.C. § 706(2); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

6. *See, e.g.*, Motor Vehicle Mfrs. Assoc. v. St. Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Business Roundtable v. SEC, 647 F.3d 1144 (2011).

7. *See* Exec. Order No. 12,044; Exec. Order No. EO 12,291; Exec. Order No. 12,866; Exec. Order No. 13,422; Exec. Order No. 13,563.

8. Cass Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 9 (2017).

9. Caroline Cecot & Michael A. Livermore, *The One-In, Two-Out Executive Order is a Zero*, 166 U. PA. L. REV. 1 (2017).

It is not surprising, then, that supporters of the EO have suggested that 2-for-1 is merely an extension of cost-benefit analysis and thus can be rationalized on similar grounds.[10] The difficulty with this gambit is that 2-for-1 explicitly rejects the well-established efficiency maximization lodestar on which CBA rests. Contrary to CBA, 2-for-1 addresses only the costs (and not the benefits) of regulations, and the OMB Guidance Memorandum implementing the Order expressly prohibits agencies from considering the benefits of regulation in deciding which regulations must go and which may stay.[11] This is, quite simply, unjustifiable under fundamental principles of welfare economics: "At least as far as economic theory is concerned, any new regulation that offers more benefits than costs should be undertaken, regardless of its contribution to the aggregate regulatory costs to society."[12]

If the EO and agency decisions made pursuant to it cannot be justified by the efficiency rationale underlying CBA, they must rest on some other principled basis. This is where regulation counting studies come in. Such studies promise to provide empirical support for the policy of reducing regulation counts in the service of promoting desired (and ostensibly more efficient) macroeconomic outcomes. But as explained below, they fail to deliver on that promise and, thus, such studies cannot rationalize the EO or administrative decisions based on it. Regulation-counting studies do not, and cannot, rationalize deregulatory policies like 2-for-1 because based on prevailing standards of social scientific research they are, themselves, irrational and empirically unsound.

The trouble with using regulation counts to justify regulatory actions is that they do not validly measure a construct that can be theorized to cause economic outcomes. It is commonly claimed, for instance, that regulation counts are a proxy for the "costs" or "burdens" of regulation on regulated entities. While these claims have undeniable political appeal, a tally of the number of regulations or regulatory mandates on the books simply does not measure the costs or burdens of

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10. *See, e.g.*, Ted Geyer, et al., *Evaluating the Trump Administration's Regulatory Reform Program* (2017) (Brookings Center); Benjamin M. Miller, et al., *Inching Toward Reform: Trump's Deregulation and Its Implementation* (2017) (Rand Corp.); *Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker*, 8:2 J. BENEFIT-COST ANALYSIS 187 (2017).

11. OMB GUIDANCE, *supra* note 2.

12. Geyer, et al., *supra* note 10, at 5.

regulation because it does not account for at least nine important features of regulatory law.

First, regulation counts do not account for variation in the weight of regulations. For instance, a regulation that requires mine operators to put their correct address and telephone number on forms submitted to the regulator[13] counts the same as a regulation requiring that automakers comply with EPA's complex and demanding greenhouse gas fleet average requirements.[14]

Second, regulation counts do not account for variation in regulations' scope of coverage. A Department of Justice regulation provides multiple mandatory criteria applicable to the vanishingly small population of individuals who wish to claim a financial reward for disclosing information relating to the unlawful handling of nuclear materials.[15] These regulatory mandates count the same as those found in Occupational Health and Safety Agency regulations applicable to millions of U.S. workplaces.

Third, regulation counts do not account for the object of regulatory requirements. A large number of regulations apply not to private regulated entities but to the government's actions. These regulations require transparency, due process, and fair administration for the benefit and protection of regulated entities. Yet regulation counters add them to the costs and burdens on regulated entities.

Fourth, regulation counts overlook structural relationships among regulations. For example, many regulations contain exceptions that limit their applicability and thus their cost or burden. Others provide alternative means of complying with a primary regulatory command, providing regulated entities with greater flexibility and lessening costs and burdens. Some regulations simply clarify other regulations, providing greater clarity and certainty in application of the law for the benefit (and often at the request) of regulated entities.

Fifth, regulation counts ignore basic grammatical conventions within regulations. Sometimes, the mandatory language in regulations is explicitly negated by words like "no" or "not." Others, it is contained in questions—for instance, "Must I do X?"—which are answered in the negative. Regulation counters add these to the tally of costs and burdens nonetheless.

Sixth, regulation counts do not account for enforcement levels. Regulations are enforced with wildly varying degrees of stringency and

13. 30 C.F.R. § 41.30 (2017).

14. 40 C.F.R. § 86.1818-12 (2017).

15. 28 C.F.R. § 13.6 (2017).

frequency, with some enforced vigorously and regularly, others enforced with moderate stringency or only sporadically, and many languishing entirely unenforced. These all count the same.

Seventh, regulation counts count conditional benefits as burdens. Many regulations set forth mandatory criteria and procedures for obtaining valuable benefits from the federal government, including grants, loans, leases, and entitlements. These rules need not be followed by those who do not seek the benefits. Those who elect to follow the rules—for instance, to obtain a mineral lease for oil and gas exploration and development in federal waters[16]—do so voluntarily and for their own often substantial benefit and cannot be properly characterized as burdened by such rules.

Eighth, regulation counts do not account for the benefits of regulation that accrue to regulated entities. There is empirical evidence that in certain contexts, regulated entities benefit from their own regulation—for instance, companies enjoy lower costs of capital in countries with robust securities-regulation enforcement.[17] Regulation counts make no attempt to net out the benefits regulated entities enjoy from regulation from whatever costs they may incur in implementing it.

Ninth, regulation counts do not account for the source of regulatory requirements. Many regulations repeat verbatim language from the statute authorizing them. Even if these might fairly be said to create costs or burdens on regulated entities, these costs or burdens are not agency created, thus they cannot be corrected by agencies, because agencies are not at liberty to repeal statutory commands.

Taken together, these mistakes infect regulation counts with two fundamental fallacies that disqualify them as meaningful measures of the costs or burdens of regulation on regulated entities. First, regulation counts are tremendously inflated, because they double count (and triple count or more) many regulatory requirements, because they count subtractions from regulatory costs and burdens as additions to regulatory costs and burdens, and because they count outright benefits to regulated entities as costs and burdens on them. Second, regulation counts are unreliable because they equate things that are wildly incommensurate with one another and aggregate them into a single measure.

For these reasons, regulation counts do not provide a rational basis for regulatory policymaking. Empirical studies employing them to

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16. 30 C.F.R. § 550.200 *et seq*. (2017).

17. John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 230 (2007).

support deregulatory policies should be viewed with extreme skepticism on judicial review. Government officials should be wary of claims that regulation counting will help them reform their regulatory systems. Likewise, political rhetoric deploying regulation counts should be vigorously contested because it crowds out meaningful dialogue about specific social and economic problems and appropriate regulatory responses.