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# Tailored Participation: Modernizing the APA Rulemaking Procedures

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# TAILORED PARTICIPATION: MODERNIZING THE APA RULEMAKING PROCEDURES

*Dorit Rubinstein Reiss\**

## ABSTRACT

*Prominent scholars have criticized informal rulemaking's "Notice and Comment" procedures for not providing adequate public input into the process. The procedures can also be criticized for using a one-size-fits all approach for reviewing rulemaking, ignoring the vast array of tasks agencies face. This article proposes a reform in rulemaking procedures that will allow agencies to choose between three models for overseeing proposed rules: peer review, Notice and Comment, and deliberative democracy mechanisms. Such a choice will allow agencies to tailor the form of oversight to the goals they are trying to achieve. When focusing on the scientific or technical validity of the information a rule is based on, agencies should use peer review; to receive information from the public, Notice and Comment; however, for controversial issues deliberative mechanisms will provide the best opportunity to achieve consensus or at least increase legitimacy and facilitate implementation, and agencies should use them. This method should increase the effectiveness of the review, the accountability of agencies and the legitimacy of the rule, since it will match review to rulemaking. On the other hand, it raises a classical "who guards the guardians" concern since it allows agencies to decide how their work will be reviewed. The article demonstrates that this concern is probably overstated because agencies already have other motivations to seek accountability. Agencies already experiment with various mechanisms to increase their legitimacy, but the current system forces them to use Notice and Comment regardless of what else they have done. This may allow special interests to twist the process in ways that subvert the public good, or alternatively, lead administrators to treat it as a meaningless procedural hoop. The article also sug-*

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\* Associate Professor, UC Hastings College of the Law. I would like to thank Ashutosh Bhagwat, David Fontana, Ethan Leib, Alasdair Roberts, Reuel Schiller, and Carolyn Shapiro for very useful comments on previous drafts. I would also like to thank David Coolidge for language editing and Frederick Reiss for support and discussions. All errors are, of course, my own.

*gests guidelines for judicial review that will appropriately balance the need to prevent unsuitable review choices by agencies with the need to allow agencies to experiment with different models of oversight and at time err in their choice.*

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## INTRODUCTION

*No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-Comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues. To secure the genuine reality, rather than a formal show, of public participation, a variety of techniques is available . . . .<sup>1</sup>*

Consider three rules.<sup>2</sup>

1. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

2. The sources for the information included here are searches conducted on <http://www.regulations.gov>, the government regulation portal. Obviously, there are an infinite number of rules that could be addressed here. My criterion for choosing was to find a manageable number of examples that require different levels of expertise and have different patterns of public participation.

In 2007 the National Highway Traffic Safety Administration (NHTSA) called for a public meeting to discuss whether to mandate seatbelts on large school busses.<sup>3</sup> It also provided opportunity to comment, and a large number of comments were submitted on the topic (over time, the number grew to more than one hundred). After the meeting, which was described in the proposed rulemaking as a “roundtable,” NHTSA published its proposed rules for comments.<sup>4</sup> Not surprisingly, the question elicited strong responses from school bus operators, school bus manufacturers, school boards, public interest organizations, former NHTSA officials and other interested people. Comments addressed with passion issues of child safety, school financing, discipline, and other issues; the submissions included both short and pithy responses and long, detailed, very technical comments.<sup>5</sup>

Contrast this with the Occupational Safety and Health Administration’s (OSHA) 2007 proposal to amend the rules regulating working conditions in shipyards, addressing, among other things, sanitation requirements. While many comments appeared in response, industry members or associations submitted all but two of the comments.<sup>6</sup> The

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3. Federal Motor Vehicle Safety Standards for School Bus Passenger Protection, 72 Fed. Reg. 30,739 (June 4, 2007).

4. Federal Motor Vehicle Safety Standards; School Bus Passenger Seating and Crash Protection, 72 Fed. Reg. 65,509 (Nov. 21, 2007) (to be codified in 49 C.F.R. part 571).

5. To give a couple of examples, taken from the shorter comments: “SAFETY FIRST PLEASE: Please consider the safety of the children first and require that ALL school buses be required to have and use seat belts, not just the new buses, but also that the old buses be required to have seat belts installed (retrofitted). Parents are required to have and use seat belts/car seats/booster seats in passenger vehicles, why is there a different standard for buses? I have read some of the arguments against, but I believe that the safety of our children should be our primary concern. (The requirement of aides on all buses for special needs children would also improve safety.) Thank you.” Public Comment of Kristy Durkovic, *available at* <http://www.regulations.gov> (No. NHTSA-2007-0014-0094) (Mar. 3, 2008); “I am a school bus operator in Harrison County, commenting that if the bus is impacted from the side, the students will not get out fast enough trying to get out of their seat belts. Besides, the elementary students, as well as the upper grades, will use the buckles and etc. as weapons to hit and injure others beside and around them in the seat. Here’s another thing to suspend students for! I firmly believe that this proposal is a BIG mistake!!! And the proposal of making seat backs from 20 to 24 inches high has its drawbacks too. You will not be able to see the smaller students and be able to tell what they are doing, even when they are sitting up! This leaves the door open for a lot of things to imagine. I firmly believe this proposal is also a BIG mistake!!! PLEASE, DON’T GO THROUGH WITH THESE PROPOSALS !!!!!” Public Comment, *available at* <http://www.regulations.gov> (No. NHTSA-2007-28103-0076) (Dec. 11, 2007).

6. Public Comments, *available at* <http://www.regulations.gov> (No. OSHA-S049-2006) (last visited Sep. 21, 2009).

remaining two were submitted by the Navy and the National Institute for Occupational Safety and Health, both government agencies.<sup>7</sup> While industry had strong views on the issue, few others seemed to. However, in response to commentators' request, the agency scheduled a public hearing.

Finally, in 2008, the Federal Aviation Administration (FAA) adopted a rule addressing the airworthiness of a certain helicopter, to address a problem resulting from the failure of a fuel valve. While the agency held a Notice and Comment period, no comments were submitted.<sup>8</sup>

These three cases show the large variety of issues that must be addressed by the federal administrative state. The examples were chosen in an attempt to demonstrate the varying levels of expertise, different levels of public interest, and types of responses that typify the government regulatory process. Such wide variety calls for equivalent variety in models of oversight. Mechanisms which are quite appropriate for one type of regulatory issue can be inappropriate and counterproductive for other types. Officially many of these rulemakings are handled under the Notice and Comment rulemaking procedures included in the Administrative Procedure Act (APA), whose core is providing opportunity for the public to submit written comments.<sup>9</sup> Apart from the criticisms that can be raised against the Notice and Comment procedures themselves, there is the broader issue that applying a uniform approach to the extremely diverse set of issues addressed by agencies is inherently problematic. Agencies are aware of that and do not actually take a uniform approach in practice. Nonetheless, the legal framework of the APA forces them to jump through certain hoops, and in this writer's view that needs to be changed. Agencies should be allowed to dispense with Notice and Comment proceedings where appropriate, though never at the expense of transparency or review. They should, in fact, be strongly encouraged and even required to go beyond Notice and Comment where appropriate. Instead of a "one-

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7. Public Comment of Paul A. Schulte, NIOSH, *available at* <http://www.regulations.gov> (No. OSHA-S049-2006-0675-0129) (Mar. 19, 2008); Public Comment of John H. James, Jr., Dept. of the Navy, *available at* <http://www.regulations.gov> (No. OSHA-S049-2006-0675-0132) (Mar. 17, 2008).

8. The helicopter in question was the Bell Helicopter Textron Canada (BHTC) Model 222, 222B, 222U, 230 and 430, and the regulations at issue required rewiring and testing of the fuel valve. Airworthiness Directives: Bell Helicopter Textron Canada (BHTC) Model 230 Helicopters, 73 Fed. Reg. 39,569 (proposed July 10, 2008) (to be codified at 14 C.F.R. pt. 39). Estimates suggest that the FAA issues several airworthiness directives each day. CINDY SKRZYCKI, *THE REGULATORS: ANONYMOUS POWER BROKERS IN AMERICAN POLITICS* 31 (2003).

9. 5 U.S.C. § 553 (2006).

size-fits-all” process for making rules, a more flexible approach should be adopted that focuses on what is really important: providing meaningful review of agency rulemaking that minimizes abuses and problems, while allowing agencies, within the limits of such review, to do their job.

Furthermore, the rules governing federal rulemaking process have been criticized by many scholars. Most criticisms focus on the ossification of the process and the degree to which it has become cumbersome and inefficient.<sup>10</sup> This article suggests a reform that goes beyond mere streamlining of existing practices, and instead calls into question the efficacy of the Notice and Comment process itself as a means of legitimizing the administrative state. The article suggests that Notice and Comment does not, in many cases, produce meaningful review, that is, review appropriate to the action. Notice and Comment may even decrease accountability in some cases.

To correct the problem, the proposed reform would allow agencies to choose (within limits) among several models of oversight and to be assessed based on the mode of oversight used, which, hopefully, would be the mode that best fits the procedure in question. The reform is pragmatic in two senses. First, it allows agencies to adapt the form of oversight to the function the agency is trying to fulfill. Second, it acknowledges that actions already taken by some agencies have actually improved accountability and suggests giving agencies that adopt extensive participation mechanisms room to experiment with them, even going so far as to allow them to omit the usual Notice and Comment process altogether in cases where Notice and Comment would undermine other models of oversight.

Part I of the article describes the current Notice and Comment rulemaking procedures required by the APA, including surrounding

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10. See generally Elliott, *supra* note 1; JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 147–56 (1990); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385 (1992); Richard J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 *ADMIN. L. REV.* 59 (1995); Antonin Scalia, *Back to Basics: Making Law without Making Rules*, 1981 *REG. 25* (1981); Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 *ADMIN. L. REV.* 453 (1995). But see Jason Webb Yackee & Susan Webb Yackee, *Is Federal Rulemaking “Ossified”? The Effects of Procedural Requirements on the Agency Policymaking Process* (Feb. 29, 2008) (unpublished manuscript, on file with author); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 *U. ILL. L. REV.* 1111, 1125–31 (2002); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 *Nw. U. L. REV.* 393 (2000); Peter L. Strauss, *The Rulemaking Continuum*, 41 *DUKE L.J.* 1463 (1992); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 *VA. L. REV.* 889, 923, 931–32 (2008).

legislation and judicial review provisions, and outlines some criticisms of that system. Part II discusses how insights from recent literature on participation can be applied to the existing rulemaking procedures. The literature on deliberative democracy teaches us that deliberative participation mechanisms, such as citizen juries and other methods, offer new and promising avenues to handle certain problems agencies face, and should be acknowledged as part of the regulatory arsenal; they are not hypothetical or utopian ideas, but methods that have been tried at different levels of government in the United States and worldwide. From the literature on pragmatic participation we learn that deliberative mechanisms are not always necessary or appropriate, but also that Notice and Comment is not always necessary or appropriate. Part III then opens with two current proposals for reforming the APA and explains why they do not go far enough; it then describes the proposed reform. Three models of oversight are examined: peer review, Notice and Comment, and deliberative mechanisms. The agency should choose between the models based on the enabling legislation and the scope of the anticipated conflict. This section then discusses the characteristics of each model and how it should be evaluated, and addresses how the courts should review agencies' choices of oversight model, suggesting a pragmatic, flexible approach that balances the need to allow room to experiment with the need to hold agencies accountable. This part ends by reemphasizing the advantages of the suggested reform for the system, focusing especially on the flexibility it offers and its potential to increase legitimacy. Part IV addresses possible criticisms and responds to them, focusing especially on the danger of agencies abusing the system and the complexity of the proposal.

## I.

### NOTICE AND COMMENT RULEMAKING

The basic framework for informal rulemaking specified in section 553 of the APA is quite straightforward.<sup>11</sup> On rules made through

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11. 5 U.S.C. § 553 (2006). This section focuses on informal rulemaking, also known as "Notice and Comment rulemaking," though that is not the only option available to agencies. Agencies can make policy decisions through adjudications, although at least since the 1960s, many have used rules to make such decisions. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 13–22 (3d ed. 2003); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1147–48 (2001). Agencies can also use formal rulemaking procedures, although such use is rare. O'Connell, *supra* note 10, at 901. Agencies also have the option of using direct final rules, which are rules published in the federal register and which become



informal rulemaking (also known as Notice and Comment procedures), the agency is required to publish a notice in the Federal Register,<sup>12</sup> provide an opportunity to submit written comments, consider those comments, and then publish the rule with a “concise general statement of [the rule’s] basis and purpose.”<sup>13</sup>

Court decisions, executive orders, and legislation by Congress added requirements to this skeletal framework. Congress included additional requirements in the organic statutes of certain agencies.<sup>14</sup> It also passed a number of laws requiring agencies to prepare in-depth analysis of regulations to protect various values—an Environmental Impact Statement (EIS) that requires agencies to describe the impact of their actions on the environment under the National Environmental Protection Act (NEPA),<sup>15</sup> an analysis of the rule’s effect on small business under the Regulatory Flexibility Act,<sup>16</sup> and others. Various presidents added requirements through executive orders, most notably the requirement of publishing proposed and final rules in the annual agenda and the regulatory review process.<sup>17</sup>

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effective if no opposing comments appear within a specified period of time after publication. *Id.* at 903 & nn.36–38. Finally, agencies may adopt interim final rules, which first take effect and later receive comments. *Id.* On whether such rules are legal under the APA, see generally Ronald Levine, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1(1995); Ronald Levine, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999) (saying direct rulemaking is consistent with the APA). *But see* Noah Lars, *Doubts About Direct Final Rulemaking* 51 ADMIN. L. REV. 401 (1999) (expressing concerns about its use).

12. Notice on the agency’s internet site or elsewhere is not enough. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 277, n.12 (4th ed. 2006).

13. 5 U.S.C. § 553(c) (2006). Formal rulemaking, of course, requires a much more elaborate process, with formal hearings on the record and trial-like proceedings like cross examinations. *Id.* at §§ 556–57. However, that process is exceedingly rare.

14. *E.g.*, Clean Air Act, 42 U.S.C. § 7607(d) (2006) (adding requirements about hearings and docket keeping); Toxic Substances Control Act, 15 U.S.C. § 2601 (2006) (adding requirements for an oral hearing and cross examination); Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 57(a) (2006) (requiring an oral hearing and advanced notice).

15. 42 U.S.C. § 4332(c) (2000).

16. 5 U.S.C. §§ 601–12 (2006).

17. Agencies now have to publish proposed rules as part of the regulatory agenda, which is published twice annually. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006). They also have to send major rules, such as, significant regulatory actions as defined in Executive Order 12,866, and regulations with an annual effect on the economy of \$100 million or more, with a cost-benefit analysis to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). *Id.* For a discussion of the regulatory review of rules, see generally Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864 (1988); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); John D. Graham et al.,

Courts too added depth and layers to the initial requirements of the APA. Agencies making rules have to make sure that the final rule they end up with is a “logical outgrowth” of the proposed rule they started with, or else the case will be remanded to the agency with instructions to reopen the comment period.<sup>18</sup> The agency must also include the relevant data on which it relied.<sup>19</sup>

Another major tool judges use to oversee rules is the “concise and general statement” requirement.<sup>20</sup> The statement needs to address the major issues related to the rulemaking. Courts require that an agency “examine the relevant data and articulate a satisfactory explanation for its action.”<sup>21</sup> The court will remand a rule for reconsideration under certain circumstances:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>22</sup>

This review is referred to as the “hard look” doctrine, in which courts give agency actions close scrutiny, a “hard look.”<sup>23</sup> By contrast,

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*Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953 (2006); Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461 (1994); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1985); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001); William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRES. STUD. Q. 76 (2005). President Obama’s White House is currently engaged in amending Executive Order 12,866, but it is not clear what the result will be. See General Services Administration, Federal Regulatory Review, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/fedRegReview.jsp> (last visited Nov. 1, 2009).

18. *Chocolate Mfrs. Ass’n of United States v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

19. *Portland Cement v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973).

20. LUBBERS, *supra* note 12, 376–77.

21. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 30, 43 (1983).

22. *Id.*

23. Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit first used the term “hard look.” Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974). He, however, used it to refer to the care with which the agency has examined the issues. *Id.* Today, “hard look” often refers to the court’s behavior in giving an agency’s final decision a “hard look.” See, e.g., Jordan, *supra* note 10, at 398–99; Pierce, *supra* note 10, at 69; Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A*

agency interpretation of laws generally receives a high level of deference.

A problem noted by several authors<sup>24</sup> is that this standard does not allow agencies to know in advance which issues courts will consider important enough to require responses by the agencies. Therefore, agencies acting in the face of uncertainty—and concerned about being forced to redo years of work—will address any issue raised by commentators, whether important or trivial. This not only makes the rulemaking process more cumbersome, it gives regulatees—especially the more sophisticated of them—a way to slow down or even halt the rulemaking process when it suits their purposes.<sup>25</sup> The additional demands placed on agencies by courts make rulemaking complex and cumbersome and have led scholars to criticize the ossification<sup>26</sup> of the rulemaking process and to suggest solutions.<sup>27</sup>

Another concern raised by scholars is that many of the judicial decisions restricting agency discretion exhibit a misunderstanding of the reality surrounding agencies and how they regulate.<sup>28</sup> Since judges are not experts—and given the variety of subject matters in the administrative state, no judge can ever be an expert in everything—

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*Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 527 (1997); Michael J. Legg, *Verizon Communications, Inc. v. FCC—Telecommunications Access Pricing and Regulator Accountability through Administrative Law and Takings Jurisprudence*, 56 FED. COMM. L.J. 563, 563 (2004).

24. Pierce, *supra* note 10, at 69; McGarity, *supra* note 23, at 538–39; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 492 (1997).

25. McGarity, *supra* note 23, at 533–35. That is not to say that regulatees do not often have legitimate interests at stake, such as minimizing the cost to themselves and preventing extremist regulation. Rather, the process is still prone to abuse.

26. A term that Professor McGarity uses in his famous article about ossification of rulemaking, attributed to Donald Elliott. See McGarity, *supra* note 10, at 1385.

27. See generally Elliott, *supra* note 1; McGarity, *supra* note 10; Pierce, *supra* note 10; Verkuil, *supra* note 10; Seidenfeld, *supra* note 17. Recent empirical scholarship found no ossification. See Webb Yackee, *supra* note 10; Jordan, *supra* note 10; O’Connell, *supra* note 10, at 923, 932. However, all these studies acknowledge that Notice and Comment rulemaking places substantial costs on the agencies; it is not ossified, in their view, because agencies still make rules, often a lot of rules, in spite of these costs. O’Connell’s study also points out that agencies have been making more and more interim or direct rules, rules where the rule is made first and the comments collected later, demonstrating the burden the “comments first” requirement puts on agencies. See O’Connell, *supra* note 10, at 923, 932.

28. McGarity, *supra* note 23, at 536–37; JERRY L. MASHAW, BUREAUCRATIC JUSTICE: ADMINISTRATIVE LAW FROM AN INTERNAL PERSPECTIVE 4, 7 (1983); Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in ADMINISTRATIVE LAW STORIES 334, 335–36, 379–80 (PETER L. STRAUSS ed., 2006) [hereinafter *The Story of State Farm*].

they may not be sensitive to the uncertainties and problems involved in crafting a certain rule and may place unreasonable demands on agencies or make decisions which are at odds with the reality of the field.<sup>29</sup>

Finally, a possible criticism is that the existing process does not allow for meaningful participation or accountability through participation. I now turn to this topic.

## II.

### PARTICIPATION STUDIES AND THE APA

#### A. *Participation Critiques of Notice and Comment Procedures*

As mentioned above, the Notice and Comment process has been criticized for not providing appropriate participation. Participation refers to the opportunity given to those who will be affected by the rule to influence its wording, scope, and impact. "Those affected" can be defined broadly (i.e., the public in general) or narrowly (i.e., direct stakeholders or interest groups). This means participation usually involves allowing actors' input into the decision making process.<sup>30</sup> The identity of the particular actors who will have input varies according to the decision in question and the problem being addressed.<sup>31</sup> This article takes an instrumental approach, focusing on the effect of participation on the policy that is being made and on participation's potential to improve agency decisions or implementation, but not on participation's salutary effect on those participating.<sup>32</sup> In this, the article follows in Archon Fung's footsteps in assuming participation is used to address deficiencies in decision making by officials.<sup>33</sup> It is a

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29. Mashaw, *The Story of State Farm*, *supra* note 28, at 334, 335–36, 379–80; McGarity, *supra* note 23, at 536–37.

30. JAMES L. CREIGHTON, *THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT* 7 (2005) (stating that "[p]ublic participation is the process by which public concerns, needs and values are incorporated into governmental . . . decision making").

31. Archon Fung, *Varieties of Participation in Complex Government*, 66 *PAR* 66, 66 (2006).

32. For examples of literature focusing on the effects of participation on the participants, see JOHN GASTIL, *BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS*, 129–136 (2000) (arguing that deliberative participation, through convening citizen juries, will lead to better informed and more engaged citizens, as well as less cynicism), and Maria Powell & Daniel Lee Kleinman, *Building Citizen Capacities for Participation in Nanotechnology Decision-Making: The Democratic Virtues of the Consensus Conference Model*, 17 *PUB. UNDERSTANDING OF SCI.* 329 (2008) (looking at the effect of participating in consensus conflicts on citizens and concluding that they substantially improve citizens' views of their ability to participate in such decisions).

33. Fung, *supra* note 31, at 67.

tool to increase the accountability of officials and to prevent abuses or shortcomings.

Generally, enabling participation is one of the goals behind many changes in government and political theory in recent decades; public participation is considered an important positive value in modern democracies.<sup>34</sup> Since the 1960s, both judicial decisions and legislation were intended to increase the ability of interest groups to take part in the process and thereby to influence rulemaking.<sup>35</sup> However, as many scholars have pointed out, experimentation with public participation over the last decades raises strong concerns as to whether Notice and Comment rulemaking actually achieves effective public participation in many cases. Two concerns are especially important. First, it is unclear that the Notice and Comment procedures actually allow the public or stakeholders meaningful input into the process in most cases. Second, and just as important, direct public input is neither necessary nor appropriate in every rulemaking.

Starting with the more familiar first criticism, if the topic at hand is one where public comment is appropriate and useful, several studies suggest that the Notice and Comment process does not make for meaningful participation.<sup>36</sup> Donald Elliott, quoted at the opening of

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34. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY: HOW DOES POPULAR SOVEREIGNTY FUNCTION IN AMERICA?* 3 (1963) (“democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders”); CHRISTOPHER HOOD, *THE ART OF THE STATE* 121 (1989) (discussing how egalitarian government leads to increased participation); B. GUY PETERS, *THE FUTURE OF GOVERNING* 50–76 (2d ed. 2001); ETHAN LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 1–4, 77–79 (2004) (suggesting the need to create a method for deliberative participation of citizens in government); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 *Geo. L.J.* 525, 527–30 (1972).

35. Gellhorn Ernest, *Public Participation in Administrative Proceedings*, 81 *YALE L.J.* 359, 361–369 (1972); Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 *POL’Y SCI.* 165, 165–66 (1993). Administrative Conference of the United States (ACUS), Recommendation No. 76-1, *Public Participation in Administrative Hearings* § 1. For a more critical discussion flagging some of the problems of public participation, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1770–81 (1975); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 49–54 (1988); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *Nw. U. L. REV.* 173, 217–41 (1997).

36. An important question is what exactly “meaningful participation” entails. While there is no single answer, for purposes of this Article, “meaningful participation” refers to input that will be considered seriously and may have influence on the public decision, at the agency’s discretion. However, more than one scholar would say that this level of participation is insufficient. Ned Crosby et al., *Citizens Panels: A New Approach to Citizen Participation*, 46 *PUB. ADMIN. REV.* 170, 170 (1986);

this article, stated flatly that when an official wanted real participation, the Notice and Comment procedures were not what they used.<sup>37</sup> Jody Freeman found the Notice and Comment process too adversarial to create real dialogue, since parties talk at each other rather than with each other.<sup>38</sup> Other scholars expressed similar concerns.<sup>39</sup> Most empirical studies of rulemaking, as well as articles that draw on them, demonstrate limited participation in rulemaking and rare participation beyond involved interest groups (and especially business interest groups), which would—and do—participate beyond the Notice and Comment stage anyway.<sup>40</sup> While interest group participation is enough in certain kinds of cases, in others, lack of public participation can lead to implementation problems or loss of legitimacy later.

The same studies also cast doubt on whether agencies actually change their views following such participation, and on whether new communication technologies, such as the [www.regulations.gov](http://www.regulations.gov) website, allow for greater participation.<sup>41</sup> Even Mariano-Florentino Cuéllar

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JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 32–34 (1991) (focusing on legislators, but easily applicable here, since it analyzes concerns about lack of equality in access and inability of people to influence decision makers, which are not confined to legislators); Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASSOC. 216, 217–18 (1969).

37. Elliott, *supra* note 1, at 1492.

38. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11–12 (1997).

39. Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 319 (1989); Rossi, *supra* note 35, at 216.

40. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 247 (1987); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 476–80; Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250–53 (1998); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70–71 (2004); John M. De Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 987–89 (2006); David Schlosberg et al., *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*, 4 J. INFO. TECH. & POL. 37, 49–51 (2007). KERWIN, *supra* note 11, at 180–81; Cramton, *supra* note 34, at 529. Kerwin, who conducted the most wide-ranging study, found that between fifty-five and sixty-six percent of rules where notice was published generated public comment, meaning that many do not generate such public commentary. KERWIN, *supra* note 11, at 180–83. He did not explain who participates. *Id.* He did, however, note that the total evidence suggests that participation is real and important to interest groups. *Id.*

41. See generally Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 949 (2006). But see Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Governmental Information Through the Internet* 50 ADMIN. L. REV. 277, 279 (1998)

lar, who demonstrated that there were substantial numbers of comments from individuals in the three rulemakings he investigated in depth,<sup>42</sup> demonstrated that the comments from individuals, as opposed to those from interest groups, had very little influence (though he did find that in two of the rulemakings the agencies substantially changed their proposal).<sup>43</sup> Other empirical research showed that agencies change rules in response to comment in some cases, though the studies found substantial changes in less than fifty percent of the rules researched.<sup>44</sup>

This does not necessarily imply that agencies are unresponsive; it can mean that the preparatory work leading to the rule was sufficiently in depth that there was no need for further changes. But what does raise concerns about the willingness of agencies to change are the findings by Marissa Martino Golden that most changes put in rules are minor,<sup>45</sup> and the finding by William F. West that out of sixteen changes made in the forty-two rules he studied, most changes were the result of political processes, not comments; only in five cases did the comments have direct impact.<sup>46</sup>

Besides the fact that an agency might treat the Notice and Comment process as just one more administrative hurdle, another drawback is that it comes too late in the day. The point in the rulemaking process in which Notice and Comment proceedings kick in is when an agency has a detailed rule ready to go. At that point in the process, the agency has already considered and evaluated the different alternatives, has almost always gone through a lengthy internal vetting process, and many critical decisions have been discussed and finalized. Typically,

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(arguing that internet use will make a substantial difference to participation in the rulemaking process).

42. Cuéllar, *supra* note 40, at 442, 448, 456 (referring to the numbers for each of his three case studies respectively). Though, as Coglianese states, most of them were form letters. Coglianese, *supra* note 41, at 953–54.

43. Cuéllar, *supra* note 40, at 476–80. Cuéllar found that most comments by individuals lacked sophistication, and that sophistication of the comment was the single most important factor in the effect it might have on the agency. *Id.* at 480.

44. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 111 (2006); Golden, *supra* note 40, at 259–60 (noting that five out of eleven rules had minimal to no change, only one rule had substantive change, and that the agency “rarely altered the heart of the proposal”); West, *supra* note 40, at 66, 71 (noting that sixteen out of forty-two rules were amended “in a meaningful but not fundamental” way).

45. Golden, *supra* note 40, at 262.

46. West, *supra* note 40, at 71. More empirical research of rulemaking would be useful, as pointed out by Coglianese, *supra* note 10, at 1137.

the agency will have also received input from stakeholders.<sup>47</sup> At least to some degree, the agency is fairly wedded to its decision at that point, and the impact of input can be expected to be less than it might have been if provided earlier.<sup>48</sup> This does not mean the agency will not change its position or will not be open to comments; but it has invested in its decision and will be less open to input than it might have been earlier. This late in the game it is difficult for the agency to identify or consider alternatives besides those already considered.

An example is the Environmental Protection Agency's (EPA) standards for regulating ozone that came under consideration in *Whitman v. American Trucking Association*.<sup>49</sup> In that case the agency started working in 1982, and although initially it had to be forced into action by environmental groups, by the late-eighties/early-nineties it was hard at work analyzing the data and creating reports. In 1996, it issued its final staff paper of 285 pages, references and appendices, covering almost 200 studies and analyzing their problems, concluding that the standard should be a concentration in the atmosphere of between 0.07 and 0.09 parts per million (ppm).<sup>50</sup> By the time the EPA arrived at that standard, it was set on the range, although still debating about limits within that range.<sup>51</sup>

Agencies, being sophisticated political actors, are aware of the problem of late input and many of them try to fix it in various ways. As will be described below, several agencies use advance notice procedures to allow early input, and most agencies regularly solicit informal input before the actual proposal.<sup>52</sup> However, agencies do not get "credit" in the courts for using these early mechanisms; they do not

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47. West, *supra* note 40, at 70 (stating that of forty-two rules he assessed, only six did not have informal contact with interest groups before the notice was published).

48. See KERWIN, *supra* note 11, at 73–81 (discussing pre-notice stages). West reviewed forty-two proceedings, out of which thirty-eight tested a specifically defined alternative. West, *supra* note 40, at 69. Among the other four, only one was a regulatory action. *Id.* The average time between starting research and a proposed rule was 4.3 years, or 5.3 if rules that needed to be renewed annually (routinely) were excluded, compared to 2.2 years from proposed to final rule, i.e., substantial action occurred before the proposed rule. *Id.*

49. *Whitman v. Am. Trucking Assns. Inc.*, 531 U.S. 457 (2001).

50. Craig N. Oren, *Whitman v. Trucking Associations—The Ghost of Delegation Revived . . . and Exorcised*, in *ADMINISTRATIVE LAW STORIES*, *supra* note 28, at 6, 14–15.

51. Oren points out that the differences within the range were tremendous. *Id.* at 18–22. However, his description of the battle surrounding the standards showed that the battling interest groups had widely divergent approaches that went beyond the debates about the range. *Id.* Yet, the agency's position limited the battle to debate about limits within the range they had identified. *Id.*

52. West, *supra* note 40, at 69–70.



count as part of the review process (and might even count against the agency as *ex parte* communications). Also, informal contacts are—with some reason—suspected by outsiders as strongly favoring well connected industry members over others.

The conclusion is that in certain cases all Notice and Comment procedures achieve is *pro forma* participation,<sup>53</sup> rather than providing a way to give power or a real say to stakeholders or the public.<sup>54</sup> Even if in some cases the goals are achieved informally, there are many examples of rulemaking criticized for problems that sufficient participation could have corrected.

This calls into question the suitability of Notice and Comment as a method of participation. From the agency's point of view, if the agency gets into the habit of treating a central participation mechanism as something done purely for form, the result will be that meaningful participation will not occur, whether or not it would have been useful or important in a particular case. From the public's point of view, if the participation is perceived as *pro forma*, Notice and Comment aside from responding to comments at a level sufficient to prevent overturning the decision through judicial review, the process will lose legitimacy.<sup>55</sup> Public participation experts—practitioners and scholars—have repeatedly warned against conducting “fake” participation, since such participation harms legitimacy, making it more difficult to achieve real participation in the future.<sup>56</sup> In the words of one such expert:

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53. Though clearly not all cases, and in the cases where there is heavy participation, the Notice and Comment system may be very important. However, in at least some of those cases, where, as described above, participation is limited, other methods of ensuring participation may better achieve the agency goals than Notice and Comment procedures. See *supra* notes 37–41 and accompanying text.

54. In a recent study, Susan Webb Yackee demonstrated that in the forty rules she evaluated, agencies reacted to forty-nine percent of the top concerns of comments, with the level of change affected by whether there was uniformity or controversy between the commentators. Webb Yackee, *supra* note 44, at 117. That still means that agencies do not constantly change their rules in response to comments.

55. A good question is “in whose eyes” legitimacy will be lost. At the very least, those who try to participate regularly will be disillusioned; reaction beyond that will depend on whether the public starts perceiving the agency as unresponsive or captured.

56. CREIGHTON, *supra* note 30, at 40–41; Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 PLAN. THEORY & PRAC. 419, 419–20 (2004); see Renee A. Irvin & John Stansbury, *Citizen Participation in Decision Making: Is It Worth the Effort?*, 64 PUB. ADMIN. REV. 55, 59 (2004) (warning that misled participants would grow increasingly dissatisfied); see also CAROLYN J. LUKENMEYER & LARS HASSELBLAD TORRES, PUBLIC DELIBERATION: A MANAGER'S GUIDE TO CITIZEN ENGAGEMENT (2006), available at <http://www.businessofgovernment.org/pdfs/LukensmeyerReport.pdf>.

A bogus participatory process destroys the credibility of all future attempts to provide genuine participation on other issues . . . . If the agency has already made a decision, public participation is a sham. Save public participation for times when the agency really wants it, needs it, and is willing to respond to the public's ideas.<sup>57</sup>

Though the research shows clearly that participation is not *pro forma* in all cases,<sup>58</sup> if the public perception is that an agency does not take participation seriously, the damage is done.

However, Notice and Comment can be also criticized for its format, which, according to some, does not offer sufficient opportunity for participation. For several decades, scholars who advocated deliberative democracy also supported strong citizen input, beyond just receiving public comment. Advocates strongly demanded that, in appropriate cases, the public affected should have the final say on policy decisions affecting it.<sup>59</sup> What is "appropriate," however, is not always clear from the literature. Deliberative democracy ideas do not refer to conducting regular public hearings; as with Notice and Comment, the format of a public hearing is seen as suffering from a number of drawbacks: not allowing meaningful input, not creating a dialogue, not seriously informing the public, and limiting participation.<sup>60</sup> Deliberative democracy methods aim at engaging people who would not normally participate, either the whole public or a representative sample, and at creating an informed dialogue. The goal of the dialogue may vary from achieving consensus to developing policy options, according to the issue under consideration.<sup>61</sup> While many are skeptical about the ideas of deliberative democracy,<sup>62</sup> methods of de-

57. CREIGHTON, *supra* note 30, at 11, 41.

58. Scholars demonstrate convincingly that agencies take comments seriously in at least certain cases. *See, e.g.*, Cuéllar, *supra* note 40, at 498; Webb Yackee, *supra* note 44, at 117–18; William F. West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 PUB. ADMIN. REV. 655, 661(2005).

59. Arnstein, *supra* note 36, at 216; Cramton, *supra* note 34, at 525; *see* Crosby et al., *supra* note 36, at 171.

60. Innes & Booher, *supra* note 56, at 424–25. *But see* Brian Adams, *Public Meetings and the Democratic Process*, 64 PUB. ADMIN. REV. 43, 43, 46–51 (2004) (describing methods of public participation through public meetings of city councils).

61. ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 110, 127, 226 (2006) [hereinafter EMPOWERED PARTICIPATION]; Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC'Y 37, 87–88 (2001) [hereinafter *Accountable Autonomy*]; LEIB, *supra* note 34, at 35–45; Jennifer Nou, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL'Y REV. 601, 619–20 (2008).

62. *See, e.g.*, Rossi, *supra* note 35, at 211–12; David Schlosberg et al., *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*. 4 J. INFO. TECH. & POL. 37, 39, 50–51 (2007).

liberative democracy have been tested in many areas, including budgeting, policing, economic growth, science and technology, water projects, and more. While these methods have had mixed results, it's clear they are one of the tools agencies can and do use in policy making. The next sections will address when and how they can be used.

### B. *Deliberative Mechanisms in Practice*

The following section addresses the literature that describes use of deliberative mechanisms, evaluates them, or suggests ways to use and improve them. The focus is on past experiences. Addressing the potential of deliberative mechanisms to perform in new and promising ways or analyzing the theoretical foundations of deliberative mechanisms is beyond the scope of this article.<sup>63</sup> The goal of this paper is to demonstrate that deliberative mechanisms are an extant alternative for administrators, or at least something experimented with. This discussion does not purport to cover all currently or potentially conceived possibilities; new combinations of methodologies are constantly being invented.

Not all experiments with deliberative methods were successful, certainly not if one defines success as achieving consensus or a specific result. Thomas Webler describes the example of a landfill siting project where long discussions with citizens failed to lead to agreement on the siting, and points out that, while the official initiating the process saw it as a failure, the citizens probably saw it as a success, since they avoided having the landfill in their community.<sup>64</sup> Several instances of regulatory negotiation have not achieved a consensus,<sup>65</sup> and scholars have rightly cast doubts on the effectiveness of the process and its ability to prevent litigation.<sup>66</sup> Notice and Comment

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63. For discussion of the theory behind these mechanisms, see generally FISHKIN, *supra* note 36, at 29–41, LEIB, *supra* note 34, at 31, and Nancy Roberts, *Public Deliberation in an Age of Direct Citizen Participation*, 34 AM. REV. PUB. ADMIN. 315, 322–30 (2004).

64. Thomas Webler, 'Right' Discourse in Citizen Participation: An Evaluative Yardstick, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 35, 35–36 (Ortwin Renn et al. eds., 1995).

65. The EPA, the most active agency in using negotiation to issue rules, had completed eleven negotiations as of mid-1993. Of these eleven negotiations, the EPA was able to reach a full consensus on seven cases and partial consensus on two. Daniel J. Fiorino, *Regulatory Negotiation as a Form of Public Participation*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 64, at 223, 227–28.

66. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J., 1255, 1286–1309 (1997). *But see* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9

processes occasionally end in rules that are criticized by participants,<sup>67</sup> and there are certainly rules that are litigated.<sup>68</sup> As is the case with all forms of policy making, participatory methods should be used where they are relevant to their goal, used carefully, and used with the knowledge that there are no guarantees of success and that it is an ongoing process. Although participatory methods will sometimes end in deadlock and debate, that does not mean they should not be used. It does mean they need to be corrected and improved on an ongoing basis, and that they will need to be carefully structured and planned.<sup>69</sup>

Inclusive methods, i.e., methods that encourage participation from the population at large, have been used from a neighborhood level to the level of a medium city for issues such as local budgeting and determining growth,<sup>70</sup> policing, and schools.<sup>71</sup> For example, Chicago has engaged in two such experiments: neighborhood level school management and neighborhood level policing. Citizens are very actively engaged in both activities, and, while success has not been universal, crime has dropped and school achievements have improved in many neighborhoods.<sup>72</sup> Similarly, participatory budgeting was used in the following places: cities in Brazil, starting with Porto Alegre and

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N.Y.U. ENVTL. L.J. 32, 32, 40–41 (2000) (claiming the process is “enormously successful in developing agreements in highly polarized situations.”).

67. The studies of participants focused on the importance they see in the rulemaking process to achieving their goals. *See, e.g.*, KERWIN, *supra* note 11, at 180–81; Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 360 (2005) (describing the results of a survey that asked participants different questions as to the importance of rulemaking to them).

68. *See generally* Jordan, *supra* note 10, at 412–39 (discussing the effect of court decisions on agency rulemaking).

69. *See generally* Archon Fung, *Deliberative Democracy, Chicago Style: Grassroots Governance in Policing and Public Education*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, 111, 133–37 (Archon Fung & Erik Olin Wright eds., 2003) [hereinafter *Deliberative Democracy, Chicago Style*] (providing two examples where problems that damaged deliberative mechanisms were fixed by external intervention); CREIGHTON, *supra* note 30, at 229–42 (providing studies of three public participation cases).

70. For deliberative democracy experiments with budgeting, see generally REBECCA ABERS, *Inventing Local Democracy: Grassroots Politics in Brazil*, 71–89 (2000); Gianpaolo Baiocchi, *Participation, Activism and Politics: The Porto Alegre Experiment*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, *supra* note 69, at 45–76. For examples of using deliberative democracy to decide on patterns of growth, see generally Edward C. Weeks, *The Practice of Deliberative Democracy: Results from Four Large-Scale Trials*, 60 PUB. ADMIN. REV. 360, 366–69 (2000).

71. For policing and schools, see generally FUNG, *Accountable Autonomy*, *supra* note 61, at 73–75, and FUNG, *EMPOWERED PARTICIPATION*, *supra* note 71.

72. Fung, *Deliberative Democracy, Chicago Style*, *supra* note 69, at 111.

moving to other cities;<sup>73</sup> Washington, D.C., where the budget under Mayor Anthony Williams was planned and evaluated through a Citizen Summit;<sup>74</sup> Eugene, Oregon; and Sacramento, California.<sup>75</sup> Participation has never been completely general, but there are strong indications that the process did increase legitimacy and involved people who would not otherwise be included.

More targeted methods, such as citizen juries, citizen panels, planning cells, workshops, consensus groups, interactive meetings, and others, were used on a larger scale, up to a large country level, including the U.S. and Germany. Some European countries routinely use representative models for handling issues of science and technology.<sup>76</sup> For example, Denmark has used consensus conferences, which engage ten to twenty-five citizens in several rounds of deliberations spread out over three months and end with a report making recommendations. As of 2005, this technique was used for twenty-two technology issues, including electronic surveillance and air pollution.<sup>77</sup> These conferences produce reports with recommendations, and frequently—though not always—the recommendations are adopted into policy.<sup>78</sup> In Germany, planning cells, where about twenty-five citizens meet and deliberate on an issue for several days, have been used for a number of issues, including a broad project (with twenty-four

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73. ABERS, *supra* note 70 at 83–89; Baiocchi, *supra* note 70, at 41–76.

74. CAROLYN J. LUKENSMAYER et al., *A Town Meeting for the Twenty-First Century*, in THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY 154, 154–56 (John Gastil & Peter Levine eds., 2005).

75. Weeks, *supra* note 70, at 363–66. The budget process worked well in Brazil. See Baiocchi, *supra* note 70, at 69 (noting the success of the Participatory Budget (PB) process); Weeks, *supra* note 70 at 365. I have no data on how it worked in Washington (results are not mentioned in Lukensmeyer at all), but it worked only moderately well in Sacramento. While important changes were suggested and the end budget followed the result of the workshops, the participation rates were lower than in the other places and the result less definite. *Id.* at 366.

76. Anneke Hamstra, *The Role of Public Instruments of Constructive Technology Assessment in Public Participation in Science*, in PUBLIC PARTICIPATION IN SCIENCE: THE ROLE OF CONSENSUS CONFERENCES IN EUROPE 53, 59–64 (Simon Joss and John Durant eds., 1995); Lars Kluver, *Consensus Conferences of the Danish Board of Technology*, in PUBLIC PARTICIPATION IN SCIENCE: THE ROLE OF CONSENSUS CONFERENCES IN EUROPE, *supra* note 76, at 41; Josée van Eijndhoven, *Technology Assessment: Product or Process?* 54 TECH. FORECASTING & SOC. CHANGE 269, 269–70 (1997); Simon Joss, *Public Participation in Science and Technology Policy and Decision-Making—Ephemeral Phenomenon or Lasting Change?* 26 SCI. & PUB. POL'Y 290, 290–91 (1999).

77. Carolyn M. Hendriks, *Consensus Conferences and Planning Cells: Lay Citizen Deliberations*, in THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY, *supra* note 74, at 83–84, 89.

78. *Id.*

planning cells) that discussed energy policy, ended with a decision to adopt a policy that emphasized conservation and energy efficiency rather than high supply, and included a list of very specific recommendations.<sup>79</sup>

The United States experimented only once with a mechanism called a “planning cell,” in relation to sewage sludge management in New Jersey.<sup>80</sup> However, a very similar mechanism—citizen juries—has been used several times. Citizen juries are small groups (fifteen to twenty-five individuals) selected randomly but according to criteria that makes them demographically representative. They meet for a number of days for an intense workshop in which they study an issue, receive materials and hear from experts, after which they deliberate and create recommendations.<sup>81</sup> So far, citizen juries have been used at the national level to suggest options for dealing with climate change,<sup>82</sup> as a political legitimating exercise to deliberate on budgetary problems and health care reform,<sup>83</sup> and in the contexts of global warming, education, environmental protection, and managing water resources.<sup>84</sup>

Additionally, United States national and state agencies<sup>85</sup> have used participatory mechanisms to make rules on issues that are governed by a central law but then have strong local aspects. For example, a broad-range participatory project was used to choose the site for

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79. *Id.*; Peter C. Dienel & Ortwin Renn, *Planning Cells: A Gate to ‘Fractal’ Mediation*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 64, at 117, 130–32.

80. Hendriks, *supra* note 77, at 93.

81. The term “citizen juries” has been registered as a trademark by the Jefferson Center. See Nou, *supra* note 61 at 618 (referencing [www.jefferson-center.org](http://www.jefferson-center.org)). Part III discusses Nou’s article in greater detail. There appears to be little difference between citizen juries and planning cells. Although planning cells in Europe tended to be conducted serially, i.e., more than one planning cell about a topic was held at the same time, some citizen juries were also conducted serially while others were not, and on some topics only one citizen jury was held. Other than that, the two models seem to do the same things. See, e.g., THEODORE LEWIS BECKER & CHRISTA DARYL SLATON, THE FUTURE OF TELEDEMOCRACY 53–54 (2000).

82. See JEFFERSON CENTER, CITIZENS JURY: GLOBAL CLIMATE CHANGE 3 (2002), available at <http://www.jefferson-center.org> (follow “Past Projects” hyperlink).

83. Jefferson Center, Frequently Asked Questions, <http://www.jefferson-center.org> (follow “FAQ” hyperlink; then follow “How successful were Citizen Jury projects on specific public policy issues?” hyperlink) (last visited Nov. 1, 2009).

84. John Randolph & Michael Bauer, *Improving Environmental Decision-making through Collaborative Methods*, 16 REV. POL’Y RES. 168, 178–85 (1999); Irvin & Stansbury, *supra* note 56, 61–63.

85. Agencies in other countries have also used participatory mechanisms in the same manner; however, for the purpose of this paper, addressing the United States agencies is enough.

a dam in Arizona.<sup>86</sup> Such projects have also been used for addressing waste management.<sup>87</sup>

Similarly, stakeholders-centered participatory mechanisms have been used in the United States. In the area of the Endangered Species Act, Habitat Conservation Plans are a very controversial mechanism that brings stakeholders together to deliberate, negotiate and create a plan for implementation of the Act in relation to a specific species.<sup>88</sup> While regulatory negotiation<sup>89</sup> has not become as common as its promoters first hoped,<sup>90</sup> it has been used in a number of instances, often ending in a proposed rule that then had to go through Notice and Comment. A 1995 study addressed eleven negotiations conducted by the EPA, seven of which ended in a proposed rule and two of which ended in almost complete consensus.<sup>91</sup>

If done properly, these methods can be expensive, though not necessarily prohibitively so. The Jefferson Center estimates that citizen juries will cost \$35,000–90,000,<sup>92</sup> and a three year, broad participatory project about the Arizona dam location cost “approximately \$1 million (in 1980 dollars).”<sup>93</sup> That number addresses only what the participation consultants charge; it does not take into account the hourly costs for the agency to prepare the proposal (including possible scientific surveys needed to assess alternatives) and arrive at a decision. On the other hand, this is a one-sided equation; we do not really have empirical data on how much conducting a Notice and Comment

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86. CREIGHTON, *supra* note 30, at 233–36.

87. See Anna Vari, *Citizens' Advisory Committee as a Model for Public Participation: A Multiple-Criteria Evaluation*, in FAIRNESS AND COMPETITION IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE, *supra* note 64, at 103, 108–09.

88. See generally Craig W. Thomas, *Habitat Conservation Planning: Certainly Empowered, Somewhat Deliberative, Questionably Democratic*, 29 POL. & SOC. 105 (2001); CHARLES SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 3–5 (2000).

89. Regulatory negotiation, often referred to as “reg-neg,” is a process for increasing the level of participation in rulemaking. In regulatory negotiation, the agency—itsself or through a moderator—organizes a negotiation between interested parties; if the negotiation is successful, the result is a proposed rule which, then goes through the Notice and Comment process. See Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation v. Conventional Rulemaking: Claims, Counterclaims and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 599–600 (2000).

90. See generally Fiorino, *supra* note 65, at 223–25.

91. *Id.* at 228.

92. Jefferson Center, *Frequently Asked Questions*, *supra* note 83; see also Mark D. Robbins, Bill Simonsen & Barry Feldman, *Citizens and Resource Allocation: Improving Decision Making with Interactive Web-Based Citizen Participation*, 68 PUB. ADMIN. REV. 564, 569 (2008) (suggesting that due to the costs of participation mechanisms they should be reserved for controversial issues).

93. CREIGHTON, *supra* note 30, at 233.

process costs.<sup>94</sup> The cost of the rulemaking process cannot stop at the point where a rule is created—it must also address costs of implementation and costs of litigation, if any. One of the claims often made by those supporting deliberative mechanisms is that these methods can decrease costs of implementation and costs of possible litigation after the fact.<sup>95</sup> A decision which is impossible to implement cannot be useful, and certainly does not represent an economy, no matter how modest the cost of the decision-making process. Admittedly, this is a somewhat theoretical discussion, given the lack of systematic data. However, in one anecdotal example, Crosby describes a situation of a dispute between Winona County in Minnesota and another city, where the Jefferson Center offered to conduct a citizen's jury for \$5,000; after the city disapproved, considering the process too expensive, "the two sides together had incurred legal fees of over \$500,000."<sup>96</sup> This, Crosby implies, is due to the contentious nature of the non-participatory method, which could have been mitigated by using a participatory method.

It is clear, however, that deliberative mechanisms require a high level of involvement and time and concentration from the participants

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94. To the best of my knowledge there is no empirical study of the costs of Notice and Comment rulemaking; however, there is some information about how long a rulemaking takes. See West, *supra* note 40, at 69 (finding on average that it took 4.3 years until notice and 2.2 years from notice to finalize a rule, with the average time till notice rising to 5.3 years if one excludes routine renewal of rules that have to be renewed annually); see also Webb Yackee, *supra* note 10, at 13–23. However, this information just tells us about the time the total rulemaking takes. A true comparison would have to include implementation and litigation costs, and as far as I know, this data is not available. Studies measuring the costs of the regulatory state focus on the costs of regulation for the private sector, not the costs of making and implementing the regulations in the public sector. See CLYDE WAYNE JR. CREWS, *COMPETITIVE ENTERPRISE INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 1–3* (2008); WINSTON HARRINGTON, *GRADING ESTIMATES OF THE BENEFITS AND COSTS OF FEDERAL REGULATION 1 (Resources for the Future)* (2006), available at <http://ssrn.com/paper=937357> (addressing the number of regulations and federal register pages, as well as the federal budget; but these measures do not allow a calculation of the costs of specific rulemaking processes).

95. See ROSEMARY O'LEARY, ROBERT F. DURANT, DANIEL J. FIORINO, & PAUL WEILAND, *MANAGING FOR THE ENVIRONMENT: UNDERSTANDING THE LEGAL, ORGANIZATIONAL, AND POLICY CHALLENGES* 133–36 (1999); CREIGHTON, *supra* note 30, at 18, 19. But see Coglianese, *supra* note 66, 1292–95, 1301–09 (noting that scholars have cast doubt on the effectiveness of the rulemaking process and its ability to prevent litigation).

96. Ned Crosby, *Citizen Juries: One Solution for Difficult Environmental Questions*, in *FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION*, *supra* note 64, at 157, 166.



themselves.<sup>97</sup> While participants may receive substantial external and internal benefits from the process, the need for that level of involvement suggests limits on the extent of use of these methods, and certainly limits on the number of projects any one actor may be involved in.<sup>98</sup>

The final observation is that there are difficulties in evaluating the success of these programs. There is no one view on what constitutes effective participation or how to measure it.<sup>99</sup> Some programs were seen by their participants and other actors as highly successful, others were seen as failures and in other cases there was no consensus on the level of success.

What is clear, however, is that the current form of participation in rulemaking does not take into account what decades of experimenting with deliberative methods can teach us. That should be corrected. Deliberative democracy is a legitimate alternative to Notice and Comment in appropriate cases, and agencies should use it where appropriate.<sup>100</sup> It is not a utopian or purely theoretical idea.

Agencies can, and do, as described above, use deliberative methods in addition to Notice and Comment, but that creates problems of its own. Imagine a dispute about siting a nuclear plant. A long, complicated deliberative process arrived at a solution acceptable to all but 100 people using the area suggested for a medieval mock tournament. The group submits a comment complaining that the agency did not acknowledge the cultural import of its tournament. The agency does not address it in its general statement, focusing instead on the deliberative process and the reasons for its final result. The group takes the agency to court. The agency may or may not win, but it has some cause for concern since it did not address the argument and the court might see that as problematic. Leaving aside the time and energy the agency has to spend on litigating this issue, the result in this case has

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97. See Irvin & Stansbury, *supra* note 56, at 58; Fung, *Deliberative Democracy, Chicago Style*, *supra* note 69, at 111.

98. External benefits include desirable policy outcomes, increased control over governmental processes, and stronger communities. Internal benefits (internal to the participating citizen) can include increased knowledge about public affairs, a sense of empowerment, and stronger civic involvement.

99. Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189, 190–191 (1993); see also Gene Rowe & Lynn J. Frewer, *Evaluating Public-Participation Exercises: A Research Agenda*, 29 SCI., TECH. & HUMAN VALUES 512 (2004); Webler, *supra* note 64, at 35–38.

100. The logic of deliberative democracy mechanisms is different than that of Notice and Comment, and should therefore be evaluated using different criteria. As such, deliberative democracy should be considered as an alternative as opposed to an “extra” form of review for which the agency can utilize.

been achieved in a way that is not directly reliant on Notice and Comment.<sup>101</sup>

### C. *Pragmatic Participation*

A second important strand in the current literature on participation offers a different set of insights. This literature, which has been described as the “pragmatic participation” literature,<sup>102</sup> suggests that the form of participation should be suited to the problem to be solved and the goals to be achieved.<sup>103</sup> Not all problems can be solved by a deliberative mechanism. Sometimes, allowing the public to participate is the best way to assure meaningful review and control of agencies’ decisions. Sometimes, it is not. This section reviews what goals participation can achieve, in order to suggest when a mechanism to allow participation—whether Notice and Comment or deliberative—is appropriate.

There are several goals towards which participation aims, and there can be different goals in different situations.<sup>104</sup> Again, it is vital to make the distinction between the agency’s point of view and the public’s point of view. From the agency’s point of view, public participation can increase the quality of the agency’s decision by introducing new information about available alternatives and/or about public preferences. Participation can also improve decisions by providing an external check on the agency’s processes. Agencies can also use participation to facilitate implementation both by building consensus and by the reduction of resistance that seems to occur as a result of participatory processes. Agencies aim to legitimize and build up the credibility of their policy decisions by setting up legitimate processes and pointing to the legitimacy of such processes as a way of building support for the final result.<sup>105</sup> Finally, agencies may wish to

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101. Though this example is hypothetical, it is far from imaginary; it draws on the example of the dredging of the Oakland port described by Robert Kagan, where an acceptable compromise—though not one arrived at through a deliberative process—was taken first to federal and then to state court and undermined by the Half Moon Bay Fisherman’s marketing association. ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 25–29 (2001).

102. Archon Fung, *Democratic Theory and Political Science: A Pragmatic Method of Constructive Engagement*, 101 *AM. POL. SCI. REV.* 443, 444 (2007).

103. Irvin & Stansbury, *supra* note 56, at 61, 62; *see also* CREIGHTON, *supra* note 30, at 11, 42–44; Fung, *supra* note 31, at 67.

104. CREIGHTON, *supra* note 30, at 11, 42–44; *see also* Fung, *supra* note 31, at 67.

105. Studies have shown that people may react to either the outcome or to the process of policy making, or both. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 161–165.

provide information to the public about their activities or educate the public.

From the public's point of view, the first goal of participation is the basic goal of allowing people to have an influence on decisions affecting their life. This raises several problems: often the people who participate are not the general public, and it is unclear to what degree decision making by those willing to get involved is better than decision making by the bureaucrats.<sup>106</sup> The bureaucracy's decision can derive legitimacy either from expertise or from the fact that heads of agencies are appointed by elected representatives. Another goal for participation, from the public's point of view, is having increased control over government behavior and holding agencies to account, especially in the current age where distrust in government is strong.<sup>107</sup> Finally, the public may prefer efficient use of public resources, though the relation between that goal and participation is complex. On one hand, there is a tension between spending resources on participation and spending resources on other activities, which are also important to the public. On the other hand, as suggested above, resources spent on participation may increase efficiency by identifying better alternatives suggested by the participants, by facilitating implementation, and increasing legitimacy. In addition, participation can serve as a legitimating mechanism to compensate for the fact that agencies are not directly elected.<sup>108</sup>

The goals to be achieved will vary across agencies and across rules, and across the stage in the process. After all, policy making tends to be an ongoing process and a current rulemaking is often con-

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106. See SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 127, 150 (1987) (demonstrating that those who participate are unrepresentative and skewed in specific ways). *But see* Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, *supra* note 69, at 3, 26–29 (providing examples of participation that was more common among the less wealthy on issues that are very close to home for them).

107. ROBERT A. KAGAN, *The Organization of Administrative Justice System: the Role of Political Mistrust* (2006) (unpublished manuscript, on file with author); *see also* Seok-Eun Kim, *The Role of Trust in the Modern Administrative State: An Integrative Model*, 37 ADMIN. & SOC'Y 611 (2005).

108. Giandomenico Majone, *The Regulatory State and its Legitimacy Problems*, 22 W. EURO. POL. 1, 2 (1999); *see also* GIANDOMENICO MAJONE, INDEPENDENCE VS. ACCOUNTABILITY: NON-MAJORITARIAN INSTITUTIONS AND DEMOCRATIC GOVERNMENT IN EUROPE 1 (1994); Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, 25 W. EURO. POL. 125, 126 (2002); Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EURO. POL. 1, 2 (2002).

nected to and influenced by previous agency actions. If agencies faced substantial conflicts with stakeholders on similar issues, an agency may want to prevent or reduce such conflict in the rulemaking. In that situation, a deliberative mechanism may be the best choice. In others, an agency will want to make sure it has considered all the relevant information and ascertain what the public preferences are; in that situation, an opportunity for the public to submit comments may suffice. If an agency is making a rule on an issue that is technically complex and on which its experience leads it to believe that there will be little or no controversy, or controversy only between the agency and the regulated industry, it will probably not want to do much beyond informing the public. In such cases, there is a high probability that Notice and Comment will be a sham.

These are the kinds of areas in which large numbers of comments are not likely to be submitted.<sup>109</sup> One reason for this is that the public is not well informed on these issues. Agency members are aware of that fact, and are unlikely to give much weight to public comments. Their responses are often merely *pro forma*, intended mainly to preempt judicial review.<sup>110</sup> Participation by the public by no means guarantees meaningful accountability, and where public participation is appropriate, the optimum form for it will not always be the same.

Furthermore, agencies may have different goals at different points in the rulemaking process. An agency may want to separate the process into an early stage of gathering scientific information (which can be done at a preliminary stage, or to assess several options on the table) and a later stage of public involvement, when decisions can be made based on the information developed by the preliminary investigation.

#### D. *Alternative Suggestions for Participatory Reform*

The need to reform the rulemaking process to improve participation has been raised before. Two recent proposals, one by David Fontana and one by Jennifer Nou, stand out. Fontana, concerned with

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109. Golden, *supra* note 40, at 252–53, and West, *supra* note 40, at 71, both find that there are rulemaking cases where there are very few, or no, comments. Other issues have comments almost completely from business actors. That is not to say that there are not rulemaking cases where there will be substantial public participation. West addresses some, West, *supra* note 40, and the three case studies in Cuéllar, *supra* note 40, generated substantial discussion. But this reinforces the point that different methods of participation are suitable to different cases.

110. Though experience shows that with efforts, a selected member of the public can be informed and achieve an in-depth discussion, as described above, many issues agencies handle do not sufficiently interest the public to allow this to happen.

the lack of participation accompanying rulemaking, proposes creating incentives for agencies to increase participation by providing different levels of judicial deference for different modes of participation.<sup>111</sup> Under Fontana's reform, agencies have two forms of participation to choose from. The first is the regular Notice and Comment process. If the agency chooses that process, it would publish a statement counting the number of non-repetitive and relevant comments submitted and a breakdown of who submitted these comments.<sup>112</sup> If the agency received a sufficient number of comments of that kind, the courts would award its decision special deference, under the logic that increased participation contributes to the democratic nature of the decision making process.

Alternatively, an agency can choose to use deliberative Notice and Comment, in which it will convene citizen juries, which will meet and deliberate on the proposals and submit comments.<sup>113</sup> That model will also provide the agency with special deference from the court. The idea of using such a model of extended participation was not originated by Fontana,<sup>114</sup> but the application to rulemaking was his own.

Fontana's suggested reform improves on the existing Notice and Comment model by increasing the options available for formulating rules and rewarding agencies for increasing participation. It has two major advantages. First, it is clear and simple. There are only two models available and they are very well defined and clear. Second, there is an elegant incentive mechanism. If an agency achieves increased participation it benefits by reducing the level of judicial review, and thus the chances that the agency's decision will be overturned will be reduced.<sup>115</sup>

However, Fontana's idea suffers from several drawbacks. First, he is assuming that increased participation is in all cases a benefit. However, as discussed above, that is not necessarily the case. De-

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111. David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81 (2005).

112. *Id.* at 89–90.

113. For further detail on this proposal, see *id.* at 91–94.

114. *E.g.*, LEIB, *supra* note 34, at 12–29; Crosby et al., *supra* note 36.

115. Assuming, of course, that courts will cooperate with the changed standard. See, *e.g.*, SHAPIRO, *supra* note 35, at 122–123 (arguing that judges should manipulate the legal standard to prevent deregulatory changes). However, the *Chevron* experience suggests that courts will generally be deferent if a deference standard is imposed. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 *YALE J. ON REG.* 1 (1998) (showing high deference under *Chevron*); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969 (1992).

pending on what the agency wants to achieve, increased participation may or may not be a benefit. If the agency is trying to make a decision on a scientific question that it expects will lead to little public controversy, such as the helicopter design rule described above, going the deliberative Notice and Comment route is simply wasteful, since it is not useful. However, if the agency does not go that route and—unsurprising in a non-controversial rulemaking—receives only a few comments, or only comments from industry, it is punished by increasingly close judicial review. The public may not take it to court, but the regulated industries may, even just one dissatisfied organization. Why give one disaffected party such an advantage? Even in a case where there is serious participation by industry, as in the example opening this article of OSHA's attempt to change safety rules governing shipyards, the number of comments is not necessarily a good measure of the democratic nature of the process. Generally, it is not clear that a higher number of different comments is by itself a positive thing. There may simply not be much to say on an issue. Why give agencies the incentive to generate or encourage useless comments to avoid more searching judicial review? Or punish them for the lack of such comments? Generally, the Fontana reform suffers from the same problem as the current Notice and Comment system. It is not sufficiently sensitive to the need for different levels of participation in different situations.

Nou suggests evaluating proposed rules by using a deliberative forum—either citizen juries or deliberative polls—to assess their costs and benefits.<sup>116</sup> Nou acknowledges that this method should not be used in every rule, though she bases that idea on cost considerations. She suggests limiting deliberative cost-benefit analysis to rules where there is no ready market, for example, where human life or environmental issues need to be given monetary value.<sup>117</sup> The decisions would be bounded by expert knowledge.<sup>118</sup> Nou suggests that deliberative cost-benefit analysis be used at the alternative evaluation stage. In other words, the outcome of the citizens' deliberations will become part of the materials experts use to design the proposed rule and to assess which form of regulation is best.

This reform has the advantage of providing for more meaningful participation. Participation will be more meaningful both because it will occur earlier in the process—thus allowing those participating to determine the format of the rule—and because it balances nicely the

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116. Nou, *supra* note 61.

117. *Id.* at 622.

118. *Id.* at 623.

role of expertise with creating participation. It also limits the costly participation mechanism to a range of specific situations.

However, what Nou is proposing is essentially only a component, a step, in the review of a rule. She does not address the rest of the process, and does not really offer an alternative to existing Notice and Comment. In addition, like most cost-benefit analysis the proposal does not remove the need for other value choices that a cost-benefit approach does not capture, for example, the choice between dangerous species and economic growth, or between different water uses. The next section will elaborate on these issues and suggest a reform aimed at improving the rulemaking mechanism.

### III.

#### SUGGESTED REFORM

As explained above, the main concern of this article is two problems of the Notice and Comment procedure: its limitations as a mechanism of participation, and its use as a cookie cutter model, which is (incorrectly) viewed as equally applicable in all cases. Legislative and regulatory over-reliance on this single technique often fails to produce meaningful review of agency decisions. Notice and Comment can miss the point in either direction, producing too much public input in some cases, and too little in others. Sometimes, it will not achieve the goals set by agency members. Notice and Comment can even be harmful. When the agency has this cut-and-dried method available, unaccompanied by any requirement to consider the actual goals of public participation, it is less likely to consider or adopt the more sophisticated and deep forms of participation that have been suggested by participation scholars. Agencies, already overburdened and under-financed, will simply take the pre-set route. Notice and Comment requirements can undermine more deliberative participation methods, even if the original solution, while not necessarily addressing every factor, addressed most concerns and was seen as legitimate by most of the affected population. For example, the agency may have to set aside a consensus reached using a deliberative method as a result of a later Notice and Comment process, mandated either through judicial review or the threat of it. After all, it only takes one dissatisfied party to appeal, as can be seen from the fact that negotiated rulemaking did not achieve a lower level of litigation than non-negotiated Notice and Comment rules.<sup>119</sup>

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119. Coglianese, *supra* note 66, at 1301–09; *see also* Langbein & Kerwin, *supra* note 89, at 614–15.

To return to the examples mentioned at the beginning of the article, in relation to whether to add seatbelts to large school busses, there is clearly strong community sentiment on a number of issues that are not purely scientific, as well as on some issues that are scientific. Parents are concerned about the safety of their children, but also about how their local school districts spend money. Bus operators are concerned about discipline and safety. Bus manufacturers worry about costs, as do school boards. While the agency conducted hearings and had a Notice and Comment process, the comments on the regulations.gov website each stand on their own; some of them demonstrate a high level of knowledge, some of them simply pick one value and stake an emotional position.<sup>120</sup> In other words, there is no dialogue among the parties. In a case like this one, after a presentation of the data and the options, a community dialogue might well have helped the agency and others to better assess the practical options and consider the real trade-offs. Alternatively, even where dialogue among the parties exists, participatory mechanisms may facilitate implementation by achieving a workable agreement.

On the other hand, sometimes Notice and Comment participation is unsuitable because it provides for too much public participation, and of the wrong kind. It can give opponents a way to delay and encumber proposed regulation; such opponents can simply submit a large number of comments each requiring an answer, and can later go on to an appeal on grounds that one issue, even if trivial, was not answered to their satisfaction. By providing regulatees with a mechanism to raise any comment, not necessarily scientific, and require that it be addressed by the agency, it may force other considerations into the picture. The combination of Notice and Comment and the “hard look” doctrine means that regulated industry or interest groups can take advantage of the process to delay regulation and limit even non-problematic agency action.<sup>121</sup>

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120. See *supra* note 5.

121. McGarity, *supra* note 10, at 1397; McGarity, *supra* note 23, at 531–33. For studies about the unsurprising advantage of organized interests in using access avenues, see Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799 (2001) (showing that interest groups have substantial influence on the composition of advisory committees to the bureaucracy, not just on legislative outcomes); David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–33; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684–85 (1975); Lucig Danielian & Benjamin Page, *The Heavenly Chorus: Interest Group Voices on TV News*, 38 AM. J. POL. SCI. 1056, 1062–63 (1994) (suggesting interest groups have substantial representation in the media and among interest groups business is well represented). For studies that suggest that or-



### A. *The Alternative*

As discussed above, the problem with the APA Notice and Comment procedures is that they do not allow agencies to tailor their participation model to the goals they are trying to achieve, and accordingly, they may have unintended costs without real benefits. In addition, they provide for participation at a very late stage in the process.<sup>122</sup> Allowing better-tailored participation mechanisms may help with efficiency as well, either by increasing the efficiency of the rulemaking process itself or by facilitating implementation and by changing the judicial review provisions of the APA.

A new model would need to balance the public's interests with those of the agencies. The public needs a process in place which provides genuinely meaningful review. Agencies need a process that allows them space to maneuver and tailor the review to the needs of a specific rulemaking. Both will lose rather than benefit from the wrong kind of review.

I suggest allowing agencies to choose, within certain constraints, a model of oversight that is suitable to the content of the rulemaking and the stage in the process. The evaluation will then be done in two stages. The agency's choice of review mechanism can be challenged. However, if it is not challenged, an agency can only be evaluated under the logic relevant to the review mechanism.

Two caveats are in order. This reform addresses only the external review of rulemaking. Many agencies already have in place elaborate mechanisms for conducting internal reviews of rulemaking.<sup>123</sup> However, observers generally consider these mechanisms insufficient and require some form of external review. This reform addresses how that review will be conducted.

In addition, deliberative mechanisms have been suggested for a number of years, and as was described above, are the subject of an extensive, perhaps even gigantic, literature. Peer review has also been used, though on a much smaller scale than Notice and Comment and in more specific contexts, and it has not been considered as a legiti-

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ganized interests in this context does not necessarily mean business interests, see Gregory Caldera & John Wright, *Amicus Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782 (1990) (showing that the Supreme Court is responsive to a wide range of interests); BRONWEN MORGAN, *SOCIAL CITIZENSHIP IN THE SHADOW OF COMPETITION: THE BUREAUCRATIC POLITICS OF REGULATORY JUSTIFICATION* 215–16 (2003) (suggesting consumers can have impact on regulatory policy as long as they learn to speak the language of economic rationality).

122. Though some agencies have attempted to solve that problem by using pre-notice procedures such as regulatory negotiation and advance notices.

123. Kerwin, *supra* note 11, at 80–81.

mate part of the rulemaking process. The idea of doing away with Notice and Comment has also been implemented. This is what direct rules, which are supposed to be used when there is no controversy, are about.<sup>124</sup> The novelty in this article is twofold: applying the insight that the form of oversight can—and should—be tailored to the problem at hand to rulemaking; and giving the agency an official choice between options, thus legitimating deviations from Notice and Comment.

Under this proposal, before publication of a final rule, an agency will be required to use an oversight process at least once, and preferably more than once, in various stages of the rulemaking. When an agency uses an oversight model before the final stage of rulemaking, that process should accompany the final rule and count as part of the total oversight process. Early-stage oversight procedures might, for example, include a deliberative process that evaluated alternatives and/or suggested new ones, or peer-review of the science involved before it is put forward as the basis for a rule.

The oversight process will have two major stages. First, agencies will decide on the oversight model suitable for their participation goals, and publish in the Federal Register (and on the agency website) a general memo which describes the process chosen and explains why that process is appropriate, and a very general statement of the rule. Parties will have 30 days to challenge the model of oversight suggested. If, however, they do not challenge the scheme, the agency's rulemaking can only be challenged at a later stage on the basis of the particular oversight scheme it chose.<sup>125</sup>

### B. *The Three Oversight Models*

The available forms of oversight can be grouped under three categories, though the details will vary dramatically across topics and issues, and an agency can and probably will use different models at different stages of the process. When an agency wants to focus on technical issues such as the validity of the science it used, it will sub-

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124. See Lars, *supra* note 11, at 423–24 (1999) (claiming that the use of direct rules allows agencies to circumvent judicial review, and also that they violate the APA).

125. A limited time to review a rule is not a new idea in the United States or abroad. In the United States, the Congressional Review of Agency Rulemaking Act, 5 U.S.C. §§ 801–808 (2006), delays the starting date of regulations for a limited time of sixty days, in which the Congress can overturn the rule. The stronger form of limited time exists in several European countries, a classic example being France, where a law's constitutionality can only be challenged before the Conseil Constitutionnel, the Constitutional Court, in the limited time between its passage and its promulgation. See JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 33 (1992).

mit the decision to peer review.<sup>126</sup> When an agency wants to inform the public and get information about preferences of stakeholders and alternatives, it will probably use existing Notice and Comment procedures, possibly with the addition of surveys or oral hearings. When an agency is focusing on consensus building, facilitating implementation, or increasing its legitimacy, it will be likely to choose a deliberative model based on the most appropriate participation mechanism suggested by the deliberative democracy scholarship.<sup>127</sup>

The choice between alternatives may be greatly influenced by statute if Congress has already specified the criteria on which the decision should be based. For example, the Endangered Species Act requires that in relation to listing decisions the secretary “shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him.”<sup>128</sup> While the powerful consequences of a listing decision made the listing process inevitably political, the law itself does not reflect that politicization. Currently, one of the major criticisms of environmental groups is that politicizing the process undermines Congress’s intent in passing the statute.<sup>129</sup> However, as long as the law stays as it is, it appears clear that for the listing stage the agency would need to use peer review to evaluate the science. In addition, the use of Habitat Conservation Plans in the later stages to moderate the harsh consequences of listing<sup>130</sup> can be seen as including a more participatory element.

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126. Peer reviews have been used by agencies, to a limited extent, to evaluate certain decisions. OIRA has recommended use of peer review to evaluate scientific data, though not Regulatory Impact Analysis. OFFICE OF MANAGEMENT AND BUDGET, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf> (2004). The memorandum makes some interesting suggestions about the format of peer review. See also J.B. Ruhl & James E. Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1 (2006) (describing the controversy around the use of peer review in certain regulatory contexts, the perceptions of such use and the lack of real data about its necessity and effectiveness). Though peer review has not counted as a substitute to Notice and Comment.

127. As developed in the next section, while an agency may always generally desire consensus building and facilitating implementation, it will take special care to do so when it anticipates, or has faced, special problems in relation to an issue. In those situations it will want increased public participation.

128. 16 U.S.C. § 1533(b)(1)(A) (2006).

129. For an in depth analysis, see Thomas Jakob Kerr, *Of Politics and Polar Bears: the Bush Administration and the Endangered Species Act*, 14–17 (Apr. 27, 2008) (unpublished manuscript, on file with author).

130. *Id.*; Jennifer Jester, *Habitat Conservation Plans under Section 10 of the Endangered Species Act: The Alabama Beach Mouse and The Unfulfilled Mandate of Species Recovery*, 26 B.C. ENVTL. AFF. L. REV. 131, 132–33 (1998).

Similarly, the Supreme Court held in *Whitman v. American Tracking Associations* that the only thing the EPA could consider when setting National Air Quality Standards are health effects. This excludes costs from being considered.<sup>131</sup> If the decisions should really be made on that basis alone, the scientific basis should be evaluated through peer review. This is nothing new; the APA has always been the default, and specific language in an agency statute has always trumped it.

To use an example from the opposite side of the spectrum, Peter L. Strauss reads the Federal-Aid Highway Act of 1966<sup>132</sup> and the Department of Transportation Act of 1966<sup>133</sup> as emphasizing local authority and interest group participation. In that situation, the Department of Transportation should have used a deliberative mechanism and respected its results, and it did; Strauss describes in detail the adoption of a new framework for highway planning which emphasized participation of local interests as a balance against the views of the administrative technocrats.<sup>134</sup> He demonstrates how the federal government involved local interests in the process and gave weight to their views.<sup>135</sup> This supports Strauss's conclusion that *Citizens to Preserve Overton Park v. Volpe*<sup>136</sup> was wrongly decided and demonstrates the Court's lack of understanding of the process.<sup>137</sup>

If, however, the agency statute does not explicitly set the form of oversight, the agency will have to choose. The criteria for choice between the three models should be the nature of the question and the scope of anticipated conflict, i.e., from whom does the agency expect objections or suggested modifications, and how intense is any opposition likely to be, either at the rulemaking stage or at a later stage. There is, after all, limited use to preventing conflict during rulemaking

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131. 531 U.S. 457, 486–87 (2001).

132. Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, 80 Stat. 766, 771.

133. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931, 934 § 4(f) (codified as amended in 49 U.S.C. § 303 (2005)).

134. Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1285–88 (1992).

135. *Id.* at 1290, 1296–1311.

136. 401 U.S. 402 (1971).

137. Strauss, *supra* note 134, at 1318–19; Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—of Politics and Law, Young Lawyers and the Highway Goliath*, in ADMINISTRATIVE LAW STORIES, *supra* note 28, at 258, 307–11.

if by doing so one sets up serious problems during the implementation stage.<sup>138</sup> This is described in more detail below.

Any of these models, if candidly defended and carried through, will increase the legitimacy of the process, as discussed in Part III.D. All of them raise concerns about abuse, as discussed in Part IV. The next sections address each of the suggested models and are followed by a discussion of judicial review. They describe the situations in which an agency would use a particular model of oversight, describe the model shortly, and point out some issues related to the implementation of the described model. The following chapters address reasons why this reform would be an improvement on the current system, and then address concerns about the reform.

### 1. Peer Review

Peer review means submitting the decision to evaluation by experts in the relevant fields, and receiving a detailed evaluation of the proposal from them. If the agency does not anticipate serious conflict or any interest by outside stakeholders in the rulemaking, the decision should simply be reviewed for its technical or scientific correctness. Similarly, if the conflict will center only on technical or scientific conclusions, such conclusions are what must be evaluated. Peer review is the proper method here. In situations where the conflict is only between the agency and regulated industry, the agency may also want to emphasize its professionalism by limiting the evaluation to the science that supports its position. Finally, an agency may base its work on scientific or technical expertise only because Congress has decided that such is the way to reach a decision or because it is preparing the background to be used in the later stages. In all these situations, the best way to evaluate it is through peer review.

It may be doubted whether there are any purely scientific questions in the administrative state;<sup>139</sup> many questions that are science-heavy have strong value dimensions.<sup>140</sup> But there are clearly cases where the law requires the agency to base a decision on expertise and

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138. The focus should be on the scope and not the level because there can be very intense conflict when an agency regulates an industry in a way that is unacceptable to that industry, but it is not clear that that is a point for consensus seeking.

139. Fischer, *supra* note 35; Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1261–63 (2004) (showing the EPA use science to avoid close scrutiny of its work).

140. For example, what level of pollution will create what level of health risk may be a scientific question, but to what degree to limit pollution raises questions of which level of risk is acceptable to a community and what limitations is that community willing to place on economic activity to reduce risks.

expertise only, where the values to be considered have been predetermined. There are also cases where the public interest is very low, and the politicians and the public are happy to leave the decision to the experts. There are also cases in which an agency's job is to regulate, based on science, an industry that will naturally raise objections. In those cases, peer review is useful.

Even in cases where the decision rests heavily upon value judgment, substantial amounts of knowledge are needed if the discussion is to move forward. For example, in the rule about seatbelts on school busses, conclusions need to be drawn about the chances of accidents, the damage from accidents without seatbelts, the possible damages from seatbelts, and costs. This information about different alternatives can be collected and prepared by the experts, with the costs and benefits of each alternative described, and then submitted to peer review to guarantee the validity of the work and increase faith in its accuracy.

Using peer review in these situations will not only save resources by not requiring agencies to go through a *pro forma* Notice and Comment process, it will prevent the agency from using claims of scientific expertise as a smoke screen to problematic decision-making practices. Such practices were suggested by Cary Coglianese and Gary E. Marchant as mechanisms used by the EPA in at least certain cases.<sup>141</sup>

Furthermore, cases where the agency's decision is based mostly on scientific expertise are those where concerns about the lack of expertise from the participating public are the strongest.<sup>142</sup> These are also the situations where the advantages of consensus are most in doubt; it is unclear that more people involved will help arrive at a correct or better scientific decision.<sup>143</sup>

The question is what form peer review should take. Several things are clear. First, the decision should be reviewed by experts from all the disciplines involved. Second, the decision should be assessed for its connection to the facts and to the methodology used in getting to those facts. Therefore, reviewers should comment on the data relied upon, on the methodology used in collecting and analyzing it, and on the conclusions drawn from it. Third, to assure the availability of enough competent reviewers some form of compensation is

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141. Coglianese & Marchant, *supra* note 139, at 1265–66.

142. Rossi, *supra* note 35, at 215–18.

143. *Id.* at 217; Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93, 94 (Eric Orts & Kurt Deketelaere eds., 2001).

necessary.<sup>144</sup> Fourth, the reviewers should not disqualify a decision on the sole grounds that they disagree with it (which is not as impossible as it seems—reviewers for peer journals are required to assess articles based on the validity of their methods, not on whether they agree with the theory). Generally, reviewers should assess a decision as well-based or not sufficiently well-based. The agency will often have to make a policy decision in the absence of scientific certainty, and should be allowed discretion to do so.

I suggest that reviewers complete a short form (parallel to that used by academic reviewers of articles submitted to peer review journals) assessing the decision as: (1) well grounded in existing scientific knowledge; (2) sufficiently grounded in existing scientific knowledge, but raises some concerns due to methodological problems with data relied upon, but not to the level of disqualifying the data; (3) scientific uncertainty; (4) conflicts within expert community, and agency followed majority opinion; (5) conflicts within expert community, and agency followed minority opinion; or finally, (6) not grounded in scientific knowledge.

The reviewer should then explain briefly, in both technical and non-technical language, the basis for their views.

## 2. *Notice and Comment*

Notice and Comment is appropriate when the agency wants to glean information from the public or the relevant industry and does not have direct contact with all the concerned individuals. The agency does not want to share decision-making authority (or is legally prevented from doing so) and is not looking to create a consensus or dialogue. For example, if an agency wants to regulate the industry by limiting certain kinds of behavior, it sometimes is not interested in garnering the agreement of the industry; in fact, if the industry is completely happy with the agency proposals, the agency will probably be accused of capture or ineffectiveness.<sup>145</sup> In these situations, the parties raising objections need to be heard, because they have information that no one else has, but not given decision making power. That can be achieved through Notice and Comment, the emphasis in this case being on information-gathering rather than dialogue-creation. Simi-

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144. This mirrors Fontana's concern that his deliberative juries should be paid. Fontana, *supra* note 111, at 93.

145. As happened, for example, to the Interstate Commerce Commission, accused of equating the public interest with that of the railroads. See DAN B. WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 18 (1994).

larly, Notice and Comment may be a good default: if the agency is not sure about the scope of the conflict, Notice and Comment may allow it to test the water. Of course, if the agency knows that Notice and Comment has worked well in the past there is no reason for it to change its method of oversight.

Currently, much of the work agencies do is complete before the notice stage, which is one of the reasons the effectiveness of the process is in doubt.<sup>146</sup> Hopefully, by allowing procedures before the final stage to be considered as part of the review when judicially reviewed, this reform will enable incorporation of review in earlier stages of the policymaking process. The Notice and Comment process should be complemented with surveys where the agency wants information about the views of the general public, and with oral hearings where, in the agency's view, that is potentially useful.

The agency often cannot expect regulated industry to be happy about regulation, and in those cases, the goal is to prevent mistakes in decisions, but not to achieve consensus. In addition, Notice and Comment has the advantage of familiarity; agencies have been using it at least since the 1960s, and do not have to invest in learning a new process. Accordingly, where it serves the goal of meaningful review, it should be used.

### 3. *Deliberative Democracy Mechanisms*

If the matter at hand has produced deep-set value clashes and/or strong public interest, has resulted in implementation problems in the past, or if the agency anticipates that it will be controversial, a deliberative process is in order.<sup>147</sup> Clearly those mechanisms are not useful or appropriate in every rulemaking. However, they should be considered as a tool for problem preventing or problem solving, applicable at a number of points along the policymaking continuum.

Starting from the end, deliberative mechanisms may be useful when implementing a rule and running into problems. Implementation is a tricky process and often runs into as many problems as the

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146. Kerwin, *supra* note 11, at 74–82; West, *supra* note 40, at 69. At the notice stage, the agency has generally chosen a policy alternative and is simply subjecting it to minor changes and approval/disapproval.

147. The agency can also use a deliberative process when it wants to generate new ideas and options (though in practice, the areas when it's actually done tend to have high levels of conflicts) or to examine its general priorities. For example, the EPA's citizen jury on climate change asked citizens to rank alternatives and discuss what options, in general, should be taken. That left the problem definition to the jury. See JEFFERSON CENTER, *supra* note 82, 3–4; see also Nou, *supra* note 61, at 124.



initial rulemaking.<sup>148</sup> While implementation is not officially part of the rulemaking process, use of the deliberative option at the point of transition from rulemaking to implementation can have an effect on the rulemaking process. For example, the Habitat Conservation Plans put in place under the Endangered Species Act (ESA), with all the criticisms raised against them,<sup>149</sup> are an example of the use of a deliberative mechanism to assure that the rules listing a species—and more importantly, the intent of the Act—are implemented. They may also reduce some of the tension and struggles surrounding the rulemaking. In a Habitat Conservation Plan, landowners or developers agree to set aside certain territory within a species' habitat where an endangered species is protected in return for a permit to harm the species elsewhere, as an exception to the ESA's prohibition on "takings" of listed species.<sup>150</sup> Currently, there are 650 such plans approved.<sup>151</sup>

During the rulemaking process itself, deliberative mechanisms can be used to evaluate a proposed rule and see the public's reaction, which, in theory, is the goal of Notice and Comment. Agencies can use deliberative mechanisms instead in cases where the agency believes the rule is going to be politically controversial and is willing to alter it to reduce or avoid the controversy or to facilitate later implementation. This can be done by submitting the proposed rule to a citizen jury or deliberative poll.<sup>152</sup> Alternatively, an interactive meeting can be done to acquaint citizens with the issues and evaluate the

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148. As demonstrated in Pressman and Wildavsky's classic work, JEFFERY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL* (3rd ed. 1984). See also EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* (1977); William H. Clune, *A Political Model of Implementation and the Implications of the Model for Public Policy, Research, and the Changing Role of Lawyers*, 69 *IOWA L. REV.* 47 (1983).

149. See, e.g., Jester, *supra* note 130, at 134–35; Cameron W Barrows et al., *A Framework for Monitoring Multiple-Species Conservation Plans*, 69 *J. WILDLIFE MGMT.* 1333, 1334–35 (2005); Frances C. James, *Lessons Learned from a Study of Habitat Conservation Planning*, 49 *BIOSCI.* 871, 872–73 (1999); M. Nils Peterson et al., *A Tale of Two Species: Habitat Conservation Plans as Bounded Conflict*, 68 *J. WILDLIFE MGMT.* 743, 756–58 (2004); Matthew E. Rahn et al., *Species Coverage in Multispecies Habitat Conservation Plans: Where's the Science?*, 56 *BIOSCI.* 613, 616–19 (2006).

150. Craig W. Thomas, *Habitat Conservation Planning: Certainly Empowered, Somewhat Deliberative, Questionably Democratic*, 29 *POL. & SOC'Y* 105, 108 (2001).

151. U.S. Fish and Wildlife Service, Conservation Plans and Agreements Database, [http://ecos.fws.gov/conserves\\_plans/public.jsp](http://ecos.fws.gov/conserves_plans/public.jsp) (follow the "Nationwide" hyperlink, then select "Regional (Summary) Report" button) (last visited Nov. 1, 2009).

152. These methods are suggested, with some important variations, by Nou and Fontana. See Nou, *supra* note 61, at 617–24; Fontana, *supra* note 111, at 91–96.

rule. This type of proceeding was conducted when a citizen jury evaluated the proposed Clinton health plan in 1993; while several other options were discussed by the jury, the focus was on the Clinton plan and the jury ended up voting against it.<sup>153</sup> While this was not a rulemaking, it is an example of the public assessing a policy proposal. When done as part of rulemaking, the process should include an option to suggest changes.

In another example, the EPA conducted a large online dialogue on public involvement in EPA decisions. The dialogue included both planned panels and the general public, and a different EPA office was on call on each of the ten days of discussion. The materials were then used to create training brochures to improve public involvement practices at the EPA, and a policy paper was issued.<sup>154</sup>

Similarly, evaluating alternatives or defining the details of the rule, and certainly the choice of alternative, can be accomplished using any of the mechanisms described above, as well as through reg-neg. In fact, this is an excellent stage to use deliberative mechanisms, since it gives the participants a chance to provide input at an early stage of the process.

Reg-neg, for example, has been used to choose the best alternative and develop the details of a rule proposal.<sup>155</sup> In another case involving a wide-ranging study conducted in relation to the building of a dam in Arizona, deliberative participation led to a substantive change in the rule. One of the mechanisms used in that process was determining the preferences of each stake-holder and then evaluating alternatives on how well they matched preferences. Creighton explains that often parties are surprised at the results, since the option they initially prefer is not always the one that best achieves their value-preferences.<sup>156</sup> In that case, the option that initially seemed most desirable to business owners and agriculture (having one dam) was seen, after closer evaluation and deliberation, to not really promote their preferences as much as the option of two smaller dams; that option also fared best under the criteria important to environmental groups and ended up being adopted by the policymakers.<sup>157</sup>

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153. Crosby, *supra* note 96, at 162.

154. Patricia A. Bonner et al., *Bringing the Public and the Government Together through On-Line Dialogues*, in *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY*, *supra* note 74, at 142, 147.

155. Harter, *supra* note 66, at 33; Langbein & Kerwin, *supra* note 89, at 625-27.

156. See Creighton, *supra* note 30, at 235-36.

157. However, a lawsuit stopped construction on one of the two dams, and only one ended up built. *Id.* at 236.

Finally, even before the development of policy alternatives, deliberative mechanisms can be used to suggest options and put issues on the agenda as discussed above. Two examples demonstrate this. In a large-scale project, fourteen city and two “national” interactive meetings (including over 1,100 participants) were conducted for the U.S. Army Corps of Engineers to discuss water challenges.<sup>158</sup> The Corps had its own ideas of challenges, but a large part of meeting time was dedicated to brainstorming and raising other challenges.<sup>159</sup> After the main challenges were identified, solutions were suggested.<sup>160</sup> The Corps used the results to formulate a report on its priorities in the issue.<sup>161</sup> This format allowed the agency to draw on the public both for agenda setting (to identify the problems) and for developing alternatives (to identify possible solutions).

In another example, in 2002 the Jefferson Center conducted a citizen jury sponsored by the EPA to discuss global climate change and possible options.<sup>162</sup> This citizen jury had the potential to help the EPA both in setting an agenda and suggesting alternatives and policy options the EPA staff may not have considered.

These examples are only a small sample of ways that agencies can use deliberative mechanisms in different stages of the rulemaking process. The details of the appropriate form of participation will have to be determined on a case-by-case basis. A review of all the existing literature on such mechanisms is beyond the scope of this paper.<sup>163</sup> Since applying deliberative mechanisms in rulemaking is still a relatively new idea, it will not be surprising if still other novel applications of known mechanisms, or perhaps even completely new mechanisms, are eventually developed and used.

Several observations are in order. The first is that, as noted above, this kind of intensive participation often requires substantial time and resource investment on the part of the participants, both to educate themselves and to be truly involved in the decision-making

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158. *Id.* at 163.

159. *Id.* at 164.

160. *Id.* at 164–65.

161. *Id.* at 163–65.

162. JEFFERSON CENTER, *supra* note 82, at 2–4.

163. For an extensive review and many examples, see, for example, CREIGHTON, *supra* note 30, at 229–40; Fung, *supra* note 31; Fung, *supra* note 106, at 14–23; JOHN GASTIL, *POLITICAL COMMUNICATION AND DELIBERATION* (2008). See generally Carolyn M. Hendriks, *When the Forum Meets Interest Politics: Strategic Uses of Public Deliberation*, 34 *POL. & SOC'Y* 571 (2006); Carolyn M. Hendriks et al., *Turning Up the Heat: Partisanship in Deliberative Innovation*, 55 *POL. STUD.* 362 (2006); Terrence Kelly, *Unlocking the Iron Cage: Public Administration in the Deliberative Democratic Theory of Jürgen Habermas*, 36 *ADMIN. & SOC.* 38 (2004).

process. It should therefore only be undertaken when useful, in order to not waste public resources and participants' valuable time. For example, deliberative mechanisms are appropriate where there is a high level of controversy, or where the agency does not have good ideas as to what to do. Participation may generate possible alternatives that are worthy of consideration. Indeed, some agencies are already using advance notice proceedings for exactly that purpose.<sup>164</sup> Also, it is appropriate to use a deliberative democracy process when implementation is going to be very heavily dependent on community cooperation.

A common worry about any forum that allows citizens access to government is that organized and resource-rich groups can benefit more than the public at large from adoption of these mechanisms.<sup>165</sup> While this is certainly a legitimate concern, the potential problem may be less serious in situations where deliberative democracy mechanisms are used, as such procedures emphasize representation and access. The remedy is not complete; in any public process, organized, strongly interested groups tend to be heard more than disadvantaged or diffused ones.<sup>166</sup> However, using deliberative mechanisms can go a long way towards ameliorating this problem. In some anecdotal examples, scholars have demonstrated that when a local government policy would have a significant effect on their interests, the poor, the less-educated, and racial and gender minorities participate more than other groups.<sup>167</sup>

Third, the discussion above raises options but does not set in stone what agencies should do in each case. The design of each mechanism will require careful thought and expertise; there is great scope here for public participation professionals to contribute from their experience and knowledge.

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164. LUBBERS, *supra* note 12, at 156; Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 J.L. & POL'Y FOR INFO. SOC'Y 59, 74, 79 (2005).

165. Rossi, *supra* note 35, at 238–39.

166. For a discussion of the inherent advantages of organized groups compared to “one shotters”, those who do not regularly participate in the process, in connection with the courts, see Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974).

167. Fung, *Deliberative Democracy, Chicago Style*, *supra* note 69, at 129; Baiocchi, *supra* note 70, 67–68. Though Fung found that while participation was higher in low income, low education neighborhoods than commonly perceived, Fung also found that, within any given neighborhood, those who were advantaged participated at higher rates.

#### 4. Example of a “Fuzzy” Situation

A tricky situation is when an agency anticipates intense conflict, but only with industry. In that situation, any of the models may be justified using a different rationale. An agency may justify peer review by pointing out that its job is to impose its will on the industry, and the only question is one of expertise: if a rule can be shown to be scientifically valid no other justification is needed. It can justify Notice and Comment on the grounds of needing to learn the thinking within the industry while at the same time limiting the dialogue and making it more one-sided. Also, an agency can suggest that implementation will be easier if the decision is done through a more deliberative mechanism. In that situation, as in the other unavoidable fuzzy situations, agencies are going to need some leeway to learn from experience, and mistakes are inevitable. However, agencies do have expertise and political experience, and they will probably be right more often than they are wrong. Furthermore, they are in the best position to learn from experience.

Interestingly, and as developed below, the logic behind the three models of oversight corresponds to different stages of the development of the administrative state.<sup>168</sup> As is often the case in the administrative state, rather than being “left behind” after their premises have been challenged, these models simply exist side by side, with built-in contradictions and mismatch, and an agency can expect to be criticized for being inadequate from the point of view of any of them.

Peer review parallels the logic of expertise, promoted by the progressive supporters of the early New Deal agencies.<sup>169</sup> It evaluates whether decisions are actually based on expertise. Notice and Comment allows many groups to have a say, but does not create a real dialogue; it promotes expression of contrasting views and then allows any actor to challenge the agency in court for not responding in accord with his particular ideas. Notice and Comment therefore suffers from the problems of interest group pluralism; all groups must have a say

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168. This discussion draws on Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 *VAND. L. REV.*, 1389, 1398–1416 (2000), and Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1748–60 (1975). Schiller addresses the move from the emphasis on expertise to pluralism and then to a participatory model. Stewart discusses the problems with the new emphasis on participation. See also Rossi, *supra* note 35, at 196–250 (discussing three models of decision making that correspond to the three models—expertocratic, pluralist, and civic republican).

169. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of the New Deal Administrative Law*, 106 *MICH. L. REV.* 399, 413–41(2007).

and their words must be taken seriously, but no attempt is made to achieve a consensual solution and it has all the problems of pluralism.<sup>170</sup> Finally, deliberative mechanisms fit the movement to increase participation and deliberation, a movement that resulted from disillusionment with pluralism and tried to give more meaningful say to a larger part of the populace.<sup>171</sup>

### C. Judicial Review

Judicial review as a mechanism of agency accountability has its own problems. Some drawbacks to this approach are: (1) lack of expertise on the part of judges, (2) the possibility that a judge may have an agenda, and (3) the addition of delays to the process with a corresponding decrease in efficiency.<sup>172</sup> It is also unclear how effective judicial review actually is, since agencies, subject to many other political pressures, may be more sensitive to political will than to the courts (though no one will say courts have no impact at all).<sup>173</sup> How-

170. Schiller, *supra* note 168, at 1399.

171. *Id.* at 1413.

172. JAMES Q. WILSON, *BUREAUCRACY-WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT*, 282-90 (1989) (stating that judicial review negatively affects the costs of agencies' operations, agencies' willingness to innovate, the power relations between actors and the policy outcomes); Elliott, *supra* note 1, at 1494 (arguing that judicial review makes process more cumbersome); McGarity, *supra* note 23, at 528, 530, 532-33 (contending that judicial review both makes process more cumbersome and is a tool in the hands of hostile anti-administrative state judges to curtail agency powers); Richard J. Pierce, *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, at 63-64 (1997) (maintaining that courts, inconsiderate of agencies resource constraints, distort agency actions by forcing them to put more effort and resources into one subset of cases, those that are litigated, over all the other things the agency wants to do); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1315-1321 (1999) (claiming that judges have their own built in biases); Martin Shapiro, *Judicial Delegation Doctrines: The US, Britain, and France*, 25 W. EURO. POL., 173, 174-75 (2002), (arguing that judicial review creates a principal-agent problem between the legislature and the courts, since the courts have their own agenda); Mashaw, *The Story of State Farm*, *supra* note 28, 335-36, (reasoning that courts are insensible to the complex realities of regulation and can make decisions that miss the point). On the other hand, many scholars believe judicial review of agencies is necessary to prevent abuses by agencies. See, e.g., Jordan, *supra* note 10, at 442; McCubbins et al., *supra* note 40, at 272 (maintaining that encroachment on policy making by the court is a danger); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV., 599, 628, 631-35 (1997); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV., 659, 665-66, 670(1997).

173. See Scott Furlong, *Political Influences on the Bureaucracy-the Bureaucracy Speaks*, 8 J. PUB. ADMIN. RES. & THEORY 39 (1998), where he finds that agencies consider the President and Congress as more important in determining what they do than the courts. See also SIMON HALLIDAY, *JUDICIAL REVIEW AND COMPLIANCE WITH*

ever, with the administrative state being ever-present and powerful,<sup>174</sup> citizens, politicians and scholars are understandably concerned about the accountability of agencies.<sup>175</sup> Courts are one respected and acknowledged mechanism for maintaining accountability. Indeed, in certain ways, there is no substitute for what courts can do. Courts provide a forum for checking agencies that can be triggered by a single private actor. Courts are a forum where claims of rights and legality take precedence over politics, where generalists can check the biases of experts, and they provide a way for the actions of constituents to alert an overworked Congress to problems with agency actions.<sup>176</sup> Judicial review is therefore an important part of the general accountability framework facing agencies.

How central will courts be to holding agencies accountable for rulemaking? Other sources or tools of accountability can be considered. For example, in a manner similar to the Office of Management and Budget (OMB) review of rulemaking, which requires agencies to engage in a cost-benefit analysis, agencies could be required to submit their suggestion for a review mechanism to a central agency in the White House, at least for “major” rules.<sup>177</sup> However, given the special characteristics of judicial review described above, OMB review—even with a deliberative aspect—will not be a substitute for judicial review. It does not provide a forum where individual actors can claim their rights, and it is populated with a specific brand of experts, policy analysts and economists, with the potential for a specific kind of bias (though deliberation can counteract that to some degree).

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ADMINISTRATIVE LAW (2004). Halliday looked at compliance of administrators in England’s Homeless Persons Units with court decisions and found strong evidence of non-compliance. Wilson, *supra* note 172, at 27–28, also points out the importance of other mechanisms.

174. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14 (2007); KENNETH J. MEIER, POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT 1–3 (3rd ed. 1992); CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF THE BUREAUCRACY (1990).

175. MICHAEL W. DOWDLE, PUBLIC ACCOUNTABILITY: CONCEPTUAL, HISTORICAL, AND EPISTEMIC MAPPINGS, 1 (Michael W. Dowdle ed., 2006). However, several scholars have pointed out that agencies may be subject to stronger accountability mechanisms than elected officials. See COSMO GRAHAM, REGULATING PUBLIC UTILITIES: A CONSTITUTIONAL APPROACH 63 (2000).

176. McCUBBINS et al., *supra* note 40; Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L. J. 1059, 1078 (2001–2002).

177. Analogizing from the framework set in Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (2006). See also Nou’s proposal for making the cost-benefit analysis more deliberative, *supra* note 61.

Congress also oversees the bureaucracy, at times very effectively.<sup>178</sup> But regardless of how effective Congressional oversight is or is not, it does not have the resources to oversee every aspect of rulemaking. Judicial review can catch cases Congress misses, serving as a “fire alarm” to Congress members,<sup>179</sup> and can also make access available to groups that lack the necessary resources to mobilize congressional action on their behalf. Accordingly, how the courts will police the new system is very important.

Judicial review can occur, under this proposal, at either of the stages of rulemaking. First, judicial review can and should address the choice of mechanism of review. In this, the guiding rules are the same that guide an agency. The court will have to assess whether Congress explicitly determined one of the three models of oversight, parallel to step one in *Chevron*.<sup>180</sup> If Congress has not made an explicit determination, the court will have to evaluate the agency’s memo explaining its choice. The court must especially look at the basis of the agency’s assessment of the scope of the conflict. The review must be a reasonableness review: if the agency’s decision is reasonable, the court should not substitute its judgment for that of the agency, deferring to the agency’s expertise. The courts already use language that states that they will not substitute their judgment for that of the agency.<sup>181</sup> But that approach is included in cases where the court did in fact review agency decisions very closely, and without too much deference. This raises a concern about over-aggressive action by courts anxious to prevent abuses by agencies, which could work counter to this reform that seeks to provide agencies with more flexibility.<sup>182</sup>

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178. JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 2, 46–47, 187 (1990); Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 102–05 (1997); Louis Fisher, *Micromanagement by Congress: Reality and Mythology*, in *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* 152 (Crovitz & Rabkin eds., 1989); CHRISTOPHER H. FOREMAN JR., *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGES OF SOCIAL REGULATION* (1988); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 167 (1984).

179. McCubbins & Schwartz, *supra* note 178.

180. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

181. *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (“The Court is not empowered to substitute its judgment for that of the agency.”).

182. Schiller documents a somewhat similar problem when he describes how the court’s reaction to concerns about the administrative state clashed with the move towards rulemaking, with the result that one reform undermined the other. Schiller, *supra* note 11, at 1155–66, 1182–87.



Such concern is inherent in a vague standard. However, this vague standard addresses the heart of the matter. The choice of review mechanism is left, under this proposal, to the agency's discretion, since it must be tailored to the situation the agency is facing. Agencies will have to make a choice, often in the face of uncertainties, based on their past experience. Sometimes they will make errors, but they will develop expertise in using the system. If the agency is to have the necessary room to operate and develop that expertise, overly specific rules cannot be set for it. This is exactly the kind of situation where flexible case-by-case review is suitable. There is no real substitute to a reasonableness review by the courts. However, the review needs to be light handed, especially in the first decade or so, while agencies are learning to use the system. One way to provide such flexibility is by adding language to the APA expressly saying that agencies should be given the benefit of the doubt. However, if agencies do make use of the alternative models of oversight suggested here, the problem might be less serious than it seems. Experience shows that judges are more deferential to agencies that use the more exhaustive procedures under formal rulemaking or adjudications.<sup>183</sup> Two examples of this will suffice. Even though the actual standard in the APA, the "substantial evidence" standard, can be read as less deferential, courts are very deferential to agencies using it in formal adjudications.<sup>184</sup> Similarly, in relation to statutory interpretation, increased procedures led the court to a higher level of deference to agency decisions.<sup>185</sup>

Judicial review also has a place in evaluating the content and application of the model chosen by the agencies. However, the method of review of those mechanisms must vary across the range of procedures used. The logic of the three models of oversight is substantially different, and therefore the treatment of them must also be different.

Peer review aims at assuring that agency decision was based on correct scientific or technological information and was analyzed according to the methodology accepted in the relevant disciplines. Accordingly, it should evaluate whether the agency used appropriate methods for collecting and analyzing data and that the conclusions

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183. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 552–53 (2006).

184. See *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213 (5th Cir. 1991).

185. *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001).

drawn are properly supported by the research that was performed. Issues arising out of peer review which are likely to come before a court will usually have to do with proficiency and the honesty of assigned reviewers. Alternatively, they will attack the attitude of the agency toward the reviewers' conclusions. Since courts typically lack specific technical or scientific expertise it is usually inappropriate for a court to directly overturn scientific findings of reviewers. However, courts can and should examine assertions about the choice of reviewers and definitely ought to examine the agency's treatment of reviewers' reports after the fact.

Notice and Comment procedures rely on a very different logic; the intent is to allow input from all relevant actors before having the agency produce an independent decision that takes into account the arguments of the different parties, but which may or may not be guided by them.<sup>186</sup> The goal is to arrive at a decision that can be justified by analytical reasoning, not necessarily by how much any party likes it. There is, in fact, an embedded expectation that some interested party may not like it. Therefore, the agency's interpretation needs to be measured against an external rational standard. Years of experimenting with Notice and Comment created a carefully thought through body of judicial review which developed criteria for evaluating it. These criteria can be summed up as requiring a carefully explained decision, well supported in the materials the agency used, which takes into consideration the major issues raised by the parties.<sup>187</sup> While all those criteria are vague and, like many vague standards, can lead to uncertainty and possible abuse by judges with an agenda, they make sense as a way to evaluate Notice and Comment. It is not clear what would be a better way. This means that current "hard look" review should still be the standard when the agency uses Notice and Comment.<sup>188</sup>

The final model, deliberative participation mechanisms, is established upon yet another basis. Often these mechanisms aim at creating

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186. In that sense, Notice and Comment does not really embody the logic of pluralism. Pluralism believes the result of the give and take of interest groups will be the best possible result; it denies the existence of a solution that is in the "public interest" independently from the interests of the parties. In that sense, Notice and Comment—which does expect an agency to provide a justification of its decision that is not just "this party sent more letters"—is a deliberative, or at least analytical, approach.

187. LUBBERS, *supra* note 12, at 377–79; *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

188. I personally would support a more deferential standard there—such as Professors McGarity and Shapiro's pass/fail metaphor—but this is not an issue for this paper. THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* 260 (1993).

a decision that is especially suited to the needs and preferences of the target audience; or a consensual decision; or a legitimate decision. In other words, a decision that will be acceptable to as many parties as possible, or at least to informed parties. Allowing an external reviewer to overturn the decision made through such a process because of its content is problematic. It applies a logic foreign to that of the participatory process, since it assumes that the external observer can recognize the best solution better than the participants themselves. It undermines the legitimacy of the process and creates hostility from the participants who worked hard to develop a solution—it is worse than not having the deliberative process at all. Accordingly, evaluation of deliberative mechanisms should focus on whether the process designed was sufficiently inclusive or participatory given the declared goals, and whether it was conducted appropriately. In other words, review should be process based rather than content based.<sup>189</sup>

This raises the problem of how to evaluate the process—an especially acute problem since there is a debate in the participation literature on how to evaluate participatory processes.<sup>190</sup> There is not only a debate about the proper criteria, but many of the mechanisms described above have not been widely used and require quite a bit of experimentation before we can say what works and what does not. Accordingly, the process is going to require much effort, and there is no guarantee of success in any specific process.

Then again, there is no guarantee of success of any specific rulemaking process, and many run into trouble. Agencies will make mistakes, and even when they do not, even when they plan the participation process as well as they can given the information they have, the process will not always work well. No public policy process works perfectly every time. Rulemaking certainly does not. The goal is to get to a process that works well enough most of the time. With the ability to experiment, agencies will gain expertise that will allow them to do so.

Accordingly, the standard for judicial review of deliberative mechanisms used should be a “good faith effort” standard. If the agency made a good faith effort, its process should stand; decisions on specific situations depend on the process chosen. For example, if an agency is conducting a community wide discussion and a party asked

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189. Which means that in relation to these mechanisms, in the Bazelon-Leventhal debate, I am taking Bazelon’s view. MEIER, *supra* note 174, 1–3.

190. Webler, *supra* note 64, at 37–38; Vari, *supra* note 87, at 103; Renn, *supra* note 99; MARIAN BARNES, BUILDING A DELIBERATIVE DEMOCRACY: AN EVALUATION OF TWO CITIZENS’ JURIES 3–9 (1999).

to participate and was denied without good reason, there is a problem. However, if an agency is using a citizen jury and selecting participants at random, a party can complain about not being allowed to present its views to the jury, or not having its arguments included in the material, but it cannot claim one of its members should have been included in the jury.

#### *D. Advantages of the Proposed Reform*

Any reform carries substantial costs in terms of effort expended in adjusting to a new system and in dealing with the inevitable unintended consequences. It is always hard to change, especially when the change is substantial and affects a large system. Therefore, those suggesting reform should have the burden of demonstrating that the costs associated with their suggested changes are worthwhile. Accordingly, I offer the following in defense of the reform proposed in this paper.

The most important advantage of the reform would be the improvement, in several ways, of the nature of rulemaking review—and therefore of accountability of agencies. Fundamentally, it acknowledges lessons from many years of experimenting with different models of participation in rulemaking within the complex administrative state. It will permit tailoring the mode of participation to the goals to be achieved. If there is one lesson we have learned from experimenting with participation, it is that cookie cutter models do not work very well.<sup>191</sup> This is especially true in relation to the administrative state, where agencies vary so much in their activities and nature—as demonstrated, among other things, by the three rules opening this article.<sup>192</sup> The question of seatbelts on school busses affects a substantially different audience than do safety conditions in shipyards or airworthiness of a helicopter. They spark very different levels of controversy, and the nature of the controversy is different; while the school bus case directly touches on the core values of the majority of average citizens, the other two cases are much more specialized and esoteric in nature, and could be expected to elicit comment only from a narrow segment of the population. The anticipated problems may also be different. In the case of the seatbelts on school busses, there are concerns about making a decision that will be inefficient, that will have more costs than benefits. There is also a concern about making a

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191. Though, as will be discussed below, they have advantages of simplicity and clarity, both for the implementer and for whoever wants to supervise/control them.

192. And for a much broader discussion of the differences among agencies in the administrative state and substantial anecdotal evidence of them, see Wilson, *supra* note 172 at 10–13.

decision that will divert funds from other goals in a way that makes calculating costs and benefits very difficult. There are disagreements about which risk, out of a number of unmeasured risks, is greater. There is potential for one value, children's safety, to be seen as a trump card. And there is a concern that the agency will be insensitive to community concerns, and make a decision that may be analytically right but politically wrong, i.e., that may have more benefits than costs but will be seen as damaging. There are powerful legitimacy concerns there. And the agency can address these through a more participatory process; NHTSA clearly agrees, since it already scheduled hearings as part of its the preparatory work before creating a proposed rule, which would then be subject to the Notice and Comment framework.

The rule addressing safety in shipyards raises a whole different set of problems. Here, industry is anxious to reduce costs to preserve its profit; workers may be anxious to have regulations that provide maximum safety; and the agency, at the end of the day, is aiming to balance costs and benefits. In this case, it is not focused on consensus, and not even on diffusing conflict.<sup>193</sup> It wants to protect workers, hopefully without crippling the industry. Notice and Comment, in this situation, possibly augmented with hearings, allows the stakeholders to express their views and provides the agency with information about the choices it made (or possibly, if used earlier, about alternatives) and about preferences. Such a system is probably what the agency needs in this case.

In relation to the helicopter's airworthiness, the concern is probably about whether the agency's decision makes sense from a technical point of view: was it correct? While all three cases have technical elements, in the case of the aircraft it is acknowledged that technical considerations are paramount. The issue seems to be safety rather than economic effect. In that situation, peer review would probably be appropriate.

These are just three examples of rulemakings, all made by government agencies as part of the process of regulating business and industry, but at the same time differing significantly in many important characteristics. The administrative state makes literally thousands of such rules every year, and they vary enormously.<sup>194</sup> It makes sense to have them reviewed in different ways.

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193. Although less conflict may reduce implementation costs.

194. Crews counted 3,595 final rules in 2007 and 3,718 in 2006. CREWS, *supra* note 94, at 2.

The reform may also improve the quality of decision-making by giving agencies the room to conduct the review suitable to the type of decision, rather than superimposing a form of oversight that misses the point. For example, requiring an agency to go through Notice and Comment after achieving a rule through deliberative proceedings may lead a court reviewing the procedures under “hard look” to overturn the result of the deliberative efforts because of a missed factor—an analytic requirement that may not fit the purposes of a deliberative mechanism—and leave the participants frustrated. They will justifiably feel that their substantial efforts in learning the issue and participating in the decision has been brushed aside, and that the decision has been, in a sense, anti-democratic in ignoring the views of the populace. This will harm the legitimacy of both the agency—which will seem to have wasted its own resources and the participant’s time—and the court, which acted in an anti-populist or anti-participatory manner. Similarly, requiring answers to comments that are not scientific on an issue that is science-based will not only add useless work but may lead to changes that are not sufficiently supported to warrant inclusion.

Use of an issue-tailored oversight procedure may yield other benefits. It may improve the accuracy of rules that are scientifically or technically-based and which will now be evaluated through expert input by peer review. Another potential advantage of the proposal is that it may improve accountability by encouraging review earlier in the process, and allowing such review to count. In addition, the increased openness and honesty in the review process—where agencies can be clear about when they are using public input and when they are not—should improve its legitimacy and thus, the legitimacy of the resulting rule with the public and the stakeholders (sometimes stakeholders will be unhappy, but a better process may increase the legitimacy of the rule nonetheless).<sup>195</sup>

#### IV.

##### CONCERNS ABOUT THE PROPOSED REFORM

The most powerful concern if the reform is adopted is that under this reform proposal, the degree of discretion agencies can use is increased. The approach suggested seems to assume a high level of trust in agencies. The core of this reform is letting agencies decide how

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195. See Tyler, *supra* note 105; E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, 57–59 (1988), for evidence that the process matters to people as much, if not more, than outcomes.

their decisions will be reviewed. That sounds not only prone to abuse, but almost to guarantee abuse.

This is a substantial criticism. The institutional structure of the American government is built on mistrust, with no actor given free reign.<sup>196</sup> The system is based on limiting government efficiency and tying government hands to prevent abuse. Agencies in particular have been everyone's favorite whipping boys for at least twenty years, subject to extensive criticism from politicians and citizens.<sup>197</sup> They were criticized for being unresponsive bureaucrats; for being captured by interest groups, especially by those they regulate; for being in the pocket of politicians; for not reacting to politicians; for being incompetent; for focusing only on expertise and having professional biases; for discriminating; for not being sensitive to the differences between cases; for being inflexible; and so on. Why should they be trusted to competently and honestly design an appropriate review mechanism to evaluate their own work? This is asking them to prevent their own abuses, something we may trust judges to do, but not bureaucrats.<sup>198</sup> This could be described as self-regulation at its worst.

I have two responses to this very valid concern; and while they may appear contradictory, they are both true. First, if agencies are to be entrusted with extensive delegated roles, as indeed they are, they must be given discretion in carrying them out.<sup>199</sup> The problem of delegation versus trust is a very real one, but not delegating is not an option. The same reasons that lead to delegation to agencies—Congress's lack of time and expertise and the desire to remove certain issues from the political debate<sup>200</sup>—mean that the roles of agencies

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196. See, e.g., Dahl, *supra* note 34, at 6 (repeating this theme throughout the book).

197. See, e.g., McCubbins, *supra* note 40 (finding that a main issue for Congress is how to control runaway agencies); ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 16–17 (2001); WILLIAM GORMLEY JR., *TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES* (1989); Gregory L. Ogden, *Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability*, 7 PEPP. L. REV. 553, 567–68 (1980) (describing unhappiness with administrative agencies); Norman L. Jr. Rave, *Interagency Conflict and Administrative Accountability: Regulating the Release of Recombinant Organisms*, 77 GEO. L.J., 1787, 1806–09 (1989) (criticizing agencies for rigidity and “bureaucratic momentum”).

198. See Shapiro, *supra* 35, at 1, 75; GARY C. BRYNER, *BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES* (Richard A. Brody et al. eds., 1987); CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* 13–14 (4th ed. 2004); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2095–96 (2004–2005).

199. Edley, *supra* note 174.

200. See Rubin, *supra* note 198, at 2092; DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 18–19 (1999).

cannot be defined too closely. Congress simply does not have the time and expertise to decide all the details. At the end of the day, if agencies cannot be trusted in decision-making, the whole administrative state structure is useless and dangerous. Furthermore, if one of the roles of agencies is to protect the public from certain dangers, agencies need to preserve their ability to do so.<sup>201</sup> The anti-administrative impulse is understandable, but has more costs than benefits.<sup>202</sup>

Also, the concerns about agency abuses tend to be overstated. In practice, agencies seek legitimacy. Lack of legitimacy and suspicion brings substantial pressures and negative consequences. It leads to more reporting requirements; to contracting out or putting agency members on contracts rather than civil service status; to having the work of years tossed out by a dissatisfied court; to an inability to complete their missions, to do their job well.<sup>203</sup> And agencies regularly face pressures and blame from many actors.<sup>204</sup> In an effort to increase their legitimacy and reduce criticism, agencies already regularly go beyond the requirements of section 553 of the APA. They go through pre-rulemaking stages; they conduct oral hearings they are not required to; they use advance notices and deliberative mechanisms and peer review, as described above. Agencies have an interest in at least appearing accountable, because they are constantly attacked for lack of accountability and they know there are real costs to that: political pressures, budget cuts, and reorganizations.

None of the above should be read to mean that there is no danger of abuse of power by agencies, or that they should have unfettered, complete discretion. Unrelated to this reform, agencies are subject to substantial accountability mechanisms that have nothing to do with the informal rulemaking process and its complement, the hard look doctrine—both of dubious effect in restraining agencies while allowing them to do their job.<sup>205</sup> Agencies are subject to congressional control

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201. See McGarity, *supra* note 23, at 532 (federal regulatory programs exist to protect the public).

202. See Rubin, *supra* note 198, at 2091–98.

203. See, e.g., ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 25–29 (2001) (telling the story of the negative effects of too much accountability on Oakland's port).

204. MELVIN J. DUBNICK & BARBARA S. ROMZEK, *AMERICAN PUBLIC ADMINISTRATION: POLITICS AND THE MANAGEMENT OF EXPECTATIONS* 62–72 (1991); WILLIAM T. GORMLEY JR. & STEVEN J. BALLA, *BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE* (2004); BERYL A. RADIN, *THE ACCOUNTABLE JUGGLER* 1–2 (2002).

205. WILSON, *supra* note 172, at 235–36; Wood & Waterman, *supra* note 145, at 129–32; Scott Furlong, *supra* note 173, at 48–49; KEVIN B. SMITH AND MICHAEL J. LICARI, *PUBLIC ADMINISTRATION: POWER AND POLITICS IN THE FOURTH BRANCH OF*



both through legislation and the appropriation process; both have their limitations as effective accountability mechanisms, but when Congress really wants to use them, it does.<sup>206</sup> Agencies are subject to a host of control mechanisms in the hands of the President, from removal powers for executive agencies through presidential review and executive orders to informal influence.<sup>207</sup> And they are subject to political and media pressures. These mechanisms would still be in place.

Furthermore, as explained in the previous sections, the reform does not reduce accountability of agencies. First, agencies must still have a review process. So an accountability mechanism is put in place for each rulemaking. Since it will be better tailored to the rule, it may lead to more meaningful review of the process. Second, the process is subject to judicial review. If agencies attempt to rig the peer review process, or choose an unsuitable mechanism, they can and will be taken before a court and have to justify their choices. If appropriate, those choices will be overturned. Therefore, the reform does not seem to require a much greater level of trust in agencies than the current system. It does not present opportunities for abuse beyond those in existence today. In fact, it should produce closer review by providing for increased participation in appropriate cases; the matching of format to the type of issue ought to make the review better targeted and more to the point.

Another concern is the ability of the courts to review the choices agencies make as to participation. It is true the reform would require courts to gain more expertise in relation to public participation mechanisms and learn what has been used and what is appropriate in various circumstances; however, as things stand now, judges dealing with administrative cases regularly find themselves required to address complex issues which confront them. Under the reformed process, they

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GOVERNMENT, 103–15 (2006). *But see* Furlong, *supra* note 173, at 43–44 for other studies that found more influence.

206. *See, e.g.*, Wood & Waterman, *supra* note 145, 62–69; Mashaw, *The Story of State Farm*, *supra* note 28, at 342, 359–66.

207. *See generally*, RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983); Cooper & West, *supra* note 17; Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461 (1994); Terry M. Moe, *The Presidency and the Bureaucracy: the Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 425 (Michael Nelson ed., 1995); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999); Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997* (2003).

will have to gain expertise in one field: mechanisms of participation, a field that is probably more accessible to lay persons than nuclear physics. Some of the expertise needed for the review they will be doing under this process is much closer to the training provided to legal professionals than that needed to review most administrative decisions. Participation is also only one field, as opposed to the endless areas of expertise included in the administrative state. Thus, their chances of gaining expertise that will allow them to meaningfully review agency decisions are improved, not reduced.

Another important cause of concern is the fact that adding alternatives to the system will make it more complex and less uniform. Of course, the current APA system does not stand on its own; many agency statutes deviate from it or add to it, and the reality of administrative rulemaking is already very complex. However, the proposed reform does create a less uniform mechanism than current rulemaking procedures. In this, it is less elegant and less easy than the reform suggested by Fontana. The price of a system that is more nuanced and better tailored to specific cases is less clarity in rules and less simplicity of procedure. It is certainly a trade-off. I think it is a worthwhile one.

#### CONCLUSION

The APA was written in 1946, though it has since been updated. In the 1960s and 1970s, judges increased the level of their review of agencies behavior and bureaucracies started experimenting with rulemaking and mechanisms of participation in response to accusations of agency capture and abuse.<sup>208</sup> But we have been living with distrust of agencies and a desire for public participation for several decades, giving us a chance to experiment and learn about new ways to participate, and to learn, also, that participation is not an automatic cure for every ill. It is time to put the knowledge we have gained into practice, by creating a mechanism to tailor participation to the goals to be achieved by it: peer review if the rulemaking involves only applying expertise; Notice and Comment when the goal is to inform and receive information; and deliberative mechanisms when the goal is to achieve consensus and facilitate implementation.

This change fits the practices of many agencies that have been experimenting with more extensive participation. It should increase legitimacy by eliminating participation which is merely *pro forma* and

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208. Schiller, *supra* note 11, at 1154; Stewart, *supra* note 35, at 1713.

instead reserve participation for instances where it is really meaningful. It will also fundamentally alter the nature of judicial review. Many scholars would say it is about time.

