FOREWORD

Rulemaking, Democracy, and Torrents of E-Mail

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INTRODUCTION

Bold claims have been made for democracy and federal administrative agency notice-and-comment rulemaking, now the dominant mode of administrative action. An agency's public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimating. "[H]aving administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity."[1] Moreover, "[r]ulemaking is comprehensible, relatively quick, and democratically accountable, especially in the sense that decisionmaking is kept aboveboard and equal access is provided to all."[2] Rulemaking has been described as "refreshingly democratic"[3]

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1 Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992).

2 KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 269 (4th ed. 2004).

3 Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 129 (1994).

and "the most transparent and participatory decision-making process" in the government,[4] and we are proselytizing worldwide for the procedure.[5]

Moreover, technological changes and the advent of e-rulemaking may have the potential to enhance—perhaps substantially—public understanding of and involvement in rulemaking. E-rulemaking is the use of technology to help facilitate public access to and participation in agency rulemaking.[6] With respect to e-rulemaking, reformers hope for expanded public participation.[7] Scholars have commented that "[p]articipation in rulemaking is one of the most fundamental, important, and far-reaching of democratic rights"[8] and that e-rulemaking represents "online 'deliberative democracy'"[9] with the potential to "enlarge significantly a genuine public sphere in which individual citizens participate directly" in governmental decisionmaking.[10]

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4 *See* Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402 (2011).

5 *See* Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—for Better or Worse*, 34 OHIO N.U. L. REV. 469, 471 (2008). Even our government statements describing rulemaking have placed it on par with legislation in terms of public accountability. In view of the privacy and safety concerns motivating the rule, the Health Insurance Portability and Accountability Act privacy rule authorized disclosure notwithstanding the rule only if done by a "legislative or executive body." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,527 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 164). As the final rule commented, "[l]aw and regulations reflect a clear decision to authorize the particular disclosure of protected health information, and reflect greater public accountability (e.g., through the required public comment process or because enacted by elected representatives)." *Id.*

6 The American Bar Association's Committee on the Status and Future of Federal e-Rulemaking describes e-rulemaking as "the use of technology (particularly, computers and the World Wide Web) to: (i) help develop proposed rules; (ii) make rulemaking materials broadly available online . . . and (iii) enable more effective and diverse public participation." COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, AM. BAR ASS'N, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 3 (2008) [hereinafter FEDERAL E-RULEMAKING REPORT], *available at* http://ceri.law.cornell.edu/documents/report-web-version.pdf.

7 Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 945 (2006).

8 Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 517 (2004).

9 Lubbers, *supra* note 5, at 482. As Professor Peter Strauss has commented, we may have a particular need to find the procedure democratic, given the amount of law that is made through it. *See* Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit*," 98 CAL. L. REV. 1351, 1351–52 (2010).

10 Peter M. Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 147, 148 (2005), *available at* http://www.is-journal.org/V01I01/I-S,%20V01-I01-P147,%20Shane.pdf, *quoted in* Coglianese, *supra* note 7, at 947 (reviewing DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003)).

E-rulemaking can, for example, permit the public to more readily view the identity of commenters to the agencies and the content of comments. E-rulemaking can "enhance public participation . . . so as to foster better regulatory decisions . . . and greater support for those decisions by more involved regulatory and beneficiary communities."[11] Indeed, public participation, already extensive in some high-visibility, high-salience rulemakings, may be further increased by e-rulemaking.[12] A 2008 blue-ribbon panel report to Congress and the President indicated that "comment activity on regulations.gov has been increasing at a very encouraging rate."[13]

Levels of participation in rulemaking are very occasionally startling. The Fish and Wildlife Service's rulemaking on whether to list the polar bear as a threatened species under the Endangered Species Act attracted approximately 670,000 comments, including roughly 43,000 letters and postcards and 627,000 e-mails.[14] In its 2003 rulemaking on media ownership rules, permitting more consolidation of broadcast ownership in a particular market, the Federal Communications Commission ("FCC") received over one million comments, 99.9% of which were opposed to the rules.[15] (The FCC adhered to its position.) As of July 2011, four recent rulemakings posted on regulations.gov had prompted over 10,000 public comments *each,* with one prompting over 60,000 comments.[16] At the same time, however, many rulemakings garner few, if any, comments.

As the prominence of administrative rulemaking—and e-rulemaking—as a means of creating policy increases, it is critical that we thoroughly consider what potential rulemaking may in fact have to make agency decisionmaking democratically responsive. These claims also warrant further examination because other ideas regarding how the administrative state might be considered democratically legitimate, including control by Congress or the President, have been subjected to sharp criticism. The extent of participation and the usability,

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11 FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 7.

12 *See* Coglianese, *supra* note 7, at 952–53.

13 FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 13 & n.19 ("[A]bout 295,000 documents [were] submitted by public users via regulations.gov in the first eight months of 2008, as compared with about 114,000 in the last eight months of 2007.").

14 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursa maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,235 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17).

15 *See* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 908 (2006).

16 *See* REGULATIONS.GOV, http://www.regulations.gov (last visited July 2, 2011) (follow "Your Voice in Action: Site Data" hyperlink).

transparency, and accessibility of e-rulemaking dockets are obvious issues, and they have received some attention in the 2008 blue-ribbon panel report.[17]

In contrast to participation issues, the question of what agency officials do with the information they get from the public has received far less attention. To implement their responsibilities, agencies typically must resolve value-laden questions in addition to more technical and scientific questions. A significant number of public comments received by agencies seem to relate to these questions of value or policy. But agency officials appear to be discounting these value-laden comments, even when they are numerous.

This should raise significant concerns. If agencies are in fact systematically discounting these comments, it could undermine the potential of public rulemaking to serve as a source of democratic accountability. Agencies of course ought not formalistically treat public comments as a dispositive "vote." But discounting these comments as inconsistent with a notion of rulemaking as a "technocratically rational" enterprise is also deeply problematic given the value-laden nature of many agency decisions and the democratic claims made for rulemaking. This Foreword is meant as an initial foray into the question of what agencies should do with mass public comments, particularly on broad questions of policy.

Part I discusses the extent to which congressional control, presidential control, and agency procedures themselves can ensure that agency decisions are democratically responsive. In view of shortcomings in both congressional and presidential control, I underscore the need to focus closely on rulemaking procedures as a source of democratic responsiveness. The possibility that agencies may be systematically discounting certain public submissions raises difficulties, and I present some examples. Part II makes a preliminary case that agencies should more thoroughly consider public policy and values comments. Public comments filed with an agency in reaction to a concrete proposal would seem to have considerable potential as a source of information on citizen values and preferences. The presence of significant and numerous public comments in a rulemaking might at least trigger further investigation and deliberation by an agency. Alterna-

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17 *See* Farina et al., *supra* note 4, at 396 (noting the need to focus on "the right mix of technology, content, and human assistance to support users in the unfamiliar environment of complex government policymaking"). *See generally* FEDERAL E-RULEMAKING REPORT, supra note 6.

tively, agencies should more candidly and publicly acknowledge that participation in rulemaking can serve only a limited function.

I. AGENCIES, MODERN STATUTORY DELEGATIONS, AND DEMOCRACY

What it might take to consider the American administrative state legitimate remains a persistent question. Although it exercises considerable power to make law and adjudicate cases in addition to implementing statutory programs, this "fourth branch of government" is not mentioned in the Constitution and its officials are not popularly elected. Moreover, it has been clear for many decades that agencies do not simply function as repositories of technical expertise, filling in minor details of statutory schemes while elected officials make the critical policy decisions. If this were so, agency authority, even with respect to rulemaking, could be seen as sharply constrained by statutory schemes, with agencies functioning as largely neutral technical experts.

The reality of modern statutory delegations, however, has required the abandonment of the view that agencies are "transmission belts," merely applying their technical expertise to well-specified statutory questions. Statutory delegations to agencies are now far too broad to sustain any claim that all—or even most—critical policy decisions are being made by Congress, the most democratic branch of government.[18] Rather, agency officials receive broad powers to resolve not only questions requiring substantial technical expertise, but also questions that can only be understood as value-laden. One might characterize these decisions not as an exercise of expertise, but of judgment.

Agencies are the institutions tasked with deciding, for example, not only whether a particular drug is "safe," but also *how* safe a drug must be to reach the U.S. market, how much contamination a food may contain consistent with the "protection of public health,"[19] and

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18 It is now well settled that the nondelegation doctrine presents no significant obstacle to Congress broadly delegating rulemaking authority to agencies. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001). Some have suggested that it is simply too tempting for Congress to take credit for solving a problem through a statutory delegation, particularly because it preserves the ability of Congress to blame the agency if something ultimately goes wrong. *See generally* Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–57 (1982) (discussing various explanations, including public choice explanations, that members of Congress, in delegating, may be able to shift a "preponderantly large part of the blame" to the agency if something goes wrong).

19 21 U.S.C. § 346 (2006).

what level of air pollution is "requisite to protect the public health" or environment with "an adequate margin of safety."[20] As of 2010, agencies will soon be responsible under new financial reform legislation for defining substantial aspects of the extent of consumer protections and investment restrictions in the banking industry.[21] This responsibility will require a new agency, the Bureau of Consumer Financial Protection, to balance, for example, risks and benefits to consumers, banks, and other entities that provide financial products.[22] By dint of these broad delegations, the decisions that agencies make very often involve both significant technical questions (how much will reducing arsenic in drinking water reduce the risk of cancer?) and significant questions of value (how much risk to health is tolerable?; how much risk can an unsophisticated borrower reasonably bear?; at what point do risks to consumers warrant loss of access to a particular sort of financial product?). Often, an agency must balance multiple goals. In the context of national forest management, for example, the U.S. Forest Service is authorized by statute to create and administer a national forest in order to "to improve and protect the forest within the boundaries" while simultaneously "furnish[ing] a continuous supply of timber for the use and necessities of citizens."[23] The Environmental Protection Agency ("EPA") must regulate hazardous air pollutants in a way that achieves the "maximum degree of reduction in emissions of" the pollutant, while still considering whether reduction is "achievable" in view of its cost and feasibility.[24]

Given the range of questions agencies must resolve, legitimacy for their actions has become a function of both accountability and democratic responsiveness. When an agency's authority is meaning-

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20 42 U.S.C. § 7409(b)(1) (2006).

21 *See, e.g.*, Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. TIMES, June 27, 2010, at A1 ("Regulators are charged with deciding how much money banks have to set aside against unexpected losses, so the Financial Services Roundtable, which represents large financial companies, and other banking groups have been making a case to the regulators that squeezing too hard would hurt the economy."); *see also* Farina et al., *supra* note 4, at 400 ("Both health care reform and the financial crisis have led to massive new federal regulatory responsibilities . . . . [T]he job of actually solving the problems . . . is delegated to Executive agencies and independent regulatory commissions.").

22 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(2)(A)(i), 124 Stat. 1376, 1980 (2010) (to be codified at 12 U.S.C. § 5512) (discussing the Bureau's consideration of "potential benefits and costs to consumers and covered persons" in issuing rules).

23 Christopher Cumings, Comment, *Judicial Iron Triangles: The Roadless Rule to Nowhere—and What Can Be Done to Free the Forest Service's Rulemaking Process*, 61 OKLA. L. REV. 801, 801 (2008) (internal quotation marks omitted).

24 42 U.S.C. § 7412(d)(2).

fully constrained, an agency can be seen as accountable for acting in a constrained, nonarbitrary way.[25] To be accountable, the agency should be obligated to disclose and justify its actions in light of its constraints and suffer consequences on the basis of its performance.[26] Judicial review of agency action makes agencies accountable for acting lawfully and nonarbitrarily, within the limits set by statute.[27] The electoral process can also be an important source of accountability when, for example, elected officials are removed by voters for their failure to adequately control the lawless or arbitrary behavior of agencies.

Beyond this sort of accountability, agency decisions, to be legitimate, also must be democratically responsive. To the extent Congress has made critical policy choices in a statute delegating authority to an agency, judicial review can ensure that agencies comply with the statute consistent with congressional policy decisions. Otherwise, the judiciary is limited in its ability to ensure that agencies are democratically responsive. More often, an agency must make value-laden decisions without significant guidance from the statute that authorizes the decisions, necessarily limiting the usefulness of judicial review.[28] Many of these value-laden decisions are outside the realm of scientific and technical expertise that traditionally resides within administrative agencies. The difficulty: as then-Professor Elena Kagan commented, agency officials have "neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking."[29]

If Congress—the most democratic branch—does not make key policy or values decisions in statutes that constrain agency actions,[30]

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25 *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64 (2003) ("The presidential control model misleads us into thinking that [political] accountability is all we need to assure ourselves that agency action is constitutionally valid. . . . I suggest that a focus on the avoidance of arbitrary agency decisionmaking lies at the core of . . . a theoretical justification of administrative legitimacy . . . ."); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005).

26 *See* Rubin, *supra* note 25, at 2119.

27 *See* Bressman, *supra* note 25, at 472–73; Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1134 (2010).

28 *See, e.g.*, Schurz Commc'ns, Inc., v. FCC, 982 F.2d 1043, 1048 (7th Cir. 1992) (Posner, J.) ("So nebulous a mandate invests the Commission with an enormous discretion and correspondingly limits the practical scope of responsible judicial review."). Judges do, of course, enforce the procedural requirements of the Administrative Procedure Act ("APA") and other statutes, and review agency decisions for their essential reasonableness under the APA's "arbitrary and capricious" standard. *See infra* Part II.

29 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2353 (2001).

30 The judiciary could, of course, enforce procedural requirements meant to ensure that

how might agency decisions nonetheless be understood as "democratically responsive"? Generally, a government action might be characterized as democratically responsive to the extent it reflects and expresses the popular will. Pluralist and civic republican theories offer influential alternative views of this notion. Under a pluralist conception, a government decision might be seen as democratic to the extent the government institution hears from and considers—even reconciles—a wide variety of interests. The electoral process, in theory, can serve this function directly, for both the President and Congress, and derivatively, for the agencies that respond to Congress and the President. (I turn to the caveats shortly.)

A particular agency decision also might be seen as democratic in the pluralist sense—indeed, as a microcosm of the legislative process—to the extent the agency hears and considers a wide variety of interests. If the relevant interests are fully represented in the agency process, the agency might function as a broker, much like Congress serving as a broker among interest groups in pluralist theories of legislatures.[31] As Professor Richard Stewart has pointed out, some elements of administrative law could be understood to enhance the possibility that agency procedures are effectively pluralist.[32] For example, the public right to comment in rulemaking and judicial recognition of broad standing in suits against agencies both might be understood to "facilitat[e] input from affected interests"[33] and minimize the danger that one or a few factions would inappropriately influence the process.[34]

The other leading alternative is the civic republican view, which sees governmental decisionmaking as legitimate to the extent it facilitates and responds to democratic deliberation. In contrast to pluralist theories, which conceptualize the public interest as an aggregation of preferences of stakeholder groups, these deliberative democracy theories conceptualize the public interest as the result of a democratic dia-

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agencies engage the public in deciding individual matters. *See infra* notes 36–37 and accompanying text.

31 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975); *see also id*. at 1670 ("Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.").

32 *See id.* at 1679 (noting that these elements might "serve[ ] as partial substitute for political safeguards").

33 *Id.*

34 *See also* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 121–23 (2000).

logue in which citizens fully disclose their interests and are open to hearing others' reasons and revisiting their own views.[35] The electoral process for Congress and the President might be characterized as democratically deliberative. Alternatively, the institution's internal decisionmaking could be characterized as deliberative. Under either view, agency decisions would be considered democratically responsive to the extent they are made responsively to Congress and the White House.

Some also have tried to characterize agency rulemaking itself as a site of civic republican democratic deliberation. As Professor Mark Seidenfeld has argued,[36] notice-and-comment rulemaking might be seen as facilitating a democratic dialogue because the public is entitled to participate and because the agency is required to explain its reasoning and answer significant comments.[37] Civic republican advocates have acknowledged, however, that because the comment period is short, a commenter has little chance to participate directly in dialogue or be persuaded during the rulemaking itself that the ultimate result serves the public interest.[38] The result of such a process could nonetheless be theorized as serving the public interest if agency staff are thought to act as agents of constituent stakeholders in a dialogue on what serves the public interest.[39]

To summarize, if agencies must decide values and policy questions left unresolved by their authorizing statutes, three other sources

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35 Mark Seidenfeld, *The Quixotic Quest for a "Unified" Theory of the Administrative State*, 6 ISSUES LEGAL SCHOLARSHIP 4–6 (2005), http://www.bepress.com/ils/iss6/art2.

36 *See* Seidenfeld, *supra* note 1, at 1559–60.

37 Section 553 of the APA requires an agency to provide public notice of a proposed rule and a "concise general statement of . . . basis and purpose." 5 U.S.C. § 553 (2006). The judicial gloss on APA requirements has also resulted in agencies being required to respond to the substance of significant comments received during rulemaking. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

38 *See* Seidenfeld, *supra* note 35, at 5 ("[S]takeholders themselves are too impassioned and poorly informed to expect them to change preferences in the short period during which regulatory controversies get resolved.").

39 *See id.* at 4–6. One hope that some scholars have for e-rulemaking is that it will realize a potential for even greater deliberation on agency decisions because individuals can comment more easily and have a greater opportunity to read and react to each other's comments. *See* BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 41 (2009) (suggesting that e-rulemaking could lead to democratic dialogue among interested individuals). It is necessary to note, however, that e-rulemaking remains a work in progress on this score. For example, some agencies, despite legal requirements, are "failing to post many significant rulemaking materials—including submitted comments. As a result, the publicly accessible portion of the database is not complete and the e-dockets for many agencies are not in fact authoritative . . . ." FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 4.

might provide the information, the control, or the incentives to prompt agencies to make democratically responsive decisions, whether in a pluralist or civic republican sense. These are presidential oversight, informal congressional oversight, and agency processes themselves. Both presidential oversight and informal congressional oversight have some important shortcomings, however. That underscores the appropriateness of a close focus on agency processes that directly engage the public.

A. Presidential and Congressional Oversight

Consider, first, presidential oversight. Much recent scholarship has focused on the potential of presidential control to ensure that agencies exercise their discretion in a way that is democratically accountable and legitimate.[40] Presidents can remove poorly performing agency heads or influence individual decisions, as they currently do through the regulatory review process.[41] In addition to being energetic leaders, as Alexander Hamilton argued,[42] presidents are more likely to take a national perspective compared to members of Congress, as Professor Jerry Mashaw has contended, because the President may be less focused on distributing pork to narrow interest groups or "home state" constituents.[43] Following Professor Mashaw's argument, this makes presidents particularly well suited to oversee major decisions made by the administrative state.

As Professors Cynthia Farina and Evan Criddle, among others, have recently pointed out, however, the presidential election process, focused as it often is on swing states, may not be sufficient to prompt the President to take the national perspective envisioned by Professor

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40 *See*, *e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152 (1997); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) [hereinafter Mashaw, *Prodelegation*]. Whether presidential control blunts potential negative effects of interest groups in the agencies or instead provides another opportunity for interest group pressure is the subject of some debate. *See generally* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

41 *See* Mendelson, *supra* note 27, at 1132–33; Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 947 (1980).

42 *See generally* THE FEDERALIST No. 70 (Alexander Hamilton).

43 Mashaw, *Prodelegation*, *supra* note 40, at 95 ("The president has no particular constituency to which he or she has special responsibility to deliver benefits.").

Mashaw.[44] Even assuming that the President is likely to take the national view, and further assuming that voters are engaged and informed on issues of relevance to administrative agency policies, presidential elections are infrequent and voter choices are sharply limited, typically to a very few candidates, each of whom may hold a complex set of policy positions.[45] At the outset then, even if voter preferences are well formed, a President's preferences may not correspond well to national preferences, particularly on individual matters of regulatory policy. Even an impending reelection campaign will have its limits as a source of electoral accountability for agency decisions.

Moreover, voter preferences are often far from well formed. On a wide array of issues the President will face, voter views are inchoate at the time of an election, leaving the President without any possibility of a mandate or even a clear sense of national preferences on a given issue.[46] To develop a sense of the popular will, even in a pluralist sense, a President must continue to engage the public outside the electoral process, going beyond understanding the national preferences at the time of an election.

Once the President is in office, however, the institution of the Presidency may not necessarily engage an especially wide range of views, particularly without the discipline imposed by an upcoming election.[47] Of course, any political official is free to consult polls, citizens, and interest groups and will have to contend with other political institutions, as the President does with Congress. Moreover, the President is likely to have an incentive to consider more than just the interests of one state or region.[48] But the electoral process and the necessity of negotiating with Congress are likely to provide the President with only a partial incentive to consult the wide range of views

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44 See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 391–92 (2010) ("[W]hat cannot be disputed is [the Electoral College's] success in focusing the attention of would-be Presidents on geography.").

45 *See* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 459 (2010); Farina, *supra* note 44, at 383.

46 *See* Criddle, *supra* note 45, at 458 (arguing that presidential elections do not confer regulatory mandates).

47 *Cf.* THE FEDERALIST No. 56 (James Madison) (explaining why members of the House of Representatives need not know every detail of their district to be effective).

48 Mashaw, *Prodelegation*, *supra* note 40, at 95 ("[I]ssues of national scope . . . are the essence of presidential politics.").

one might think necessary for "democratic responsiveness" under either a pluralist or civic republican view.[49]

Further, although presidential influence over agency action is indisputably present, if not always consistent,[50] the content of that influence is generally unknown. For example, as I have documented elsewhere, agency rules undergoing executive review in the Clinton and second Bush Administrations were changed at very high rates, and in the Obama Administration, that rate has reached over ninety percent for significant rules.[51] Information regarding the content of those changes, however, is extraordinarily limited.[52] Because Presidents may try to maintain deniability with respect to agency action, the lack of transparency impairs the ability even of engaged voters to hold the President accountable for agency action.[53] All of these features limit the Presidency as a source of democratic responsiveness and accountability for the administrative state.

What about Congress? Assuming that Congress has not answered the pertinent policy or values questions by passing or amending an agency's authorizing statute, Congress has other more or less effective means of influencing the administrative state. These include budgetary control and informal influence through hearings and correspondence with an agency.

Either on a pluralist or a civic republican theory of democracy, Congress may have an advantage over the Presidency in collecting and reconciling the views of a wide range of groups. This is due not only to Congress's size, but also its quality as a regional institution. Some have suggested that this results in more of a focus by individual members of Congress on "pork,"[54] but local interests and local values may also be more likely to play a part in congressional elections compared with presidential elections.[55] Meanwhile, the President is not free from the pressure to deliver special benefits; it is just that those pres-

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49 In overseeing the administrative state, the President will of course have some incentive to respond to Congress, because Congress can revise the terms of delegation or cut the budget. As noted, however, congressional oversight of administrative issues has tended to be infrequent and ad hoc. *See infra* note 59 and accompanying text.

50 *See* Mendelson, *supra* note 27, at 1146–47.

51 *Id.* at 1149–51.

52 *Id.* at 1149–54.

53 *See id.* at 1159–63. I have elsewhere argued for the importance of at least some disclosure of the content of executive supervision. *Id.*

54 MASHAW, *supra* note 40, at 152.

55 *See* LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER 33 (2000).

sures relate to areas where the votes may swing.[56] In other words, Congress in its entirety may have the potential—arguably broader than that of the Presidency—to engage a relatively wide range of American views. Nonetheless, the congressional process suffers from its own shortcomings. Many members of Congress come from "safe" districts, limiting the prospects for meaningful dialogue during an election campaign, and voter views on particular topics are at least as likely to be ill formed at the time of a congressional election as a presidential election. So members of Congress, like the President, may be able only to form a very limited sense of the popular will at the time of election.

On a deliberative view, congressional deliberation again may have some advantages over White House deliberation, simply because the discussants are likely to convey and engage a wider range of views. On the other hand, much of this deliberation, in a setting short of amending authorizing legislation, is conducted by submajorities of Congress, such as committees that hold oversight hearings. Such submajorities may not be representative of the full Congress.[57] I have argued elsewhere, however, that such submajority views can be important sources of information on value to agencies.[58] The biggest difficulty with Congress is that congressional oversight of administrative decisionmaking is often limited, infrequent, and ad hoc rather than systematic.[59]

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56 *See supra* note 44 and accompanying text.

57 Although the idealistic notion of committees is a smaller body representative of the whole that has an opportunity to develop expertise, committees have been criticized as being composed of "preference outliers" who seek committee membership in order to distribute benefits to their constituents or to well-organized interest groups. But Professor Keith Krehbiel has compiled statistical evidence suggesting that committees are not, in fact, composed of preference outliers. Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149, 155 (1990).

58 Nina Mendelson, *Midnight Rulemaking and Congress*, *in* TRANSITIONS (Austin Sarat ed., forthcoming 2011).

59 Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 10 (1994) (even as oversight has become more popular, "monitoring and reporting only reveals what an agency is doing; these activities do not automatically cause the agency to adhere to, or alter, a policy"); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 420 (2009) ("The fundamental problem with fire alarm oversight, however, is that it ignores arbitrary decision making by Executive Branch agencies that escapes the attention of well-organized interest groups."). *See generally* Mendelson, *supra* note 58.

B. *Agency Rulemaking Procedures as a Source of Information on Public Values*

Given the patchy and incomplete nature of congressional and presidential influence over agencies, the recent scholarly focus on the rulemaking process itself is more than justified. To what extent can agency rulemaking procedures aid agencies in ensuring that their decisions can be seen as democratic?[60]

By rulemaking, I mean the familiar process for informal notice-and-comment rulemaking set forth in section 553 of the Administrative Procedure Act ("APA"). An agency must publish advance notice and take public comment prior to finalizing a legally binding rule.[61] As a result of judicial interpretation of section 553's requirements, an agency also must publicly disclose the data on which it is relying prior to seeking comment and must explain its reasons for rejecting significant comments.[62] Finally, a judge may vacate the agency decision if it is not reasoned, does not follow substantive legal requirements in the authorizing statute or in the APA, or if it is arbitrary or capricious.[63] These requirements ensure to some degree that agencies are accountable for following the law (including implementing any critical value choices Congress may have made in the authorizing statute) and for acting in a nonarbitary fashion.[64] They also codify an entitlement to public participation and to at least some public reason-giving from the agency. As noted, Professor Stewart has argued that these opportunities for groups or individuals to register their views and supply infor-

60 Even if agency rulemaking procedures can be seen as democratically legitimate, substantial questions remain regarding the legitimacy of agency adjudication as a policymaking method. Longstanding judicial doctrine confirms an agency's ability to use adjudication, as well as rulemaking, to resolve policy matters. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). Nonetheless, agency adjudication is beyond the scope of this Foreword. Because rulemaking is now the dominant method used by agencies to resolve issues, this article follows the lead of other scholarship in focusing only on rulemaking. *See, e.g.*, Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 428–29 (2005) ("Notice and comment deserves close attention in a study of regulatory democracy because the bulk of regulation is crafted through that procedure today . . . .").

61 5 U.S.C. § 553 (2006).

62 ACLU v. FCC, 823 F.3d 1554, 1581 (D.C. Cir. 1987) (requiring response to significant comments); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (requiring disclosure of scientific data relied upon); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973) (requiring disclosure of technical data or studies in time to allow for meaningful comment); *see also* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, dissenting in part) (noting the "shaky legal foundation" of the *Portland Cement* doctrine because it lacks textual foundation in the APA).

63 5 U.S.C. § 706.

64 *See* Bressman, *supra* note 25, at 463.

mation to the agency can help turn agency decisionmaking in a more pluralist direction.[65] Professor Seidenfeld has suggested that the participation opportunities, coupled with the obligation on agencies to give reasons, can enable agency decisionmaking to function in a civic republican manner.[66]

One possible ground for criticism of these theories of rulemaking as intrinsically democratic is that even if the process is useful, public participation is skewed. Although the right to notice and the opportunity to submit written comments in agency rulemaking extends to every member of the public, the reality is that actual participation in rulemaking is not well balanced. Regulated entities tend to be heavily represented in rulemaking, compared with regulatory beneficiaries—those who expect to benefit from a regulatory program. Professor Wendy Wagner has documented, for example, that business groups substantially dominated comments in a rulemaking on hazardous air pollutants.[67] Professors Jason and Susan Webb Yackee reached similar results in a study of forty midsized rulemakings.[68] In several studies of run-of-the-mill rulemakings, "[f]ew of these comments ever came from ordinary citizens."[69] However, there are occasional exceptions, where rules are so salient and visible that "comments from the lay public make up the vast majority of total comments."[70]

One reason that business groups dominate rulemaking participation is that although the right to participate in rulemaking is clear, participation is not cost free. It takes resources to uncover the exis-

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65 *See* Stewart, *supra* note 31 and accompanying text.

66 *See* Seidenfeld, *supra* note 1, at 1515–16.

67 Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1382, 1386 (2010); *see also* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 188 (2d ed. 1999); NOVECK, *supra* note 39, at 131.

68 In a set of rulemakings that excluded those with more than 200 comments, Professors Jason Webb Yackee and Susan Webb Yackee found that business interests submitted over 57% of the comments; of nonbusiness groups, public interest groups provided only 6% of total comments. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131, 133 (2006).

69 Coglianese, *supra* note 7, at 951 (discussing his own studies as well as studies conducted by Professors Marissa Golden and William West). The studies addressed rulemakings by the EPA, the National Highway Traffic Safety Administration ("NHTSA"), and the Department of Housing and Urban Development ("HUD"). *Id.* One study of EPA and NHTSA rules from the 1990s found that "[b]usinesses dominated . . . filing 77 percent of all comments." *Id.* at 952 (citing Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 253–54 (1998) (discussing studies conducted by Professor Golden which indicated that in the HUD rulemakings she studied, governmental entities contributed "75 percent of all the comments submitted").

70 Cuéllar, *supra* note 60, at 414.

tence of a rulemaking, to understand the issues at stake, and to prepare persuasive comments.[71] As has long been observed, due to the free rider problem, groups representing interests diffusely spread among large groups of individuals face greater challenges to organizing than smaller groups where interests are more concentrated.[72] In the context of rulemaking specifically, diffuse regulatory beneficiaries face "substantial impediments to participating in costly rulemakings."[73] In the setting of health, safety, and environmental regulation, for example, regulated entities (consider automobile manufacturers and operators of coal-fired electric utilities) tend to be more concentrated, while regulatory beneficiaries (consider drivers and tap water drinkers) tend to be more diffuse and thus more often underrepresented.[74]

In addition, regulated entities possess greater control of certain types of information, such as cost and feasibility, that may be especially valuable to agencies. That may prompt agencies to be particularly attentive to regulated entity comments.[75] Regulated entities also may be better able than regulatory beneficiaries to deluge agencies with information, distracting them from comments submitted by other groups.[76]

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71 FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 8 ("Extracting and understanding information embedded in reams of studies, analyses and other relevant documents is inherently time-consuming and often difficult for those without both substantive and legal expertise.").

72 *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2, 5–65 (1971); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 171–72 (1986); JAMES Q. WILSON, POLITICAL ORGANIZATIONS 33–35 (1973) (describing incentives, including solidary and purposive, that may cause individuals to join groups); James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 366–70 (James Q. Wilson ed., 1980) (describing circumstances under which groups are likely to organize); *see also* Seidenfeld,, *supra* note 35, at 1–2.

73 Wagner, *supra* note 67, at 1326. Professors Jason Webb Yackee and Susan Webb Yackee similarly concluded that rulemaking costs appear to "remain sufficiently high that individual citizens and public interest groups remain disadvantaged." Jason Webb Yackee & Susan Webb Yackee, *supra* note 68, at 133; *see also* LAWRENCE S. ROTHENBERG, LINKING CITIZENS TO GOVERNMENT: INTEREST GROUP POLITICS AT COMMON CAUSE 266 (1992) ("The claim that there exists a brave new world of organizations that constitutes a strong, countervailing representation of the public will must be viewed with considerable hesitancy.").

74 Rulemaking "is typically dominated by a limited range of participants who have the resources and expertise to obtain, comprehend and formulate an effective comment on the information crucial to the agency's proposal." FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 8.

75 Wagner, *supra* note 67, at 1380–81.

76 *Id.* at 1333. That may further dilute the relative influence of diffuse groups. *See id.* Professors Jason Webb Yackee and Susan Webb Yackee concluded, however, that although agencies in their study seemed more responsive to business groups, this responsiveness could not be explained by greater information content in the comments supplied by business groups. Jason Webb Yackee & Susan Webb Yackee, *supra* note 68, at 137.

E-rulemaking may reduce the imbalance in participation somewhat, because it reduces the cost both of identifying proposed agency rules and of submitting comments, compared with monitoring the *Federal Register* and filing paper comments.[77] One scholar has suggested, however, that for rulemakings that are already high visibility, e-rulemaking may simply increase the size of the "bounce" in public participation, rather than the range of interests represented.[78] In any event, reducing the imbalance in public participation has already occupied the attention of some commentators.[79]

At least as significant a problem, however, and one that has received far less attention, is what agency officials *do* with the views the agency receives in rulemaking. An agency's dismissal or pro forma treatment of significant numbers of public comments would be very hard to square with a vision of rulemaking as a democratic process.[80] In fact, a preliminary look suggests that agencies appear to treat technically and scientifically oriented comments far more seriously than what we might call value-laden or policy-focused comments. A number of observers have commented that the primary focus of rulemaking documents has been the issues that are framed in more technical or scientific terms, even if, as Professor Emily Meazell and others

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77 Enabling commenters to more easily comment on each other's comments may also be in the offing; the Cornell e-Rulemaking Initiative is currently piloting such discussion on a highly limited set of rules. *See* REGULATION ROOM, www.regulationroom.org (last visited June 12, 2011); *see also* NOVECK, *supra* note 39, at 149–56 (discussing the use of internet communication and collaboration to enhance deliberative process of rulemaking). Regarding the level of participation, compare J. Woody Stanley & Christopher Weare, *The Effects of Internet Use on Political Participation,* 36 ADMIN. & SOC. 503, 504 (2004) (suggesting that e-rulemaking will be used primarily by individuals and groups already active in rulemaking), and Coglianese, *supra* note 7, at 943 ("[E]mpirical research shows that e-rulemaking makes little difference: citizen input remains typically sparse, notwithstanding the relative ease with which individuals can now learn about and comment on regulatory proposals."), with FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 13 n.19 (finding level of participation encouraging).

78 Coglianese, *supra* note 7, at 952–58.

79 *See, e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 132 (1998) (discussing imbalance in "financial constraints" among participants in rulemaking, and noting that a Senate Committee found that "regulated industries spend from ten to one hundred times as much as public interest groups do in rulemaking and adjudication proceedings"); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 108–10 (2011) (noting "systematic biases that favor regulated parties in rules promulgated by several different agencies," and discussing "systematic skews in the practical accessibility of the rulemaking process to the full range of affected stakeholders").

80 One other pathway to democratic responsiveness could be congressional awareness that an agency has ignored extensive public comments. As discussed above, however, congressional oversight is so limited and ad hoc that this is not likely to be a substantial incentive for the agency to consider those comments.

have noted, "agency science . . . is laced with policy decisions at numerous levels."[81] Agencies frequently cloak their resolution of values issues in their resolution of scientific and technical issues.[82]

Public comments go far beyond scientific and technical issues, however. Professor Mariano-Florentino Cuéllar has most extensively inventoried the range of comments on three rules generating high volumes of comments promulgated by the Nuclear Regulatory Commission, the Federal Election Commission, and the Treasury Department.[83] He characterizes relatively sophisticated comments as those revealing an awareness of statutory constraints faced by agencies, providing either concrete examples or "discrete logical arguments," and supplying "legal, policy, or empirical background."[84] These are the sorts of comments likely to be filed by well-organized groups or institutions who can enlist attorneys and technical experts to help them formulate comments.

Anyone can file a comment, of course, and comments from individuals can be and sometimes are[85] sophisticated in this same way, "using the kind of complex argumentation to which agency staff claim to pay the most attention."[86] But comments from laypersons also can be unsophisticated, ranging from a description of the commenter's personal experience to little more than a simple preference for a particular outcome.[87] One comment submitted in 2009 on an EPA proposed rule to reduce interstate transport of fine particulate matter and ozone stated, "I strongly commend your proposal to more stringently regulate coal-fired power plants and in two simple words urge you to 'hang tough', as the coal people will fight you tooth and nail."[88] Another comment on the same rule stated, "[i]t is long overdue that . . . EPA actions reduce sulfur dioxide, nitrogen oxide and particulate

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81 Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review of Agency Science*, 109 MICH. L. REV. 733, 736 (2011) ("[I]nterested parties and agencies alike are incentivized to cloak their policy choices in the seemingly unassailable mantle of science.").

82 *Id.*; *see* Wagner, *supra* note 67, at 1359.

83 *See* Cuéllar, *supra* note 60, at 429.

84 *Id.* at 431. Professor Cuéllar devised these criteria based on interviews with lawyers and agency policy officials. He included two additional criteria as well: whether the commenter "include[d] at least a paragraph of text providing a particular interpretation of, and indicating an understanding of, the statutory requirement," and whether the commenter "propose[d] an explicit change in the regulation provided in the notice of proposed rulemaking." *Id.*

85 *See id.* at 414, 487.

86 *Id.* at 414.

87 *See id.* at 430.

88 Donnie Dann, *Comment on Proposed Rule: Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-0169 (last visited June 12, 2011).

matter as much as possible. I see that [a study] . . . show[s] the new regulations will not hurt the reliability of the electric grid . . . . The true costs and avoidable damage of this energy source MUST be addressed by full implementation."[89] As Professor Cuéllar notes regarding the comments from laypeople in his sample, they "nearly always raise concerns that are relevant to the agency's legal mandate."[90]

Most famously of late, agencies have been at the receiving end of public comment campaigns where numerous comments flow into the agencies from individuals. The most extreme example is the submission by individuals of multiple form letters, postcards, or e-mails to an agency, each with identical or near-identical text.[91] This type of campaign is often facilitated by interest groups, which may help individuals prepare comments by supplying suggested text as well as electronic portals to use in submitting those comments.[92] For example, in the first major organic food standards rulemaking, the U.S. Department of Agriculture received over 40,000 comments,[93] and in its roadless area rules, over 1.6 million comments, all told.[94] The FCC's media ownership rule generated over a million comments, the majority from individual citizens,[95] and the Clinton Administration tobacco rule generated over 700,000 comments.[96] And as noted earlier, the Fish and Wildlife Services received more than 640,000 e-mail comments on whether to list the polar bear as a threatened species.[97] These comments may include technical issues as well as statements of policy and value preference.

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89 John Kersting, *Comment on Proposed Rule: Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-0165 (last visited June 12, 2011).

90 Cuéllar, *supra* note 60, at 414.

91 The Clinton Administration's tobacco rule generated 700,000 pieces of mail, including "more than 500 different types of form letters." Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,418 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, and 897).

92 *Cf.* FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 47 ("Interest and advocacy organizations help individuals filter the massive stream of regulatory activity, so that they can focus on, learn about, and engage with specific issues of relevance to them . . . . [Such organizations can also] explore innovative forms of individual and collective participation.").

93 National Organic Program, 65 Fed. Reg. 80,548, 80,548 (Dec. 21, 2000) (to be codified at 7 C.FR. pt. 205) ("The public submitted 40,774 comments on the proposed rule.").

94 Special Areas: Roadless Area Conservation, 66 Fed. Reg. 3244, 3248 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

95 *See* Benjamin, *supra* note 15, at 908 & nn.41 & 43.

96 Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,418 ("Altogether, the agency received more than 700,000 pieces of mail, representing the views of nearly 1 million individuals.").

97 FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 54 n.127.

One could imagine that some of these comments are irrelevant. Sometimes issues are legally out-of-bounds in a rulemaking, such as when a statute evidences a clear preference that an activity continue, subject to regulation, while the comments favor a complete ban, or where the statute requires that an activity be regulated regardless of cost and the comment asks the agency to weight cost heavily.[98] The broad phrasing of many statutes, however, makes this possibility much less likely, and in his study, Professor Cuéllar found that the vast majority of comments filed were indeed relevant.[99]

How do agencies respond to all these comments? At present, agency response to comments—particularly numerous value-laden comments from large numbers of individuals—seems both limited and focused on technical and sophisticated comments. Professor Cuéllar's empirical work suggests that the most sophisticated comments, which likely are also the ones that advance the most technical concerns, are the ones that get the most response from agencies.[100] In his study, sophisticated comments tended to get more attention from agency officials whether they were submitted by individual members of the public or by organized groups, but organized groups submitted sophisticated comments far more often than individual members of the public.[101] Sophisticated comments got more attention even though they did "not always mention the range of concerns raised by comments from the lay public."[102]

By contrast, however, agencies have so far appeared fairly resistant to significantly engaging value-focused comments. Consider the Consumer Product Safety Commission's ("CPSC") recent rulemaking setting standards for infant bath seats to reduce infant drownings.[103] CPSC received public comments arguing that a ban would be more appropriate. They stated that the risk to infants of being left alone by

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98 For example, public views on whether the polar bear should be listed as a threatened species might well be irrelevant under the Endangered Species Act, which requires the Interior Department to make the finding based on threats to the existence of the species and habitat availability, and "solely on the basis of the best scientific and commercial data available to him . . . taking into account [governmental] efforts . . . to protect such species." 16 U.S.C. § 1533(b)(1)(A) (2006).

99 Cuéllar, *supra* note 60, at 414.

100 *Id.*

101 *Id.* ("Dramatic differences exist in the extent of specialized knowledge and technical sophistication reflected in comments from organized interests versus those from individual members of the public.").

102 *Id.* at 414–15.

103 Safety Standard for Infant Bath Seats, 75 Fed. Reg. 31,691 (June 4, 2010) (to be codified at 16 C.F.R. pt. 1215).

a parent in the tub was not worth the risk of offering greater choices to parents regarding how to bathe their children.[104] The CPSC did not offer a response.[105] Somewhat more impressive was the Federal Aviation Administration's ("FAA") response to a comment in a minor rulemaking concerning certain airplanes whose wing attachment fittings were liable to crack.[106] The FAA proposed to require replacing cracked fittings and using reinforcement kits.[107] A commenter suggested repetitive inspections as a way of addressing safety at a lower cost, and the FAA responded, "[t]he FAA's policy is to provide corrective action . . . . The FAA has determined that long-term operational safety will be better assured by design changes that remove the source of the problem, rather than by repetitive inspections or other special procedures."[108] Although the agency did not offer much of a reason in response to the comment,[109] at least it did respond.

Agencies similarly seem unmoved even when the volume of comments is very large. Agencies have frequently treated these multiple postings briefly and with little real engagement. Form letters, postcards, or e-mails, if they are present among the comments, are "sometimes derided by agency staff."[110] As Professors Schlosberg, Zavetoski, and Shulman have reported, "[i]nterviews with agency rule writers show that agencies do not value and often openly resent form letters."[111] Very frequently, a notice of final rule will note the filing of large numbers of public comments, but will pass over those comments lightly, saving detailed responses for more sophisticated or technical comments.[112] In general, rulemaking documents only occasionally ac-

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104 *Compare* Donald Mayes, *Comment on Proposed Rule: Requirements for Accreditation of Third Party Conformity: Third Party Testing for Certain Children's Products; Infant Bath Seats*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=CPSC-2009-0064-0014.1 (last visited June 12, 2011) (opposing rule), *with* Howell Johnson, *Comment on Proposed Rule: Safety Standard for Infant Bath Seats*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=CPSC-2009-0064-0003 (last visited June 12, 2011) ("[I] believe [infant bath seats] can be made safe and serve a vital purpose . . . but that as they are currently, there is more risk than benefit.").

105 *See* Safety Standard for Infant Bath Seats, 75 Fed. Reg. 31,691.

106 Airworthiness Directives; SOCATA-Groupe AEROSPATIALE Models TB10 and TB200 Airplanes, 63 Fed. Reg. 19,178 (Apr. 17, 1998) (to be codified at 14 C.F.R. pt. 39).

107 *Id.*

108 *Id.*

109 *Cf.* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1995).

110 Cuéllar, *supra* note 60, at 421–22 (noting that form letters may be sent in the hope of provoking congressional attention).

111 David Schlosberg, Steve Zavestoski & Stuart Shulman, *Deliberation in E-Rulemaking? The Problem of Mass Participation*, *in* ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE 133, 143 (Todd Davies & Seeta Peña Gangadharan eds., 2009).

112 Professor Cuéllar supplies one example. *See* Cuéllar, *supra* note 60, at 422 n.39 (citing

knowledge the number of lay comments and the sentiments they express; they very rarely appear to give them any significant weight.

Take a National Park Service ("NPS") rulemaking regarding the permissibility of personal water craft (more often known as jet skis) in Assateague National Seashore. Beginning in 2000, the default rule was to restrict jet skis in national parks and seashores until the NPS made specific "appropriateness" determinations on a park-by-park basis.[113] Accordingly, in 2002, the NPS published a Notice of Proposed Rulemaking to maintain the closure in most of Assateague National Seashore, but to permit jet skis in two significant areas of the park closest to access from the populated areas of Chincoteague Island, Virginia, and Ocean City, Maryland.[114] The agency stated that it received 7600 comments.[115] Of them, the agency stated that "7,264 support a complete ban on [jet ski] use within the national seashore boundary. An additional 43 individuals support banning [jet ski] use within the entire National Park System."[116] Approximately 170 comments supported the rule.[117] The NPS then turned to analyzing several issues raised in the comments regarding safety, crowding, and other technical issues presented by the proposed restriction. In the final rule, the agency never engaged at all the overwhelming number of comments opposing any jet ski access in the park.[118]

Concession Contracts, 65 Fed. Reg. 20,630, 20,631 (Apr. 17, 2000) (to be codified at 36 C.F.R. pt. 51)) (implying that the National Park Service needed only to respond to "non-duplicative" comments).

113 *See* Assateague Island National Seashore, Personal Watercraft Use, 68 Fed. Reg. 32,371, 32,372 (May 30, 2003) (to be codified at 36 C.F.R. pt. 7).

114 *Id.* (noting that the proposed rule was published May 6, 2002). The two areas are at the north end of the park, near Ocean City, Maryland, and a significant area known as Horsehead Marsh, near Chincoteague Island, Virginia. For maps of the areas, see *Personal Watercraft (PWC) Closure Areas, Chincoteague, VA*, NAT'L PARK SERV., U.S. DEP'T INTERIOR, http://www.nps.gov/asis/planyourvisit/upload/PWCSouth.pdf (last visited June 12, 2011); *Personal Watercraft (PWC) Closure Areas, Sinepuxent Bay*, NAT'L PARK SERV., U.S. DEP'T INTERIOR, http://www.nps.gov/asis/planyourvisit/upload/PWCNorth.pdf (last visited June 12, 2011).

115 Assateague Island National Seashore, Personal Watercraft Use, 68 Fed. Reg. at 32,372.

116 *Id.*

117 *Id.*

118 Somewhat cryptically, the NPS did state that comments referring to the environmental assessment "have been identified and responded to in the Finding of No Significant Impact." *Id.* It is not clear whether those comments might even encompass the over 7000 ban-favoring comments. In any event, that finding, prepared in compliance with the National Environmental Policy Act, is not readily obtainable, and so it would have been very difficult for the public to discover whether the agency responded to these comments. *Id.* at 32,375 ("A copy of that finding may be obtained by contacting the Superintendent of Assateague Island National Seashore.").

Another well-known NPS rule, on snowmobile access in Yellowstone National Park and the Grand Tetons, similarly failed to engage public comments adequately.[119] When the NPS proposed restricting snowmobile access, it received 360,000 comments on its Draft Environmental Impact Statement, eighty percent of which reportedly supported a ban on snowmobiles.[120] Nonetheless, the NPS ended up expanding snowmobile access.

Similarly, in a rule regarding grazing policy, the Bureau of Land Management's ("BLM") treatment of the large number of lay comments it received was perfunctory at best. BLM noted that it had received over 18,000 comment letters and electronic communications, and it stated:

> Most of the comments were form letters or emails. An exact count of the comments is not available because of the large amount of duplication among the comments due to individuals or entities submitting identical comments multiple times or via different media. We did not attempt to keep track of all the duplications, although we observed many.[121]

Professor Stephen Zavestoski and his coauthors discuss the U.S. Forest Service's roadless area rule.[122] That rule received 1.2 million comments, and the Forest Service explicitly noted that its content analysis team would make "no attempt to treat input as if it were a vote."[123] Of the comments, some felt the rule did not go far enough; others felt it went too far.[124] Similarly, with respect to the FCC's media ownership rules, "[t]he overwhelming sentiment against the rules in the comments appears to have had no effect."[125]

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119 *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 90 (6th ed. Supp. 2009–2010).

120 *See* Special Regulations; Areas of the National Park System, 68 Fed. Reg. 51,526 (proposed Aug. 27, 2003) (to be codified at 36 C.F.R. 7); BREYER ET AL., *supra* note 119, at 90 (reporting that eighty percent of comments favored ban); *see also* Katharine Q. Seelye, *Flooded with Comments, Official Plug Their Ears*, N.Y. TIMES, Nov. 17, 2002, at C4.

121 Grazing Administration—Exclusive of Alaska, 71 Fed. Reg. 39,402, 39,403 (July 12, 2006) (to be codified at 43 C.F.R. pt. 4100).

122 Stephen Zavestoski, Stuart Shulman & David Schlosberg, *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 SCI., TECH. & HUM. VALUES 383, 386–88 (2006).

123 *Id.* at 387.

124 *Id.* at 386.

125 Benjamin, *supra* note 15, at 908. The EPA also received approximately 500,000 public comments in response to its 2005 "Clean Air Mercury Rule" for coal-fired power plants. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,608 (May 18, 2005). A small subset of those comments received an agency response in the final rule document. *Id.* ("Some of the more significant

An impressive counterexample to the pattern of agency dismissiveness of public comments can be found in a 1997 National Highway Traffic Safety Administration ("NHTSA") rulemaking regarding whether to permit dealerships to install on-off switches for airbags.[126] The agency received 700 comments, 600 of them from members of the general public.[127] Comments from the general public in that rulemaking "almost universally favored allowing air bag deactivation for anyone who wants it," on grounds of "personal choice," emphasizing "the danger that they believe air bags pose and many [comments] mention[ing] media reports that they had seen."[128] The agency's view, however, was that the public was not properly assessing the risks and benefits of airbags and that only a very few conditions warranted airbag deactivation on safety grounds.[129] Rather than either follow the preferences of the commenters or dismiss them out of hand, the agency convened focus groups regarding whether enhanced information provided to the public could address fears about airbags.[130] In the sessions, the focus groups "emphasized that public information and education would reduce misconceptions about air bags."[131] Following the focus groups, the agency sharply restricted the availability of on-off switches—but added a "public education information campaign to put air bag risks and benefits into proper perspective."[132]

Another might be the Agriculture Department's National Organic Program rulemaking, finalized in December 2000, at the very end of the Clinton administration.[133] In deciding that foods certified

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comments . . . are addressed in this preamble."). The agency responded to "300 unique public comments" in a separate document published only in the regulatory docket, but provided no discussion or description of the other over 400,000 comments. *See* OFFICE OF AIR QUALITY PLANNING & STANDARDS, ENVTL. PROTECTION AGENCY, RESPONSE TO SIGNIFICANT PUBLIC COMMENTS RECEIVED IN RESPONSE TO: REVISION OF DECEMBER 2000 REGULATORY FINDING ON THE EMISSIONS OF HAZARDOUS AIR POLLUTANTS FROM ELECTRIC UTILITY STEAM GENERATING UNITS AND THE REMOVAL OF COAL- AND OIL-FIRED ELECTRIC UTILITY STEAM GENERATING UNITS FROM THE SECTION 112(C) LIST RECONSIDERATION 10 (2006), *available at* http://www.epa.gov/ttn/atw/utility/final_com_resp_053106.pdf.

126 Air Bag On-Off Switches, 62 Fed. Reg. 62,406 (Nov. 21, 1997) (to be codified at 49 C.F.R. pts. 571 and 595).

127 *Id.* at 62,413.

128 *Id.* at 62,414.

129 *Id.* at 62,417.

130 *Id.*

131 *Id.*

132 *Id.* at 62,423.

133 National Organic Program, 65 Fed. Reg. 80,548, 80,551 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205).

as "organic" should not include irradiated foods, the agency said the following:

> The prohibition on ionizing radiation in the final rule is based solely on consumer preference as reflected in the overwhelming public comment stating that organically handled foods should not be treated in that manner.[134]

The rule could be understood as responding to public discomfort with radiation, though the issue could also be understood as technical: this is the meaning that "organic" generally conveys to the public.

Finally, the Department of Health and Human Services' Health Insurance Portability and Accountability Act ("HIPAA")[135] Privacy Rule of late 2000 appears to be a less attractive example of an agency responding to public preferences.[136] In finalizing that rule in late 2000, the agency responded to the nearly 52,000 public comments it received, many urging more privacy protections.[137] The rule has been criticized as creating too much "red tape"[138] and discouraging some hospitals and clinics from "assist[ing medical] researchers."[139] It is difficult to conclude that the problems with the rule, however, can be blamed solely on agency response to public preferences.[140]

Despite these latter examples, agencies generally appear to be impatient with and unresponsive to value-focused commenting. At a minimum, the scope of agency response to such comments is worth further investigation. To the extent agencies are unresponsive in this way, one cause could be agency official motivations. More likely, institutional commitments and legal requirements simply do not prompt agencies to consider or respond to these sorts of comments.[141]

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134 *Id.* at 80,551.

135 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

136 Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,566 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

137 *Id.* at 82,566 (noting "substantial changes to the proposal in response to those comments").

138 Carl E. Schneider, *HIPAA-cracy*, HASTINGS CTR. REP., Jan.–Feb. 2006, at 10, 10; *see* Stephen K. Phillips, *A Legal Research Guide to HIPAA*, J. HEALTH & LIFE SCI. L., July 2010, at 134, 147; *see also* Jack Brill, Note, *Giving HIPAA Enforcement Room to Grow: Why There Should Not (Yet) Be a Private Cause of Action*, 83 NOTRE DAME L. REV. 2105, 2135 (2008) (noting that although the HIPAA privacy rule has "unfortunate adverse effects on the physician-patient relationship and on medical research," the rules "may certainly be well worth their costs").

139 Brill, *supra* note 138, at 2134.

140 *Cf.* Schneider, *supra* note 138, at 11 ("However 'fundamental' privacy may be, HIPAA is otiose if it promotes it ineffectively.").

141 I assume here that agency officials are generally subjectively motivated to serve the

First, many agency rules—particularly high-profile, more controversial rules—are perceived to be pretty well finalized at the notice of proposed rulemaking stage.[142] One reason that an agency position in a proposed rule may be set in mud, if not concrete, is the public notice requirement of the APA.[143] An agency must give full public notice of all critical matters contemplated for a final rule.[144] Any rule change in response to comments that is beyond a "logical outgrowth" of the contents of the proposed rule either makes the rule vulnerable to judicial invalidation or requires a new round of notice and comment.[145] This creates an incentive for agencies to identify and resolve as many critical issues as possible prior to the issuance of the notice of proposed rulemaking,[146] and a number of observers have suggested that agency practice conforms to theory on this point.[147] The consequence is that only the most technical comments, such as those that might result in

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public interest, and that in any event, a structure which holds the agency accountable for proper action would help blunt any contrary motivations. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 92–96 (2008) (discussing motivations of regulatory officials); Cuéllar, *supra* note 60, at 428 (finding it unsurprising that "staff may be (at least in part) genuinely interested . . . in responding to intelligible concerns raised by commenters"); Seidenfeld, *supra* note 1, at 1565–66 (suggesting that agency officials may seek to maximize post-work opportunities); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 262 (2009) (officials may seek to shirk); Stewart, *supra* note 31, at 1681–84 (discussing process of determining public interest, with officials as brokers); *see also* Seidenfeld, *supra* note 1, at 1565–74.

142 Wagner, *supra* note 67, at 1367 (arguing that judicial review provides agencies with strong incentive to have rule in near-final state at proposed-rule stage). As Professor Edward Rubin has observed, the notice requirement is essentially a judicial concept aimed at giving "fair treatment of particular individuals," in tension with the point of rulemaking, which is a "policy process that should involve the collection of new information and the use of that information to design optimal solutions." Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 113 (2003). Professor Susan Webb Yackee found, however, in her study of more run-of-the-mill administrative rulemakings, that agencies did appear to revise final rules in response to comments. 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, 105 (2006); *see also* FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 57 (noting "frequent complaint" that public participation comes too late in process).

143 5 U.S.C. § 553(b) (2006).

144 *Id.*

145 *See, e.g.*, Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991); Wagner, *supra* note 67, at 1367.

146 As Professor Edward Rubin has suggested, the judicial review requirements for reason-giving and prior notice are in tension with having rulemaking function as a genuine quasi-legislative process. They are an obstacle to agencies modifying their options and approaches freely in response to information received from the public during rulemaking. *See* Rubin, *supra* note 142, at 111–18.

147 *See* NOVECK, *supra* note 39, at 40–43; Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 764 (1996).

technical changes or slight adjustments to the overall standard selected by the agency, are likely to get attention during the comment period. Values-focused comments aimed at the overall approach of the rule are likely to be slighted.[148]

Prenotice participation, when it happens, is not an adequate substitute for notice-and-comment rulemaking on these issues. Agencies do often try to engage a wide range of interested parties prior to publishing the notice of proposed rulemaking, but the involved parties typically include a disproportionate number of regulated entities. This may have nothing to do with "agency capture," though capture, if it exists, may make the problem worse. Instead, regulated entity groups possess information particularly valuable to the agency, the agency needs their cooperation in complying with the standard once issued, and the agency simply may have more information about whom to call.[149]

In short, the danger is that the public comment process may end up looking more like window dressing, and the precomment process is no substitute. The filing of comments—especially with respect to those who have participated prior to the notice of public rulemaking—thus resembles less a genuine and democratic opportunity to assist administrative decisionmakers and more E. Don Elliott's famous description: "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."[150] Those who have not participated prenotice may find that their comments get less attention, especially if acting on those comments would require the agency to significantly revise the content or direction of the rule.

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148 *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) ("In determining what points are significant, the 'arbitrary and capricious' standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true." (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393–94 (D.C. Cir. 1973))); *see also* City of Waukesha v. EPA, 320 F.3d 228, 258 (D.C. Cir. 2003) (upholding against challenge the EPA's "generic" response to scientific studies on radionuclides in drinking water, including its statements that it had "reviewed the documents" and that information was "familiar to the Agency and accordingly had already been considered").

149 Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 429 (2007).

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

Second, judicial review requirements provide agencies with an incentive to take technical comments more seriously than value-focused comments.[151] Agencies are responsible for responding to significant issues raised in comments, including those comments identifying a technical difficulty with a rule or transmitting scientific information.[152] In addition, in applying the arbitrary and capricious review standard, judges often focus explicitly on the rational connection between the "facts found" and the "choices made" by an agency in rulemaking.[153] Consequently, an agency's failure to acknowledge these sorts of issues may be vacated on judicial review.

As to the value issues, the legal obligation for an agency to respond to comments appears to have less bite. Public comments might, for example, advocate that an agency action be relatively protective of health, the environment, or personal privacy, that the agency should refrain from paternalism, or that the agency should weight resource conservation more heavily than resource use. With respect to the agency's obligation to respond to these sorts of comments, research has not yet uncovered an opinion in which an agency decision has been vacated because the agency failed to consider value preferences in public comments. And efforts to argue that agencies are obligated to follow the weight of preferences in the comments have been roundly—and appropriately—rejected, as with one opinion, where the court wrote that agency rulemaking is not a process in which "the majority of commenters prevail by sheer weight of numbers."[154]

Third, compared with well-organized groups, individuals who submit comments may have less ability to invoke forms of political discipline (whether it is congressional or presidential oversight) and fewer resources with which to challenge an agency action in court. The incentive an agency has to respond to an individual's comment thus may be smaller than the agency's incentive to respond to the comment filed by the well-organized group.

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151 Of course, the line is sometimes hard to draw, and agencies have been criticized sharply for burying political and values issues in technical decisions. *See generally* Meazell, *supra* note 81; Wagner, *supra* note 67.

152 *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392 (D.C. Cir. 1973).

153 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56 (1983); *see also* Am. Forest & Paper Ass'n v. EPA, No. 93-CV-0694(RMU), 1996 WL 509601, at *6 (D.D.C. Sept. 4, 1996) (vacating EPA rule in part for failure to respond to factual allegation in comment regarding amount of national water intake).

154 Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987); *see also* U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001) ("[T]he Commission has no obligation to take the approach advocated by the largest number of commenters.").

Fourth, resource constraints may impede agencies from fully considering the thousands of public comments they may receive in some rulemakings. Agencies sometimes have had to outsource or automate the reading of at least some of these comments.[155] Agencies may use technology to distill the comments in some way,[156] as the Fish and Wildlife Service did in analyzing public comments on its listing of the polar bear as a threatened species.[157] And one temptation is undoubtedly to give high-volume comments short shrift.

Finally, as one might infer, particularly from the Cuéllar study, agency officials may see themselves as operating in an atmosphere of rational, technocratic analysis. This may also explain why more sophisticated and technically focused comments receive more attention—and more responses—in the context of an agency rulemaking, while comments that seem closer to "votes" on policy questions are disregarded.[158]

II. Confronting Agency Responsiveness to Policy Comments

The relative lack of response to these types of comments is in significant tension with a view of rulemaking as facilitating democratic responsiveness. If agencies are to resolve value-laden questions, such as whether reduced pollution is worth higher electricity bills or whether the risk presented by a convenient infant bath seat is tolerable, then we must confront the way agencies apparently treat value-laden comments, including comments from laypersons that arrive in large volumes. One possibility is to be very clear that mass comments expressing policy preferences should play little or no role in agency decisionmaking. That would mean more clearly informing the public that the agency will consider only technical comments, and that expression of policy preferences alone will receive no weight and ought to be sent to Congress or the White House.[159] This would give the

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155 Professor Beth Noveck has suggested that agencies use "bots" to evaluate electronic comments to identify content that is nonidentical. *See* Noveck, *supra* note 8, at 442.

156 Federal e-Rulemaking Report, *supra* note 6, at 9, 53 (noting developments of tools to help agencies process mass comments).

157 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,235 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17) (noting use of the "*Rule-Writer's Workbench* . . . analytical software" developed at the University of Pittsburgh).

158 Schlosberg, Zavestoski & Shulman, *supra* note 111, at 141 ("Numerous civil servants have reported at workshops, focus groups, and interviews over the last four years that agencies are required to respond to substantive comments but not to sheer numbers.").

159 *Cf.* Bill Funk, *The Public Needs a Voice in Policy. But is Involving the Public in*

public a greater sense of what its participation can realistically contribute to agency decisions, though it also means reducing the extent to which we view the rulemaking process as facilitating democratic engagement.

In this Part, I propose to make an initial case for the other possibility; these sorts of comments deserve more systematic consideration. Agencies ought to engage—in some way—these comments, *especially* when they arrive in large numbers. Even if they are not distilled essays on the agency's proposal, public comments of this sort might offer highly useful information regarding the public's values that could be difficult to match elsewhere. Assuming the comments are relevant under the agency's statutory authorization, they thus may be worth more systematic engagement.

First, public commenting communicates the public's preferences in a far more concrete context than voting. Rather than casting a single, undifferentiated vote for a political candidate who possesses a not fully specified ability to affect the operation of the administrative state, an individual who comments can express directly to the agency a crystallized view that is specific to a concrete proposal.

Further, the recent high levels of participation in rulemaking suggest that an agency might hear from many more members of the public than it could otherwise feasibly consult. The e-rulemaking process, especially, may prompt high levels of public participation on a focused issue. By contrast, polling organizations that can ask focused questions of the general public typically depend on relatively small sample sizes—several hundred or a few thousand respondents.[160]

And lay comments may be relatively unaffected by the sorts of concerns that have led to complaints about "political interference" by the President or members of Congress with agency decisions.[161] There is a risk of "astroturfing," when groups form that purport to—but do not really—represent grassroots interests, potentially giving an agency an incorrect picture of public preferences. Agencies might take steps

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Rulemaking a Workable Idea? CPRBLOG (Apr. 13, 2010), http://www.progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E ("[T]elling the public they can have a voice in the rulemaking process verges on misleading. The notice-and-comment procedure of rulemaking isn't supposed to be a political exercise.").

160 *See, e.g.*, *How Does Gallup Polling Work?*, GALLUP, http://www.gallup.com/poll/101872/how-does-gallup-polling-work.aspx (last visited June 12, 2011) ("The typical sample size for a Gallup poll, either a traditional stand-alone poll or one night's interviewing from Gallup's Daily tracking, is 1,000 national adults . . . .").

161 *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 88; Mendelson, *supra* note 27, at 1141.

to address that risk, by requiring an affirmation that the commenter is not being paid or through restrictions on anonymous commenting. But in general, individuals, unlike individual members of Congress, are less likely to be in thrall to a particular interest group or to have a short-term electoral strategy in mind.

An agency's failure to engage value-focused comments, particularly mass commenting, creates a number of problems beyond the agency's loss of potentially valuable information. Recall that agencies are already in the business of resolving value-laden policy questions. An agency's decision not to attend particularly closely to large numbers of value-laden comments filed by the public is, as noted, in tension with our ability to see the agency as democratically responsive by virtue of its own processes.

Moreover, to the extent members of the public perceive that the opportunities to participate are not authentic, they may be deterred from engaging in the government process.[162] This further undermines the process's potential to legitimate agency decisions and undermines the extent to which the public is willing to accept the agency's ultimate decision.[163] Systematic agency disregard for value-focused comments threatens to create this impression, if it has not already done so.[164]

Finally, not responding to value-laden comments directly can undermine the candor of agency decisions. Agencies will be further encouraged to bury value-laden or policy issues in the resolution of scientific questions. That can complicate participation in even those questions and undermine the transparency of the agency decisionmaking process.[165]

Admittedly, having agency officials attend to public comments expressing a preference for privacy, for protection, for environmental preservation, or for the ability to choose risky products or practices is all in some tension with our view of agencies as "repositories of signif-

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162 *Cf.* Schlosberg, Zavestoski & Shulman, *supra* note 111, at 142 ("[F]orm commenters are more likely than original commenters to think that groups that organize mass mail campaigns have the ability to change proposed rules.").

163 *See* FEDERAL E-RULEMAKING REPORT, *supra* note 6, at 10 (noting that imbalance in participation undermines possibility that "taking part in a governmental process may increase acceptance of its outcome"); *see also* Zavestoski, Shulman & Schlosberg, *supra* note 122, at 390 (noting that public may develop perception that "expert scientific knowledge and jargon are privileged," creating further obstacles to commenting from a lay perspective).

164 *See* Seelye, *supra* note 120 (newspaper coverage of Park Service snowmobile decision).

165 Meazell, *supra* note 81, at 752 (noting the phenomenon of "scientists inserting their own policy choices into their analyses," which can "hinder participation and accountability because they drown policy choices in inaccessible science"); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 23–29 (2009).

icant substantive expertise and experience."[166] This understanding of agency function no doubt partly informs judicial opinions concluding that agencies cannot be compelled to follow the weight of public preferences expressed in a rulemaking.[167]

The reality, however, is that agencies are already fully engaged in deciding value-laden questions. For those decisions to be legitimate, we must be able to understand them as democratically responsive, and public comment can be an important source of information on the values agencies must weight or balance. This point was made by the Attorney General's Committee as administrative procedure bills were being considered in the 1940s, ultimately leading to the adoption of the APA: "[An agency's] deliberations are not carried on in public and its members are not subject to direct political controls as are legislators . . . . [I]ts knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulation will affect."[168]

This is not to say that an agency should tally up the total number of comments for or against a particular issue and have that serve as a referendum or a dispositive vote of some sort on the policy issue at hand. The judicial opinions saying agencies need not do this are clearly correct. Leadership can consist of knowledgeable assessment of what is in the long-term public interest, even if that is not precisely the same policy sought by the majority of voters.[169] Agencies may well possess better information and make a better long-term assessment of risks and benefits than individual commenters.[170]

Again, some of these concerns could be addressed if agencies were to candidly announce they will not generally consider these sorts of comments. But in view of the focused, crystallized and thus likely

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166 *See* Exec. Order 12,866, 3 C.F.R. 638, 640 (1994) ("Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.").

167 *See* cases cited *supra* note 154.

168 COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 101–02 (1941); *see* Dean Smith, *Lawmaking on Federal Lands: Criminal Liability and the Public Property Exception of the Administrative Procedure Act*, 23 J. LAND RESOURCES & ENVTL. L. 313, 316 (2003).

169 *See* BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC (2006).

170 Moreover, having the total number of comments serve as a referendum would generate an incentive for "astroturfing." "Astroturfing" groups could overwhelm agencies with even more form letters, e-mails, and postcards. *See generally* Wagner, *supra* note 67; *see also* Benjamin, *supra* note 15, at 906 (noting the "potential for manipulation by interest groups" already partially realized in e-mail commenting).

useful nature of many of these comments, there is a case to be made that a democratically responsive agency process should attend to, incorporate, and engage value-laden points, especially when they are made in a significant number of comments. The implication is that at times, the weight of comments could conceivably make a difference. For example, public preferences on the potential uses of a multiple-use resource perhaps should have made a difference in the grazing, jet ski, and snowmobile rules discussed earlier, particularly because they are consistent with long-term availability of the resource.

Agencies might consider the following criteria for deciding when multiple value-laden comments deserve especial attention: (1) comments submitted are particularly numerous, (2) a particular viewpoint represents a strong majority or a supermajority of the comments filed, (3) the comments raise an issue relevant under the agency's statutory authorization, (4) the comments are coherent and persuasive, and (5) the comments point in a different direction from that considered by the agency.

For example, especially where the comments point in a direction different from the agency's proposed path, such comments have to be understood as an important signal—perhaps even akin to a straw poll—that further investigation of some sort into public values and policy direction is needed.[171]

Reasons could be given, of course, why agency officials should *not* give particular weight to mass comments even if values-based comments do receive consideration. Perhaps the use of identical or near-identical text in a comment implies that a comment does not convey the commenter's genuinely held view. Identical text surely undermines the impression that an individual is communicating her deeply held convictions. But that does not make the comment content-free. After all, the vast majority of these comments are not anonymous, and so the sending individual knows the comment is attributable to her. The individual is likely to press "send" only if the suggested text reasonably corresponds to the individual's views. Both suggested text and the availability of an electronic portal, might simply be understood as the interest group's effort to lower participation costs and thereby increase public engagement. At worst, the group's suggestion of text appears to boil down the range of public views to a sort of "least common denominator." Such a comment still does convey

171 *But see* 2 O. HENRY, *A Ruler of Men*, *in* THE COMPLETE WORKS OF O. HENRY 944, 948 (Doubleday & Co., Inc. 1953) (1899) ("A straw vote . . . only shows which way the hot air blows.").

more content to the agency than, say, allowing individuals to vote outright or to click "Like" in the manner of a Facebook-type site, though that may not be far behind.[172] In any event, some groups now appear to be encouraging commenters to individualize comments submitted through electronic portals.[173]

It might also be said that a collection of forty thousand—or one hundred thousand—comments sent in from portals on public interest websites might not be representative of public views.[174] They might represent just the views of those groups' members, not others, and perhaps might even be slanted towards the interests of relatively wealthy individuals, who have readier access to the Internet.[175] Professor Stuart Benjamin has suggested that public opinion polls with "randomized samples" might be a better substitute.[176]

Public polls focused on a particular question, however, typically have much smaller groups of participants and they too have difficulties with nonresponders.[177] Meanwhile, even if not perfectly representative of the public at large, the level of participation in mass commenting is surely an improvement over a nation without citizen engagement. This is especially true given the general underrepresentation of diffuse beneficiary groups. Public comment campaigns may serve to roughly counterbalance the long-time advantage enjoyed by regulated entities.

Admittedly, not all diffuse groups of regulatory beneficiaries may be equally successful in overcoming participation barriers, so the

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172 Consider that Cornell's e-Rulemaking Initiative, which despite other statements discouraging vote-like comments, still invites members of the public to "vote" on which issues are most important for an agency to address. *See generally* REGULATION ROOM, http://www.regulationroom.org (last visited June 12, 2011).

173 *See, e.g.*, SIERRA CLUB, http://www.sierraclub.org (last visited June 12, 2011).

174 *Cf.* Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T. 41, 58 (2006) (containing the following heading: "Mass E-Mail Campaigns May Do More Harm than Good if They Make It Harder to Find the Useful Comments or Lower the Estimation of the Public Role in the Minds of Regulators.").

175 Benjamin, *supra* note 15, at 905.

176 *Id.* In addition, while randomized public opinion polls might be useful tools, it may be time-consuming to devise one specific to a particular proposed rule.

177 Concern might also be expressed that the comments represent a rough cut at the value question, rather than a fully engaged dialogue or discussion, and so they are an inferior way to resolve a question of public value compared with a discussion that takes place inside the agency, the White House, or within Congress. A similar criticism might be leveled against polls or elections, which represent an even rougher cut at values. As noted elsewhere, some effort is underway to create a dialogue as part of the commenting process. *See supra* note 39 and accompanying text; *see also* Farina, *supra* note 44, at 410–12. At a minimum, however, such comments are surely a sufficient "rough cut" to justify particular effort to prompt a focused dialogue with the public or with politically responsive institutions.

agency may still need to consider the possibility that it may not be hearing from every group of interested individuals.[178] But that hardly seems a reason to disregard extensive participation when it is present. Again, the recommendation here is not for agencies to add up the number of comments for or against a particular position, but instead to recognize the possibility that public views, as expressed in comments, point in an unexpected direction or a direction contrary to the agency's initially preferred policy. This should prompt the agency to use additional procedures to engage public views or at a minimum to engage in more extended deliberation, possibly including Congress or the White House.

What might that further assessment or deliberation look like? A range of alternatives deserves debate and experimentation; I will mention three at this point. The agency or other executive branch entities might conduct targeted opinion polling. Conceivably focus group discussions also could be used to confirm the presence and intensity of public views and whether they might be addressed through different methods, as NHTSA did in its rulemaking on airbag deactivation.[179]

Professors Cuéllar and Noveck have advocated for the use of randomly selected civil juries to provide agencies with input on values issues embedded in rulemaking—random selection to increase the chances that a particular civil jury's views will be representative.[180] Although this suggestion seems promising, the group's very small size—as with some focus groups—may limit its ability to replicate the range of views that otherwise might be expressed in a notice-and-comment process or in a larger institution.

Finally, a significant number of comments in a rulemaking might also prompt an agency to elevate the issue within the executive branch, generating an active—and ideally, a transparent—discussion among high-level executive branch officials regarding the appropriate policy. The results of any such endeavors or other reforms could and should be summarized in the final rulemaking and the agency's reasons for the policy choice in the final rule explained.[181]

Relatedly, agencies might take procedural steps to increase the usefulness of lay and value-focused public commenting. For example,

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178 *See supra* notes 67–74 and accompanying text.

179 *See supra* notes 126–32 and accompanying text.

180 NOVECK, *supra* note 39, at 152–53; Cuéllar, *supra* note 60, at 491. Professor Wagner has made a number of other proposals, including appointing advocates for underrepresented interests, imposing restrictions on comment size, and insulating some stages of agency deliberations to avoid deluging agencies with imbalanced information. Wagner, *supra* note 67, at 1414–27.

181 Mendelson, *supra* note 27, at 1127.

agencies could reshape their rulemaking notices by more often using focused questions, as agencies sometimes do now.[182] This might result in more valuable reactions from the lay public on questions of core values and prioritization. Agencies could also regularly provide information to the public on what makes for a higher quality, more persuasive comment. Further, to address the concern that by the proposed rule stage, a rule is a fait accompli, undermining the value of public participation,[183] agencies should be encouraged to use the Advanced Notice of Proposed Rulemaking process as a means to solicit value preferences prior to embarking on a more specific rule. We might also consider a streamlined process by which additional notices or modified notices might be easily published as amendments to the original notice of proposed rulemaking. This might remove a disincentive to agencies more fully considering a wide range of comments. Finally, an agency might take steps to minimize the risk of astroturfing, as discussed above, such as by requiring an affirmation that the commenter has not been paid and announcing that anonymous comments will receive less weight, particularly when such comments purport to be informed by an individual's own experience.[184] If an agency barred anonymous comments, it could on request redact a commenter's name at the time it posts the comment electronically.

What might be the best way to ensure that agencies pay attention to lay comments on value-laden issues? Congress, of course, might provide specific instructions of some sort if the level of lay commenting reaches a particular threshold. Judicial enforcement is always tempting, since individual access to the courthouse to hold an agency accountable is sometimes easier to get compared with access to Congress or the White House, but interpreting the APA to require agency responsiveness to comments on value questions would create some special problems. Suppose an agency action were to be subject to vacatur on the grounds that the agency failed to give adequate weight to comments on value matters, so that the agency action was then deemed "arbitrary and capricious." Or the action were to be challenged for the agency's failure to give an adequate explanation, violating the APA's concise statement of basis and purpose requirement.

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182 The Department of Transportation employed this technique in a recent notice of a "public listening session." *See* Hours of Service of Drivers, 76 Fed. Reg. 5324, 5325 (Jan. 31, 2011) (seeking "data and answers relating to the following issues and questions" ranging from "patterns of work for night drivers" and views on whether drivers who drive between midnight and 6 a.m. should have less duty time "to provide a longer period to obtain sleep").

183 *See supra* notes 143–47 and accompanying text.

184 John Reitz, *E-Government*, 54 AM. J. COMP. L. (SUPP.) 733, 745 (2006).

Resolving such claims could require judges to develop a notion of "adequate weight" or adequate response in the context of value-laden comments—ultimately an issue with political implications that judges would seem ill equipped to evaluate. Moreover, some judges might be tempted to use this sort of judicial review process to implement personal value preferences.[185] Instead, unless Congress has provided specific statutory instructions, judicial review under the APA on these matters ought to be limited to requiring agencies to give *some* acknowledgement of significant views expressed through lay comments, and courts then should defer to the content of any subsequent response from the agency.

Besides minimal judicial review, plus the possibility of more specific congressional instruction, the best option would seem to be self-regulation by the executive branch.[186] By internal agency rule, guidance, or executive order, agencies could commit to weigh layperson comments in a particular way or to conduct additional proceedings if layperson comments suggest that the public does not support the balance of values proposed by the agency. While self-government depends on an institution's own commitment and good will,[187] rather than accountability to an outside institution, it may nonetheless be a very straightforward way to accomplish these goals. Some accountability could be provided if the agency is required (as it might be in judicial review) to be transparent about its response to significant levels of public comment. The agency could be required to give the comments *some* consideration and provide its reasons for giving the weight that it did.[188] Disclosure and transparency—and ultimately, electoral accountability for getting the answers wrong or ignoring the public—are the best incentives for an agency to be democratically responsive, not just to executive supervision, but to the views of the public expressed through the administrative process.

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185 *Cf.* Mendelson, *supra* note 27, at 1171.

186 *Cf.* Peter L. Strauss, Foreword, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704 (2007) (noting how agency officials conduct themselves may have a lot to do with what they think they are *supposed* to do).

187 *Cf.* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 783–84 (2004) (documenting low agency compliance rates with the Federalism Executive Order).

188 An acceptable public reason, for example, could be that the agency's leadership, through the process of executive review of rulemaking, is convinced that the outcome is consistent with the views of the President.

Conclusion

If we want internal agency processes to be a source of democratic responsiveness and accountability, we must give greater thought to the role agency officials reasonably can play and how they respond to public participation in rulemaking. As part of this evaluation, we must more clearly acknowledge that the questions agencies answer—and have answered for some time—involve critical questions of value, not just expertise. Meanwhile, with the advent of e-rulemaking, public participation seems to be on the rise, and innovations seem likely to lower its cost and prompt more of an online dialogue either among commenters or between commenters and agency officials. A preliminary look suggests that many public comments, even if not technical, are relevant to the questions that agencies must resolve, but the agencies are not systematically engaging those comments.

We should strongly encourage agencies to engage comments on the value-laden questions more seriously, including the comments of lay persons submitted in large numbers. We should also reform, at least somewhat, the legal environment surrounding rulemaking to increase its potential to make agency decisionmaking democratically responsive. Alternatively, agencies should more candidly acknowledge how they handle public comments. At a minimum, the time is ripe for investigation, debate, and experimentation regarding the extent to which value-focused comments are made in rulemaking, the way agencies typically treat them, and the manner in which agencies weigh mass comments, particularly comments that relate to questions of value.[189] All this is necessary if we are to realize rulemaking's promise of a wider democratic dialogue.

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189 Further experimentation is undoubtedly required. *Cf.* Cuéllar, *supra* note 60, at 417 ("[R]egulators could systematically experiment with, and compare, different methods for blending public input with expert opinions about risk and science.").