DEMOCRATIZING RULE DEVELOPMENT

MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI*

ABSTRACT

Agencies make many of their most important decisions in rulemaking well before the publication of a Notice of Proposed Rulemaking (NPRM), when they set their regulatory agendas and develop proposals for public comment. Agencies' need for information from outside parties and openness to alternative courses of action are also generally at their greatest during these earlier stages of the rulemaking process. Yet regulatory agenda setting and rule development have received virtually no scholarly attention. The literature generally treats what happens before publication of the NPRM as a "black box" and suggests that agenda setting and rule development are primarily influenced by political considerations and pressure from well-organized groups. Other interested stakeholders, including regulatory beneficiaries, smaller regulated entities, state, local, and tribal governments, unaffiliated experts, individuals with situated knowledge of the regulatory issues, and members of the general public, are routinely absent.

While there is undoubtedly much truth to this understanding, a recent study we conducted for the Administrative Conference of the United States unearthed significant efforts by numerous federal agencies to engage the public long before the publication of an NPRM. The existing efforts, however, tend to be relatively unstructured, unsystematic, and ad hoc. Moreover, many opportunities for public engagement are voluntary and self-selecting, which do little to overcome the barriers to participation by traditionally absent stakeholders. Rule development thus warrants more

* Professor of Law & Associate Dean for Research, and Professor of Law & The A.J. Thomas Faculty Scholar, respectively, Michigan State University College of Law. This Article builds on our research as academic consultants to the Administrative Conference of the United States, which adopted Recommendation 2018–7, Public Engagement in Rulemaking, 84 Fed. Reg. 2139, 2146 (Feb. 6, 2019), based on our study. We are indebted to many agency officials who gave generously of their time in dozens of interviews conducted as part of this project, as well as the staff of the Administrative Conference—especially Cheryl Blake, Reeve Bull, Frank Massaro, and Matt Wiener—and Cary Coglianese, Chair of the ACUS Committee on Rulemaking. For additional discussions and comments on early drafts, we are enormously grateful to Nick Bagley, Jack Beermann, Anya Bernstein, Cynthia Farina, Michael Herz, Kristin Hickman, John Kamensky, Carolyn Lukensmeyer, Nina Mendelson, Gillian Metzger, Noga Morag-Levine, Mary Newhart, Nick Parrillo, Eloise Pasachoff, Phil Pucillo, Sabeel Rahman, Peter Shane, Miriam Seifter, Kevin Stack, Peter Strauss, Wendy Wagner, Chris Walker, Dan Walters, and Bill West, as well as workshop participants at the Annual Meeting of the Law & Society Association and the Annual Administrative Law New Scholarship Roundtable. Elliott Borchardt provided invaluable research assistance.

systematic focus and attention to ensure that agencies fully engage all relevant stakeholders in each rulemaking in which they have relevant knowledge, experience, or views—thereby promoting the democratic aspirations of regulation.

This Article lays the theoretical and practical foundation for more fully democratizing rule development by envisioning what a robust institutional commitment to meaningful public engagement in agenda setting and rule development would entail and developing a structural framework for facilitating quality participation by traditionally absent stakeholders during these crucial early stages of rulemaking. Democratizing rule development would not only improve the quality and legitimacy of agency rules, it could also help to build a culture of civic participation to address the ailing health of our American democracy.

TABLE OF CONTENTS

INTRODUCTION

Public engagement with rulemaking enhances both the effectiveness and democratic legitimacy of policymaking by federal regulatory agencies.[1]

1. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65–66 (1969); *see also* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 31 (4th ed. 2010) ("Rulemaking adds opportunities for and dimensions to public participation that are rarely present in the deliberations of Congress or other legislatures."); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, at 368 (4th ed. 2002) (noting rulemaking's democratic character).

While agencies possess substantial expertise, agency officials are not omniscient. They frequently need information from regulated industries, regulatory beneficiaries, unaffiliated experts, and citizens with situated knowledge of the field to fully understand regulatory problems and potential solutions, including their attendant costs and benefits.[2] The public may identify problems the agency has not seen, illuminate direct and collateral effects, propose solutions the agency has not considered, and identify unintended consequences of certain actions. Potential regulatory beneficiaries have first-hand knowledge about the problems agencies seek to address and the likely impact of potential solutions.[3] Regulated entities have information about the workability and costs of different proposals, collateral consequences, and the likelihood of achieving compliance.[4] The public may also clarify ambiguities that would undermine the agency's goals due to confusion regarding what a rule would require.

Public engagement also enhances the democratic legitimacy and accountability of federal agencies and the regulations they promulgate.[5] Agencies exercise immense policy-making authority without direct electoral checks.[6] Requiring agencies to consider and respond to public comments in a reasoned fashion improves the democratic legitimacy and accountability of agency action from a variety of theoretical views. Indeed, the democratic character of the notice-and-comment process established by the Administrative Procedure Act (APA) was one of the justifications for the turn from case-by-case adjudication to informal rulemaking as the preferred means of implementing policy during the post-war period.[7] The APA requires federal agencies to publish their proposals and give any

2. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 109 (1982) ("The central problem of the standard-setting process and the most pressing task facing many agencies is gathering the information needed to write a sensible standard.").

3. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202–03 (1982) (describing regulatory beneficiaries); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 452 (2007) (same).

4. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1346 (2010); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713–14 (1975) (recognizing that "the information upon which the agency must ultimately base its decision must come to a large degree from the groups being regulated.").

5. *See, e.g.*, Nina A. Mendelson, *Foreword, Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) ("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.").

6. *See* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10 (1978) ("Criticism of the administrative agencies has been animated by a strong and persisting challenge to the basic legitimacy of the administrative process itself."); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) ("Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.").

7. PIERCE, *supra* note 1, at 368; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1398 (2004).

interested member of the public the opportunity to comment with "data, views, or arguments."[8] Agencies are legally obligated to consider these comments and address salient issues raised by them in a reasoned fashion.[9]

Regulatory reformers seeking to enhance public participation in rulemaking have focused their efforts on broadening "the public" that participates in the notice-and-comment process. Although *formally* quite open and democratic, *in practice* well-organized groups of sophisticated stakeholders often dominate public participation in notice and comment.[10] While public interest organizations representing regulatory beneficiaries also participate, regulated entities and business groups tend to participate at significantly higher rates and have a disproportionate influence on the process. Typically absent, however, are most regulatory beneficiaries, smaller regulated entities, state, local, and tribal governments, unaffiliated experts, stakeholders with situated knowledge of the regulatory issues, and the general public. Moreover, on the rare occasions when agencies do receive large numbers of public comments, they tend to be the product of orchestrated campaigns by well-organized interest groups, provide largely duplicative information about pre-political preferences, and are of marginal value to agency rule writers.[11]

Much effort has been devoted to tackling these problems and enhancing the accessibility and democratic legitimacy of notice-and-comment rulemaking. Most recently, these efforts have focused on moving the legislative rulemaking process online and using social media and other web-based tools to encourage participation by a broader portion of the public.[12] There have even been some innovative efforts to target absent stakeholders with information or experience germane to particular rulemakings, foster deliberation among diverse interests concerning agencies' proposals, and

8. 5 U.S.C. § 553.

9. *See generally* Lisa Schultz Bressman & Glen Staszewski, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 195 (Michael E. Herz et al. eds., 2d ed. 2015).

10. *See infra* Part II.C.

11. *See* Cynthia R. Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENV'T & ADMIN. L. 123, 132–45 (2012) (claiming that mass comments have little value in rulemaking); Michael A. Livermore, Vladimir Eidelman & Brian Grom, *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. 977 (2018) (recognizing the logistical difficulties and explaining that natural language processing technology can identify identical comments and streamline and improve the review process).

12. Press Release, Off. of Mgmt. & Budget, Regulations.gov to Transform U.S. Rulemaking Process and Save Nearly $100 Million (Jan. 23, 2003) (on file with authors); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 435 (2004).

educate rulemaking novices on how to participate effectively in the notice-and-comment process.[13]

Yet agencies make many of their most important decisions in rulemaking well before the publication of a Notice of Proposed Rulemaking (NPRM). Long before agencies publish their proposals, they set their regulatory agendas and decide which issues or problems they will and will not address. Then, during rule development, agencies determine which policy alternatives receive serious consideration and draft the precise details (and resulting trade-offs) of their proposed rules. These early decisions frame the issues that will be addressed during notice and comment and strongly influence the contents of promulgated regulations.[14] Indeed, there is a widespread perception that agencies are unwilling to make major changes to their policies once they have published an NPRM.[15] This may be a natural result of path dependence whereby agency officials who have already devoted substantial thought and effort to a problem are reluctant to reverse or dramatically change course relatively late in the day,[16] and it is a tendency that is likely reinforced by certain aspects of judicial and political review of agency rulemaking.[17]

Despite their importance, regulatory agenda setting and rule development have received virtually no scholarly attention to date. The literature generally treats what happens before publication of the NPRM as a "black box" and suggests that agenda setting and rule development are primarily influenced by political considerations and pressure from well-organized groups. To the extent this is true, agenda setting and rule development would reinforce and perhaps exacerbate the imbalances in participation that are evident in the notice-and-comment process. While efforts to improve notice and comment are therefore worthwhile, fully

13. The most notable example is the "Regulation Room" project conducted by the Cornell eRulemaking Initiative (CeRI) in collaboration with two federal agencies during the Obama administration. *See generally* Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395 (2011); *infra* notes 52–56 and accompanying text (describing this project).

14. *See* Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 419 (2018) (explaining that "the very act of conceptualizing and defining a metaphorical system [for analyzing public policy choices], and the accompanying choice-of-scope decisions, constitute inherently normative decisions that are value laden and political in nature").

15. *See* William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 582 (2009) ("[T]here is a common perception among those who participate in and study the administrative process that rulemaking initiatives become increasingly difficult to stop or alter as they progress in their development.") (citation omitted).

16. *See id.* (recognizing that "sunk organizational costs . . . may reinforce agencies' commitment to proposed rules").

17. *See infra* notes 60–66 and accompanying text.

democratizing legislative rulemaking also requires enhancing public engagement with regulatory decision-making well before an NPRM.

This Article presents the first focused look at how federal agencies can enhance public engagement in agenda setting and rule development. Benefiting from unusual access provided by the Administrative Conference of the United States (ACUS), we spoke with dozens of agency officials involved in rulemaking and public engagement efforts across the administrative state.[18] This Article presents our findings and identifies the broad range of tools beyond notice and comment that agencies use to engage the public with their rulemaking process. We then show (1) how agencies can expand on this foundation to develop a more durable infrastructure for meaningful public engagement early in the regulatory process, and (2) why as both a practical and theoretical matter this is likely to be a more successful strategy for democratizing rulemaking than the existing approaches alone.

First and foremost, ordinary citizens, unaffiliated experts, and missing stakeholders with situated knowledge of regulatory problems have much to add during the earlier stages of the regulatory process, when agencies establish their priorities and evaluate alternative solutions and preliminary proposals—and before the agency has made up its mind about which course of action to pursue. Moreover, because various segments of the public may have different contributions to make at each stage of the regulatory process, there is much to be gained by taking a broader view of rulemaking and thinking carefully about what information and stakeholders may be missing at each stage, the relevant information different stakeholders possess, and the tools most likely to generate this information.

Second, enhancing public engagement in this way is likely to be a more successful strategy for democratizing rulemaking than enhanced presidential control, merely moving rulemaking online, or encouraging participation after the publication of an NPRM. The President has never proven to be an entirely satisfactory cure to the "democracy deficit" of rulemaking because the President simply cannot supervise the vast majority of rulemakings and, even if he could, many doubt how much democratic legitimacy any single representative can lend regulatory actions given the diverse interests and perspectives of the American public.[19] Moreover,

18. *See* Administrative Conference Recommendation 2018–7, Public Engagement in Rulemaking, 84 Fed. Reg. 2139, 2146 (Feb. 6, 2019).

19. *See* Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 612 (2013) (discussing "perceptions of a 'democracy deficit' in the workings of the administrative state"); Farina, *supra* note 6, at 988 ("[S]trong presidentialism . . . is premised upon a fundamentally untenable conception of the consent of the governed. The 'will of the people,' as invoked in that effort, is artificially

despite the early optimism around e-rulemaking, it has not fundamentally altered who participates in most rulemaking nor meaningfully improved the substance of public comments.[20] Finally, while efforts to improve participation in notice and comment itself are certainly worthwhile, they may come too late, after the agency has already made many of its most important decisions and committed itself to a particular proposal. Enhancing public engagement in rule development is therefore likely to yield relevant information earlier in the process and lend greater democratic legitimacy to rulemaking than the competing models alone.

The Article proceeds in four parts. Part I examines the importance of public engagement to regulatory decision-making by federal agencies. Broad public input in rulemaking improves the quality of regulation by enhancing the information and views available to agency officials when tackling regulatory problems. At the same time, opportunities for public input and the obligation of agencies to respond in a reasoned fashion and to justify their decisions in public-regarding terms enhance the democratic legitimacy and accountability of regulatory policymaking.[21] To date, efforts to increase public participation in regulatory governance have focused almost exclusively on broadening the notice-and-comment process.

Part II highlights the limited scholarly attention directed at public engagement with agency decision-making before the publication of an NPRM and the resulting limitations in our knowledge of agency agenda setting and rule development. While agenda setting by policymakers has received substantial attention from social scientists in other contexts,[22] this vital topic has thus far received minimal attention from scholars of administrative agencies and the regulatory process.[23] Similarly, rule

bounded in time, homogenized, shorn of ambiguities—in short, fabricated."); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 867–72 (2012) (criticizing the presidential control model as "deeply problematic").

20. MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 2 (Nov. 21, 2013) ("[T]he move online has not produced a fundamental shift in the nature of notice-and-comment rulemaking."); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 958 (2006) ("[N]either agencies' acceptance of comments by email nor the development of the Regulations.gov portal have led to any dramatic changes in the general level or quality of public participation in the rulemaking process.").

21. *See, e.g.*, Mendelson, *supra* note 5, at 1343; Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1282–83 (2009) (explaining how reason-giving promotes democratic legitimacy); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 502 (2008) (describing legitimacy as "the process by which . . . collective decisions can be morally justified to those who are bound by them. It is the key defining element of deliberative democracy.").

22. *See, e.g.*, JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984).

23. *See* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 94 (2016).

development has received almost no focused attention from scholars.[24] The literature generally treats what happens before publication of the NPRM as a "black box" and suggests that agenda setting and rule development are primarily influenced by political considerations and pressure from well-organized groups.[25]

Although there is undoubtedly much truth to this view, Part III shows that the reality is not quite so bleak. Based on our research for ACUS, we unearthed numerous efforts by federal agencies to engage the public with their agenda setting and rule development activities.[26] These include the use of rulemaking petitions, federal advisory committees, focus groups, requests for information, listening sessions and other public hearings, hotlines or suggestion boxes, public complaints, various forms of web-based outreach, negotiated rulemaking, and advance notices of proposed rulemaking.[27] Nevertheless, the existing efforts tend to be relatively unstructured, unsystematic, and ad hoc.[28] Moreover, existing opportunities for public engagement are often voluntary and self-selective. This raises concerns that public participation at this stage could be imbalanced and facilitate regulatory capture. Thus, rule development warrants more systematic attention to ensure that agencies are fully engaging all relevant stakeholders in each rulemaking in which they may have relevant knowledge, experiences, or views.

Part IV envisions what a robust institutional commitment to meaningful public engagement in agenda setting and rule development would entail. This includes planning for public participation early in the regulatory process, developing policies for public engagement, and establishing mechanisms to ensure that those policies are consistently followed. Public engagement with rule development also requires targeted outreach and educational efforts, which could be facilitated by social media and advanced digital communications technologies. Part IV thus highlights the kinds of information most useful to agencies at each stage of the rulemaking process and the best practices for soliciting thoughtful public input or comment prior to publication of a proposed rule. It concludes by comparing the democratization of rule development with the competing models from both a theoretical and practical perspective.

Although scholars have devoted significant efforts to improving the operation of notice-and-comment rulemaking, the regulatory state remains

---

24. For the exception that proves the rule, see West, *supra* note 15, at 583, noting that "[s]cholars have practically ignored these earlier processes."

25. *See generally* Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011).

26. *See infra* Part III.

27. *See infra* Part III.A–III.B.

28. *See infra* Part III.D.

under siege from different quarters.[29] Indeed, the Trump administration rejected and dismantled some of the most innovative public engagement efforts of its predecessor and unduly politicized many regulatory decisions. President-elect Biden has pledged to repair and strengthen the regulatory state. Thus, one of the most valuable projects at this time is to develop a blueprint for institutionalizing public engagement with rule development and thereby provide a bulwark against administration of the laws based on narrow, factional interests. This Article begins that project.

I. THE ROLE OF PUBLIC ENGAGEMENT IN RULEMAKING

Public participation in rulemaking serves several vital functions. First, it improves the quality of regulations by providing agencies with better and more comprehensive information.[30] While agencies possess substantial expertise, agency officials are not omniscient and frequently need information from regulated industries, regulatory beneficiaries, unaffiliated experts, and citizens with situated knowledge of the field to fully understand regulatory problems and potential solutions, including their attendant costs and benefits.[31] Notice and comment was designed in large part to provide agencies with more and better information upon which to base their regulatory choices,[32] and it ideally operates to "ensure that agency regulations are tested via exposure to diverse public comment."[33] Otherwise, "an agency's perspective . . . might not extend beyond the views of the [agency] staff or the client groups with whom the staff regularly consults."[34] Members of the public may identify problems or propose solutions that the agency has not considered, reframe the relevant issues or highlight the potentially competing values at stake, and identify unintended ambiguities or unanticipated problems with a proposal that should be clarified or avoided. Regulated entities often have the most direct access to

29. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

30. *See* Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) ("Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge.").

31. *See* BREYER, *supra* note 2, at 109.

32. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] ("The objective [of notice and comment] should be to assure informed administrative action and adequate protection to private interests."); U.S. DEP'T OF JUST., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 6 (1941) (noting how the APA "improve[s] . . . the rule-making process by emphasizing the importance of outside participation").

33. Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

34. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402–03 (1985).

information about the workability and costs of different alternatives, collateral consequences, and the likelihood of achieving compliance.[35] Potential regulatory beneficiaries also have a personal stake in agency decision-making, and they may have first-hand knowledge regarding the problems agencies seek to address and the likely impact of alternative solutions.[36]

Second, public engagement with rulemaking enhances the democratic legitimacy and accountability of federal agencies and the regulations they promulgate.[37] Agencies exercise immense policy-making authority without direct electoral checks.[38] Requiring agencies to respond to the public in a reasoned fashion improves the democratic legitimacy and accountability of agency action from a variety of theoretical views. It promotes due-process objectives, particularly from the perspective of regulated entities, by ensuring that those effected by government policies have a meaningful opportunity to be heard before such policies are implemented.[39] It is crucial to the interest group representation model of administrative law, whereby government officials are expected to implement majoritarian or pluralistic preferences.[40] And it is critical to the political control model of administrative law, which legitimizes discretionary agency actions based on the oversight of elected officials, who themselves are politically accountable to voters.[41] While this theory is also based on majoritarian or pluralistic conceptions of democracy, it is representative rather than direct in its orientation, and the primary function of public engagement from this perspective is to bring unpopular or potentially problematic agency proposals to the attention of elected officials so they can intervene.[42]

Finally, public participation is essential to deliberative models of administrative legitimacy, which require public officials to engage in a decision-making process that considers all relevant interests and perspectives and provides reasoned explanations for policy choices that could be accepted by free and equal citizens with fundamentally competing

35. *See* Wagner, *supra* note 4, at 1346; Stewart, *supra* note 4, at 1713–14.

36. *See supra* note 3 and accompanying text.

37. *See, e.g.*, Mendelson, *supra* note 5, at 1343; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992).

38. *See supra* note 6 and accompanying text; Mendelson, *supra* note 3, at 417 ("As a theoretical matter, scholars have struggled to locate a source of democratic legitimacy for administrative agencies, which the Constitution does not mention and whose officials are not directly elected.").

39. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 32, at 34.

40. *See* Stewart, *supra* note 4, at 1711–12 (describing this model).

41. *See, e.g.*, Mathew D. McCubbins, Rodger G. Noll & Barry R. Weingast, *The Political Economy of Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1663 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56–58 (2008).

42. *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 258–59 (1987).

views.[43] Agency decisions adopted pursuant to these criteria are democratically legitimate because each interest and perspective is treated with equal respect and arbitrary decision-making is prohibited.[44] Deliberative democratic theory seeks to eliminate arbitrary decisions and promote courses of action that best promote the public good in light of the available information and fundamental differences of opinion.[45]

Democracy is an essentially contested concept. The proper understandings of democratic legitimacy and accountability in regulatory governance are fundamentally contested as well. Yet there is, in effect, an incompletely theorized agreement that public participation in the regulatory process promotes basic democratic values. Whether one emphasizes fundamental fairness to regulated entities, a desire to promote the will of the people that emerges from interest group politics, the need to provide fire alarms to bring salient agency action to the attention of elected politicians, or the obligation of agency officials to engage in reasoned deliberation on how to promote the public good, there is virtually unanimous agreement that public participation is vital to securing a legitimate place for agency lawmaking within American democracy.[46]

Regulatory reformers seeking to enhance public engagement with the regulatory process have focused their attention on improving notice-and-comment rulemaking. The APA requires agencies to publish most proposed rules in the *Federal Register* and give interested members of the public an opportunity to comment before the rules are finalized. Moreover, agencies are required to respond to salient public comments in a reasoned fashion, explaining why the public's "written data, views, or arguments" did or did not result in changes to the rule.[47] Otherwise, final rules risk judicial invalidation. Although the notice-and-comment rulemaking process is formally quite open and democratic,[48] in practice it is often dominated by

43. *See, e.g.*, HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 213 (2002); Staszewski, *supra* note 19, at 857–58. For influential accounts of this deliberative ideal, see AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 55 (1996); Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 22–23 (Alan Hamlin & Philip Pettit eds., 1989); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 773 (1997).

44. Staszewski, *supra* note 21, at 1282–83; Thompson, *supra* note 21, at 502.

45. *See, e.g.*, RICHARDSON, *supra* note 43, at 17 (seeking to develop a conception of public reasoning that would "reconcile administrative discretion with democratic control in such a way as to prevent bureaucratic power from being exercised arbitrarily").

46. There are, however, still some commentators who believe that it is unconstitutional for Congress to delegate broad lawmaking authority to agencies. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

47. 5 U.S.C. § 553(c).

48. DAVIS, *supra* note 1, at 65 (describing the process as "one of the greatest inventions of modern [democratic] government"); Noveck, *supra* note 12, at 517 (describing the opportunity to

well-organized groups of sophisticated stakeholders.[49] Accordingly, efforts to democratize rulemaking have sought to broaden participation in notice and comment by moving the process online, targeting absent stakeholders with information and views relevant to the proposed rule, and creating tools to encourage relatively informed and robust interactive online deliberation among diverse groups with different stakes in the regulation. To date, however, the impact of moving the rulemaking process online, without more, has been modest.[50] While it is certainly easier for interested parties to obtain access to relevant information about agency activities, e-rulemaking has not dramatically increased the level or quality of participation in the notice-and-comment process.[51]

More promising have been efforts that combine e-rulemaking and social media with innovative outreach, education, and deliberative forums designed to create richer opportunities for public engagement by traditionally absent stakeholders with specific rulemakings. The most prominent example is the Cornell eRulemaking Initiative's (CeRI) work in collaboration with the Department of Transportation (DOT) and Bureau of Consumer Financial Protection (CFPB) during the Obama administration, more commonly known as "Regulation Room."[52] A cross-disciplinary group of faculty and students summarized in plain language the significant issues in several NPRMs, highlighted key questions for commenters to address, and created a user-friendly interface for online deliberation.[53] Regulation Room supplemented its user-friendly web architecture with robust outreach to traditionally absent stakeholders and active moderation by students trained in law and group facilitation.[54] These efforts produced many examples of situated knowledge from traditionally absent stakeholders—including consumers, truck drivers, small trucking companies, and travelers with disabilities—which were helpful to agency

participate in rulemaking as "one of the most fundamental, important, and far-reaching of democratic rights.").

49. *See infra* notes 109–114 and accompanying text.

50. *See supra* note 20 and accompanying text.

51. *See* Coglianese, *supra* note 20, at 958; HERZ, *supra* note 20, at 40–42 (noting many instances in which engagement by the "lay public" with agency regulation has failed to produce novel or helpful ideas).

52. Farina et al., *supra* note 13. Professor Cynthia R. Farina of Cornell Law School served as the Principle Investigator for CeRI, and Mary J. Newhart, also of Cornell Law School, served as its Executive Director. The CeRI team included professors of Computing and Information Science and Communication, as well as experts in design, communications, conflict resolution, technology, and e-Government.

53. *See* Farina et al., *supra* note 13, at 412; Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 390–91 (2011).

54. *See* Farina et al., *supra* note 13, at 413.

rulemaking.[55] Before the close of the comment period, the Cornell researchers summarized the online discussion and invited participants to suggest revisions before submitting the summary as a formal comment in the rulemaking proceeding using Regulations.gov.[56] CERI's work points the way toward more promising forms of public engagement with rulemaking, and such initiatives should be more widely adopted.

Yet many of the most important regulatory decisions are made long before the publication of an NPRM, when agencies set their agendas and develop and refine the proposals they will later publish for public comment. In contrast to the notice-and-comment process, scholars have given little attention to enhancing public participation in these regulatory decisions. Moreover, the APA provides virtually no institutional framework for broad public engagement during this period,[57] which is often viewed as a "black box" dominated by powerful political interests. While efforts to improve notice and comment are undoubtedly worthwhile, fully democratizing rulemaking requires engaging the public *well before* the publication of an NPRM.

II. THE BLACK BOX OF RULE DEVELOPMENT

A. The Importance of Agenda Setting and Rule Development

Federal agencies are routinely delegated broad authority, have substantial discretion to choose which specific issues or problems to tackle at any given time, and are limited in what they can address by resource constraints. Agencies must therefore inevitably identify the particular issues or problems they plan to resolve and establish their highest priorities.[58] Even when Congress sets much of an agency's agenda through mandatory rulemaking obligations, the agency will still need to establish priorities among various statutory requirements and other discretionary goals. Agenda setting is also the stage when agencies are likely to be least well informed about a potential regulatory problem and thus most open minded about the best course of action. During early rule development the agency is gathering information, beginning to identify and evaluate various alternative options, and is often open minded about whether or how to

55. *See* CYNTHIA R. FARINA, IBM CTR. FOR THE BUS. OF GOV'T, RULEMAKING 2.0: UNDERSTANDING WHAT BETTER PUBLIC PARTICIPATION MEANS, AND DOING WHAT IT TAKES TO GET IT 17 (2013).

56. *See* Farina et al., *supra* note 13, at 414–15.

57. Exec. Order No. 12,866 does advise agencies to consult with parties likely to benefit from or be burdened by a proposed rule, but it is neither enforceable nor requires any particular method of engagement.

58. *See, e.g.*, Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008).

proceed. During advanced rule development the agency has made tentative decisions about the most promising courses of action and is in the process of choosing from among different alternatives and drafting a proposed rule.

Both these stages of rule development have tremendous untapped potential for more fully democratizing the rulemaking process because agencies are still generally receptive to new information and relatively open minded about precisely how to proceed. Early rule development, in particular, may be when the public's values and priorities can substantially influence the agency's chosen direction. Informed public input could also help an agency choose from among the most viable alternatives during advanced rule development. Moreover, unaffiliated experts and citizens with situated knowledge could provide valuable information throughout the course of rule development as agencies seek to develop a better understanding of the relevant issues, develop the most promising regulatory solutions, and avoid unintended ambiguities or unanticipated problems with their proposals.[59]

The importance of rule development has only been compounded in recent years as judicial and executive branch review have increased the incentives for agencies to "get things right" before promulgating an NPRM.[60] Federal courts have held that the APA's requirement of adequate notice is only satisfied "if the changes in the original plan 'are in character with the original scheme,' and the final rule is a 'logical outgrowth' of the notice and comments already given."[61] The "logical outgrowth" test creates a disincentive for agencies to make major changes to proposed rules because doing so may require a second round of notice and comment to avoid judicial invalidation. Similarly, the requirement that agencies provide a reasoned response to salient public comments creates an incentive for agencies to front-load their analytic efforts and puts them in a defensive posture during notice and comment, which may make them reluctant to make meaningful changes as a result of unanticipated comments. It may also induce agencies to weaken rather than strengthen their proposals to minimize the likelihood of a successful judicial challenge.[62] Meanwhile,

59. *See* Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1197 (2012) (discussing the value of the situated knowledge of traditionally absent stakeholders "about impacts, ambiguities and gaps, enforceability, contributory causes, [and] unintended consequences" based on "their lived experience in the complex reality into which the proposed regulation would be introduced").

60. *See* West, *supra* note 15, at 582.

61. Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) (citations omitted).

62. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 393–94 (2019); *see also* West, *supra* note 15, at 581 (recognizing that "courts may be less likely to entertain procedural challenges to [subtractive changes] because such actions do not tend to create legal standing in the same way as actions that extend the reach of government to previously unaffected interests").

economically significant proposals must undergo cost-benefit analysis and be approved by the White House Office of Management and Budget before they are published in the *Federal Register*.[63] Agency officials may therefore be disinclined to make major changes in response to subsequent public comments. Other analytical requirements imposed by the White House or Congress on certain rulemaking, including obligations to consult with representatives of small businesses or other entities, could have similar effects.[64]

The time and expense associated with the foregoing legal requirements are widely believed to have "ossified" the rulemaking process—meaning that agencies either forego legislative rulemaking in favor of adjudication or other less participatory policymaking forms, or that agencies tend to be closed minded and inflexible about making changes to their promulgated rules based on the public comments.[65] As a result, E. Donald Elliott once observed that "[n]otice-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."[66] Indeed, there is a widespread perception that agencies are unwilling to make major changes to their policies once they have published an NPRM.[67] Even if this is due to the substantial thought and effort agencies have already devoted to a problem before publishing an NPRM,[68] it places a premium on public engagement during agenda setting and rule development, when some of the most significant regulatory decisions are made.

B. Limited Knowledge of Public Engagement Pre-NPRM

Despite its undeniable importance, agenda setting has thus far received minimal attention from scholars of regulatory agencies and the administrative process.[69] The existing literature generally treats what

63. *See* Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 370–72 (2014).

64. For a list of statutes and executive orders requiring various forms of regulatory analysis, see Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

65. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

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

67. *See* West, *supra* note 15, at 582.

68. *See id.* (recognizing that "sunk organizational costs . . . may reinforce agencies' commitment to proposed rules"). *Cf.* Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1176 (D.C. Cir. 1979) (Leventhal, J., concurring) ("[O]ne cannot even conceive of an agency conducting a rulemaking proceeding unless it had delved into the subject sufficiently to become concerned that there was an evil or abuse that required regulatory response.").

69. *See* Coglianese & Walters, *supra* note 23, at 94.

happens before publication of the NPRM as a "black box"[70] and suggests that such decisions are primarily influenced by political considerations and pressure from well-organized groups. An agency's formal agenda includes the plans or activities identified in the semi-annual *Unified Agenda of Regulatory and De-Regulatory Actions* (Unified Agenda) and the agency's annual *Regulatory Plan*. Agencies must prepare these documents under the supervision of the White House's Office of Information and Regulatory Affairs (OIRA) to comply with the Regulatory Flexibility Act and Executive Order 12,866.[71] While little is known about how agencies prepare and update these documents, it is widely understood that they are frequently incomplete and contain inaccuracies.[72] It is therefore useful to adopt a broader definition of agenda setting, which includes "all the choices and opportunities that both agency officials and other participants in the regulatory process have about what problems agencies emphasize and what alternatives they consider."[73]

Although empirical literature on regulatory agenda setting is still in its infancy, existing studies have found that most agency rules involve incremental changes to existing regulations rather than initial adoption of new regulatory demands.[74] These "updates" are often responsive to emergent problems, new technology, or changed circumstances and are typically initiated as a result of informal interactions between agency officials and regulated entities.[75] In addition to industry influence, agency agendas are also informed by the priorities of the agency's leadership and staff, as well as Congress, federal courts, and the White House. Indeed, presidents sometimes direct agencies to promulgate rules to address specified problems.[76] Moreover, Congress frequently requires agencies to promulgate rules on designated subjects in its enabling legislation.[77] Congress sometimes also requires agencies to engage in periodic

70. *See e.g.*, Wagner et al., *supra* note 25, at 152; West, *supra* note 15, at 583–84.

71. *See generally* Regulatory Flexibility Act, 5 U.S.C. § 601; Exec. Order No. 12,866 § 4(b), 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* CURTIS W. COPELAND, THE UNIFIED AGENDA: PROPOSALS FOR REFORM 6 (2015).

72. *See* COPELAND, *supra* note 71, at 11; Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 736 (2016).

73. Coglianese & Walters, *supra* note 23, at 97.

74. *See* Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017) (reporting that most agency rules revise or update existing regulations); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RSCH. & THEORY 495, 506 n.20 (2013) (reporting that eighty-five to ninety percent of rules fall into this category).

75. *See* Coglianese & Walters, *supra* note 23, at 99; West & Raso, *supra* note 74, at 495–96.

76. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282–2320 (2001) (discussing the techniques used by President Clinton to direct administrative policymaking).

77. Federal courts periodically enforce mandatory rulemaking obligations and associated statutory deadlines in successful litigation brought pursuant to the APA to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

"lookbacks" or retrospective reviews of previously enacted rules.[78] For these reasons, existing studies have concluded that Congress plays a major—and perhaps the dominant role—in this process.[79]

The APA does contemplate a role for the general public in agency agenda setting. Consistent with a longstanding constitutional tradition,[80] it provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[81] The APA also requires agencies to respond to rulemaking petitions within a reasonable time[82] and suggests that agencies must give reasoned explanations for denying such requests.[83] Accordingly, unlike most of the methods of public engagement discussed in this Article, citizens have a legal right to file rulemaking petitions and effectively to compel agencies to respond to their requests in a reasoned fashion. Yet rulemaking petitions are only one available mechanism—and generally not the best one—for facilitating public engagement with an agency's agenda. There are numerous other methods that agencies can use to engage the public in agenda setting.[84] But there is virtually no scholarly literature on the best practices for using these different techniques.

Similarly, the process for developing proposed rules has been almost completely neglected by the extant literature.[85] Based on a series of interviews with agency officials, information from the *Unified Agenda*, and a review of NPRMs issued over a two-month period, Bill West found more than a decade ago that agency officials routinely communicated with interested stakeholders during rule development,[86] that "[s]uch input is informal and idiosyncratic, . . . and [that] it generally lacks the assurances

78. *See* Wagner et al., *supra* note 74, at 186 (discussing congressional and executive lookback requirements).

79. *See* MARISSA MARTINO GOLDEN, WHO CONTROLS THE BUREAUCRACY? THE CASE OF AGENDA SETTING 19, 21 (2003); West & Raso, *supra* note 74, at 502, 504–05; *see also* Coglianese & Walters, *supra* note 23, at 105 (reviewing the literature and discussing Congress's "highly influential" role in agency agenda setting).

80. For discussions of the roots of the right to petition the government, see Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142–56 (2016), and JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITIONS FOR RULEMAKING 7–8 (2014).

81. 5 U.S.C. § 553(e).

82. *See id.* § 555(b).

83. *See id.* § 555(e) (requiring prompt notice of the denial of a petition and "a brief statement of the grounds for denial"). Federal courts review denials of rulemaking petitions under an especially deferential version of the arbitrary and capricious test. *See* Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4–5 (D.C. Cir. 1987).

84. *See infra* Part III.A (identifying the available methods).

85. *See* Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 687 (2013) ("Despite the potential importance of this rule development process as an additional access point, precious little is known about interest group engagement during this period."); Wagner et al., *supra* note 25, at 113 ("As an empirical matter . . . little is known about the rule development phase."); West, *supra* note 15, at 583.

86. *See* West, *supra* note 15, at 584.

of inclusiveness and transparency that are afforded by notice-and-comment requirements." [87] West suggested that public participation in rule development may be more common than is conventionally understood and that this activity could reinforce or magnify the imbalances of notice-and-comment and potentially facilitate capture by regulated entities or other groups with preferred access to agency decision makers.[88]

Wendy Wagner and her colleagues examined these possibilities in the leading empirical study of public participation in rule development to date.[89] They reviewed ninety EPA hazardous air pollutant rulemaking dockets and found that the agency regularly engaged in extensive communications with interested stakeholders during rule development. Moreover, such interactions were "almost completely monopolized by regulated parties."[90] In particular, Wagner's team found that "[i]ndustry had, on average, at least 170 times more informal communications docketed with EPA during the pre-NPRM stage than public interest groups and more than ten times the informal contacts with EPA as compared with state regulators."[91] The gross disparity may have been exacerbated for these particular rules because they are required by statute to turn partly on the existing state of the industry's technology[92]—and EPA therefore plainly needed technical information from industry to develop its NPRMs.[93] Nonetheless, Wagner and her colleagues posited that public interest groups may be less likely to participate in rule development because they are unaware of what the agency is contemplating, lack requisite substantive knowledge, or cannot afford to devote limited resources to time-consuming work conducted largely behind the scenes.[94]

Thus, the existing literature has done little to dispel the view that what happens before publication of an NPRM is a "black box" dominated by

87. *See id.*

88. *See id.* at 584–93.

89. *See* Wagner et al., *supra* note 25.

90. *See id.* at 125.

91. *See id.*; *see also* Sidney Shapiro & Richard Murphy, *Public Participation Without a Public: The Challenge for Administrative Policymaking*, 78 MO. L. REV. 489, 501 (2013) (canvassing empirical research on the imbalanced nature of public participation in rulemaking and summarizing the results of this study); Wagner, *supra* note 85, at 687–88 (explaining that imbalanced participation in the rulemaking process begins during rule development and discussing the results of this study).

92. *See* 42 U.S.C. § 7412(d)(3)(A) (requiring that emissions from existing plants should meet at least "the average emission limitation achieved by the best performing 12 percent of the existing sources"); Wagner et al., *supra* note 25, at 120 (discussing this statutory requirement).

93. *See* Wagner et al., *supra* note 25, at 111 (recognizing that regulated entities are "particularly privileged" in this context "because industry possesses a great deal of in-house information on industrial processes that EPA needs to write the rules").

94. *See id.* at 127–28; *see also* Wagner, *supra* note 85, at 688 ("Thus, although technically access to the agency during the pre-NPRM period might be free, because it involves extensive negotiation and repeat play—none with credit—it appears to attract only the richest stakeholders with the most immediate gains who can afford to participate.").

political considerations and pressure from well-organized groups. Indeed, it suggests that imbalances in participation are likely worse during agenda setting and rule development.[95]

C. Obstacles to Enhancing Public Participation in Regulatory Governance

There are significant obstacles to broad and diverse public engagement in regulatory decision-making of any kind, whether it involves agenda setting, rule development, or the notice-and-comment process itself. Sophisticated stakeholders have the motivation, resources, and capacity to provide agencies with the types of information they need and advance the kinds of arguments agencies are likely to find most persuasive. In contrast, ordinary citizens and many regulatory beneficiaries, smaller regulated entities, state, local, and tribal governments, and unaffiliated experts lack the resources for sustained engagement and face various other obstacles to participation.[96]

First, members of the general public and less sophisticated stakeholders are often unaware of regulatory decision-making that may impact them and opportunities for public participation.[97] News coverage of agency rulemaking rarely mentions the opportunities for public comment, even though it is guaranteed by law. During an era of "Presidential Administration,"[98] the media often portrays agency decision-making as an opaque, politically driven process in which presidential appointees choose regulatory initiatives based on the current administration's priorities.

Second, many individuals lack the motivation or incentive to become involved in regulatory decision-making, even when they are aware that their interests are at stake.[99] Consistent with the logic of collective action, the interests of potential beneficiaries of regulatory action may be insufficient

95. A recent case study of the Financial Stability Oversight Council's interaction with the public during development of proposed rules to implement the Dodd-Frank Act found that organized groups representing the financial industry "collectively accounted for roughly 93% of all federal agency contacts on the Volcker Rule during the time period studied," whereas public interest groups or other persons or organizations "accounted for only about 7%" of such contacts, and "the quality of federal agency contacts with financial industry representatives exceeds that of other contacts on several measures." Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 59 (2013).

96. *See* CYNTHIA R. FARINA & MARY J. NEWHART, IBM CTR. FOR THE BUS. OF GOV'T, RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION 11–12 (2013) (discussing "barriers to effective . . . participation" by rulemaking novices).

97. *See* Farina et al., *supra* note 53, at 389 (citing "[i]gnorance about the rulemaking process" and "[u]nawareness that rulemakings of interest are going on"); FARINA & NEWHART, *supra* note 96, at 11.

98. *See generally* Kagan, *supra* note 76.

99. *See* Farina et al., *supra* note 53, at 391.

to justify the expenditure of time and attention on participating in the process, and absent stakeholders may assume that someone else will represent their interests.[100] Indeed, not unreasonably, ordinary citizens may assume that agencies charged with pursuing the "public interest" will advocate on their behalf. Alternatively, they may believe that their participation will have no impact because the agency has already made up its mind.

Third, even if absent stakeholders are aware of the opportunity to participate and motivated to become involved, they may not have the capacity to participate effectively. This is a significant obstacle even when the public is invited to participate in notice-and-comment rulemaking. Rules published for comment are typically lengthy, technically and legally complex, written for an audience with an advanced level of education,[101] and downright boring for most readers. Moreover, most members of the public do not know how to submit effective comments. Several scholars have noted that there is "a fundamental incongruence between the ways that 'insiders' think and talk in rulemaking and the ways that novice commenters do." [102] The "insiders" who regularly participate in rulemaking—i.e., executive branch officials, regulated industries, trade associations, and major advocacy organizations—form a "community of practice," with "shared rhetoric, competencies, experiences, and expertise," developed "over sustained interactions."[103] These insiders value objective, empirical evidence and quantitative data, presented in analytical, premise-argument-conclusion reasoning, while unsophisticated stakeholders tend to offer "highly contextualized, experiential information, often communicated in the form of personal stories,"[104] which insiders may not be prepared to hear. There is also a fundamental tension between popular conceptions of democratic participation that merely involve voting and expressions of pre-political preferences, and the ideal of reasoned deliberation that underlies regulatory decision-making and is reflected in the nearly universal agreement of agency officials and administrative law scholars that the process is not—and should not be—"a plebiscite."[105]

100. *See* MANCUR L. OLSON JR., THE LOGIC OF COLLECTIVE ACTION (1965); Coglianese, *supra* note 20, at 966 (noting collective action problems of public engagement).

101. *See, e.g.*, FARINA & NEWHART, *supra* note 96, at 12 (describing an NPRM written at a "late-college/early-graduate school reading level").

102. Farina et al., *supra* note 59, at 1187.

103. *Id.*

104. *Id.*

105. Farina et al., *supra* note 11, at 131; Farina et al., *supra* note 53, at 429–30. *But cf.* Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENV'T & ADMIN. L. 173, 173 (2012) (noting that "[a]ll agree that public comments cannot serve as a plebiscite on the issue before the agency" but suggesting that agencies give greater consideration to public policy and value preferences in certain circumstances).

Public interest and other advocacy groups could potentially overcome these barriers on behalf of individuals who cannot, but these groups have limited resources and sometimes make strategic decisions not to participate, even when their members may be rich sources of information, and they may not adequately convey the diversity of views or experiences of their constituents even when they do participate.[106]

These barriers to broad public participation are reflected in the fact that most proposed rules generate very few public comments. While there has always been a paucity of public comments, the most recent data show that in fiscal year 2018 nearly one-third of proposed rules *did not receive a single public comment*; more than forty-five percent generated between one and ten public comments; and just over twelve percent received between eleven and one hundred public comments.[107] Fewer than six percent of proposed rules generated more than one hundred public comments during the 2018 fiscal year.[108] In addition, organized groups generally participate in the rulemaking process at a substantially higher rate than individuals.[109] While representatives of diffuse public interests, such as environmental or consumer groups, participate in some rulemaking, the process tends to be dominated by regulated entities, trade associations, and other business interests.[110] There is also evidence to suggest that sophisticated parties have a greater influence on agency decision-making than ordinary citizens if and when the latter do participate.[111] Finally, there are some studies showing

106. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (recognizing that interest groups vary in their operating procedures and the extent to which they involve and accurately speak for members).

107. *See* OIRA Data (on file with authors).

108. *See id.* At the same time, as discussed *infra* at note 114 and accompanying text, a small number of unusually salient rulemaking proposals have periodically generated an extremely high volume of public comments.

109. *See* KERWIN & FURLONG, *supra* note 1, at 189–214 (canvassing the empirical literature and recognizing that "in most instances participants in rulemaking will be groups, organizations, firms, and other governments," and that individuals "will be less prominent than institutional participants").

110. *See, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (reporting that about fifty-seven percent of comments in a sample of rulemakings came from business interests); Wagner et al., *supra* note 25, at 128 (finding that eighty-one percent of comments on EPA's proposed regulations of hazardous air pollutants came from business interests); *see also* Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV'T L. REV. 175, 184 (2019) (canvassing the literature and reporting that "[o]n the whole, these studies have revealed striking evidence of business dominance of these procedural opportunities for participation").

111. *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (reporting results of case studies showing that "the sophistication with which a comment is written seems to affect the probability that the agency will accept suggestions in that comment"); *see also* STEVEN J. BALLA, PUBLIC COMMENTING ON FEDERAL AGENCY REGULATIONS: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 34–35 (Mar. 15, 2011) (emphasizing "the apparent importance of comment sophistication");

that the overwhelming majority of changes to proposed rules were made in response to comments from regulated entities or other business interests.[112] While the evidence is far from conclusive,[113] it does suggest that business interests have greater influence in regulatory decision-making than ordinary citizens or public interest groups. At the very least, participation is often imbalanced and potentially unrepresentative of the views or perspectives held by members of the broader public.

The picture of the regulatory process that emerges from these studies is one of agenda setting and rule development shaped by powerful political and corporate interests, followed by a notice-and-comment process in which the public is invited to participate but rarely does. The mass comments that are occasionally generated by advocacy groups in response to particularly salient proposals pose logistical problems and are not particularly useful to agencies.[114] Citizens with situated knowledge of the regulatory issues based on their personal experiences and unaffiliated experts are routinely missing from the process, even when they have important information that could greatly improve the quality and legitimacy of the resulting rules.[115]

As explained in the next Part, however, the situation is not quite so bleak. In conducting a comprehensive study of public engagement for the Administrative Conference of the United States (ACUS), we identified

---

Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 87–88 (2013) ("Agencies tend to be more responsive to comments from regulated entities and to other 'repeat players' in the rulemaking process because they have the type of information that the agencies need to develop their rules and they are the entities that are most likely to sue if they are disappointed with the final rules.").

112. *See* Wagner, et al., *supra* note 25, at 130–31 (reporting that eighty-three percent of significant changes made to EPA's air toxic emission standards "weakened them in some way, usually by eliminating some requirement that EPA originally suggested in the proposed rule"); Yackee & Yackee, *supra* note 110, at 135 (concluding that "agencies appear to alter final rules to suit the expressed desires of business commenters, but do not appear to alter rules to match the expressed preferences of other kinds of interests").

113. *See* KERWIN & FURLONG, *supra* note 1, at 210–14 (canvassing the literature, recognizing the complexity of the issue, and identifying "variable factors"); BALLA, *supra* note 111, at 34 (reporting mixed evidence on "the extent to which comments filed by regulated entities and industry interests exert greater influence over agency decision-making than arguments and evidence submitted by consumers, environmentalists, and representatives of the public interest"); Walters, *supra* note 110, at 185–86 (reporting that the empirical evidence is mixed "when it comes to assessing business influence, defined as an association between participation and policy change").

114. *See* Coglianese, *supra* note 20, at 958; HERZ, *supra* note 20, at 40–42. Although most agree that mass comments rarely provide information useful for fashioning effective rules, there is an ongoing debate regarding whether mass comments have any real value in rulemaking—and, relatedly, how agencies ideally should respond to them. *Compare* Farina et al., *supra* note 11, at 132–45 (claiming that mass comments have little value because they tend to be the product of relatively uninformed preferences rather than the type of reasoned deliberation that is supposed to characterize rulemaking), *with* Mendelson, *supra* note 105, at 176, 182–83 (pointing out that mass comments are typically relevant to agency decision-making in a broad sense, and arguing that agencies "should commit to acknowledging mass comments in the final rule document and to offering a brief answer" or potentially using those comments as a trigger for further deliberation).

115. *See* Farina et al., *supra* note 59, at 1197.

numerous efforts by agencies to engage the broader public in their work, including during the critical period before the publication of an NPRM. Nevertheless, these public engagement efforts are mostly unstructured and ad hoc. Moreover, they are not always designed to reach unaffiliated experts or traditionally absent stakeholders with situated knowledge of the regulatory issues based on "their lived experience[s]."[116] Therefore, there is significant untapped potential for restructuring and improving public engagement with agency agenda setting and rule development and fostering meaningful participation by a broader and more diverse public.

III. ACUS STUDY ON PUBLIC ENGAGEMENT IN RULEMAKING

We recently conducted a major study for the Administrative Conference of the United States on public engagement in rulemaking, including agenda setting and rule development. ACUS has already produced important studies on related topics,[117] and we sought to build on this work in two main ways. First, we focused on when and how agencies can encourage greater participation by traditionally absent stakeholders. Second, we sought to broaden the discussion of public participation in rulemaking beyond the notice-and-comment process to include regulatory agenda setting, early and advanced rule development, and retrospective review. We wanted to examine public engagement with rulemaking in a holistic way and take advantage of this rare opportunity to utilize ACUS's contacts to open the black box of agenda setting and rule development.[118]

We defined "public engagement" broadly to include efforts to enhance public understanding of and meaningful participation in the regulatory process. Public engagement can (1) merely "inform" or educate the public; (2) "consult" or obtain feedback from the public; (3) "involve" the public in decision-making by working directly with interested citizens and ensuring their concerns and aspirations are understood and considered; or (4)

116. *Id.*

117. *See, e.g.*, CHERYL BLAKE & BLAKE EMERSON, ADMIN. CONF. OF THE U.S., PLAIN LANGUAGE IN REGULATORY DRAFTING (2017); Administrative Conference Recommendation 2017–2, Negotiated Rulemaking and Other Options for Public Engagement, 82 Fed. Reg. 31,039, 31,040 (July 5, 2017); HERZ, *supra* note 20; Administrative Conference Recommendation 2013–5, Social Media in Rulemaking, 78 Fed. Reg. 76,269, 76,269 (Dec. 17, 2013); Administrative Conference Recommendation 2011–1, Legal Considerations in e-Rulemaking, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011); Administrative Conference Recommendation 2011–2, Rulemaking Comments, 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011).

118. *See* Krawiec, *supra* note 95, at 71 (explaining that despite its importance, "research on the preproposal stage of the rule development process has traditionally been impeded by a lack of information; Administrative Procedure Act docketing and other transparency requirements are generally limited to the period after publication of the proposed rule").

"collaborate" or partner with the public in each aspect of the decision.[119] Efforts to involve or collaborate with the public tend to be more ongoing and deliberative in nature than efforts to inform or consult.

With the assistance of ACUS and its federal agency contacts, we surveyed forty-three federal agencies to identify the institutional structures, procedures, and practices used to engage the public with their regulatory work. Based on the most promising responses, over the next year we used telephone interviews, public forums, and additional research to develop a rich understanding of how twenty-one federal agencies engage the public throughout the course of the regulatory process. They included a mix of large and small agencies, executive branch and independent agencies, and agencies that engage in rulemaking both frequently and infrequently.

This Part presents the key findings from our study. First, there are many existing tools that agencies can use to engage absent stakeholders and unaffiliated experts in agenda setting and rule development. Second, unbeknownst to many scholars, agencies *already use* many of these existing tools. Third, each of these tools presents distinctive challenges, and agencies do not always use them successfully. Yet some agencies, such as the CFPB, have been more innovative. Finally, and perhaps most importantly, public engagement with agenda setting and rule development is unsystematic and ad hoc in nature. This raises concerns that agencies will undersupply participatory opportunities; important data, views, or arguments will remain missing from the regulatory process; and regulatory capture or unduly political decision-making could be facilitated by imbalanced participation in the early stages of the rulemaking process. Our findings therefore highlight both the promise and pitfalls of existing public engagement efforts and provide a foundation for the vision of democratizing rule development set forth in Part IV.

A. Existing Tools for Early Public Engagement

A regulatory agency that wants to ensure that it has access to all relevant information and views, and that it has heard from the full range of interested stakeholders, has an arsenal of tools to accomplish these goals. The first, which is explicitly authorized by the APA, is a petition for rulemaking, which can be used by any member of the public to seek the issuance,

119. *See IAP2 Spectrum*, INT'L ASS'N FOR PUB. PARTICIPATION, https://iap2usa.org/resources/Documents/Core%20Values%20Awards/IAP2%20-%20Spectrum%20-%20stand%20alone%20document.pdf [https://perma.cc/N9CD-4N79] (articulating an influential "spectrum of public participation"). An agency could also theoretically "empower" participants by placing decision-making authority in the hands of the public. But this rarely occurs (and may be unlawful) since agencies are typically the authoritative rule makers under federal regulatory statutes.

amendment, or repeal of a rule.[120] Agencies are required to respond to rulemaking petitions in a reasonable time.[121] In addition, although not legally required, agencies may subject petitions for rulemaking to public notice and comment to assess the merits of the petitions and any alternatives. Indeed, as set forth in the following table, agencies can use various forms of notice and comment[122] to solicit diverse perspectives on what should and should not be on the agency's agenda and the potential regulatory alternatives:

120. 5 U.S.C. § 553(e).

121. *See id.* § 555(b) (providing that "within a reasonable time, each agency shall proceed to conclude a matter presented to it"). The Supreme Court has never clarified the meaning of a "reasonable time" as set forth in § 555(b), however, see Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1411 (2011), and courts rarely compel agencies to respond to petitions for rulemaking, see Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 96 (2007). The Administrative Conference has long urged agencies to publish procedural rules for the handling of petitions, which varies greatly among agencies, including establishing deadlines for responding to petitions. *See* Administrative Conference Recommendation 2014–6, Petitions for Rulemaking, 79 Fed. Reg. 75,114, 75,118 (Dec. 17, 2014); Administrative Conference Recommendation 95–3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995); Administrative Conference Recommendation 1986–6, Petitions for Rulemaking, 51 Fed. Reg. 46,988, 46,988–89 (Dec. 30, 1986). But their procedures remain all over the map. SCHWARTZ & REVESZ, *supra* note 80, at 70.

122. Agencies refer to these kinds of early notice and comment proceedings by a variety of names, including Requests for Information (RFIs) and Notices of Inquiry (NOIs). RFIs are also very similar to, and in some cases, indistinguishable from Advance Notices of Proposed Rulemaking (ANPRMs), which are published in the *Federal Register* to obtain comments on a potential rule that is under consideration by an agency. For purposes of this Article, we use the term "RFI" to refer to requests for comments early in the rule development process when the agency is still considering whether to engage in a rulemaking project and is just beginning to consider potential approaches to a problem. We use the term "ANPRM" to refer to requests for comments later in the rule development process when the agency has prepared a rough draft of a proposed rule or has significantly narrowed the options that are seriously under consideration.

NOTICE AND COMMENT DURING AGENDA SETTING AND RULE DEVELOPMENT

Subject of Public Comment	**Information Sought/Value**
Rulemaking Petitions	Merits of petition/available alternatives
Specific Regulatory Issues (RFIs and ANPRMs)	Data, comments, or information on a designated issue to help agency decide whether a problem is worth addressing, and if so, how it might approach the issue
Draft Submissions for *Unified Agenda* or *Regulatory Plan*	Completeness and accuracy of documents/merits of agency's priorities
Agency's Priorities	Diverse perspectives on what should be agency's top priorities

In addition to these early forms of notice and comment, agencies can also use various informal means to gather information from traditionally absent stakeholders to inform their regulatory agendas. Such tools, which include hotlines, suggestion boxes, and procedures for lodging public complaints, typically make use of the agency's website and are more open and accessible to rulemaking novices than the *Federal Register* or Regulations.gov. While it can be challenging to operate these tools effectively,[123] they can bring previously unknown or underappreciated problems to an agency's attention and indicate whether those problems are widespread or warrant greater scrutiny. Agencies can also create databases of these public contacts and mine them to identify regulatory issues in need of attention.

Of course, agencies may sometimes want to solicit data, comments, or other information from the public in person, where they can generate more interactive conversations and more easily pose follow-up questions than is generally possible through paper proceedings. There are a variety of methods for achieving these goals, which are briefly described in the following table:

123. *See* MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 57–61 (Nov. 19, 2018) (discussing these challenges).

IN-PERSON PUBLIC ENGAGEMENT DURING AGENDA SETTING AND RULE DEVELOPMENT

Mode of Engagement	Function/Goal	Selection Method	Strengths/Benefits
Listening Sessions	Gather information, data, or comments on a designated problem or issue during agenda setting or rule development	Open	Allows for more informal and interactive exchange than is typically available through written comments
Focus Groups	Facilitate small group discussions of prepared questions by individuals or members of targeted demographic groups	Random or Targeted Recruitment	Relatively inexpensive means of gauging reaction of specific groups to information, ideas, messages, or proposals and identifying preferred alternatives and potential concerns
Advisory Committees	Solicit and obtain advice from formally established groups of stakeholders, unaffiliated experts, and/or ordinary citizens	Professional or Lay Stakeholders	Relatively inexpensive advice from formally established and balanced groups of outside experts or citizens
Negotiated Rulemaking	Advisory groups composed of key stakeholders who collaborate on developing a proposed rule for public notice and comment	Professional and Lay Stakeholders	Allows a limited number of affected interests to negotiate in good faith over proposed rule

Shuttle Diplomacy	Private meetings with specific stakeholders to gain a deeper understanding of their views or perspectives	Professional Stakeholders	Provides candid information or views from specific stakeholders when developing solutions or addressing challenges identified during rule development
Enhanced Deliberative Methods	A variety of methods[124] to facilitate reasoned deliberation about what should be done by agency officials in collaboration with well-informed citizens	Random, Targeted Recruitment, or Professional and Lay Stakeholders	Informs agency what targeted stakeholders or general public would think about a problem after robust and informed deliberation

Agencies may also use web-based outreach and social media to facilitate public engagement with rulemaking. While such efforts have been the

124. Our definition of "enhanced deliberative methods" encompasses various established mechanisms for promoting principles of deliberative democracy, including Regulation Room, Citizen Juries, Citizen Advisory Committees, Citizen Assemblies, and Deliberative Polls. *See supra* notes 52–56 and accompanying text (discussing Regulation Room); Bull, *supra* note 19, at 640–47 (advocating the use of citizen advisory committees in appropriate circumstances); CAROLYN J. LUKENSMEYER & LARS HASSELBLAD TORRES, IBM CTR. FOR THE BUS. OF GOV'T, PUBLIC DELIBERATION: A MANAGER'S GUIDE TO CITIZEN ENGAGEMENT 24–25 (2006) (describing the other listed methods). While these tools of deliberative democracy vary in their particulars, they commonly involve the creation of "mini-publics" and (1) are more dialogic in nature than typical public meetings, (2) provide participants with balanced and objective briefing materials on the relevant issues, (3) include opportunities for small group discussions, (4) provide participants with opportunities to consider and respond to competing perspectives, (5) include opportunities to ask questions of outside experts or agency officials, (6) produce new information that can be incorporated into the decision-making process, and (7) result in a final report with findings and recommendations. If, however, a mini-public provides an agency with advice or recommendations *as a group*, this could implicate the requirements of the Federal Advisory Committee Act (FACA). *See* REEVE T. BULL, THE FEDERAL ADVISORY COMMITTEE ACT: ISSUES AND PROPOSED REFORMS 13–14 (2011) (describing the "group" requirement of the statute and explaining that "the case law has also created an amorphous exception to FACA that arises when an agency seeks advice from an assemblage of persons acting not as a formal group but as a collection of individuals"). Agencies should therefore consider using an advisory committee when seeking group advice. While the precise details are beyond the scope of this Article, it would be worthwhile for Congress to consider amendments to FACA that would facilitate less inhibited use of enhanced deliberative exercises.

subject of extensive study,[125] it is worth emphasizing that the potential of social media to facilitate public engagement is significantly greater during the early stages of rule development than during notice and comment because "the APA and other legal restrictions do not apply, and agencies are often seeking dispersed knowledge or answers to more open-ended questions that lend themselves to productive discussion through social media."[126] Moreover, the information load that must be surmounted for productive discussions is frequently much lower during the early stages of rule development. Social media could therefore be a useful tool for public outreach and education—simply informing stakeholders about an agency's activities, notifying them of opportunities to participate, and providing instructional materials focusing on what information the agency seeks and how to participate effectively[127]—and also potentially for soliciting situated knowledge and other useful information during agenda setting and rule development from absent stakeholders and unaffiliated experts who do not traditionally participate in notice-and-comment proceedings.[128] While social media and other information communication technologies (ICTs) can also be used to facilitate interactive dialogue about an agency's potential regulatory plans, this is by far the most challenging use of social media[129] and requires careful planning and implementation.[130] The e-rulemaking literature correctly recognizes that the use of social media is not like a field of dreams—if you build it, they will not necessarily come.[131] One could add that even if they come, they will not necessarily provide information that agencies need. Nonetheless, as explained further below, if used effectively for informational and educational purposes, in some circumstances agencies may also be able to use ICTs to gather useful information and promote meaningful deliberation among discrete audiences during rule development.[132]

125. *See* Administrative Conference Recommendation 2013–5, Social Media in Rulemaking, *supra* note 117, at 76,269; HERZ, *supra* note 20; *see also* Stephen M. Johnson, *#Better Rules: The Appropriate Use of Social Media in Rulemaking*, 44 FLA. ST. L. REV. 1379 (2017).

126. Administrative Conference Recommendation 2013–5, Social Media in Rulemaking, *supra* note 117, at 76,270.

127. The latter of which can increasingly be done through the production and distribution of instructional videos. *See generally* Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183 (2016) (providing a comprehensive discussion and evaluation of the emerging use of visual materials in rulemaking).

128. *See* Administrative Conference Recommendation 2013–5, Social Media in Rulemaking, *supra* note 117, at 76,271–72.

129. For an extensive discussion of these challenges, see HERZ, *supra* note 20, at 21–28; *see also* Farina & Newhart, *supra* note 96, at 11–12 (discussing the primary barriers to meaningful public engagement in rulemaking).

130. *See* Farina & Newhart, *supra* note 96, at 21–42 (discussing strategies for overcoming these challenges).

131. *See id.* at 21.

132. *See infra* Part IV.A.5.

B. Federal Agencies Utilize Many of These Tools

Over the course of our ACUS study, we spoke with numerous agency officials who described significant efforts to engage the public with their agenda setting and rule development activities. Indeed, federal agencies use many of the tools that are described in the preceding section, and some of those tools, including RFIs, listening sessions, and advisory committees, are used extensively by some agencies. Our ACUS report provides a host of concrete examples of federal agencies that have used the foregoing tools and discusses some of the best practices associated with each of those methods.[133] Rather than repeating that information here, we believe that it is most useful for present purposes to provide a general summary of our most relevant findings and a few pertinent examples.

While agencies' practices and experiences with rulemaking petitions over the years can best be described as mixed,[134] the Nuclear Regulatory Commission (NRC) and the Fish and Wildlife Service (FWS) have both received praise for their approach to this process,[135] and ACUS has issued two sets of Recommendations on the best practices in this area.[136] While some agencies do seek public comments on their rulemaking petitions, and the Internal Revenue Service (IRS) has sought input from the public on what should be its top regulatory priorities,[137] agencies have not established a regular practice of seeking public comments on drafts of their submissions for the *Unified Agenda* or *Regulatory Plan*. The use of RFIs and ANPRMs is, however, a common practice at several agencies, and agency officials repeatedly praised the value of these tools during our study.[138]

The CFPB, which was generally the most innovative agency in our study, was at the forefront regarding the effective use of hotlines and public complaints during the Obama Administration.[139] The Bureau's Office of

133. *See generally* SANT'AMBROGIO & STASZEWSKI, *supra* note 123.

134. *See generally* William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1 (1988); SCHWARTZ & REVESZ, *supra* note 80.

135. *See* SCHWARTZ & REVESZ, *supra* note 80, at 49–50 (reporting that the NRC makes a concerted effort to educate the public about the petitioning process, provides transparent updates on the status of pending petitions, and regularly communicates with petitioners about its informational needs); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 378–82 (2010) (describing FWS's positive experience with the petition process under the Endangered Species Act).

136. *See* Administrative Conference Recommendation 1986–6, Petitions for Rulemaking, *supra* note 121; Administrative Conference Recommendation 2014–6, Petitions for Rulemaking, *supra* note 121, at 75,117.

137. *See* Coglianese & Walters, *supra* note 23, at 115.

138. *See* SANT'AMBROGIO & STASZEWSKI, *supra* note 123, at 50–52, 65, 78–80, 122–24.

139. For an analysis of how the Trump administration has undermined the work of the Bureau, see Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection*

Consumer Education and Engagement managed a web-based hotline called "Tell Your Story," which invited consumers to tell the agency about their "experiences with money and financial services, good and bad."[140] The website provided basic information about the Bureau, explained how "telling your story works," gave examples of stories shared by other consumers, and noted that CFPB used this information to identify "trends and work to head off problems," partly through its enforcement actions.[141] CFPB's website also included a feature called "Ask CFPB," which provided consumers with the opportunity to obtain "answers to frequently asked financial questions about student loans, credit cards, mortgages, credit scores and reporting, getting out of debt and more."[142] The CFPB received approximately 1.2 million consumer complaints via its website and an associated call center as of December 2017,[143] and the Bureau was able to periodically mine this database using natural language processes. CFPB used the database mostly for rule development, and such data mining could also inform the Bureau's agenda setting by identifying recurring problems and showing their magnitude or frequency.[144]

Our study also found that federal agencies make extensive use of various types of live meetings during agenda setting and rule development. For example, the Forest Service, the NRC, and the Environmental Protection Agency (EPA) have all used listening sessions during the early stages of rule development to inform their decision-making.[145] The NRC even has a designated group of employees trained as facilitators to organize and run these meetings.[146] Numerous federal agencies use focus groups, primarily to ask questions about different approaches to consumer disclosure or product labelling, or to gauge public knowledge or attitudes regarding potential subjects of regulation, particularly when there may be widespread misinformation or confusion on the topic. For example, the National

Bureau, 103 MINN. L. REV. 2543 (2019). Yet many of the systems developed to collect information from consumers have survived, creating a rich source of data for a future administration more interested in pursuing the Bureau's mission.

140. *Your Money, Your Story*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/your-story/ [https://perma.cc/78TF-2UR4].

141. *Id.*

142. *Id.*

143. Telephone Interview with Off. of Regulations, Consumer Fin. Prot. Bureau (Dec. 5, 2017) [hereinafter CFPB Interview] (on file with author).

144. *Id.*

145. Telephone Interview with Off. of the Gen. Counsel, Dep't of Agric. and Forest Serv. (Nov. 17, 2017) [hereinafter Forest Service Interview] (on file with author); Telephone Interview with Nuclear Reg. Comm'n (Jan. 26, 2018) [hereinafter NRC Interview] (on file with author); DEBORAH DALTON & PHILLIP J. HARTER, EPA CONFLICT PREVENTION & RESOL. CTR., BETTER DECISIONS THROUGH CONSULTATION AND COLLABORATION 6, 9–10 & app. V at 115 [hereinafter EPA, BETTER DECISIONS MANUAL] (describing EPA listening sessions).

146. NRC Interview, *supra* note 145.

Highway Traffic Safety Administration (NHTSA) has conducted focus groups to address public fears about airbags,[147] potential labels on tire fuel efficiency,[148] and whether drivers understand advanced crash avoidance technologies.[149] Similarly, the Food and Drug Administration (FDA) has conducted focus groups on food nutrition labelling,[150] the usefulness of prescription drug labeling under current regulations,[151] and the public's views on genetically modified foods.[152] Our study also found that many agencies use advisory committees during rule development to identify problems and obtain feedback on tentative solutions, including drafts of proposed rules. The Department of Energy (DOE), the Federal Communications Commission (FCC), the NRC, and the CFPB all regularly consult with advisory committees for this type of advice before issuing NPRMs.[153]

In contrast to the relatively widespread use of some methods of public engagement with rule development, federal agencies have made limited use of negotiated rulemaking in recent years.[154] Similarly, we found few examples of agencies using enhanced deliberative methods to generate feedback or advice from members of the general public during rule development.[155] While negotiated rulemaking naturally has limited utility in policy areas with too many diverse interests at stake to be adequately represented by standard advocacy groups,[156] one of the clearest lessons of our study is that agencies should seriously consider making greater use of enhanced deliberative methods in appropriate circumstances if they truly want to democratize rule development.

147. *See* Mendelson, *supra* note 5, at 1366 (discussing this example).

148. *See* Douglas A. Kysar, Commentary, *Politics by Other Meanings: A Comment on "*Retaking Rationality *Two Years Later"*, 48 HOUS. L. REV. 43, 52 (2011).

149. *See* Stephen P. Wood, Jesse Chang, Thomas Healy & John Wood, *The Potential Regulatory Challenges of Increasingly Autonomous Motor Vehicles*, 52 SANTA CLARA L. REV. 1423, 1497 (2012).

150. *See* Food Labeling: Format for Nutrition Label, 57 Fed. Reg. 32,058, 32,060 (July 20, 1992).

151. *See* Erika Fisher Lietzan & Sarah E. Pitlyk, *Thoughts on Preemption in the Wake of the* Levine *Decision*, 13 J. HEALTH CARE L. & POL'Y 225, 250 n.141 (2010).

152. *See* U.S. FOOD & DRUG ADMIN., REPORT ON CONSUMER FOCUS GROUPS ON BIOTECHNOLOGY (2000).

153. Telephone Interview with Dep't of Energy (Jan. 20, 2018) [hereinafter DOE Interview] (on file with author); *Advisory Committees of the FCC*, FCC, https://www.fcc.gov/about-fcc/advisory-committees-fcc [https://perma.cc/597K-R4XY]; NRC Survey Response; CFPB Interview, *supra* note 143.

154. *See* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 996 (2008); Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES L. 417, 439 (2014).

155. The best examples are the mediated online deliberations that Regulation Room conducted on ANPRMs. *See infra* note 157 and accompanying text; Cynthia Farina, Hoi Kong, Cheryl Blake, Mary Newhart & Nik Luka, *Democratic Deliberation in the Wild: The McGill Online Design Studio and the Regulation Room Project*, 41 FORDHAM URB. L.J. 1527, 1545 (2014) (describing Regulation Room efforts regarding an ANPRM issued by the CFPB).

156. *See* Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1210 (1994).

Of course, numerous federal agencies have used the internet and social media to engage with interested members of the public in recent years. For example, the Department of Transportation (DOT) has been a pioneer in the use of "status reports" and "effects reports," which allow interested persons to keep track of the status of rulemaking initiatives that could affect them.[157] DOT also worked with Regulation Room to conduct interactive online deliberations regarding one of its ANPRMs.[158] The FCC made extensive use of web-based outreach and public engagement early in the development of its National Broadband Plan.[159] As explained further below, the CFPB was at the forefront of using the internet and social media to engage with the public during rule development during the Obama Administration. For example, the Bureau collaborated with Regulation Room to facilitate mediated online deliberations involving consumers regarding an ANPRM and engaged extensively with the public in developing new disclosure requirements for home mortgages.[160] These are just a few prominent examples of a larger and growing phenomenon—indeed, Elizabeth Porter and Kathryn Watts have recently documented a range of innovative ways in which many federal agencies are producing and distributing audiovisual materials focused on their rulemaking activities.[161] Those efforts have, however, mostly involved educating or informing the public about an agency's activities rather than involving or collaborating with the public early in the process of developing a proposed rule.[162]

C. Challenges and Successes

Federal agencies periodically use many of the available tools for engaging with the public when they develop proposed rules. However, that does not mean that their public engagement efforts are always successful. Each of the available tools poses distinctive challenges, and agencies do not always use these tools effectively. Yet some agencies, including CFPB,

157. Telephone Interview with Dep't of Transp. (Jan. 12, 2018) [hereinafter DOT Interview] (on file with author).

158. *See* Enhanced Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,319 (proposed June 8, 2010) (to be codified at 14 C.F.R. pt. 259.5); Farina et al., *supra* note 53, at 428 & n.116.

159. *See* Jennifer A. Manner & Ronnie S. Cho, *Broadband in America: Introduction to a New Federal Priority*, 19 MEDIA L. & POL'Y 5, 9–10 (2009) (discussing these efforts). *But cf.* HERZ, *supra* note 20, at 41 (cautioning that "[d]espite some fanfare," the comments received by the FCC "were neither especially numerous nor especially substantive").

160. *See supra* note 154; Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOK. J. CORP. FIN. & COM. L. 1, 5–8 (2012).

161. *See generally* Porter & Watts, *supra* note 127.

162. *See id.* at 1200, 1278 (reporting that agencies that use visual media in rulemaking have focused on information "outflows"—i.e., efforts to "sell[] their rulemaking stories to the American people"—and advocating for greater use of visual media by agencies to leverage information "inflows" —i.e., public participation in rulemakings).

have been more innovative and provide examples of best practices that could be more widely emulated.

The same barriers that typically prevent rulemaking novices from participating effectively in notice-and-comment rulemaking also exist during agenda setting and rule development.[163] Thus, ordinary citizens and less sophisticated stakeholders may not be aware that agencies are examining a problem or seeking public participation. Moreover, members of the general public may not be sufficiently motivated to participate even if relevant opportunities are brought to their attention. Finally, rulemaking novices may not have the capacity to participate effectively, even if they are aware of the available opportunities and motivated to become involved, because they do not understand the relevant issues or how they can be of assistance to the agency. While these barriers are often much easier to overcome during agenda setting and rule development than during the notice-and-comment stage,[164] agencies must still engage in substantial efforts to target potentially interested stakeholders and unaffiliated experts, persuade them to participate, and bring them up to speed on the relevant issues and the input the agency is seeking.

It is also widely recognized that voluntary, self-selective forms of public participation "are frequently quite unrepresentative of any larger public,"[165] disproportionately utilized by wealthier, better educated, and otherwise more privileged citizens, as well as by citizens with relatively intense preferences or a large personal stake in the outcome. Thus, in the absence of the type of targeted outreach and educational efforts referenced above, one might predict that early forms of notice and comment during agenda setting and rule development—including RFIs, ANPRMs, and opportunities to comment on rulemaking petitions—will suffer from the same kind of imbalances that have been well documented in notice and comment rulemaking. The same may be true of listening sessions, enhanced deliberative methods such as Regulation Room, and other forms of public hearings that are open to the general public.

While focus groups, advisory committees, and other enhanced deliberative methods are specifically designed to allow agencies to obtain relatively focused input or recommendations from targeted constituencies—including unaffiliated experts, rulemaking novices with situated knowledge, or representative samples of ordinary citizens—each of these modes of public engagement raises its own set of challenges. Focus groups require

163. *See* FARINA & NEWHART, *supra* note 96, at 11–12 (discussing "barriers to effective participation" by rulemaking novices).

164. *See infra* Part IV.

165. Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66, 67 (2006).

skilled facilitation and careful planning, participants may face a steep learning curve, and the views expressed in such interviews may not be representative of the general public (even in an informal sense).[166] Federal advisory committees are heavily regulated by law, relatively time-consuming and expensive to charter, and their composition may not truly be representative or balanced, despite FACA's formal requirements.[167] Enhanced deliberative methods, including citizen advisory committees, deliberative polls, and mediated online efforts to facilitate informed feedback from traditionally absent stakeholders such as Regulation Room, are undoubtedly resource intensive to design and implement, and they may not always yield substantial amounts of useful new information.[168] Those methods are most likely to prove worthwhile when rulemaking novices "are likely to have useful information and . . . it is feasible to provide the . . . support necessary to elicit this information."[169] Agencies should therefore consider the "information load" or effort required to educate rulemaking novices so they can participate effectively.[170] Moreover, agencies should consider using enhanced deliberative techniques "selectively—that is, . . . targeting only certain types of potential new participants or only certain issues in the rulemaking."[171] Finally, agencies should favor enhanced deliberative methods when rulemaking proceedings are more rather than less important, more rather than less politically salient, and more rather than less likely to turn on the resolution of conflicting public values.

Despite these challenges, our ACUS study found notable examples of innovative efforts by agencies to engage traditionally absent stakeholders in the process of developing their proposed rules. For example, the U.S. Forest Service conducted numerous public meetings and listening sessions as part of the process of developing its 2012 Planning Rule.[172] While these meetings were open to the public, the agency also conducted targeted outreach to important stakeholder communities, including users of the forests for recreational and economic purposes, Native American tribal communities, state and local government officials, and the scientific community.[173] The Forest Service hired the U.S. Institute for Environmental Conflict Resolution (IECR) to design and facilitate its public engagement efforts. The public engagement efforts also included a science forum, four national roundtables and thirty-three regional roundtables, national and

166. *See* SANT'AMBROGIO & STASZEWSKI, *supra* note 123, at app. C.
167. *See id.*
168. *See id.*
169. FARINA & NEWHART, *supra* note 96, at 38.
170. *Id.* at 39.
171. *Id.*
172. Forest Service Interview, *supra* note 145.
173. *Id.*

regional public forums, national and regional tribal roundtables, tribal consultation meetings, Forest Service employee feedback, and comments posted to a Planning Rule blog. The agency considered all of the feedback it received through these efforts and used public input, science, and agency expertise to develop the 2012 Planning Rule.[174]

As indicated above, the CFPB was at the forefront of public engagement with rule development during the Obama Administration.[175] When the Bureau was developing new disclosure requirements for home mortgages, it posted prototypes on its website and invited both consumers and industry to comment on the alternative forms, report any missing information,[176] and assess their "usability and ease of implementation."[177] The Bureau received more than 27,000 text box comments and emails in response to the prototypes.[178] In addition, the public could click on parts of the forms they "liked" or "disliked," allowing the Bureau to create heat maps showing where readers focused their attention. The comments and heat maps helped the Bureau identify problems with the disclosure forms and develop solutions. The public thereby helped the CFPB further refine its proposed disclosure forms before publishing an NPRM.

Merely posting material on a website is insufficient to ensure meaningful public participation, however. First, extensive outreach using multiple forms of social media was critical to CFPB's success in obtaining robust public participation in the development of the mortgage disclosure rule.[179] Second, these online exercises were part of an iterative, multi-modal approach to public engagement. Early in the process, the CFPB held brainstorming sessions with a broad range of affected stakeholders to identify issues and potential solutions, conducted outreach on the reaction to prior disclosure proposals, hired experienced consultants to help with the design and testing, and held a scholarly symposium on how consumers make choices and the best practices for designing disclosures.[180] Then, once the Bureau had developed two prototypes, it conducted five rounds of qualitative testing of each form using one-on-one interviews conducted in different parts of the country.[181] After each round of testing, the Bureau evaluated the results, revised the forms, and tested the new forms during the

174. *Id.*

175. *See* McCoy, supra note 160, at 7 (discussing the following example, which may have been the first time "any federal banking regulator . . . elicited mass public input on prototype disclosure forms before a proposed rule was published").

176. *See id.* at 8; Porter & Watts, *supra* note 127, at 1213.

177. McCoy, *supra* note 160, at 8.

178. *See id.*

179. *See id.* at 7.

180. *See id.* at 5.

181. *See id.* at 5–6.

next round.[182] At the same time, the Bureau used the web-based exercises to involve the broader public.[183]

Internet and web-based exercises of this nature lend themselves particularly well to disclosure and labeling requirements because consumer preferences and reactions are directly relevant to their effectiveness.[184] Nevertheless, similar exercises could potentially be effective in a broader range of circumstances as one part of a comprehensive effort to democratize rule development.

D. Public Engagement with Rule Development Is Unstructured and Ad Hoc

Agencies have a host of tools to obtain information from missing stakeholders or unaffiliated experts and to understand the values, priorities, and concerns of ordinary citizens during agenda setting and rule development—when agencies are genuinely open to alternative courses of action. Yet aside from considering petitions for rulemaking, the tools of public engagement described above are *legally optional* and typically *unstructured and ad hoc*.[185] While some agencies conduct carefully planned public engagement efforts regarding some rules some of the time, most agencies do not do so on a regular basis.[186] Thus, whether agency policymaking pre-NPRM involves public engagement efforts, and precisely what those efforts entail, has a reasonably good chance of being arbitrary. Agencies might not conduct public engagement that would substantially improve their decision-making because they overestimate its costs, they (or their political overseers) do not believe the public has relevant information to contribute, or they are unaware of which stakeholders are likely to be missing from the regulatory process or how to facilitate their effective participation. There are many incentives for agencies to undersupply public engagement or rely primarily on tools realistically accessible only to sophisticated stakeholders—such tools require fewer resources and less planning by agencies—which could result in political or regulatory capture of rule development. The unstructured and ad hoc nature of public

182. *See id.* The Bureau also tested the prototypes in both English and Spanish. *See id.* at 6–7.

183. *See id.* at 7.

184. The CFPB conducted similarly robust outreach and public engagement before publishing an NPRM during its development of regulations and disclosures concerning college costs, overdraft fees, pre-paid cards, overdraft protection, payday lending, and private educational loans. *See id.* at 3.

185. *But cf. supra* note 57 (noting that E.O. 12,866 advises agencies to consult with certain stakeholders).

186. *Accord* West, *supra* note 15, at 588 (reporting that "the character of prenotice participation—its extent, its timing, its content, and the mechanisms through which it occurs—varies a great deal, both across agencies and within agencies from one rule to the next").

engagement pre-NPRM also means that truly public-spirited agencies are almost certainly foregoing many golden opportunities.

To be sure, the proper level and kind of public engagement with rulemaking *should* vary from rule to rule, depending on the nature of the relevant information and the extent to which competing perspectives are adequately represented in the agency's deliberations. Relatedly, public engagement efforts beyond notice and comment will at times be unnecessary or even counterproductive, such as when agencies have full information and complete authority to implement their statutory mandates.[187] Moreover, even when relevant information or views would otherwise be missing, agencies do not need to hear from everyone. It is sufficient if all of the relevant information and competing views are adequately represented in the rulemaking process.

Nevertheless, the ad hoc nature of much public engagement pre-NPRM raises concerns that agencies will undersupply participatory opportunities; important data, views, or arguments will remain missing from the decision-making process; and agencies could be unduly driven by partisan politics or captured by well-organized special interests. The final Part of this Article explains that through careful planning, development of public engagement resources, and thoughtful outreach, agencies can enhance public engagement in agenda setting and rule development while retaining flexibility rationally to allocate limited resources based on the nature of the regulatory matters they confront.

IV. DEMOCRATIZING RULE DEVELOPMENT

Democratizing the federal rulemaking process will require sustained effort and significant resources, but this project is of fundamental importance at a time when the very future of American democracy seems increasingly fragile. This Part sets forth a blueprint for building on the tools described in Part III to more fully democratize agenda setting and rule development. It then explains why public engagement early in the rulemaking process offers a normatively more satisfying way to democratize rulemaking than the competing alternatives.

A. Opening Up and Democratizing the Black Box

Because the best approach to public engagement with rulemaking varies by agency and by rule, it would be counterproductive to mandate an overly

187. *See* SUSAN L. MOFFITT, MAKING POLICY PUBLIC: PARTICIPATORY BUREAUCRACY IN AMERICAN DEMOCRACY 32 (2014) (recognizing that public participation holds little value for bureaucrats in this situation).

prescriptive set of uniform procedures on this subject. The legitimate need for *customization*, however, naturally raises the prospect that public engagement efforts will be inconsistent, uncoordinated, and ineffective. Avoiding this catch-22 requires institutionalizing reasoned decision-making regarding the appropriate scope and form of public participation for each regulatory initiative. This includes developing mechanisms that will encourage agencies to plan for public engagement early in the process, utilize available expertise, and devote sufficient resources to these efforts. Moreover, these structural reforms should encourage agencies to identify the missing information and stakeholders they need and choose the most effective means to engage them.

1. Institutionalizing Planning for Public Engagement

The best way for agencies to overcome the adhockery that currently afflicts public engagement with rule development is through early and systematic planning. This includes adopting general policies committing the agency to public engagement and providing a framework for involving the public in particular rulemaking initiatives. The EPA and the National Park Service have adopted public engagement policies of this nature.[188] They provide guidance to agency managers and staff on specific steps that should be followed to promote effective public engagement and provide information about resources that are available to facilitate those efforts.

The challenge is ensuring that such policies are consistently followed, particularly in administrations that place a low priority on civic engagement or when agencies face severe budgetary limitations. Agencies could, however, "pre-commit" to public engagement efforts by promulgating rules that at least presumptively require them to take certain action. For example, the DOE has used stakeholder engagement to adopt a "Process Rule" that sets forth the agency's procedures for promulgating consumer appliance efficiency standards.[189] Pursuant to the rule, DOE routinely issues RFIs, holds public workshops and otherwise solicits input from unaffiliated experts and consumers during the early stages of rule development, consults with an Advisory Committee on Appliance Energy Efficiency Standards throughout the rulemaking process, and issues an ANPRM to solicit

188. *See* EPA, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003); NAT'L PARK SERV., DIRECTOR'S ORDER #75A: CIVIC ENGAGEMENT AND PUBLIC INVOLVEMENT (2007).

189. *See generally* Energy Conservation Program for Consumer Products: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 Fed. Reg. 36,974 (July 15, 1996) (to be codified at 10 C.F.R. pt. 430); Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 82 Fed. Reg. 59,992 (Dec. 18, 2017) (to be codified at 10 C.F.R. 430) (issuing an RFI seeking comments on ways to improve DOE's process rule and noticing a public meeting on the topic).

additional public comments before publishing an NPRM. DOE is required by statute to hold public hearings during the notice-and-comment stage,[190] and agency officials told us they routinely host public hearings at each stage of the rulemaking process.[191] Other agencies could adopt similar process rules that presumptively require them to facilitate public engagement using certain tools at certain stages of the rulemaking process.

Second, based on these general policies, agencies can develop specific plans for public participation in each rulemaking they undertake or seriously consider. Early and thoughtful planning is crucial to the success of public engagement,[192] and there is no single approach that will work for every agency or every type of rule. There are, however, systematic ways to think about whether and how to conduct public engagement for any particular rulemaking.[193] There are also resources that provide detailed guidance on how to conduct such planning effectively.[194] A public engagement plan for a specific rulemaking should address (1) why the agency wants to engage with the public on the topic, (2) who the agency is trying to reach, (3) what type of information the agency is seeking, (4) how this information is likely to be obtained, (5) when these efforts should occur, and (6) what the agency will do with the information.[195]

2. Developing and Deploying Public Engagement Expertise

Although agencies typically have a great deal of subject-matter expertise, they do not necessarily know how to engage effectively with the public. Most agencies have also grown accustomed to notice-and-comment rulemaking and may perceive little need to supplement existing legal requirements with other forms of public participation. Moreover, while agency officials generally need the technical information and data that can be provided by regulated entities and other sophisticated commenters, they frequently question whether ordinary citizens have anything of value to

190. *See* 42 U.S.C. § 6393(a)(3).

191. DOE Interview, *supra* note 153.

192. *See* EPA, INTRODUCTION TO THE PUBLIC PARTICIPATION TOOLKIT 17 [hereinafter EPA, PUBLIC PARTICIPATION TOOLKIT] ("The success of a public participation program is largely determined by how thoroughly and thoughtfully it is planned.").

193. *See* JAMES L. CREIGHTON, THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT 27 (2005) ("There is no such thing as a one-size-fits-all public participation plan. But there is a systematic way of thinking through the issues that will help produce a successful plan that fits the unique requirements of a particular decision or issue.").

194. *See, e.g.*, *id.* at 27–87; EPA, BETTER DECISIONS MANUAL, *supra* note 145, at 19–63; EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 192, at 8–25; DOUGLAS MISKOWIAK, CTR. FOR LAND USE EDUC., CRAFTING AN EFFECTIVE PLAN FOR PUBLIC PARTICIPATION (2004).

195. For detailed information on how to conduct situation assessments as part of this planning, see EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 192, at 8–25; EPA, BETTER DECISIONS MANUAL, *supra* note 145, at 19–42.

contribute.[196] Even when agency officials recognize that absent stakeholders could provide the agency with useful information or novel views, agency officials may not be familiar with the best practices for generating or using this feedback.

One way for agencies to develop and utilize expertise regarding public engagement is to hire experienced consultants with the training and experience to develop their public engagement policies and planning for specific rules. Agencies could also hire neutral conveners or facilitators to plan and implement at least some of their public engagement efforts. Many modes of public engagement described in Part III—including advisory committees, focus groups, listening sessions, public meetings, and enhanced deliberative methods—would likely be more effective if agencies utilized the services of trained professionals to design and manage the activities. Agencies may also want to secure the services of facilitators, mediators, or other persons trained in alternative dispute resolution when public engagement efforts involve particularly controversial issues or may generate substantial conflict.

Of course, agencies can also develop the internal capacity to plan and carry out these activities. Agencies committed to public engagement would encourage employees to become knowledgeable about civic engagement techniques and principles. They would maintain interdisciplinary training materials and support opportunities to educate employees responsible for public involvement activities to understand and apply recognized best practices in the field. They would designate certain employees or establish new positions or units with responsibility for supporting and fostering efforts to engage a broad and diverse public in their rulemakings. These employees would be trained in procedures and practices aimed at involving rulemaking novices and unaffiliated experts in the regulatory process and serve as resources for rulemaking teams planning and executing public engagement efforts. A public engagement specialist might even be assigned to each rulemaking team.

Finally, the federal government could take advantage of economies of scale to provide the requisite expertise in ways that may be more efficient and potentially even more effective. For example, Congress might establish and fund a new federal agency or division of an existing agency charged

196. *See* FARINA & NEWHART, *supra* note 96, at 40 (reporting that members of rulemaking teams are often "highly skeptical" of enhanced public participation); Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 466 (2010) (reporting that many survey respondents perceived that e-rulemaking was not generating more useful comments and was primarily generating "opinions without supporting facts or arguments").

with helping other agencies plan and carry out their public engagement efforts.[197]

3. Designating Resources for Public Engagement Efforts

Regardless of who is responsible for an agency's public engagement efforts, democratizing rule development will be resource intensive. Although robust public engagement will not be necessary for every rule, agencies will need to make this determination in the first instance. Moreover, even relatively modest public engagement efforts, such as RFIs, listening sessions, ANPRMs, and the use of advisory committees, will demand scarce resources and prolong the rulemaking process. And using several of these tools in combination along with enhanced deliberative forums would require a serious commitment of time, resources, and energy. Public engagement efforts of this nature should therefore not be undertaken lightly.[198]

The need to devote sufficient resources to public engagement efforts reinforces the importance of careful planning to ascertain if meaningful public participation is possible with the resources available and whether the agency is committed to the effort.[199] Professors Farina and Newhart emphasize that facilitating "new participation that adds value to the rulemaking process requires significant commitments from the agency—commitments of human, as well as technological [and financial], resources."[200]

Nevertheless, it is important to keep the resources necessary for effective public engagement in perspective. Relatively modest efforts to enhance public engagement could frequently yield substantial benefits at relatively little cost. For example, an extensive study for ACUS concluded that considering the amount of quality information they generated, federal advisory committees enable regulatory agencies "to solicit *what is tantamount to free advice*."[201] Based on our interviews, a similar conclusion would often apply to RFIs, listening sessions, some web-based forms of outreach, and perhaps even ANPRMs. In any event, when one considers that significant and major legislative rules by definition have effects of more

197. This is a role that could conceivably be played by ACUS, if it were provided with the funding and personnel necessary to perform this function effectively.

198. *See* CREIGHTON, *supra* note 193, at 29, 41 (emphasizing the importance of developing a broad consensus within the organization of the nature of the decision and the extent to which public participation is necessary and identifying any constraints that could undermine the feasibility or effectiveness of those efforts).

199. *See* EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 192, at 17–18.

200. FARINA & NEWHART, *supra* note 96, at 12.

201. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REGUL. 451, 527 (1997) (emphasis added).

than $100 million on the national economy, the costs associated with even the most robust forms of public engagement will usually be just a drop in the bucket. Given the legitimacy and effectiveness such efforts would lend to agency decision-making, enhanced public engagement will often be worth the costs.

4. Identifying Absent Stakeholders and Information

Our vision for democratizing rule development seeks to promote principles of *deliberative* rather than *direct* democracy. It is therefore concerned primarily with the quality of public engagement as opposed to its quantity. Legitimate collective decisions in a deliberative democracy should be based on the best available information and respond in a reasoned fashion to all of the relevant interests and perspectives. That is why the imbalanced nature of public participation in notice and comment is problematic, and special efforts are often needed to ensure that missing stakeholders, unaffiliated experts, and ordinary citizens are heard in the process. Agencies do not need every interested person to participate, but they do need to ensure that all of the relevant interests and perspectives are represented.

Thus, agencies must think systematically about which individuals or groups will be benefitted or burdened by a potential rule, whether their interests and perspectives are likely to be represented, and what types of information or views they could potentially contribute. Sometimes this analysis will be straightforward—for example, rules designed to protect consumers should consider their experiences and views; rules that affect the trucking industry should consider the experiences and perspectives of truck drivers and small trucking companies; and rules designed to address the needs of disabled travelers should be informed by members of that group.[202] But in other cases it may be difficult to identify all the regulatory beneficiaries of a rule or how it would affect the interests of state, local, or tribal governments, other small entities, or members of the general public. While an agency's experience with existing regulatory analysis requirements and prior public engagement efforts provide a sound basis for beginning this process, agencies will generally need to undertake affirmative efforts to identify, solicit, and obtain information or views from stakeholders who do not typically participate.

Enhanced public engagement efforts should focus primarily on three distinct categories of traditionally absent or underrepresented stakeholders—unaffiliated experts, citizens with situated knowledge of the regulatory context, and ordinary citizens. These stakeholders typically

202. These examples are drawn from the work of Regulation Room. *See supra* notes 52–56 and accompanying text.

possess different kinds of information or views that could be relevant to rulemaking initiatives. Unaffiliated experts possess specialized knowledge, technical information, or related skills, and they can often provide agencies with relevant data or neutral expertise on regulatory issues that are beyond the competence of laypeople. The prototypical example is a researcher at a university. Citizens with situated knowledge have practical experience based on their "first-hand exposure to the problems, circumstances, or solutions involved in the proposed regulation,"[203] and they may be able to raise issues the agency has not considered, identify ambiguities or unanticipated problems, or perhaps reframe the relevant questions or highlight the potentially competing values at stake.[204] Ordinary citizens are most likely to convey broad support for or opposition to a rulemaking initiative or recommend strengthening or relaxing a regulatory standard based on value-laden, pre-political policy preferences or priorities.[205]

The ability of rulemaking novices to provide agencies with useful information or views of any kind, however, will also be a function of the relevant "information load"—i.e., the time, effort, and difficulty that would be required to get new participants up to speed on the relevant issues so they can meaningfully comment on them.[206] The information load is typically lower for rulemaking novices during agenda setting and rule development than during notice-and-comment rulemaking. That said, the information load is typically lowest for unaffiliated experts who already have relevant substantive expertise and tend to be highly educated and capable of understanding complex materials. The information load is generally moderate for individuals with situated knowledge of the subject of regulation but will vary from rule to rule and at different stages of the rulemaking process. The information load is typically greatest for ordinary citizens who tend to be uninformed about the rulemaking process and may struggle with the legal and technical complexity of many regulatory issues.

Public engagement with rulemaking thus requires efforts to identify missing information and views and the participants most likely to fill these gaps. Agencies with limited resources should also determine when the information or views that various types of absent stakeholders are likely to bring to the table would be most useful and estimate the information load associated with efforts to generate the desired feedback. Targeted efforts to secure increased participation by unaffiliated experts may provide agencies with the greatest bang for their buck given their lower information loads.

203. FARINA & NEWHART, *supra* note 96, at 15.

204. *See id.* at 16.

205. *See* Mendelson, *supra* note 5, at 1347–48, 1360-61 (describing the sorts of views typically expressed in mass comments).

206. *See* FARINA & NEWHART, *supra* note 96, at 19.

Meanwhile, agencies should seriously consider cost-effective ways to facilitate meaningful participation from targeted stakeholders with situated knowledge at various stages of the rulemaking process when the information load is manageable. It is generally likely to be lowest early in the rulemaking process when the agency is trying to determine whether to place an item on its agenda and considering different approaches.

Finally, while serious efforts to involve the general public in rulemaking will often be unnecessary or cost-prohibitive, it may be useful for agencies to undertake the work necessary to ascertain the values and priorities of a sufficiently well-informed and representative group of ordinary citizens during agenda setting and the early development of sufficiently important or controversial rules—or when an NPRM generates a genuine groundswell of unanticipated grassroots opposition.[207] It is at those stages that the values, policy preferences, and priorities of a representative cross-section of the general public can be most salient and useful. The following chart illustrates this general conception of public participation in rulemaking:

Absent Stakeholder	**Added Value**	**Information Load**	**Stage of Process**
Unaffiliated Experts	Neutral Expertise	Relatively Low	Throughout (and especially during rule development)
Citizens with Situated Knowledge	Experiential Knowledge and Practical Views	Highly Variable	Throughout (and especially during rule development)
General Public	Preferences, Values, and Priorities	Generally High	Diminishing value as process moves forward

5. Conducting Targeted Outreach

Once agencies have identified the stakeholders and information they need in a given matter, agencies must conduct outreach to encourage them to participate and supply their information or views. This requires engaging in communication that is likely to reach the relevant stakeholders, which emphasizes that the agency seeks their input, clearly explains how to participate, and persuades the targeted audiences that participating is worth

207. *See infra* note 249 and accompanying text (discussing how certain mass comments could serve as a trigger for further deliberation).

their effort.[208] An outreach plan should be designed "to put information about the rulemaking in places where members of the targeted participant groups are likely to come across it."[209] This means that the plan should be "tailored to the specific rule and to the targeted types of participants."[210] It should include direct communication with targeted stakeholders, where possible, as well as the proactive use of social and conventional media and efforts to communicate with organized groups that are likely to forward messages to members of the targeted audiences. An effective outreach plan also requires conscious efforts to develop messages that will persuade members of the targeted audiences to participate by clearly and concretely explaining how the agency's initiative could positively or negatively affect their interests.[211]

Structural or institutional reforms may be necessary to help agencies identify, reach, and involve absent stakeholders in rule development on a regular basis. The simplest strategy would be for agencies to include public engagement experts on their rulemaking teams tasked with these responsibilities. Agencies could hire outside consultants or provide training for agency staff who could be available to perform this function regularly. Agencies would also need to ensure that their rulemaking teams have the technical support necessary to help them use the best available information technology to carry out their outreach activities. If Congress established and funded a new federal office to help agencies plan their public engagement efforts, this entity could also be responsible for facilitating effective outreach.[212]

Regardless of precisely who is responsible for outreach, information communication technologies (ICTs) will almost certainly play an increasingly prominent role. Beth Simone Noveck, who served as the first United States Deputy Chief Technology Officer and director of the White House Open Government Initiative under President Obama, claims that "it may soon become easy to identify with precision who knows what and

208. *See* FARINA & NEWHART, *supra* note 96, at 21–22. For a more detailed discussion of the outreach efforts associated with Regulation Room, see Farina et al., *supra* note 53, at 393–416. EPA's *Better Decisions* manual provides helpful suggestions for bringing rulemaking proceedings and other opportunities to participate to the attention of relatively sophisticated parties who are already known by the agency or pay attention to traditional sources of information about agency activities. *See* EPA, BETTER DECISIONS MANUAL, *supra* note 145, at 32–33. Agencies will likely need to pursue other more creative efforts to recruit missing stakeholders, and those efforts are the primary focus here.

209. FARINA & NEWHART, *supra* note 96, at 22.

210. *Id.*

211. *See id.* at 24.

212. New York City, for example, has established a Public Engagement Unit of its city government that includes a team of outreach specialists. *See* HOLLIE RUSSON GILMAN & K. SABEEL RAHMAN, NEW AM., BUILDING CIVIC CAPACITY IN AN ERA OF DEMOCRATIC CRISIS 13 (2017).

match them to opportunities to serve."[213] Noveck recognizes that while profiling consumers based on their online behavior "has become part of everyday commerce, these applications of user segmentation and targeting make some people uncomfortable."[214] Nonetheless, she argues that "if we can develop the algorithms and platforms to target consumers, can we not also target citizens for the far worthier purpose of undertaking public service?"[215] The enhanced ability to identify people with nontraditional, experiential forms of expertise would also allow agencies to develop databases of citizens with special expertise on a broad and diverse range of subjects.[216] Noveck claims that the development of a searchable "directory of directories" or "Brain Trust" of civic knowledge would allow agencies to match the supply of available expertise with their specific demands in any particular case.[217] This information and related capacity has the potential to greatly improve the effectiveness of an agency's outreach efforts and substantially enhance participatory democracy in general.[218] While agencies have always conducted similar forms of outreach with rolodexes and other older forms of communication, ICTs open up the possibility for more creative and effective forms of outreach that can reach a broader range of participants based on their knowledge, experience, skills, and interests. In this way, technological innovations could play a substantial role in democratizing rule development.

6. Creating Meaningful Opportunities for Novices

Democratizing rule development also requires agencies to ensure that the feedback they receive is sufficiently well-informed and reflective, and that participatory opportunities for rulemaking novices are meaningful for both agencies and citizens. Agencies can secure meaningful participation by rulemaking novices, in part, by using modes of public engagement that are well-suited for the tasks at hand. If, for example, agencies merely want to begin gathering information about a potential regulatory problem, they could issue an RFI and engage in outreach to secure participation from unaffiliated experts and stakeholders with relevant situated knowledge. If, however, the agency wants ongoing advice from a more deliberative body of experts or ordinary citizens, the agency should consider using a federal

213. *See* BETH SIMONE NOVECK, SMART CITIZENS, SMARTER STATE: THE TECHNOLOGIES OF EXPERTISE AND THE FUTURE OF GOVERNING 101 (2015).

214. *Id.* at 110.

215. *Id.*

216. *See id.* at 103–36 (providing an in-depth discussion of how "technology is changing expertise").

217. *See id.* at 210–11, 218–22.

218. *See id.* at 271.

advisory committee. The agency could also conduct a deliberative poll if it wanted to know what the general public would think about a problem if they had an opportunity to engage in reasoned deliberation about the issue.[219] An agency's planning process should therefore identify which modes of public engagement make sense in any particular rulemaking proceeding and determine how and when those efforts will be conducted.

Regardless of which methods are used, participants must understand how to provide informed and reflective feedback on the relevant issues. Precisely what this entails will vary based on the circumstances (and should, once again, be addressed in the planning process), but rulemaking novices will generally need to be educated in two distinct ways. First, they will often need information about how to participate effectively in a given proceeding. Agencies have, for example, increasingly produced instructional materials that provide readily accessible information for rulemaking novices regarding how to prepare effective public comments or what should be included in a rulemaking petition.[220] An important component of democratizing rule development would be the creation of instructional materials to teach rulemaking novices about the full range of opportunities to participate in agency decision-making and how to participate effectively in each mode of engagement.[221]

Second, rulemaking novices will also routinely need information about the substance of a regulatory problem, the range of options available to the agency, the agency's tentative plans (if any), and the precise nature of the information or feedback the agency seeks. Agencies must provide novices with background information that addresses these issues in a clear, balanced, and accessible manner, so that potential participants can provide focused, relevant, and useful input. The difficulty of getting rulemaking novices up to speed on relevant issues will vary depending on the nature of the regulatory problem, the type of information or feedback the agency seeks, the methods of public engagement the agency uses, and the composition of the targeted audiences for the agency's public engagement efforts, among other factors. But the information provided to these participants must generally be "radically shorter and simpler" than a typical NPRM.[222] The likelihood of securing meaningful public participation

219. *See* JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY & PUBLIC CONSULTATION 28 (2009).

220. *See Tips for Submitting Effective Comments*, REGULATIONS.GOV, https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf [https://perma.cc/4KVU-RMDX]; SCHWARTZ & REVESZ, *supra* note 80, at 49 (noting that the NRC provides a "plain language" description of the process for filing a rulemaking petition on its website).

221. Regulation Room produced one such helpful video regarding effective comments on proposed rules. *See What Is Effective Commenting?*, REGUL. ROOM, http://regulationroom.org/learn/what-effective-commenting [https://perma.cc/J2L7-S4BN].

222. FARINA & NEWHART, *supra* note 96, at 35.

decreases as the information load associated with successfully engaging particular types of commenters on a regulatory problem grows.[223] The best way to overcome this challenge may be for agencies to focus their public engagement efforts on specific issues or questions for which the information load is lower and the targeted audience can provide the data, views, or arguments the agency needs. In addition, it will generally be easier to facilitate meaningful public participation by unaffiliated experts who already have the training and education necessary to understand complex regulatory problems in their fields of study.

Finally, agencies could significantly increase their use of deliberative modes of public engagement, which are designed to provide participants with relevant background information and to generate thoughtful recommendations after the participants have engaged in a process of reasoned deliberation that considers competing views and perspectives. While enhanced deliberative methods are relatively time-consuming and expensive, they could be streamlined to focus on discrete issues or questions. By creating the conditions necessary for participants to engage in reasoned deliberation on which courses of action will promote the public good, such methods provide the greatest hope of creating opportunities for truly meaningful participation by rulemaking novices.

7. Providing Public Interest Representation

At the end of the day, there may be interests or perspectives that are not adequately represented in a given rulemaking, despite an agency's best efforts to reach them. Therefore, agencies may want to consider appointing ombudspersons (or similar individuals or entities) to represent the concerns of absent stakeholders, particularly where collective action problems are likely to prove most intractable or the relevant information loads are overwhelming. The National Taxpayer Advocate established by Congress to represent the interests of low-income taxpayers with the IRS is widely viewed as a successful example of this model.[224] Public interest advocates of this nature can improve the quality of information that is available to agencies and help to prevent regulatory capture.[225] These representatives

223. *Id.*

224. *See* Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517 (2012) (discussing the success of the National Taxpayer Advocate and proposing reforms that would enhance the Taxpayer Advocate Service's role in influencing IRS decision-making).

225. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 62 (2010) (suggesting that agency capture resulting from asymmetrical political pressure can be counteracted in part by establishing "a formal position of public advocate who is charged with representing the public's interest before the agency."); Wagner, *supra* note 4, at 1414 (claiming

can be formally established by Congress, the White House, or by agencies themselves, and they can be part of a larger office that is charged with promoting good government in ways that may be less central to the agency's substantive statutory mission.[226] Of course, such offices must be designed with care to ensure that they have an appropriate degree of influence and stay true to their assigned functions.[227] Nevertheless, designated representatives of missing stakeholders could contribute to the democratization of rule development by providing agencies with a more complete and well-balanced array of views and perspectives.

B. Benefits of Democratizing Rule Development

Enhancing public engagement with agenda setting and rule development will lend greater democratic accountability and legitimacy to policymaking than other remedies for the administrative state's "democracy deficit."[228] In addition, it will provide agencies with more useful and timelier information, improve notice and comment itself, provide a more thorough rulemaking record for judicial review, and foster a more robust culture of civic participation.

1. More Democratic than Alternative Models

Robust public engagement with rule development is a more effective means of democratizing rulemaking than strong presidential control of agency discretion, which some advocate as a cure-all for rulemaking's democracy deficit.[229] Indeed, it enhances democracy in a way the President alone cannot. Agencies are not designed to be electorally accountable, and

---

that one strategy for addressing imbalanced participation is to deploy agency-selected ombudspersons, advocates, or other government intermediaries "to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings").

226. *See* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629 (2011) (describing existing variations on these offices and their potential to improve financial regulation); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (exploring subsidiary offices within agencies that are charged with promoting normative values that go beyond or potentially even cut against their primary statutory missions).

227. *See* Schlanger, *supra* note 226, at 103 ("Offices of Goodness cannot increase the amount of Goodness in an agency without two capacities: influence and commitment.").

228. *See* Bull, *supra* note 19, at 612; *see also supra* notes 109–113 and accompanying text (explaining that notice and comment is dominated in practice by well-organized groups of sophisticated stakeholders).

229. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 48 (1995) (claiming that a unitary executive with complete control over the execution of the laws counteracts faction and promotes accountability "because he, and he alone, speaks for the entire American people").

direct democracy is completely alien to our federal representative system.[230] Agencies' lack of electoral accountability is not problematic, however, if we conceive of democratic accountability more broadly than merely standing for periodic elections. Democratic accountability also requires government officials to render a justifiable account of what they are doing on behalf of the public based on the "republican idea [that] the business of government is public business."[231] It imposes on agencies an obligation to render an account to the public of what they are doing and to "[do] so in a form that can be understood by the [public]."[232] While elected officials are ultimately accountable to their constituents through elections, the absence of electoral controls for agencies calls for heightened accountability on their part to individuals and groups by considering their interests and perspectives, responding to them in a deliberative fashion, and by giving justifications for regulatory decisions that could reasonably be accepted by citizens with fundamentally competing views.[233] We might take this a step further and say that agencies have an obligation not only to render an account of their thinking in a form that could reasonably be understood and accepted but also in a way that gives the public a meaningful opportunity to participate in the decision-making process.[234]

Therefore, robust public engagement with policy development will lend agencies more democratic legitimacy than the President can provide indirectly through his own electoral accountability. To be sure, the President has an important role to play in shaping policy. But the President cannot possibly supervise in any meaningful way any but a few high-stakes rulemaking initiatives. Moreover, the President is not a proxy for the

230. Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1888–90 (2015) (discussing the Framers' rejection of direct democracy while embracing popular sovereignty).

231. Jeremy Waldron, *Accountability: Fundamental to Democracy* 19 (N.Y. Univ. Sch. of L., Working Paper No. 14–13, 2014).

232. *Id.* at 7.

233. Staszewski, *supra* note 19, at 857; Staszewski, *supra* note 21, at 1255 (agencies are held "accountable by a requirement or expectation that they give reasoned explanations for their policy decisions"); *see also* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 139 (2004) (explaining that "[t]he guiding principle of deliberative democracy" is that "citizens and their accountable representatives must give one another mutually acceptable reasons to justify the laws and policies they adopt" and summarizing the requirements of this principle of reciprocity); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (defining accountability as "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation").

234. *See* RICHARDSON, *supra* note 43, at 17 (claiming that "our ideal of democracy commits us to reasoning together, within the institutions of a liberal republic, about what we ought to do in such a way that it is plausible to say that we, the people, rule ourselves"); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1637 (1985) ("The job of the public administrator is not merely to make decisions on the public's behalf, but to help the public deliberate over the decisions that need to be made.").

electorate, let alone a majority of citizens. Presidents frequently stray from their campaign promises, and there is little electoral accountability for presidents in their second terms, particularly in a political system characterized by weak party control. Presidents also make far too many decisions over an extended period for elections to be an effective accountability mechanism, and most voters are unaware of most of the President's decisions. Furthermore, many presidents are elected by less than a majority of voters, and a majority of citizens do not even vote in presidential elections. Put simply, "we the people" is a much broader group than "we the voters," much less "the President's electoral base." Thus, whatever mandate a president might claim is derived from a small slice of the public.

More importantly, even if the President were able to claim the support of a majority of citizens, democracy would mean little if an electoral victory entitled the President to run roughshod over minority interests. Our republican system rejects the idea that government policy flows directly from elections. Although the Framers conceived the government as an agent of the people, they rejected the idea that elected representatives should be bound by the electoral mandates of their constituents.[235] Nor did they believe elections entitled elected representatives to act arbitrarily. Rather, the Framers envisioned a deliberative government decision-making process, allowing judgment and reason to prevail over private interests, resulting in legislation for the public good.[236] Elected officials could not merely cite the desires of their constituents to justify their positions. Rather they would need to convince both their fellow representatives and the people of the wisdom of their views. Such political deliberation about the public good would, in turn, improve the public's own understanding of the best government policies to pursue.[237] This was not simply because representatives would be "better" citizens but because they would have the time and information to engage in "collective reasoning about common concerns."[238] At the same time, political debate would prompt input from

235. THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009); *see also* Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 75 (2012) ("The American framers expected . . . elected representatives, as 'trustees' of the People, to exercise their independent judgment of the public good, instead of channeling the will of their constituents.").

236. THE FEDERALIST NO. 10, *supra* note 235, at 31–32; *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 15 (1990).

237. SUNSTEIN, *supra* note 236, at 31 ("Politics . . . was not a scheme in which people impressed their private preferences on the government. It was instead a system in which the selection of preferences was the object of the governmental process.").

238. Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102, 105 (Robert A. Goldwin & William A. Schambra eds., 1980).

political constituencies as issues and policies came to the fore, creating a deliberative dialectic between the people and their representatives.[239]

To be sure, the Framers imagined deliberation over government policy centered in the national legislature. But as the nation has grown in size and complexity, important policy decisions are increasingly made by federal agencies. It would be a poor form of democracy indeed that ignored the people when the locus of policy-making shifts from Congress to federal agencies. Whatever influence presidents should exercise over agency discretion, and whatever electoral mandate they might claim, our founding principles require the government to engage the public in an ongoing deliberative process of policy-making based on reason giving. Enhancing public engagement in agenda setting and rule development furthers this essential goal.

Meaningful public engagement in agenda setting and rule development is also likely to more fully democratize rulemaking than merely moving rulemaking online or encouraging participation after the publication of an NPRM. To be sure, the arrival of e-rulemaking dockets has made it substantially easier for interested members of the public to see what an agency is doing and to comment on regulatory proposals. Regulations.gov replaced scores of dispersed electronic and paper-based docket systems maintained by each agency with a single, centralized web-based source for all federal rulemaking dockets. Before the advent of e-rulemaking, most people had to go to a library that carried a hard copy of the *Federal Register* to learn about an agency's rulemaking activity before the publication of a final rule.[240] The library might not receive the *Federal Register* in a timely manner given the relatively brief window for public comments, and typically other public comments could only be accessed in the docket rooms maintained by the agency in Washington, D.C.[241]

Nevertheless, Regulations.gov does not appear to have led to any meaningful role by citizens in shaping the rules which affect us all.[242] As one commissioned study puts it, the website "continues to reflect an 'insider' perspective—i.e., the viewpoint of someone familiar with

239. *Cf.* SUNSTEIN, *supra* note 236, at 47 (discussing the "hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberation in a vacuum"); Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3116 (2014) ("From the time of the Founding, higher lawmaking in America has neither been an elite construction nor the simple reflex of grass-roots mobilization. It has been the product of an ongoing dialogue between transformative leaders and ordinary Americans, culminating in a series of self-conscious popular decisions by the voters in support of the new regime.").

240. *See* Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 362 (2004).

241. *See* Coglianese, *supra* note 20, at 949.

242. *See* HERZ, *supra* note 20, at 8–11 ("E-rulemaking's grander anticipated benefits have not yet come to pass.").

rulemaking and the agencies that conduct it."[243] If you know what you are looking for and have experience commenting in rulemakings, the website has most of what you need. Otherwise, it does little to overcome the barriers to participating in rulemaking for novices who manage to become aware of the rulemaking and are sufficiently interested to make it this far. This is due in part to the challenges of the underlying rulemaking process and in part to the technical shortcomings of the website.[244] Given the density of regulatory materials and the difficulty of navigating Regulations.gov, visitors are likely to become discouraged, disengaged, or just throw up their hands and select "Comment Now!" without sufficiently understanding the issues involved or what information they possess that would be helpful to the agency. Thus, it should not be surprising that many of the comments submitted by the general public merely voice approval or disapproval of the agency's general proposal or performance, address themselves to issues outside the agency's jurisdiction or the scope of the NPRM, or otherwise do not provide the agency with any actionable information. Indeed, it would be surprising if the public provided any other types of comments when confronted with lengthy and complex NPRMs lacking focused questions.

Therefore, enhancing public engagement with agency agenda setting and rule development offers a more effective means of democratizing rulemaking than merely moving the rulemaking process online.

2. More Timely and Useful Information

Democratizing rule development would also provide agencies with more timely and useful information from absent stakeholders. While federal agencies are often reluctant to make major changes to proposed rules after they have published an NPRM, and the information provided by ordinary citizens may come too late to have value, public engagement with agenda setting and rule development is more likely to provide agencies with useful information when they are most receptive to it. This is partly because agencies are typically more open minded about competing courses of action before they have gone through the work required to publish an NPRM fully vetted by the agency's politically-appointed leadership and OIRA and partly because the information load that must be satisfied for rulemaking novices to make positive contributions is frequently lower during earlier stages of the process. In addition, the situated knowledge or priorities, preferences, and values that missing stakeholders or the general public ordinarily bring

243. CYNTHIA R. FARINA, COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING: A REPORT TO CONGRESS AND THE PRESIDENT 4 (2008).

244. *See id.* at 8–20 (describing these challenges and summarizing the current situation).

to the table are often better addressed or resolved during agenda setting and rule development.

To be truly valuable, however, the priorities, preferences, and values of ordinary citizens must be well informed, carefully considered, and based on reliable information. This will generally only be the case when agencies engage in proactive efforts to facilitate reasoned deliberation on the issues by a balanced cross-section of the relevant stakeholders or the general public. Unlike notice-and-comment rulemaking, the tools available to facilitate public participation in rule development—and, in particular, the methods for involving or collaborating with the public, such as advisory committees, focus groups, and enhanced deliberative methods—can provide agencies with information about what the general public would think about a problem if they had an opportunity to engage in reasoned deliberation about the issues.[245] Moreover, virtually all of the tools described in Part III can be used to generate situated knowledge or neutral expertise from missing stakeholders or unaffiliated experts who do not typically participate in notice and comment. Accordingly, robust public engagement in agenda setting and rule development can provide agencies with more timely and useful information from a broader mix of stakeholders than notice and comment alone.

3. Supplementing Notice and Comment and Improving Judicial Review

Democratizing rule development would improve the legitimacy of regulatory decision-making and provide agencies with more timely and useful information. But our proposed reforms could also have beneficial spillover effects that improve the operation of notice and comment. In particular, agencies could use the information generated by their public engagement efforts during agenda setting and rule development, as well as the tools available to facilitate public engagement during those early stages, to supplement notice and comment and help address the challenges of mass comments.

One way that democratizing rule development could improve notice and comment would be for agencies to incorporate summaries of their public engagement efforts into the preambles of their proposed and final rules. Because public engagement with rule development is typically optional, agencies are only required to discuss their public engagement efforts and

245. *See* FISHKIN, *supra* note 219, at 28 (explaining that "Deliberative Polling has a strong basis for representing the considered judgment of the people"). While smaller groups that are not composed of a random sample of citizens are not formally representative of the broader public, they can still provide agencies with informed and reflective feedback from a diverse mix of absent stakeholders who have engaged in a reasoned deliberative process.

provide summaries of what occurred when the data, views, or arguments generated from them form the basis for a proposed rule.[246] While agencies thus have tremendous discretion regarding the contents of the administrative record and how they write their preambles, there may be significant advantages to summarizing and documenting the results of their public engagement efforts. For starters, an agency could demonstrate that a proposed rule was the result of careful study and reasoned deliberation by describing the scope of its civic engagement efforts and explaining how informed public participation influenced the proposal's development. This information would also show participants and other members of the public that the agency took their feedback seriously. In addition to explaining why it chose a particular path, the agency could also explain why it rejected the concerns of critics with competing priorities, values, or preferences of the type that are typically expressed in mass comments.

The ongoing debate among some commentators regarding the proper treatment of mass comments[247] tends to gloss over the fact that rulemaking is a multi-stage process and that notice and comment only occurs after agencies have already devoted substantial attention to the basic issues at stake. This means that the simple statements of viewpoint, value, or preference that tend to be reflected in mass comments will generally have already been considered and resolved by the agency when it established its agenda and developed its proposed rule. Agencies should not necessarily be required to redo all this work in response to mass comments when they issue their final rules. While agencies are often criticized for their inflexibility during notice and comment, a certain amount of path dependence is a natural and not entirely undesirable element of the rulemaking process.

This dose of realism, however, puts a premium on the importance of agencies conducting meaningful public engagement before publication of an NPRM, when their highest priorities are established and basic value questions are resolved. If agencies provide a reasoned explanation for pursuing a proposed rule and address value questions in the course of developing a rule proposal, they should generally be able to rely on this information as an adequate response to mass comments. This approach would create incentives for agencies to connect their early public engagement efforts with the rules that emerge from those efforts and could potentially give agencies credit during judicial review for explaining how

246. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973) (holding that agencies must make available for public comment any studies or data compilations that formed the basis for a proposed rule).

247. *See supra* note 114 and accompanying text.

public engagement influenced their decision-making.[248] Indeed, our proposals for democratizing rule development should result in more complete and balanced rulemaking records. This in turn could counteract a recent trend toward undue politicization of the rulemaking process and improve judicial review by providing courts with more comprehensive and accurate information for evaluating the reasonableness of agency decision-making.

It is, nevertheless, conceivable that mass comments could occasionally reflect a genuine groundswell of grassroots opposition to an agency's proposal that was not anticipated or addressed earlier in the rulemaking process. In this situation, the agency should either address those comments when it promulgates the final rule or treat those comments as a trigger for further deliberation. Nina Mendelson has persuasively argued that mass comments will sometimes call for further deliberation, and she has suggested that agencies could use "focused polling, focus groups, public deliberation efforts, so-called citizen juries, or other devices" for this purpose.[249] Mendelson's proposal also raises a larger point that is worth remembering—agencies can use a variety of tools of public engagement to *supplement* notice and comment. That was, in fact, precisely the point of Regulation Room. Thus, for example, advisory committees, listening sessions and other public hearings, focus groups, web-based outreach, and even deliberative polls could likewise be used by agencies to supplement the traditional notice-and-comment rulemaking procedures. Moreover, some of these tools—including advisory committees, deliberative juries, and perhaps some forms of web-based outreach—could be used *throughout* the rulemaking process. The hosts of these supplemental discussions could summarize their results and submit those documents as official comments during notice-and-comment rulemaking. Cynthia Farina performed this role as part of the Regulation Room project, and her comments on behalf of Regulation Room had a significant influence on final rules adopted by CFPB and DOT.[250] The key point is that democratizing rule development should not be viewed in isolation but rather as an indispensable component of a broader program to facilitate public engagement with rulemaking, which could significantly improve notice and comment in a variety of ways as part of this broader program.

248. For a more radical proposal to tailor the standard of review to the extent of an agency's public deliberations, see David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81 (2005).

249. *See* Mendelson, *supra* note 105, at 181.

250. *See supra* notes 52–56 and accompanying text.

4. Building a Culture of Civic Participation

Beyond improving the quality and legitimacy of individual regulations, democratizing rule development would also provide systemic benefits that are sorely needed in this era of political polarization, deep and growing inequality, and concerted efforts to dismantle the regulatory state. These broader benefits would accrue to individuals who participate, agencies that have access to a new cadre of actively involved citizens, and social movements with new levers for influencing policy and facilitating their organizational efforts. In short, democratizing rule development could help to build a culture of civic participation in government decision-making that would likely improve the health of American democracy.

Individuals who participate in public engagement efforts are likely to become more informed and actively engaged citizens. They will have an opportunity to learn about the administrative process, the agency's statutory mission, and the particular policy issues under consideration. They may be exposed to competing perspectives and learn about the complexities and trade-offs associated with most regulatory decision-making. They will likely also develop more refined views about the best approaches to regulatory problems. This knowledge and experience could lead those individuals to become more interested in policymaking generally and to seek other participatory opportunities. James Fishkin has reported, for example, that participation in deliberative polls "seems to create 'better citizens,' if one means by better citizens those who have developed civic capacities for dealing with public problems—information, efficacy, public spiritedness, and participation."[251] While the extent to which an individual is transformed by her interactions with an agency will plainly vary based on the nature of the experience and her own circumstances, it is conceivable that democratizing rule development could provide some of the same benefits traditionally attributed to involvement with civic associations. It is widely documented that participation by Americans in organizations of this nature has declined over the years.[252] Yet it is also well established that active engagement with such groups provides a form of social capital, a broader sense of community, and an opportunity to engage in collective decision-making (often with citizens with competing political views) that is not commonly replicated outside of the workplace today.[253] Even if one is

251. FISHKIN, *supra* note 219, at 143 (presenting empirical findings on how participation in deliberative polls results in "changes in civic capacities").

252. *See, e.g.*, ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

253. *See* Phil Parvin, *Democracy Without Participation: A New Politics for a Disengaged Era*, 24 RES PUBLICA 31, 34–38 (2018) (describing low levels of political participation, high levels of socio-

ambivalent about strong forms of communitarianism or classic civic republican theory, democratizing rule development realistically could provide mechanisms for promoting "civic virtue" by enhancing the civic capacities of participants and making them better prepared to serve as engaged members of our political community.

Improving the civic capacity of citizens who participate in rule development would also provide systemic benefits for agencies. For starters, agencies could return to citizens who participate effectively for "repeat business" when they update their agendas or turn to related issues. Those citizens should be added to the agency's "outreach directory," so that its public engagement efforts can operate more efficiently and effectively based on prior experience. While agencies should plainly resist limiting their public engagement efforts to a new group of usual suspects, they could benefit from developing "mini-communities" of missing stakeholders and unaffiliated experts with demonstrated knowledge of and interest in particular recurring issues.[254] The leaders of these mini-communities could then be tapped by agencies to help facilitate or moderate deliberations on related issues at future events. The Regulation Room researchers expressed the hope that their work would produce mini-communities with citizen leaders performing these functions over time, in addition to simply modeling best practices in public deliberation based on their development of civic capacities from prior successful experiences with the project.[255] And, of course, citizen deliberators need not be restricted to one mini-community. Rather, citizens who demonstrate an aptitude for thoughtful public deliberation in one agency's rule development proceedings could be affirmatively targeted by the outreach efforts of other agencies when their interests, craft expertise, or practical knowledge or experiences could prove similarly valuable. By using technological advances to assist with the identification of potentially useful commentators, agencies could begin to develop the "brain trust" or "directory of directories" envisioned by Noveck.[256]

Finally, democratizing rule development could provide benefits for social movement groups by providing them with new levers for potentially influencing policy and enhancing their involvement with regulatory

economic inequality, and the decline in civil society); *see also* MARC HETHERINGTON & JONATHAN WEILER, PRIUS OR PICKUP? HOW THE ANSWERS TO FOUR SIMPLE QUESTIONS EXPLAIN AMERICA'S GREAT DIVIDE (2018) (suggesting that increased political polarization has resulted in part from diminishing opportunities for Americans to interact with people who have competing worldviews).

254. In this way, mini-publics, which are established to deliberate about particular policy issues, could become "mini-communities" with expertise and ongoing engagement with particular sets of related problems.

255. Telephone Interview with Cornell eRulemaking Initiative (Jan. 15, 2018).

256. *See supra* notes 213–218 and accompanying text.

governance. As Sabeel Rahman has explained, "[a]dministrative agencies and processes can be useful spaces in which to reshape the power dynamics between different interest groups, constituencies, and institutional levers." [257] Rahman argues that by establishing institutional structures designed to deepen the linkages between public agencies and targeted constituencies, we can help politically powerless regulatory beneficiaries and other groups "expand their ability to mobilize, organize, and exercise influence." [258] Social movements can sometimes accomplish more by establishing institutional structures that provide them (or their allies) with increased representation and influence within the regulatory process than they can with one-off policy victories. This strategy is also consistent with recent literature on law and social movements that focuses less on traditional impact litigation and instead emphasizes "the building of long-term civil society organization, capacity, and leadership" and the importance of "creating a repertoire of action that goes beyond the articulation of grievance and advocacy, to the ability to share in the actual business of governing."[259] Democratizing rule development would provide substantial new upside potential for the implementation of such strategies by social movements.

There are good reasons to believe that democratizing rule development would help to build a culture of civic participation that could improve the overall health of our democracy. Yet this claim is necessarily speculative to some extent because federal agencies have not engaged in systematic efforts to involve rulemaking novices in their agenda setting or rule development, and their periodic efforts to do so have received little scholarly attention. Both of these things must change if we ultimately hope to figure out the best ways of conducting public engagement with rulemaking and build a

257. K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 340–41 (2018). He points out, for example, that the CFPB was established to serve as a representative for consumers in regulating the financial industry and that this agency engaged in substantial public engagement efforts that specifically targeted this group, which then provided *a clear focal point for consumer advocacy*. CFPB's effectiveness in this regard was precisely what made the Bureau "so powerful . . . and so threatening" to established financial interests, and its subsequent demise during the Trump administration therefore illustrates both the promise and the perils of this strategy. *Id*. at 359; *see also* Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 6, 8 (2016) (claiming that "there is a critical need for a range of structural, power-shifting reforms to our law, our economy, and our democracy," and recognizing that one strategy of social movements is "to build new structures to facilitate countervailing power of civic organizations in government" by seeking "to remake policymaking bodies to grant workers, consumers, citizens, and residents greater influence in substantive outcomes"); Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010) (discussing and advocating this strategy in the "war on poverty").

258. Rahman, *supra* note 257, at 369.

259. *Id.* at 370–71.

broader, more inclusive, more deliberative, and more efficacious culture of civic participation in American government.

CONCLUSION

The requisite tools for democratizing rule development for the most part already exist, and unbeknownst to many regulatory scholars, agencies already use them. Our ACUS study unearthed countless examples of federal agencies using tools such as rulemaking petitions, advisory committees, focus groups, requests for information, listening sessions and other public hearings, hotlines or suggestion boxes, public complaints, various forms of web-based outreach, negotiated rulemaking, and ANPRMs to engage traditionally absent stakeholders in the process of developing their proposed rules. Yet this commendable work, in addition to being largely unrecognized, also has a tendency to be unsystematic, unstructured, and ad hoc. This raises serious concerns that agencies will undersupply participatory opportunities and that rule development could be dominated by the same sophisticated stakeholders that exert disproportionate influence over the notice and comment process.

This Article provides a structural framework for facilitating meaningful public engagement with agenda setting and rule development that is responsive to these concerns. Yet democratizing the rulemaking process is easier said than done. For starters, the same obstacles that inhibit meaningful participation by rulemaking novices in notice and comment also exist during rule development. Rulemaking novices often lack the awareness, motivation, and capacity to participate effectively at each stage of the rulemaking process. We have shown how agencies can overcome these obstacles through thoughtful planning, targeted outreach, and educational efforts and how such efforts are more manageable during rule development than during notice and comment because the information load is typically lower and because situated knowledge and broad public values are generally more useful during the earlier stages of the process. Nevertheless, agencies will need to work consciously, continuously, and creatively to successfully overcome these barriers in practice.

Similarly, one might legitimately worry that the same stakeholders that dominate notice and comment could also exert disproportionate influence over rule development, particularly since it does not have the same legal assurances of transparency as notice and comment.[260] This concern is most acute when agencies use self-selective forms of public engagement open to anyone for purposes of consultation, such as rulemaking petitions, RFIs,

260. The few existing empirical studies lend support to this concern. *See supra* Part II.C.

ANPRMs, and listening sessions or other public hearings. But it can be counteracted by the targeted outreach and associated educational efforts we have described. The concern is less pressing for public engagement specifically designed to involve or collaborate with balanced cross-sections of the public, such as advisory committees, focus groups, and enhanced deliberative methods. The ability of regulated entities to dominate public engagement with rule development can also be counteracted by efforts to facilitate involvement by unaffiliated experts. Moreover, there is nothing to prevent agencies from being as transparent as possible in their efforts to democratize rule development, even without legal compulsion. Indeed, almost by definition, any serious public engagement effort aimed beyond the usual suspects must be transparent and well publicized, thus mitigating concerns with capture.

The greatest obstacle to democratizing rule development is likely overcoming the political, institutional, and economic resistance to broader public engagement. This resistance is likely to come from a variety of quarters, including powerful regulated entities seeking to maintain their influence, agency officials skeptical of public engagement or otherwise set in their ways, certain members of Congress, and presidents who seek to commandeer agencies for their own regulatory or deregulatory goals. While the Trump administration was unlikely to be interested in these reforms, this project could easily be a high priority for President-elect Biden and could significantly advance his administration's efforts to reconstruct and improve the regulatory state. There is, in fact, already substantial and growing pockets of support for enhanced public engagement with rulemaking among scholars, regulatory reformers, social movement activists, and—most importantly—among agency officials themselves, which is clearly demonstrated by the findings of our ACUS study and the recommendations of the Administrative Conference based on our work. Moreover, this Article has identified a host of reforms that would help to institutionalize public engagement with rule development even if some public officials are wary.

Democratizing rule development will ultimately require nothing less than a shift in regulatory culture. This will not happen overnight, and it will require further study and experimentation, dedicated and creative leadership in Congress, the White House, and federal agencies, and buy in from social movement groups and interested members of the public. This cultural shift could also be aided by incremental efforts by individual agencies and officials that adopt the vision of civic engagement described in this Article and share the lessons of their efforts. Fully democratizing rulemaking will not be easy. But our democracy is currently on very shaky ground, and the magnitude of the stakes justifies the effort. Thus, democratizing rule

development should be a central component of the regulatory reform agenda. At the very least, this vitally important and understudied topic deserves increased attention from scholars, government officials, and regulatory reformers.