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Reforming the Administrative Procedure Act: Democracy Index Rulemaking

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ESSAY

**REFORMING THE ADMINISTRATIVE
PROCEDURE ACT:
DEMOCRACY INDEX RULEMAKING**

*David Fontana**

INTRODUCTION

In his magisterial *The Ages of American Law*,¹ Grant Gilmore described three main periods in the history of American law. American administrative law has gone through three periods in its modern history similar to Gilmore's three eras.² First came an effort to justify the very existence of the administrative state, similar to Gilmore's discussion of the "Age of Discovery."³ Next, as with Gilmore's "Age of Faith,"⁴ a larger number of individuals started to believe in the power of reason and objective principles; in administrative law, this "Age of Faith" was characterized by a belief in superior technical expertise as the reason for the existence of agencies.⁵ With the rise of Gilmore's "Age of Anxiety"⁶ and the resultant loss of faith, administrative law turned to an "interest representation" model, in which the administrative state was viewed as

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1. Grant Gilmore, *The Ages of American Law* (1977).

2. This characterization of the ages of administrative law is subject to the same problems of overbreadth that Gilmore's categories are. *Id.* at 16 ("All generalizations are oversimplifications. It is not true that, during a given fifty-year period, all the lawyers and all the judges are lighthearted innovators, joyful anarchists, and adepts of Llewelyn's Grand Style . . .").

3. *Id.* at 19-40.

4. *Id.* at 41-67.

5. Marver H. Bernstein, *Regulating Business by Independent Commission* 51 (1955); James M. Landis, *The Administrative Process* 23-24 (1938); Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 *Minn. L. Rev.* 299, 306-07 (1983).

6. Gilmore, *supra* note 1, at 68-98.

legitimate because it operated as a micro-political process that went out of its way to incorporate all sorts of affected interests.⁷

Now, though, we have entered a new age of administrative law, one that features an increasing number of articles and books stating that administrative law and public governance in general should focus on the admirable goal of direct public participation. Many of these interesting proposals, though, are so broad in their scope and so legally coercive in their nature as to make them normatively undesirable. This Essay instead argues in favor of a more limited and optional—and hence more normatively desirable and realistic—system of administrative law in the context of informal administrative rulemaking, what I call “democracy index rulemaking.” The basic idea behind democracy index rulemaking is simple: The more public participation in the promulgation of an agency rule, the more deference that rule should receive when it is challenged in court.

How would this system work? An agency deciding which legislative rule to promulgate would have a choice between what I will call “normal notice and comment” (“NNC”) rulemaking and what I will call “deliberative notice and comment” (“DNC”) rulemaking. If the agency decided to use NNC rulemaking, the greater the number of relevant and non-repetitive comments the agency received, the more deference its actions would receive if its rule was challenged in court. If the agency decided to use DNC rulemaking, the rulemaking process would involve a series of administrative jury deliberations (juries featuring stakeholders and members of the general public). Due to the extra participation it involves, an agency choosing to use deliberative rulemaking would be guaranteed special deference from the courts. The choice between these forms of rulemaking would remain entirely up to the agency.

With such a system in place, we would encourage, but not require, agencies to invite broad discussion and public participation about their proposed rules, certainly a virtue, by promising them more lenient judicial review. This potential participation would supply agencies with a degree of legitimacy and a reservoir of information that would help them with their responsibilities, but would do so while maintaining a substantial degree of respect for agency autonomy. In other words, we could have many of the pluses of participation in administrative rulemaking without enduring so many of the minuses.

Surprisingly, there has been no scholarship advocating anything like this sort of system for administrative rulemaking. The Negotiated Rulemaking Act of 1990 contemplates special procedures to involve non-agency members in rulemaking.⁸ These special procedures, though, only permit the participation of a tiny number of affected elite interest groups, in

7. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1675 (1975) (“The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives . . .”).

8. Negotiated Rulemaking Act of 1990, 5 U.S.C. § 570 (2000).

contrast to the various procedures that would be used in democracy index rulemaking. There has been relatively little discussion of encouraging negotiated rulemaking by providing negotiated rules with special treatment when they face judicial review.⁹ As a practical matter, then, negotiated rulemaking has been of only marginal importance, since it has been used far less than one percent of the time in rulemaking. In a similar vein, Bruce Ackerman has noted that moments of heightened democratic participation in constitutional law may result in certain “constitutional moments”¹⁰ that should be treated with special reverence by courts, but these moments occur so infrequently that they are not really workable principles for daily governance like the democracy index rulemaking idea is. Even beyond that, of course, Ackerman is trying to describe a proper interpretation of the Constitution, and his idea has not been extended to the administrative law context.¹¹

Part I of this Essay first introduces the current regime of notice and comment rulemaking, then turns to the specifics of democracy index rulemaking, explaining how it would work using either the NNC process or the DNC process, and how judicial review would function at each stage of this new system of rulemaking. Part II then turns to a discussion of why this system of administrative rulemaking would be normatively preferable to the existing regime, building on the arguments first advanced in Part I. Part III defends democracy index rulemaking from its potential critics.

I. DEMOCRACY INDEX RULEMAKING

This part introduces the current regime of administrative law, before turning to the specifics of democracy index rulemaking and how democracy index rulemaking changes the current regime. As this part discusses, even with the special rules regarding participation in notice and comment rulemaking, all of the relevant empirical studies demonstrate that participation in rulemaking is infrequent and selective. The democracy index rulemaking system tries to increase participation by creating a two-tier process. An agency can decide to use NNC, which would be more or less the same notice and comment process agencies use now, with the only difference being that judicial review would be determined by the number of

9. *Id.* (“A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.”); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *Geo. L.J.* 1, 106 (1982) (briefly mentioning this possibility); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *Yale J. on Reg.* 133, 164 (1985) (same); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 *Colum. J. Envtl. L.* 1, 19 (1985) (offering a short rebuttal to Harter’s comment).

10. 1 Bruce Ackerman, *We the People: Foundations* (1991); 2 Bruce Ackerman, *We the People: Transformations* (1998).

11. For one small but possible exception, see *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (stating that deference would be due to agency rules that were “arrived at after” notice and comment and not after less democratic procedures).

relevant and non-repetitive comments the agency received. Alternatively, an agency could use the special DNC process and automatically qualify for extra deference.

A. Notice and Comment Rulemaking

If an agency decides to issue a legislative rule,¹² it must generally promulgate this rule following the requirements of section 553 of the Administrative Procedure Act (“APA”).¹³ Agencies must give notice of the proposed rulemaking, provide parties that might want to submit a comment a chance to do so, and must eventually include a statement of basis and purpose in the final rules that they adopt.¹⁴ If the agency follows this procedure, then the final result is a “legislative” rule with the full force of law.¹⁵

Reading the language of the APA would not give one a true sense of the requirements that an agency using section 553 faces. The generic language of section 553, requiring agencies to give “notice,”¹⁶ has been interpreted to require agencies to explain the general factual rationale for the contemplated rule. Along the same lines, for the agency rule to avoid being termed “arbitrary and capricious,”¹⁷ the agency would presumably face some sort of obligation to develop at least a minimal record as a result of the notice and comment process.

In addition to these mandatory obligations that an agency faces, if individuals or institutions want to participate in the rulemaking process, agencies face a series of additional obligations. Although section 553 only mandates that the notice of proposed rulemaking must state the “time, place and nature” of the comment period, agencies generally must allow a reasonable period of time to pass for comments to be submitted, as an executive order states that most rulemaking “should include a comment period of not less than 60 days.”¹⁸ If the agency eventually decides to promulgate a rule that is not the “logical outgrowth”¹⁹ of the proposed rule, the final rule may be invalid. The cure for violations of any of these proto-

12. This Essay only focuses on legislative rules, and does not touch on deference for other rules. Because deliberative deference is more desirable for agencies than the forms of deference that other types of rules receive, it should be expected that agencies will once again be attracted to informal rulemaking.

13. 5 U.S.C. § 553 (2000). Rulemakings carried out under § 553 are referred to as “informal” rulemakings. When a statute requires that a rule be made “on the record,” a “formal” rulemaking is conducted under §§ 556 and 557 instead. *See id.* §§ 556, 557.

14. *Id.* § 553(b)-(c).

15. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1322, 1327-28 (1992) (stating the requirements for a rule to qualify as “legislative”).

16. 5 U.S.C. § 553.

17. *Id.* § 706(2)(A).

18. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note at 638-42 (2000).

19. *E.g.*, *Chocolate Mfg. Ass’n v. Block*, 755 F.2d 1098, 1107 (4th Cir. 1985).

section 553 requirements is quite frequently an entirely new notice and comment period.²⁰

All of these procedural requirements on agencies have led many to agree with Kenneth Culp Davis's statement that rulemaking is "one of the greatest inventions of modern government."²¹ Davis is at least partly right, but all of the empirical research on public participation in agency rulemaking demonstrates that participation is minimal, of low quality, and dominated by powerful interests. Cornelius Kerwin, for instance, studied all rules published in the *Federal Register* between December 1990 and June 1991, leading to a total of 1985 rules examined.²² Kerwin found that a bare majority of these rules triggered any sort of participation at all.²³ When there was participation, the majority of participation was by a series of repeat player interest groups.²⁴

The most telling study regarding the scope of participation might still be the 1977 report prepared by the U.S. Senate's Committee on Governmental Affairs.²⁵ It studied the Civil Aeronautics Board, the Federal Communications Commission ("FCC"), the Food and Drug Administration ("FDA"), the Federal Power Commission ("FPC"), the Federal Trade Commission ("FTC"), the Interstate Commerce Commission ("ICC"), the Nuclear Regulatory Commission ("NRC"), and the Securities and Exchange Commission ("SEC") to identify the most significant ten of each agency's last thirty rulemakings.²⁶ In six out of eight FPC rulemakings, there was no general public participation, and in the other two proceedings the ratio of regulated industry to other participation was between 4:1 and 12:1.²⁷ In the FDA rulemakings that were examined, fewer than half involved participation by any interests outside of regulated interests, and where parties or persons outside of regulated interests were involved,²⁸ the ratio of industry to public interest participation was between 12:5 and 61:2.²⁹ These disparities were true of the other agencies that were studied as well.³⁰

20. *E.g.*, *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986).

21. Kenneth Culp Davis, *Administrative Law Treatise* 283 (1970).

22. Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* 191-210 (1994).

23. *Id.*

24. *Id.*

25. 3 Staff of S. Comm. on Governmental Affairs, 95th Cong., *Study on Federal Regulation: Public Participation in Regulatory Agency Proceedings* 12 (Comm. Print 1977) [hereinafter *Senate Report*] ("Unfortunately, little data of a comprehensive nature is available. Each agency compiles its data differently, and in the case of several agencies, few figures were available at all."); Kerwin, *supra* note 22, at 192 (noting that empirical studies of agency rulemaking "are as rare as hens' teeth").

26. *Senate Report*, *supra* note 25, at 13-17. It should be noted that this report also looked at the last ten most significant adjudications. *See id.*

27. *Id.* at 13.

28. *Id.*

29. *Id.*

30. *Id.* at 14-16. The Committee's conclusion was that "[o]n the whole, the data clearly shows that participation by public or nonregulated interests before Federal regulatory agencies is consistently exceeded by the participation of regulated industries, and often

Steven P. Croley has studied the interaction of outside groups with the White House.³¹ In 1993, President Clinton issued an executive order requiring recordkeeping of White House communications with groups regarding rules under consideration. So, the White House's Office of Information and Regulatory Affairs keeps a document tracking all communications between the White House and nongovernmental interests concerning rulemaking.³² By studying this information,³³ Croley found that business interactions outnumbered other interactions by a total of three to one.³⁴

What could be done to change this unfortunate state of affairs? Public participation carries varying degrees of legal coercion. On one hand, however broad or narrow the scope of the actual participation and the agency role in facilitating such participation, we already have at our intellectual disposal the idea that participation can be legally mandatory. Another way of structuring participation might authorize such participation but make it essentially optional. Take, for instance, the case of the Negotiated Rulemaking Act of 1990 ("NRA").³⁵ Pursuant to the NRA, of course, representatives of an agency and of interested organizations that will be affected by a potential regulation meet and negotiate the final text and content of the rule.³⁶ Agencies might face a policy incentive to use

constitutes only a tiny fraction of such industry participation." *Id.* at 10. The Committee further stated that "[t]hese findings also lend support to the suggestion that participation in agency decisionmaking processes is greater among those who can afford significant expenditures, and furthermore that more parties can afford to participate in informal rulemaking than in adjudication." *Id.* at 14-15. The Committee also stated the following:

In sum, we found that in agency after agency, participation by the regulated industry predominates—often overwhelmingly. Organized public interest representation accounts for a very small percentage of participation before Federal regulatory agencies. In more than half of the proceedings, there is no such participation whatsoever. In those proceedings where participation by public groups does take place, typically, it is a small fraction of the participation by the regulated industry.

Id. at 16.

31. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1 (1998).

32. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note at 638-42 (2000).

33. Croley, *supra* note 31, at 140. Croley states:

For the purposes of this study, the [Office of Information and Regulatory Affairs ("OIRA")] meetings log was analyzed by tabulating the number and affiliations of attendees at OIRA meetings convened for discussing pending major rules. Based on data collected from the docket room of the [Office of Management and Budget ("OMB")], OIRA personnel attended a total of 166 meetings between July 19, 1993 (following the issuance of Executive Order No. 12,866) and May 6, 1997, with a total of 1,889 attendees.

Id.

34. *Id.*

35. 5 U.S.C. §§ 561-570 (2000).

36. Admin. Conference of the U.S., *Negotiated Rulemaking Sourcebook* 5 (1990) [hereinafter *Reg. Neg. Sourcebook*]; *see also* 5 U.S.C. § 594 (providing statutory background).

negotiated rulemaking, for the reasons that prompted its enactment—concerns about saving time and preventing legal challenges to rules. In some instances, agencies might sense that Congress wants them to use negotiated rulemaking, although so far Congress has either explicitly required negotiated rulemaking or indicated no view on the matter.

Policy or practical reasons aside, there is no clear legal obligation that agencies face to use negotiated rulemaking. Indeed, an administrative agency has almost complete discretion about whether or not it wants to use negotiated rulemaking, since presumably the decision to use negotiated rulemaking or not falls within “agency choice of policymaking form,”³⁷ and is therefore immune from judicial review.³⁸ Courts have not treated rules promulgated following negotiated rulemaking any differently than rules promulgated using other administrative procedures, thereby implying that there is also no legal incentive for agencies to use negotiated rulemaking.

In *Safe Buildings Alliance v. EPA*,³⁹ for instance, the first case to challenge a negotiated rule, the U.S. Court of Appeals for the District of Columbia never once mentioned that the rule had been adopted through negotiation. Two years later, in *Natural Resources Defense Council, Inc. v. EPA*,⁴⁰ the D.C. Circuit again never mentioned that a rule it was reviewing had been promulgated using negotiated rulemaking. The NRA itself clearly indicates that judicial review of negotiated rules will be treated the same as judicial review of other forms of rules. Section 570 of the NRA explicitly states that negotiated rules should not be “accorded any greater deference”⁴¹ than other forms of rules.⁴² So, negotiated rulemaking is purely optional and provides agencies few incentives to utilize it.

In short, in the policy toolkit that has been discussed so far, there have been two forms of responses to the current incentives: One would require certain forms of participation, through coercion, and one would authorize participation but would make it optional without providing agencies any incentive to engage the public. Democracy index rulemaking, as discussed in the rest of this part, relies on a new paradigm. Agencies should be

37. See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383 (2004).

38. Even in the context of negotiated rulemaking, presumably there would be exceptions to this general statement of agency discretion. For instance, if the agency action was going to be particularized as regarding one party, an individual hearing might be required. See *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908). But see *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (rejecting a similar claim).

39. 846 F.2d 79 (D.C. Cir. 1988).

40. 907 F.2d 1146 (D.C. Cir. 1990).

41. 5 U.S.C. § 570.

42. Section 570 provides as follows:

Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.

Id.

incentivized but not required to involve the public in administrative rulemaking. And, as these later sections discuss, the incentive should be more lenient judicial review.

B. *Two-Tier Process: An Overview*

The formulation for democracy index rulemaking is simple. As with the current regime regarding negotiated rulemaking, which states that the agency has the choice between using the special rulemaking procedure or NNC, an agency that has decided to promulgate a legislative rule has to decide whether it wants to use one of two procedures. As an initial matter, the agency would have to decide internally which of the two routes for rulemaking it wants to follow. Its decision about what rulemaking form to use would be essentially unreviewable, as would seemingly be dictated by the logic of the *Chenery* cases⁴³ interpreting the APA.

During the first procedure, NNC rulemaking, the agency would follow the notice and comment procedures currently specified in the APA. Using the second procedure, DNC rulemaking,⁴⁴ the agency would be required to convene a series of administrative juries and would put its proposed rule through a process involving those juries. These juries would involve a combination of stakeholder interests and members of the general public, a combination which will be discussed at greater length in the following several sections.

An agency would first present its proposed rule to a meeting of hundreds of citizens. These citizens would then retreat to their own small groups to discuss these rules, with the assistance of counsel.⁴⁵ These various small groups would then have to assess the validity of these rules, and compose a report based on their assessment. These assessments would not be binding, but the agency would at least have to seriously consider them and, if opting to proceed in another direction, discuss why it has chosen to do so. Such a statement of agreement or disagreement would be included as part of the

43. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947); *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 84-86 (1943).

44. This part of democracy index rulemaking will seem obviously similar to Bruce Ackerman and James Fishkin's idea of "deliberation day." Bruce Ackerman & James S. Fishkin, *Deliberation Day* (2004). Ackerman and Fishkin envision a national holiday, occurring before each national election, at which time registered voters would meet in their communities to discuss the election. I tend to share Richard Pildes's feeling that this idea is "grandiose . . . a quixotic and highly contrived academic exercise." Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *Election L.J.* 685, 694 (2004); see Ackerman & Fishkin, *supra*, at 13 (calling their proposal "realistic utopianism"). By contrast, democracy index rulemaking seems to be more limited, and hence more realistic.

45. These counsel would presumably be chosen from a specially trained class of agency employees. These employees would have a kind of independence similar to the structural independence enjoyed by administrative law judges. This independence would allow them more freely to advise and discuss issues with participants in deliberative notice and comment ("DNC"). However, the fact that they were employees of the agencies, trained by the agencies, and so on would mean they would have a sort of cultural affinity for the agency in a way that would ensure that these counsel would not overly undermine agency autonomy.

general statement that the agency issues, along with its rules, which would then go through a shortened notice and comment period.

The agency that uses DNC will be guaranteed what will be called “deliberative deference.” This form of judicial review, created to entice agencies to use participatory schemes of rulemaking, would make it quite difficult to obtain pre-enforcement review of a legislative rule, and would lead to an extremely deferential standard of review of that rule once it does make it into court. The agency that uses NNC would not be guaranteed deliberative deference, but the greater number of relevant and non-repetitive comments it receives during NNC, the greater amount of deliberative deference the eventual legislative rule would receive. While the agency that uses DNC faces a bright-line test to see if it receives deliberative deference, the agency that uses the NNC procedure would be facing a sliding scale of deliberative deference in court. These are the general contours of democracy index rulemaking; but what about the specifics?

C. Normal Notice and Comment Process

NNC rulemaking pursuant to democracy index rulemaking would be a relatively straightforward process, involving nowhere near the details of institutional design necessary to explain DNC. If the agency decided to use NNC, it would proceed as is currently done with notice and comment rulemaking. First, as stated in the APA, “[g]eneral notice of proposed rule making shall be published in the Federal Register The notice shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁴⁶ The agency would then proceed to conduct its NNC procedure.

Democracy index rulemaking would change matters at the end of the process. After the notice and comment period ends, the agency would “incorporate in the rules adopted a concise general statement of their basis and purpose.”⁴⁷ This general statement would have to indicate how the agency responded to substantial comments made during NNC rulemaking,⁴⁸ and discuss the policy considerations and conclusions regarding major issues of fact and policy.⁴⁹ These requirements are old; however, agencies would also now have to include as part of their general statement a “democratic participation statement” (“DPS”). The DPS would indicate the number of relevant and non-repetitive comments received during rulemaking, and would break down by category and by individual or institutional interest who precisely submitted these comments.⁵⁰

That is how NNC procedure would differ from current notice and comment procedure. But what about judicial review of NNC, the major

46. 5 U.S.C. § 553(b).

47. *Id.* § 553(c).

48. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

49. *Indus. Union Dep’t v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974).

50. Courts would have the capacity to review this statement, pursuant to a very flexible standard, to make sure it is truthful.

incentive that agencies would face to involve the public in NNC more than they do in current notice and comment? If a legislative rule was challenged in court, the court would have to examine the DPS and determine if the agency was entitled to special deference.⁵¹

How should the amount of “democracy” during NNC rulemaking be measured? As an initial matter, comments that are not responsive or that duplicate other comments would not be counted for purposes of calculating the democracy index. Agencies currently do not have “to discuss every fact or opinion contained in the public comments.”⁵² Only “relevant . . . issues raised during” notice and comment need to be addressed,⁵³ and comments which are “frivolous or repetitive” need not be addressed.⁵⁴ Not counting these comments for purposes of the democracy index would presumably be as unproblematic from the perspective of “arbitrary and capricious”⁵⁵ or equal protection concerns⁵⁶ as not responding to these comments during notice and comment now.

Beyond that, it would make sense simply to count the sheer number of relevant and non-repetitive comments submitted and have this serve as the number that a court uses to determine the amount of deference that a particular rule would receive. Such a system would adequately balance equality concerns and public choice concerns. On one hand, counting each comment equally (so long as it meets a minimum threshold of relevance and does not duplicate other comments) is the logical extension of the “one person, one vote” principle extended to the NNC process.⁵⁷ This regime would be relatively “objective”⁵⁸ and would not involve a court (or an agency filing its DPS) ranking certain comments beyond the easier initial stage of disqualification.

On the other hand, counting all comments equally might raise some public choice concerns that special interest groups will work with agencies to find creative ways to have their allies submit many comments, in order to

51. This special (deliberative) deference is discussed in greater detail in Part I.E, *infra*.

52. *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 885 (4th Cir. 1983); *see also* *Gen. Tel. Co. v. United States*, 449 F.2d 846, 862 (5th Cir. 1971); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 484 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979).

53. *Block*, 717 F.2d at 886; *see also* *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1978); *Cnty. Nutrition Inst. v. Bergland*, 493 F. Supp. 488, 492-93 (D.D.C. 1980).

54. *Gen. Tel. Co.*, 449 F.2d at 862; *Hiatt Grain & Feed, Inc.*, 446 F. Supp. at 484.

55. 5 U.S.C. § 706(2)(A) (2000).

56. U.S. Const. amend. XIV.

57. One could make a number of arguments as to why notice and comment “one person, one vote” is not as compelling as voting “one person, one vote.” For one thing, perhaps voting is simply more crucial and fundamental than participating in the administrative process. It is clear that one does not have the same right to participate in rulemaking as one does to vote in elections, for instance.

58. *See, e.g.,* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex. L. Rev. 1643, 1648 (1993) (stating that the standard was originally adopted because it was easier to handle); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731, 741 (1998) (stating that the one person, one vote standard is the “paradigmatic ‘objective’ rule”).

ensure that their desired rule is passed and receives deliberative deference by a reviewing court. By not counting repetitive comments, though, NNC makes it much more difficult for there to be agency capture (via many submissions of comments) during this process.

D. *Deliberative Notice and Comment: The Other Option*

NNC is easy to explain and describe, and therefore easy for agencies to administer. Simply open the agency doors for comments, eliminate irrelevant and repetitive comments, and count the rest of the comments. The DNC process is more complex. For many readers, it will bear obvious similarities to Bruce Ackerman and James Fishkin's idea in *Deliberation Day* of having a national holiday for citizens to meet in their communities and deliberate about presidential and congressional races; these similarities are largely superficial and at a very general level.⁵⁹ True, DNC involves citizens deliberating about public affairs just as they would with Deliberation Day, but DNC is something less and something more. Unlike Deliberation Day, democracy index rulemaking is not a two-day national holiday which would cost hundreds of billions of dollars, thereby making democracy index rulemaking realistic and not "realistic utopianism,"⁶⁰ the way Ackerman and Fishkin describe their proposal. It does not involve the major public issues debated in a presidential or congressional race. It does, however, involve citizens making decisions with potential actual legal effects, rather than merely debating a hypothetical with no consequences to follow. Other differences in institutional design should be clear as the details of DNC are discussed in greater detail.

If the agency decided not to use the NNC process, it would instead use DNC rulemaking, which it would have to announce by publishing a notice in the *Federal Register*. The agency would be responsible for convening a series of juries composed of two discrete types of parties: those clearly affected by the proposed rule and general members of the public. The stakeholder participants would be selected in the same manner that is currently used to select negotiated rulemaking committees. As with the NRA, a convener would be retained to assist in the process of identifying the relevant affected interests.⁶¹ The convener would have the authority to make contact with potentially affected parties and to solicit participants through the *Federal Register*.⁶²

Because the Federal Advisory Committee Act ("FACA") has been interpreted to apply to negotiated rulemaking, these negotiated rulemaking committees must be "fairly balanced"⁶³ in terms of the "points of view

59. Ackerman & Fishkin, *supra* note 44.

60. *Id.* at 13.

61. 5 U.S.C. § 563(b)(1) (2000).

62. *Id.* § 564(a)(1) (requiring publication in the Federal Register of notice of the establishment of a negotiated rulemaking committee to negotiate a proposed rule).

63. *Id.* app. § 5(b)(2), at 3.

represented and the functions [that are] performed,”⁶⁴ and therefore stakeholder participants in DNC must conform to FACA as well. This FACA requirement ensures that “persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee.”⁶⁵ It is imagined that, as with the current regime regarding negotiated rulemaking, it would be quite hard to obtain judicial review of the decision to invite certain stakeholders to participate.⁶⁶

Members of the general public would be selected using a process similar to the process used to select members of juries. First, as with the selection of regular juries, there would be the identification of the relevant “jury district.”⁶⁷ In the case of democracy index rulemaking, the representative jury would be selected from the entire country. The second stage would involve the creation of the “source list,” or the list of names and addresses of residents available for jury service within this given (national) district. The Jury Selection and Service Act of 1968⁶⁸ encourages the use of voter registration lists, but this tends to create distributional inequities in the eventual composition of the jury.⁶⁹ The voter registration list would thus be combined with a national database of driver registration lists.⁷⁰ From this list of eligible jurors, the agency would select a group of potential small group members who meet the minimum requirements specified in the second stage.

Small group members whose names have been located after these first two stages would be mailed a questionnaire. Racial minorities generally receive these questionnaires at a lower rate than whites in the case of jury

64. *Id.*

65. *Nat’l Anti-hunger Coalition v. Executive Comm. of the President’s Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (citations omitted).

66. So far, the only courts of appeal to squarely address what constitutes a fair balance are the Fifth and D.C. Circuits. *See Cargill, Inc. v. United States*, 173 F.3d 323, 326 (5th Cir. 1999); *Nat’l Anti-hunger Coalition*, 711 F.2d at 1074; *see also* *NW Ecosystem Alliance v. Office of the United States Trade Representative*, No. C99-1165R, 1999 WL 33526001, at *3 (W.D. Wash. Nov. 9, 1999). Courts seem to look at the functions the committee was created to perform, and permit a substantial degree of discretion in determining whether the composition of the committee is a fair balance. *Cargill, Inc. v. United States*, 173 F.3d 323, 336 (5th Cir. 1999).

67. For a helpful discussion of the general rules used to select a jury, see Hiroshi Fukurai et al., *Race and the Jury: Racial Disenfranchisement and the Search for Justice* 39-80 (1993) (giving an overview of the jury selection process).

68. *Jury Selection and Service Act of 1968*, 28 U.S.C. §§ 1861-1869, 1871 (2000).

69. *Cf.* Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. Rev. 707, 712-13 (1993) (“Voter registration lists, the most common source of juror names, consistently underrepresent African-American and Hispanic citizens who would otherwise be eligible to serve as jurors.” (footnote omitted)).

70. *See generally* 28 U.S.C. § 1861; 4 Wayne R. LaFare et al., *Criminal Procedure* § 15.2(a), at 255 (2d ed. 1999) (noting that “both the grand jury and petit jury arrays are chosen by a method of random selection from a representative source list (such as a voter registration list or a combination of that list and other comprehensive lists)”).

selection, because they are more mobile,⁷¹ and return these questionnaires at a lower rate,⁷² so special efforts would have to be made to ensure that a large number of members of various groups received these questionnaires. Rather than the current jury regime, which disqualifies potential jurors based on vague standards such as the absence of “natural faculties,”⁷³ under DNC someone would only be eliminated from possible jury service if they did not meet certain easily satisfied minimum characteristics of competence.

These jurors would then be required to respond to a summons and serve during the DNC process. The classic “voluntary response” problem is normally a problem with other deliberative models,⁷⁴ and that could only be avoided if service was made obligatory. Without this obligatory service, then those who participate in DNC would be self-selected, an obviously enormous problem for any process that aspires to be representative (and representativeness is surely central to the legitimacy of DNC).⁷⁵ True, obliging a citizen to travel to Washington, D.C., (or to another specified site away from home) to serve in the DNC process can be inconvenient, especially so because DNC debates might not always be about the most interesting of issues. But DNC would not happen with sufficient frequency where its attendant inconveniences would affect more than a handful of citizens.

The jurors who eventually do make it to Washington, D.C., to participate in this process would be generously compensated. As it stands now, the average American juror is paid less than twenty-five dollars a day for service,⁷⁶ which is below the 2000 poverty threshold by more than ten dollars a day.⁷⁷ Presumably, if possible, these jurors would have to be compensated with more money (not to mention travel and other expenses), so that they could manage their service on these administrative juries.

Once an individual is selected to serve as a stakeholder participant or a general public participant in DNC, they would be sent an informational booklet regarding the rule they will be required to consider. The agencies themselves would prepare a brief document—perhaps no more than ten

71. Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 Va. J. Soc. Pol’y & L. 445, 456 (1994) (reviewing Hiroshi Fukurai et al., *Race and the Jury: Racial Disenfranchisement and the Search for Justice* (1993)).

72. Fukurai, *supra* note 67, at 21.

73. See, e.g., Cal. Penal Code § 893(a)(2) (West 1985) (detailing qualifications of grand jurors, who are selected with criteria similar to trial jurors); 705 Ill. Comp. Stat. Ann. 305/2 (West 1992); Tenn. Code Ann. § 22-2-302(a)(1) (1994).

74. James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* 81-104 (1991).

75. David S. Moore & George P. McCabe, *Introduction to the Practice of Statistics* 265-67 (2d ed. 1999).

76. Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. Legis. & Pub. Pol’y 289, 340 (2002).

77. Currently, the poverty wage threshold amounts to \$34.46 per day or \$8959 per year for a single earner. U.S. Census Bureau, *Poverty 2000* (Aug. 22, 2002), <http://www.census.gov/hhes/poverty/threshld/thresh00.html> (presenting 2000 threshold).

pages—summarizing the proposed agency rule and the reasons for that rule. To facilitate debate, the agency would randomly select a party (presumably an elite institutional one) to prepare a rebuttal, based on who responded to the notice in the *Federal Register* and expressed an interest in constructing such a document.

A short time later, stakeholder participants and the selected members of the general public would arrive in Washington, D.C., for their service, and at the start of the DNC process they, along with several hundred others (the overwhelming majority being general public participants, along with the appropriate number of stakeholder participants), would meet in a general session. A representative of the administrative agency would greet the participants in a general plenary session and provide them with an oral summary of the briefing book they received and the reasons why the agency is considering the rule it is proposing.

At this point, dozens of randomly organized juries would meet separately to discuss the proposed agency rules. Stakeholder participants as well as general public participants would be randomly assigned to a deliberative small group. Each deliberative small group would consist of approximately fifteen people, with about thirty-five groups meeting at first. While it would be at least conceptually possible for there to be discussions in the initial large group meeting, the primary discussions should take place in the smaller sessions since, as Robert Dahl has noted, there are “upper limits” to effective participation.⁷⁸ This smaller size is also consistent with the size of an analogous institution, the common law grand jury, which was generally composed of between twelve and twenty-three jurors.⁷⁹

In these deliberative small groups, discussions would be led by an Administrative Law Moderator (“ALM”), who would be specially trained in discussion moderation. Like administrative law judges, ALMs could not have their work evaluated or sanctioned by an agency short of clear and gross misconduct. The ALM would have a very minor role; he or she would merely be the presiding officer, entrusted with enforcing the rule that no member of the deliberative small group could talk for more than two minutes at a time and could not speak again until every other member of the small group had a chance to speak. In other words, the ALM would be entrusted with making sure that no one person could dominate the discussion. Importantly, the ALM would not have the capacity to rule certain comments out of order.

Each DNC small group would have a clear mission: to provide some sort of evaluative report to submit to the agency about the proposed rule. As the discussion in the small group proceeds, an individual who wants to suggest an item for inclusion in the small group report can indicate as much. This

78. Robert A. Dahl, *After the Revolution: Authority in a Good Society* 54, 118 (1970); Robert A. Dahl & Edward R. Tufte, *Size and Democracy* 110-17 (1973) (discussing the impact of the size of a democratic system on its ability to tackle its problems).

79. *State v. Gowan*, 214 N.W.2d 228, 231 (Minn. 1973); *People v. Infante*, 511 N.Y.S.2d 293, 294 (N.Y. App. Div. 1987); *State v. Conger*, 878 P.2d 1089, 1097 (Or. 1994).

item would then be noted by the ALM, and would be voted on only at the end of the process, when the small group could evaluate how that one reaction to the agency rule fits with other reactions to the rule.

At a certain point, members of the deliberating small group will feel that they have discussed the proposed rule enough, and that they are ready to make their final report. An individual group member would have the power to make a motion to end debate and to begin the process of creating the final report. This motion to end debate would be voted upon— anonymously—by members of the small group, and would need a simple majority in order to pass. The reason for this is simple: public voting could rupture the sort of goodwill that these small groups need. The corollary to the anonymity of the process is that each vote requires only a simple majority, so members of the group do not have the chance to target dissenters.

If this motion passes, and after the small group voted on the various reactions it had to the agency rule, a randomly assigned counsel (an individual with the same structural protections enjoyed by the administrative law judges and ALMs) would join the deliberating small group. The small group counsel would be entrusted with drafting a report based on these comments. By giving this job to the specially trained counsel, DNC ensures that the final small group report is sufficiently technical to be helpful; by not having the counsel join the group earlier DNC ensures that small group participants will not tailor their comments to please the counsel. The counsel would bring this report back to the small group, which would have the authority to reject or approve the report and indicate what changes should be made, thereby ensuring that even the technical report is accountable to the desires of the small group. This DNC small group would cease to exist once it approves, by a simple majority vote, a report commenting on the agency rule.

The agency would evaluate these position papers and suggested reforms, and would be obligated to address each relevant and non-repetitive comment raised in these reports.⁸⁰ This might be where the “hard look” doctrine of *Citizens to Preserve Overton Park, Inc. v. Volpe*⁸¹ continues in force, because judicial review of agency treatment of these jury statements would be “thorough, probing, in-depth review.”⁸² While some worry that hard look review overly interferes with agency autonomy,⁸³ applying hard look review to agency treatment of these jury suggestions would not do so. Usually, hard look review means that a court must scrutinize some—if not

80. In the context of negotiated rulemaking, the agency may promulgate a rule loosely based on the consensus position adopted by the negotiated rulemaking committee. 5 U.S.C. § 563(a)(7) (2000); see Patricia M. Wald, *ADR and the Courts: An Update*, 46 Duke L.J. 1445, 1469-71 (1997) (discussing this power).

81. 401 U.S. 402 (1971).

82. *Id.* at 415.

83. *E.g.*, Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 632 (2004) (stating that hard look review “exacerbates regulatory ossification and distorts regulatory policy”).

all—of the record established during the agency decision-making process, thus facing the agency with scrutiny related to a substantial number of materials and issues.⁸⁴

This application of hard look review, though, would require the agency to adequately consider the discrete and presumably small number of comments and issues raised in the thirty-five jury statements. It is possible that the jury statements might propose alternative suggestions, and the agency would be required to address these alternatives or face the consequences.⁸⁵ The final rule that the agency promulgates after the deliberations of these juries would then be subject to general notice and comment, but because this is a special form of participatory notice and comment, the allotted period for notice and comment would be shorter than the usual sixty days.

E. *Deliberative Deference*

As an incentive for agencies to use DNC or to ensure that there are many comments during NNC (and as a means of avoiding substantial oversight from many sources), democracy index rulemaking would provide essentially three general changes to the current treatment of agency rules (in addition to the shortened subsequent notice and comment following the small group deliberations during DNC): (i) a relaxation of analytical requirements, (ii) a tightening of the standards necessary to secure pre-enforcement review, and (iii) a loosening of the standard of judicial review used by courts to review legislative rules promulgated subsequent to agency actions that qualify for deliberative deference. These three elements can be used as helpful inducements because they have all played a powerful role in constraining agencies and because they are negotiable (as compared to something like standing, which seems to be an outgrowth of changes in constitutional rather than statutory law).

As it stands now, in addition to the foundational requirements in the APA, various statutes and executive orders require administrative agencies to use certain forms of analytical techniques, and also require agencies to submit these analyses to the Office of Management and Budget for review.⁸⁶ The National Environmental Policy Act requires that agencies prepare environmental impact statements.⁸⁷ Agencies must also engage in cost-benefit assessments of economically significant rules.⁸⁸ The Regulatory Flexibility Act of 1980 requires agencies to describe any rules

84. *Cf.* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

85. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n (Scenic Hudson II)*, 453 F.2d 463 (2d Cir. 1971); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n (Scenic Hudson I)*, 354 F.2d 608 (2d Cir. 1965).

86. *See generally* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. St. U. L. Rev. 533, 536-37 (2000) (listing requirements).

87. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2000).

88. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note at 638-42 (2000).

that they expect to have an economic impact on small entities.⁸⁹ The Small Business Regulatory Enforcement Fairness Act of 1996 requires that federal agencies go through a special process to allow small businesses and governments to comment on certain proposed rules.⁹⁰ The Unfunded Mandates Reform Act indicates that agencies should consider regulations that impose mandates on specified governmental entities, and should prepare certain regulatory analyses related to this consideration.⁹¹ Agencies must consider the potential that their regulations will effect a “taking” of private property under the Takings Clause of the Fifth Amendment.⁹² They must analyze the “trade” impact of potential regulations,⁹³ and must also consider the impact of their regulations on “federalism,”⁹⁴ as well as on “families.”⁹⁵

If an agency uses DNC, then it would automatically be freed from the obligation to perform these types of analyses. This is because the heightened democratic process that permitted the agency to receive deliberative deference would serve as a universal proxy for these analytical requirements. It would ensure that the relevant cross section of interests were considered, and if there was a sense that special considerations should be examined in the case of one particular rule, an agency would have the capacity to highlight this concern when proposing the rule.

If the agency uses NNC, it would not automatically be freed from the obligations imposed by these analytical requirements. Instead, the greater the number of comments received, the less rigorous analytical statements the agency would need to file. Sometimes, of course, this may mean that, like with DNC, the agency need not file any analytical statements at all; on other occasions, it may need to file the currently required statements.

Second of all, the standards for obtaining pre-enforcement review of agency action would be altered. As it stands now, the requirements for obtaining pre-enforcement review were spelled out in *Abbott Laboratories v. Gardner*.⁹⁶ The Court decided that the two central questions that must be answered in order to determine if pre-enforcement review is available are

89. Regulatory Flexibility Act, 5 U.S.C. § 801 (2000).

90. Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 (2000).

91. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-1538, 1571 (2000).

92. Exec. Order No. 12,630, 3 C.F.R. 554 (1989), *reprinted in* 5 U.S.C. § 601 note at 636-37 (2000).

93. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *repealed by* Exec. Order 12,866, 3 C.F.R. 638, 649 (1993), *reprinted in* 5 U.S.C. § 601 note at 642 (2000).

94. Exec. Order No. 12,612, 3 C.F.R. 252 (1987), *repealed by* Exec. Order 12,132, 3 C.F.R. 206, 211, *reprinted in* 5 U.S.C. § 601 note at 646 (2000).

95. *Id.*

96. 387 U.S. 136 (1967); *see also* Richard Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 89 (1995). Pierce has argued that two recent Supreme Court cases, *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), seem to indicate a retreat from *Abbott Laboratories*. *See* Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise* § 15.14, at 185-88 (3d ed. supp. 1995).

whether the situation is such that a court could competently handle pre-enforcement review,⁹⁷ and whether delaying judicial review would create an undue burden on the parties.⁹⁸ As a practical matter, these extremely loose standards have been applied with almost uniform results: Pre-enforcement review is almost always permitted.⁹⁹ This has attracted the wrath of a variety of critics.¹⁰⁰

This system would be changed so that an agency following DNC would not have its legislative rule subject to pre-enforcement review, absent some sort of claim of dramatic procedural irregularity.¹⁰¹ If the agency used NNC, then as part of the general balancing that occurs using the two factors pursuant to *Abbott Laboratories*,¹⁰² a court contemplating pre-enforcement review would add the degree of participation in the agency process to its list of considerations.¹⁰³

Finally, the relevant standard of review used by courts to evaluate legislative rules would be altered. As it stands right now, reviewing courts may “hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁰⁴ It might be that the “hard look” version of this standard is still in effect, so that a court must make sure that “the agency has taken a hard look at the issues with the use of reasons and standards.”¹⁰⁵ No matter what the empirical evidence seems to demonstrate, this standard of review has been easy in theory, yet frequently strict in fact.

Christopher Schroeder and Robert Glicksman, for instance, studied judicial review of a select group of Environmental Protection Agency (“EPA”) actions from 1991 to 1999.¹⁰⁶ In the cases where the EPA action was challenged as arbitrary and capricious, the agency was reversed twenty-

97. *Abbott Labs.*, 387 U.S. at 149.

98. *Id.*

99. Admin. Conference of the U.S., 1982 Report 60-64 (1982) (Recommendation 82-7) [hereinafter ACUS Recommendation 82-7].

100. Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, Law & Contemp. Probs., Spring 1994, at 185, 233-38.

101. Cf. ACUS Recommendation 82-7, *supra* note 99, at 60-64 (suggesting similar exception to proposed general ban on pre-enforcement review).

102. See also *Abbott Labs.*, 387 U.S. at 149 (“The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”).

103. The less pre-enforcement review available, the greater chance that regulated industries must participate (by definition), meaning that they could both be more aware of whether the rule will eventually be invalidated (thereby possibly leading them to invest less in compliance) and the less they have to complain about since they assisted in the promulgation of the rule.

104. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000).

105. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

106. Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s*, 31 *Envtl. L. Rep.* 10,371 (2001).

two percent of the time.¹⁰⁷ Peter Schuck and Donald Elliott's study of the aftermath of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*¹⁰⁸ shows that agencies are reversed in general half of the time, even if not always for reasons related to the arbitrary and capricious standard.¹⁰⁹

Pursuant to the new standard, agencies using DNC would have their legislative rules overturned only if there was some sort of sign of a clear and manifest error.¹¹⁰ Agencies using NNC would face a sliding scale of deference, from full-scale hard look review if the agency acted after only minimal participation to the clear and manifest error standard if the agency acted after substantial participation in NNC. Adjusting the standard of review, of course, would not alter the nature of things to be reviewed. A reviewing court would still look to see if the agency was perhaps required to give a formal hearing.¹¹¹ The reviewing court would have to ensure that the facts that the agency presented, at some level, support the rules that the agency promulgated.¹¹² The reviewing court would have to ensure that the agency acted within its permissible boundaries set by Congress. All of these considerations, though, would be reviewed with a strong presumption that the agency was correct.

II. VIRTUES OF DEMOCRACY INDEX RULEMAKING

Assessing democracy index rulemaking is problematic at some level, of course, because we do not know the precise system that would result. Democracy index rulemaking calls for a floating standard of judicial review. If the agency uses DNC rulemaking, for instance, then it would face very minimal judicial review, and one presumably could group the agency process into one that involves "political . . . controls over administrative action,"¹¹³ depending on whether one defines popular control to be a form of political control. If the agency uses NNC, and does not receive many comments, then its rules will be scrutinized more closely by courts, so it would be an instance of "judicial . . . controls over

107. *Id.* at 10,392.

108. 467 U.S. 837 (1984).

109. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1022. Note that Schuck and Elliott, in counting up reversals of agency decisions, counted any case involving any reason why the agency was reversed. *Id.* at 1008 (stating that they were counting cases where the agency "was reversed or remanded on any ground").

110. It is hard to think of any other verbal formulation that indicates a more relaxed standard of review than "arbitrary and capricious."

111. *E.g.*, *United States v. Fla. East Coast Ry.*, 410 U.S. 224 (1973) (stating that requirement regarding "hearing" as part of a rulemaking did not require formal procedures, either directly or by triggering the Administrative Procedure Act's requirements); *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 342 (D.C. Cir. 1968).

112. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 29 (1983); *Nat'l Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31, 33 (D.C. Cir. 1974); *Boyd*, 407 F.2d at 342.

113. Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. Rev. 1251, 1252-53 (1992).

administrative action.”¹¹⁴ No matter what, though, participation would seemingly be more common, a result achieved by striking a constructive balance between feeding agencies more information and providing them with greater legitimacy, yet allowing them to exercise effective power and control over the functions they have been established to pursue.

A. *The Benefits of Democracy Index Rulemaking*

1. Administrative Legitimacy

In his landmark *Crisis and Legitimacy*,¹¹⁵ James Freedman argued that the history of the administrative state is one involving the perpetual crisis of the absence of administrative legitimacy, with the administrative state being the “manifestation of a deeper uneasiness over the place and function of the administrative process in American government.”¹¹⁶ Even though “each generation has fashioned solutions responsive to the problems it has perceived, the nation’s sense of uneasiness with the administrative process has persisted.”¹¹⁷ Administrative law seems to be the rare field in American law that still must go to great lengths to justify its very existence.¹¹⁸

Democracy index rulemaking might be a partial solution for this perpetual crisis, because it provides for a floating standard of review. Surely part of the problem, which attempts to provide a unifying theory of

114. *Id.*

115. James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978).

116. *Id.* at 9.

117. *Id.*

118. Administrative law still remains unique in this way. For instance, we generally do not discuss the legitimacy of the very existence of constitutional law. Even those who call for the abolition of strong constitutional review by courts do not argue that we should do away with constitutional law altogether. *E.g.*, Mark Tushnet, *Taking the Constitution Away from the Courts* (1999). Likewise, we may argue that there should be fewer criminal laws, or more justly enforced criminal laws, but no one is really arguing that we should do away with criminal law. By contrast, even now, many of the arguments about administrative law seem to question the very legitimacy of the administrative state. There are two versions of this: One version that realizes that the administrative state is here to stay, so instead looks to something like the non-delegation doctrine as a second-best solution, *e.g.*, David Schoenbod, *Power Without Responsibility: How Congress Abuses the People Through Allegation* (1993), and to the new non-delegation doctrine as perhaps a third-best solution. *E.g.*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); *Am. Trucking Ass’ns v. E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *Yale L.J.* 1399 (2000); Kenneth Culp Davis, *A New Approach to Delegation*, 36 *U. Chi. L. Rev.* 713 (1969) (calling for general arbitrariness review). *But see* Mark Seidenfeld & Jim Rossi, *The False Promise of the “New” Nondelegation Doctrine*, 76 *Notre Dame L. Rev.* 1 (2000). Another version seems really to question the very legitimacy of any administrative state, no matter how small such a state may be. *E.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

administrative legitimacy, is that legitimacy will come from different sources in different situations. Sometimes, perhaps, legitimacy should come from agency technical expertise; sometimes, from popular participation. For some reason, though, no one seems to refer to the idea of a floating standard of review—and hence a changing theory of legitimacy—when it comes to agency rulemaking. Democracy index rulemaking changes this because legitimacy comes in different shapes on different occasions. On the occasion when the agency does not want to involve the public, its decisions will be legitimated because of the internal expertise it applies and the legal scrutiny applied by courts. On the occasion when the agency wants a great degree of public participation, its action will be legitimated by the scrutiny of the public.

Democracy index rulemaking might also help with legitimacy gaps in administrative law because it references a sort of idealized process as the source of legitimacy, rather than the less normatively appealing process that might result from the usual (public choice perhaps) story of everyday politics. Someone who believes in the unitary executive idea of administrative legitimacy,¹¹⁹ for instance, contemplates a form of political legitimacy, but one that inevitably is mired in the realities of the politics of the executive branch, where powerful groups dominate lobbying of the executive branch.

By contrast, Richard Stewart's interest representation approach is one theory of administrative legitimacy that appeals to an idealized political process as a source of legitimacy.¹²⁰ This interest representation approach required an agency to "consider all of the relevant interests affected,"¹²¹ potentially even including "persons and groups not represented as parties."¹²² In other words, legitimacy stemmed not from the groups that actually influenced the agency, but the groups that, at some normative level, are the "affected interests" that should be considered.

Despite the appeals of this sort of idealized process form of legitimacy, interest representation participation is painfully imprecise. It involves

119. *E.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *Case W. Res. L. Rev.* 1451, 1453-55 (1997).

120. It should be made clear that Stewart did not favor this approach; he just described its emergence. *Cf.* Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 *Geo. L.J.* 1625, 1633 (1986) ("[Stewart] concluded that all of the obvious possibilities for application within traditional procedural frameworks were seriously flawed."). Stewart also considered more clearly political mechanisms for interest representations. Stewart, *supra* note 7, at 1790. He discussed holding popular elections for agency members, or private organizations that have been designated by Congress appointing them. *Id.* He disliked both options. *Id.* at 1791. The problems with this system would be obvious: Voter disinterest plus interest group interest would pose massive public choice problems.

121. Stewart, *supra* note 7, at 1757.

122. *Id.* at 1758 n.422 ("[The Commission's] role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." (quoting *Scenic Hudson I*, 354 F.2d 608, 620 (2d Cir. 1965)).

agencies—and courts reviewing the actions of agencies—deliberating and guessing *ex post* about which institutions or representatives could best actualize the desires of others. How is a court, for instance, supposed to be able to know with any sort of precision which interests should be represented in a proceeding regulating the proper level of a toxin? The world of potentially affected interests is massive, and courts seem particularly ill equipped to determine who should gain a seat at the table.

By contrast, democracy index rulemaking appeals to an idealized political process as a source of legitimacy, but it does not run into the same sort of issues of imprecision involved in interest representation approaches. Rather than an ill equipped court trying to guess, *ex post*, which interests would be affected, agencies are entrusted with the obligation of identifying affected interests and bringing them to the table. Moreover, agencies supervise a sort of normatively preferable political process, one involving a representative set of citizens, rather than the forms of process involved in real political process (elite politicians being influenced by elite interests) or the interest representation process (imprecisely selected elite representatives of only affected interests).

In addition, to the extent that democracy index rulemaking encourages a form of citizen participation (without incurring substantial additional costs, as discussed later), it might generally legitimate the administrative state because “[d]eliberative democracy legitimates the collective judgment resulting from deliberative procedures”¹²³ and democracy index rulemaking would prioritize discussion and make deliberative rulemaking a more common occurrence. Bernard Manin has argued that deliberative decisions are legitimate “because they are, in the last analysis, the outcome of the deliberative process taking place before . . . the citizens.”¹²⁴ Citizen participation via democracy index rulemaking can also be a means of continually aligning administrative law with community norms:

[T]he jury imports its values into the law not so much by open revolt in the teeth of the law and the facts, although in a minority of cases it does do this, as by what we termed the liberation hypothesis. The jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values. It will not often be doing this consciously; as the equities of the case press, the jury may, as one judge put it, “hunt for doubts.” Its war with the law is thus both modest and subtle. The upshot is that when the jury reaches a different conclusion from the judge on the same evidence, it does so not because it is a sloppy or inaccurate finder

123. Amy Gutmann, *The Disharmony of Democracy*, in *Democratic Community: Nomos XXXV*, at 126, 148 (John W. Chapman & Ian Shapiro eds., 1993); see also David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 *Tex. L. Rev.* 1437, 1469 (1993) (“A decision is made legitimate by being chosen in an actual deliberative democratic procedure that tends—though imperfectly—to produce substantially just decisions.”).

124. Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *Pol. Theory* 338, 359 (1987).

of facts, but because it gives recognition to values which fall outside the official rules.¹²⁵

Moreover, as Jerry Mashaw's research on Social Security decisions has shown, participation in administrative decisions results in "an understanding on the claimant's part of the substantive adjudicatory norms and of the decision process."¹²⁶ In the context of the criminal jury, a study of jurors in Dallas County, Texas, found that they felt much better about the fairness of the criminal justice system after their jury service.¹²⁷ In the context of deliberative political experiments, all of the numbers seem to suggest that citizens tend to respect governmental process more after they participate in it.¹²⁸

This might also apply to democracy index rulemaking, even though the agency has no legal obligation to abide by the suggestions of their respective small groups, because the agency would at least have to provide a strong reason why it decided to ignore such suggestions. Indeed, although it is much debated,¹²⁹ this sort of participation in discussing a rule with an agency might eventually decrease the frequency of litigation against the

125. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 495 (1966); Michael J. Saks, *Blaming the Jury*, 75 *Geo. L.J.* 693, 704 (1986) (stating that the jury "allows the law to track change in society with an efficiency that cannot be achieved by asking legislatures to rewrite laws every few months, or even by judges, who are inclined to give more deference to the legislature than perhaps they always should," and that "[t]he jury helps bring about the gradual change that the law needs, and prevents upheavals against judicial and legislative authority").

126. Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 140 (1983) ("Participation . . . inspires confidence that sufficient efforts . . . have been made to inform the decisionmaker about the case."); see also Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 *Yale L.J.* 359, 361 (1972) ("If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced.").

127. Daniel W. Shuman & Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 *SMU L. Rev.* 449, 463 (1992).

128. See Mark Button & Kevin Mattson, *Deliberative Democracy in Practice: Challenges and Prospects for Civic Deliberation*, 31 *Polity* 609, 633 (1999).

129. See Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 *N.Y.U. Envtl. L.J.* 386, 416 (2001). Coglianese states that:

[U]ntil I undertook my research, no one had sought to assess these claims by collecting comprehensive data on court filings for negotiated and conventional rules. Having collected this data for the [Environmental Protection Agency ("EPA")], I find that six out of the twelve completed EPA negotiated rules in my study have resulted in legal challenges, a litigation rate higher than that for all significant rules under EPA's major statutes and almost twice as high as that for EPA rules generally.

Id. But see Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 *N.Y.U. Envtl. L.J.* 32, 52 (2000). Harter writes:

Coglianese argues throughout his article that the advocates of negotiated rules believed that the primary benefits of reg-neg are the reduction in both the time to reach a final rule and the incidence of litigation. While both benefits have been realized, neither was perceived by those who established the process as the predominant factor motivating its use.

Id.

agency, as has been asserted as a virtue of negotiated rulemaking.¹³⁰ It may also increase the likelihood of participating citizens to “vote in subsequent elections”¹³¹ and remain “more civically active long after the jury process has ended.”¹³² If the agency decided to use NNC, and if many comments were received, then many of the same benefits would follow. Although participating institutions or individuals might not feel the same as if they had been more directly involved, as is the case with DNC, surely they would still feel a greater sense of empowerment and hence a greater sense that the administrative action was legitimate.

If an agency uses DNC, it is possible that the stakeholders selected to participate might resent the process and might respect agencies and agency process less. They might resent being forced to mingle, via the small group sessions, with average citizens, and might resent their perceived loss of influence over agency rule. This is particularly so since it has been only fifteen short years since stakeholders were given the special authority to directly negotiate rules with agencies via the NRA. This, however, might be an acceptable price to pay from a broader administrative law perspective because by forcing stakeholders to discuss administrative rules with the general public they might be sensitized to how the public feels about these issues, and might act in a more accountable manner in the future.

Over the long term, stakeholders will surely notice that they still retain significant influence. A randomly selected stakeholder will be empowered to file the report competing with the agency report that small group participants receive. During the small group sessions, stakeholder participants will likely be able to make more informed comments about the agency rule than members of the general public, and so their comments are likely to have greater influence than the comments of other small group members. Before and after the DNC process, stakeholders will have the capacity to influence agency rules; they can file additional comments in the regular section 553 process that follows DNC, when members of the general public are surely less likely to do so.

This potential increased legitimacy would also be true across a greater geographical cross section of interests than might otherwise be true in

130. *E.g.*, Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 note at 617 (2000) (“Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court.”); Robert B. Reich, *Regulation by Confrontation or Negotiation?*, Harv. Bus. Rev., May-June 1981, at 86, 91-92 (noting a substantial increase in the number of regulatory lawyers in Washington, D.C., and advocating regulatory negotiation as a solution to the “fruitless confrontation” and “protracted regulatory battles” perpetuated by lawyers); Peter H. Schuck, *Litigation, Bargaining, and Regulation*, Regulation, July-Aug. 1979, at 26 (suggesting negotiation as a means of avoiding the “chronic fractiousness” of policymaking in the United States); *see also* Harter, *supra* note 9, at 18 n.96 (citing early work complaining of adversarial relationships between business and government).

131. John Gastil, *Is Face-to-Face Citizen Deliberation a Luxury or a Necessity?*, 17 Pol. Comm’n 357, 359 (2000).

132. Graham Smith & Corinne Wales, *Citizens’ Juries and Deliberative Democracy*, 48 Pol. Stud. 51, 60 (2000).

administrative process because DNC would involve citizens from across the country. Currently, some administrative regimes use a program of cooperative federalism:

Cooperative federalism programs set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions.¹³³

Here, though, citizens from across the country pursuant to a process of DNC would be participating in a system of administrative governance. Since federal administrative action occurs in the name of the federal government, it would be a good idea to have a system of legitimation involving national concerns.

2. Administrative Substance

In addition to the assistance with the possible legitimacy deficit in administrative law, democracy index rulemaking would provide a number of additional benefits. For one thing, it would provide a form of oversight of administrative action. Oversight is central to the administrative law project, and so many of the central aspects of the administrative law dialogue focus on forms of legislative oversight, executive oversight, and judicial oversight.¹³⁴ But all of these forms of institutional oversight face the normal problems of government; institutions have scarce resources and tend to be reactive rather than proactive in supervising administrative actions,¹³⁵ and may run into their own sorts of coordination problems.¹³⁶ The United States Supreme Court has long argued that the oversight rationale is part of the reason for the existence of criminal and civil

133. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1697 (2001).

134. E.g., Jerry L. Mashaw et al., *Administrative Law: The American Public Law System* (4th ed. 1998) (dividing the chapters of their introductory administrative law casebook into a chapter on the “Legislative Connection,” a chapter on “Executive Supervision of Administrative Action,” and chapters on “Suits to Review Administrative Action,” “Damage Actions Against the Federal Government and its Officers,” and “Beneficiary Enforcement of Public Law”).

135. Cf. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431, 433 (1989).

136. See Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 Admin. L. Rev. 1, 15-16 (1994) (arguing that increased political oversight over the last twelve years, resulting from infighting between the legislative and executive branches, has reduced the discretion of administrative agencies without more democracy or better regulatory policy).

juries,¹³⁷ so the increased possibility of DNC can be justified using this rationale.

Agencies using the DNC process, for instance, will have to deal with the sentiments of elite groups as well as average citizens, and any misbehavior on the part of agencies has a greater chance of being noticed by elite groups (and their greater capacity to publicize this misbehavior), as well as by average citizens. Agencies using NNC and receiving a significant amount of deliberative deference will be forced to engage and respond to massive amounts of public commentary, thereby functioning as a check. All of this occurs, of course, without overly antagonizing agency officials because they still have the choice to largely avoid public participation, in which case they may be forced to accept the sort of oversight that goes with negative reactions to avoiding public involvement.

Public participation via democracy index rulemaking may also be a means of decreasing the chance that interest groups will receive monopoly rents from the administrative process. As James Madison noted in *Federalist No. 10*, factions may be in the position to extract special goods from the government, goods that a majority of citizens do not necessarily want distributed to these interest groups.¹³⁸ One response to agency capture was the flourishing of the interest representation model and its use of techniques such as expanded concepts of standing to permit many parties to challenge administrative action. It used to be that only directly regulated parties could challenge an administrative action,¹³⁹ pursuant to the interest

137. See, e.g., *United States v. Powell*, 469 U.S. 57, 65 (1984) (discussing how the criminal jury serves “as a check against arbitrary or oppressive exercises of power by the Executive Branch”); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (noting the jury’s “overriding responsibility . . . to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction”); *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (indicating that “the purpose of the jury trial in criminal cases [is] to prevent government oppression, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues”) (citation omitted); *Patton v. United States*, 281 U.S. 276, 296-97 (1930) (stating that the criminal jury has historically assisted defendants in guarding “against the oppressive power of the King and the arbitrary or partial judgment of the court”); cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991) (“Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching.”).

138. See *The Federalist No. 10*, at 46-47 (James Madison) (Colonial Press ed., 1901); see also Stewart, *supra* note 7, at 1684-87.

139. See, e.g., *Ala. Power Co. v. Ickes*, 302 U.S. 464, 478 (1938) (deciding that only those who have suffered a “legal injury” have standing to sue); *Hahn v. Gottlieb*, 430 F.2d 1243, 1251 (1st Cir. 1970) (holding tenants not entitled to individual review of Federal Housing Administrative decisions to grant rent increases). Former Federal Trade Commissioner Mary Gardiner Jones, for instance, once stated the following:

At the moment under the Commission’s law enforcement obligations, it is compelled by due process to listen and take account of the viewpoints of those industries and persons which are subject to its regulations. No such compulsion exists for the Commission to listen and take account of the viewpoints of other members of the public who may be injured by the Commission’s failure to act or by ineffective action in its part.

representation model, though, the Supreme Court made it easier for other parties to challenge these actions.¹⁴⁰

This sort of change, perhaps created with anti-capture motivations, creates a new form of capture, permitting elite interest groups to dominate the administrative process, and also significantly interferes with agency action by giving some interest groups a veto power over administrative action. By contrast, democracy index rulemaking would encourage agencies to use techniques that would permit a cross section of citizens to participate in the agency process (using DNC), and if the agency decided to ignore their wishes, it would have to give a good reason for doing so. The DNC procedure might also have the effect of limiting the capacity of elite groups to pursue rent-seeking policies, because they would be sensitized to the interests of a cross section of citizens if the agency decided to use DNC.

Democracy index rulemaking also makes sense as a simple matter of instrumental rationality. By encouraging participation to the fullest extent possible yet still desirable, democracy index rulemaking would create incentives for agencies to take actions that would enable them to learn about the preferences of affected citizens and groups and the possible outcomes of policies, thereby presumably leading to better decisions.¹⁴¹ If one believes that an agency is pursuing an objectively “correct” result, then participation would increase the chance that an agency would reach this result.¹⁴² This is particularly so because the types of information that the agency would be more likely to receive via democracy index rulemaking might be information that it would not obtain otherwise. The perceptions of risk, for instance, that citizens and interest groups have may be different than that of the agency.¹⁴³ The kinds of information that the agency might receive via DNC would reflect the considered judgments of citizens, the kinds of judgments that citizens would hold after thinking through the regulation over a period of time, as they would once the regulation became effective and changed their lives.

Observations by Outgoing FTC Member Mary Gardiner Jones on the Outlook for the Federal Trade Commission (Oct. 17, 1973), in *Antitrust & Trade Reg. Rep.* (BNA) No. 636, at D-3 (Oct. 30, 1973).

140. See *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); see also *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

141. Cf. Felix Frankfurter, *The Public and Its Government* 132-33 (Beacon Paperback ed., 1964) (1930) (“[T]he people must educate their rulers. At least they must see to it that rulers are educated for the tasks of government.”).

142. Mashaw, *supra* note 126, at 202-03.

143. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 88 (1995) (arguing that risk managers should not only be attentive to the number of lives saved, but also “to public judgments about the contexts in which risks are incurred, and hence to the full range of factors that make risks tolerable or intolerable”).

B. *De-ossification with Accountability*

Democracy index rulemaking may be normatively desirable because it increases the chances of having public participation in administrative rulemaking, and of having a particular type of participation. Increased public participation would be constructive, and democracy index rulemaking would achieve this increased participation without significantly sacrificing agency autonomy (as discussed in greater detail later). But while incentives for public participation might be a good way of structuring this regime, why make the reward relaxed judicial review, as opposed to some other conceivable reward (perhaps greater funding from Congress, for instance)? On one hand, of course, there is no reason to argue against these other potential rewards, because this Essay is just arguing in favor of one kind of reward and not against others. There are real reasons, though, to value relaxed judicial review (even via a floating standard) as a particularly compelling reward because many have argued that ossification has been in large part due to courts, so giving agencies a means of avoiding difficult judicial review would presumably be a carrot of great interest to them.

For many years now, administrative law scholars have complained that the agency rulemaking process has become ossified.¹⁴⁴ The sources of this ossification are plentiful. As discussed earlier, there have been a series of analytical requirements placed on the rulemaking process making the process more expensive and therefore less productive. Executive supervision also significantly contributes to ossification, due to the increased power of the OMB.¹⁴⁵

Despite the analytical requirements discussed earlier, and the OMB and other executive restraints discussed above, most identify generally rigorous judicial review as a primary cause of ossification.¹⁴⁶ Agencies are now more likely to be required to offer detailed explanations for any action they

144. See, e.g., Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 48 Duke L.J. 300 (1988); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 Colum. L. Rev. 1231 (1974).

145. For discussions of the authority of OMB, see Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1410 n.50 (1975); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075 (1986); Philip J. Harter, *Executive Oversight of Rulemaking: The President is No Stranger*, 36 Am. U. L. Rev. 557 (1987); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059 (1986); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181 (1986); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 943, 981 (1980).

146. McGarity, *supra* note 144, at 1412; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 65 (1995).

take.¹⁴⁷ It used to be that the “concise general statement of basis and purpose” that agencies had to create was just that. For instance, when this concise general statement was created for the primary and secondary ambient air quality standards created pursuant to the Clean Air Act Amendments of 1970, it occupied a single page in the *Federal Register*.¹⁴⁸ The preamble to the 1987 version of a single standard occupied thirty-six pages.¹⁴⁹ Such explanations must generally address all factors that the agency considered,¹⁵⁰ and must address alternative measures.¹⁵¹ If the agency has decided to disregard its previous actions, it must justify this deviation.¹⁵²

Many empirical studies support the idea that courts have played a major role in creating the ossification problem. In 1990, Jerry Mashaw and David Harfst published their notable study of rulemaking at the National Highway Traffic Safety Administration (“NHTSA”), and found that the experience of that agency supported the idea that courts were behind many of the problems that agencies faced.¹⁵³ In 1966, Congress required that NHTSA create rules that improved the safety of automobile passengers.¹⁵⁴ In 1971, the Sixth Circuit reversed that rule,¹⁵⁵ identifying a rather obscure basis for its reversal.¹⁵⁶ Because of this reversal, it took NHTSA seven years to create a new rule that it felt would survive judicial review.¹⁵⁷ The Mashaw and Harfst conclusion about the consequences of judicial review on agency authority has been supported by many “policy-effect” studies that have examined the EPA,¹⁵⁸ the Occupational Safety and Health Administration (“OSHA”),¹⁵⁹ the FTC,¹⁶⁰ and the Federal Energy Regulatory

147. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

148. Clean Air Act Amendments of 1970, 36 Fed. Reg. 8186 (Apr. 30, 1971).

149. Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24,634 (July 1, 1987) (to be codified at 40 C.F.R. pt. 50).

150. *E.g.*, *Beno v. Shalala*, 30 F.3d 1057, 1073-74 (9th Cir. 1994); *Md. People’s Counsel v. FERC*, 761 F.2d 780, 785-86 (D.C. Cir. 1985).

151. *See, e.g.*, *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 78 (1st Cir. 1993); *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983).

152. *E.g.*, *Wichita Bd. of Trade*, 412 U.S. at 808; *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1385 (11th Cir. 1983).

153. Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* (1990).

154. National Traffic and Motor Vehicle Safety Act of 1966, § 103, 80 Stat. 718, 719 (repealed 1994).

155. *Chrysler Corp. v. Dept. of Transp.*, 472 F.2d 659 (6th Cir. 1972).

156. Mashaw & Harfst, *supra* note 153, at 282-83.

157. *Id.* at 295.

158. R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act 344* (1983) (“Court action has encouraged legislators and (EPA) administrators to establish goals without considering how they can be achieved The policymaking system of which the federal courts are now an integral part has produced serious inefficiency and inequities, has made rational debate and conscious political choice difficult, and has added to frustration and cynicism among participants of all stripes.”).

159. John M. Mendeloff, *The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation at OSHA 121* (1988) (“[Occupational Safety and Health Administration (“OSHA”)] leaders [had to] hesitate about issuing standards for the

Commission.¹⁶¹ No matter what the cause, the consequences are clear: rulemaking is taking longer and longer to complete and fewer and fewer rules are being promulgated.¹⁶² Notice and comment rulemaking now takes at least five years and tens of thousands of staff hours to complete,¹⁶³ and there is at least a fifty percent chance that rules that result from this process will be rejected in some court on some ground.¹⁶⁴

Democracy index rulemaking might ease the burden that courts place on agencies, because it would increase the number of instances where they would face more relaxed judicial review, thereby taking care of the ossification problem at some level (the main annoyance for agencies, and therefore probably the main incentive they would respond to) while also encouraging participation. But it would also resolve ossification issues without losing focus on the various reasons why ossification has come to exist in the first place: accountability concerns.¹⁶⁵ In the context of the analytical demands placed on agency rulemaking, this accountability concern is directed at certain preferred substantive ends. Executive control over the administrative process provides a sort of political check on agencies, and judicial control ensures that agencies stay within substantive boundaries and show due respect for certain procedures.¹⁶⁶ The question,

same reason that graduate students postpone taking their comprehensive exams: They aren't sure that they will pass."); *see also* Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 *Geo. L.J.* 1231 (1984); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 *Yale J. on Reg.* 1 (1989).

160. Barry Boyer, *The Federal Trade Commission and Consumer Protection Policy: A Postmortem Examination*, in *Making Regulatory Policy* 93, 102 (Keith Hawkins & John Thomas eds., 1989) (arguing that "the courts reviewing trade regulation rules not only failed to create a strong incentive for high-quality data and analysis; in some respects, they seemed to reward poor empirical analysis").

161. Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 *Admin. L. Rev.* 7 (1991).

162. Carnegie Comm'n, *Risk and the Environment: Improving Regulatory Decision Making* 108 (1993) ("It is not surprising that the EPA claims that informal rulemaking procedures take approximately five years to complete, that the FTC has completed only a handful of rulemaking procedures in the past decade or two.").

163. *See generally* McGarity, *supra* note 144; Paul Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 *Admin. L. Rev.* 453 (1995).

164. Schuck & Elliott, *supra* note 109, at 1022.

165. McGarity, *supra* note 144, at 530 (generally downplaying accountability concerns and calling for trusting agencies); Pierce, *supra* note 161, at 22-27 (same).

166. As an example of the accountability goals promoted by judicial review, consider the arguments made by Pierce about the Federal Energy Regulatory Commission ("FERC"). *See* Pierce, *supra* note 161. The hard look review used by courts stimulated a deeper analysis of the costs of transition to a market-based system, making the activities of FERC more in line with the ways in which Congress wanted FERC to reform energy markets. *See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 *Wis. L. Rev.* 763, 764-65; *cf.* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824j(d)(1)(C) (2000). *But see* Pierce, *supra* note 161, at 18-22 (criticizing this approach). The difficulty that FERC had in convincing courts that it had sufficiently accounted for transaction costs in deregulating natural gas made FERC consider the possibility of making reforms incrementally via the process of

then, is how to balance these accountability concerns with a concern that agencies are no longer able to pursue effective regulatory agendas. Democracy index rulemaking might help adequately balance these concerns.

For instance, removing the analytical requirements that current law places on agency actions would clearly ease the burden on agencies and allow them to pursue their regulatory agendas with greater vigor. Democracy index rulemaking would allow agencies to decide for themselves what sort of analytical interests to take account of in the process, rather than facing the current system whereby they both have to abide by the analytical requirements and face potentially stringent judicial review. Agencies could use a fairly comprehensive analytical process, as they do now, and face minimal judicial review, or they could use a thinner analytical process, and face more rigorous judicial review.

As a result of the requirements that agencies face, they have increasingly turned to other forms of making policy.¹⁶⁷ This is unfortunate because rules are in many instances preferable to other forms of agency policy making. Parties are more likely to comply with rules in the absence of specific enforcement actions. Rules are prospective, clearly identifiable, and generally clearer in their expectations. As the administrative state has continued to develop, rules have become more important as adjudication-based agencies (such as the ICC and FTC)¹⁶⁸ become less common and other agencies, that seemed to be more natural rulemaking agencies (EPA or OSHA), become more common, even as those agencies that may have been more suited to performing adjudications (Social Security Administration) started using rules as a means of agency governance.¹⁶⁹ Democracy index rulemaking would give agencies incentives to again use

approvals of mergers. *Energy Servs., Inc.*, 58 F.E.R.C. 61,234 (1992), *rev'd on other grounds*, *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173 (D.C. Cir. 1994). Even Mashaw and Harfst, despite their findings about the effects of judicial review, did not believe that courts should substantially abandon judicial review of agency action. Mashaw & Harfst, *supra* note 153, at 225-28. Rather, they believed in changing the timing of judicial review. *Id.* at 245-47; *see also* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, *Law & Contemp. Probs.*, Spring 1994, at 185, 233-38 (making the same argument).

167. *See* Carnegie Comm'n, *supra* note 162, at 106-07 (stating that "many agencies today tend to skirt the informal rulemaking process, turning far more frequently than in the past to methods for promulgating policies that are even less formal," and that "[a]n agency can make policy . . . in providing the reasons for its decision in an individual case . . . [or] in informal opinions, operating manuals, or even press releases"); Pierce, *supra* note 96, at 82 ("All agencies rely on policy statements and interpretative rules to some extent; at many agencies, these less formal documents account for 90 percent or more of the agency's 'rules.'" (citing Peter L. Strauss, *The Rulemaking Continuum*, 1992 *Duke L.J.* 1463)).

168. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1224-25, 1227-28 (1986).

169. Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 *BYU L. Rev.* 461, 465-67 (describing a five-step sequential evaluation process for disability, the listing of numerous impairments that are considered per se disabling, and the use of "grids" to determine the availability of jobs for claimants with standard exertional impairments and vocational factors).

rulemaking as a means of policy formation because it provides agencies a greater chance of seeing their rule become law, while other forms of agency policymaking would still face more stringent (even if not perhaps especially stringent) forms of judicial oversight.

On the other hand, democracy index rulemaking would ensure that the kinds of considerations that the analytical requirements forced agencies to consider would likely be examined. If the agency decided to use a broadly participatory process, it would by definition be considering the interests of various groups and individuals. If the agency decided not to use a broadly participatory process, then courts would, during the process of judicial review, be forced to inject these kinds of considerations into its analysis of the final agency action.

At the least, democracy index rulemaking would lead to a more equitable consideration of relevant interests. In perhaps one of the clearest examples of the application of capture theory, the analytical requirements prioritize the concerns of particular groups: environmental groups,¹⁷⁰ the small business community,¹⁷¹ the business community in general,¹⁷² state interests,¹⁷³ and traditional values groups.¹⁷⁴ Democracy index rulemaking would require—if an agency wants to receive deliberative deference—that it take account of all relevant interests and groups, thereby not giving particular groups preferences.

C. Mitigation of the Traditional Participatory Costs

Participation in administrative action usually comes at significant cost. For one thing, it may interfere with the authority of the agency to set and pursue its own agenda. Take citizen suits, for instance. These were originally intended to counteract potential agency capture, and to provide citizens with a means of obtaining enforcement of the laws on their own.¹⁷⁵ This is why many of those whom might be sympathetic to democracy index rulemaking—other civic republican administrative law scholars—have

170. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2000).

171. Regulatory Flexibility Act, 5 U.S.C. § 602(a) (2000).

172. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note at 638-42 (2000); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *repealed by* Exec. Order 12,866, 3 C.F.R. 638, 649 (1993), *reprinted in* 5 U.S.C. § 601 note at 642 (2000) (requiring analysis of potential takings of private property).

173. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-1538, 1571 (2000); Exec. Order No. 12,612, 3 C.F.R. 252 (1987), *repealed by* Exec. Order No. 13,132 § 10(b), 3 D.F.R. 206, 211 (1999) *reprinted in* 5 U.S.C. § 601 note at 6461 (2000) (requiring consideration of “federalism” concerns).

174. Exec. Order No. 12,612, 3 C.F.R. 252 (1987), *repealed by* Exec. Order No. 13,132 § 10(b), 3 D.F.R. 206, 211 (1999) *reprinted in* 5 U.S.C. § 601 note at 6461 (2000) (requiring an analysis of the impact of regulations on family considerations).

175. *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, *Law & Contemp. Probs.*, Autumn 1991, at 311, 334 (observing that Congress established citizen suit provisions in each of the environmental statutes to prevent agency capture).

found citizen suits to be a valuable tool of legal enforcement.¹⁷⁶ Yet citizen suits pose a real danger to agency autonomy, as demonstrated by the practice of citizen suits pursuant to the Clean Water Act.¹⁷⁷ The Clean Water Act creates a statutory standard of zero discharge as a means of eliminating all pollution, not just excessively harmful pollution.¹⁷⁸ Given this standard, it would be nearly impossible for the EPA to fully enforce the legal regime, so citizen suits have become a major means of enforcing the Clean Water Act.¹⁷⁹ If a citizen wins such a lawsuit, then the EPA usually faces some sort of coercive relief—an order to start again with its rulemaking process, an order to pay damages, or so on.

This may have its good features. Organizations such as the Atlantic Legal Foundation, which may serve a valuable role in the administrative process, use the Clean Water Act to target large firms whose past practices indicate that they might be likely to pollute again.¹⁸⁰ The interest representation approach might view these citizen suits positively, because they provide a means of participation for potentially disenfranchised groups. But consider the costs: an organization bringing a citizen suit under the Clean Water Act would have substantial authority over an agency program, potentially even having the power in court to invalidate an entire agency regulatory regime. By contrast, democracy index rulemaking would make participation by these groups encouraged and therefore more likely, but would not provide such groups with a veto power over agency action.

Participation in administrative action also might be problematic because it might overwhelm agencies with information.¹⁸¹ In democracy index

176. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 168 (1992) (suggesting that *Lujan*, properly understood, provides Congress with the flexibility to create a system of bounties for citizen enforcement or to create property rights in the benefits provided by regulatory statute).

177. 33 U.S.C. § 1365 (2000).

178. *Id.* § 1251(a)(1) (“[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated . . .”).

179. Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in *Environmental Politics: Public Costs, Private Rewards* 105 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992). Greve writes the following:

An analysis of 29 cases between 1983 and 1985 showed that more than 65 percent of the settlements [under Clean Water Act citizen suits], totaling slightly under \$1,000,000, went to environmental groups. Another analysis of 30 Clean Water Act citizen suits against alleged polluters in Connecticut between 1983 and 1986 showed that the total settlement of more than \$1.5 million included \$492,036 in attorney's fees to the [National Resources Defense Council] and the Connecticut Fund for the Environment (who had brought the vast majority of these cases) and \$869,500 to the Open Space Institute, an organization established by and affiliated with the NRDC. No fines were paid to the Treasury in these cases.

Id. at 110.

180. Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 Ga. L. Rev. 337, 402 (1988).

181. Herbert A. Simon, *Reason in Human Affairs* 94 (1983). Christopher Schroeder has written that “comprehensive rationality . . . reduces choice to an analysis of the efficacy of available alternatives to achieve predetermined goals . . . inevitably entail[ing]

rulemaking, though, this seems less likely to happen. Agencies will have complete and essentially unreviewable control over the precise notice and comment process that it wants to utilize, meaning that it is less likely to pick a path that would result in information overload. In the instance of DNC, the fact that small groups must eventually submit formal statements to the agency means that the agency will be dealing with discrete documents cataloguing the sentiments of relevant participants.

III. CRITICISMS AND RESPONSES

Many might worry that democracy index rulemaking would interfere with the traditional distribution of power among the central players in administrative law: agencies, courts, Congress, and the President. This claim is mostly untrue, because the main systems of oversight and influence that these institutions currently use would generally remain in place. The ways that democracy index rulemaking changes these systems of oversight and influence (as in the case of analytical requirements imposed by Congress or the President) leads to a more desirable regime of administrative law.

A. Agencies

It might be argued that, pursuant to democracy index rulemaking, agencies would lose substantial autonomy, and this would be quite undesirable. But, no matter how the agency responds to the series of incentives created by democracy index rulemaking, this statement is almost certainly false. The agency faces absolutely no new obligations of any sort. If the agency (successfully) pursues deliberative deference with any kind of frequency, then it will find its decisions treated with great deference under democracy index rulemaking, so if anything it would find its relative power increased. If the agency engages NNC but due to a dearth of comments finds that it is spending its resources to obtain deliberative deference and is not receiving such deference, it can use the deliberative deference safe harbor of DNC instead.

If the agency decides to use NNC and decides not to aggressively pursue many comments, then it will receive precisely the same amount of deference it receives under the current rulemaking regime: arbitrary and capricious deference. If this were the result, the agency would be just as powerful as it is under the current regime of administrative law. If the agency decides to use NNC and is successful in attracting many comments, then the agency will likely have even more autonomy and authority than it does pursuant to the current regime, because under the “clear and substantial error” standard of review it will be much more likely to have its legislative rule upheld in court.

simplification, both in the specification of goals and in the modeling methods employed to predict the extent to which alternatives achieve them.” Christopher H. Schroeder, *Rights Against Risks*, 86 Colum. L. Rev. 495, 502 n.29 (1986) (citation omitted).

If the agency decides to use DNC, it is unclear whether it would initially have to commit more resources to rulemaking than it currently commits using NNC. Take the closest current analogue to DNC, negotiated rulemaking. Cary Coglianese has argued that “[n]o matter what one concludes about the impact of negotiated rulemaking on the duration of the regulatory process, negotiated rulemaking still demands more time and effort on the part of the participants than does conventional rulemaking.”¹⁸²

Philip Harter, the original intellectual architect of negotiated rulemaking, has himself noted that “[r]eg negs are intense activities: participating in one can be expensive and time consuming.”¹⁸³ One study has indicated that negotiated rulemakings require twice as much in terms of organizational resources compared to normal rulemaking.¹⁸⁴

However, as an empirical matter, it may not be true that DNC is more problematic in terms of the expenditure of resources and speech with which a rule can be promulgated.¹⁸⁵ Again, turning to negotiated rulemaking as the closest analogue, even if negotiated rulemaking requires an intense

182. Coglianese, *supra* note 129, at 415; *see also* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. Envtl. L.J. 60, 109 (2000) (“This is one claim about reg neg that has no counterclaim.”); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 Wm. & Mary L. Rev. 411, 457 (2000) (stating that “all commentators agree that negotiated rulemaking is an intensive process requiring a concentrated devotion of resources by the agency and private negotiation participants”).

183. Philip Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 Duke L.J. 1389, 1420-21 (1997) (stating that negotiated rulemaking “is unquestionably an intense process”); *see, e.g.*, Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* 190 (1994) (stating that negotiated rulemaking demands an “extraordinary commitment of time” from individuals and that “negotiation sessions themselves are demanding activities that can wreak havoc with normal work responsibilities”); Daniel Fiorino, *Regulatory Negotiation as a Form of Public Participation, in Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* 223, 232 (Ortwin Renn et al. eds., 1995) (“Although negotiation may not take more time overall than a conventional rulemaking, the time demands are more concentrated.”); Freeman & Langbein, *supra* note 182, at 97 n.176 (noting the “resource-intensive nature of reg neg”); Steven Kelman, *Adversary and Cooperationist Institutions for Conflict Resolution in Public Policymaking*, 11 J. Pol’y Analysis & Mgmt. 178, 200 (1992) (noting that “service in regulatory negotiations has proven to be quite time-consuming compared to the adversary process, which creates a problem for organizations with limited resources”); Office of Policy, Planning and Evaluation, Envtl. Prot. Agency, *An Assessment of EPA’s Negotiated Rulemaking Activities* (1987), *reprinted in* Reg. Neg. Sourcebook, *supra* note 36, at 23, 30 (noting that “EPA managers who have been the Agency’s negotiators have devoted far more time to the negotiations in which they were involved than they ordinarily would spend on a single rulemaking effort”); Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 Envtl. L. Rep. 10,647, 10,651 (1992) (“A major disadvantage of the reg-neg process is that it can be extremely resource-intensive and stressful.”).

184. Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. Pub. Admin. Res. & Theory 599, 620 (2000).

185. Coglianese, *supra* note 129, at 415 n.134 (“As discussed . . . the evidence does not support such a conclusion.”).

agency commitment, it may result in a rule more quickly than NNC,¹⁸⁶ which the agency presumably would like, and because this process is quicker it ultimately might result in less agency expenditure of resources.

The noted study of negotiated rulemaking conducted by Cornelius Kerwin and Patrick Furlong found that at the EPA regular legislative rules took an average of 3.0 years (1108 days) to complete, while the four negotiated rules took only 2.1 years (778 days).¹⁸⁷ This data led Kerwin and Furlong to conclude that negotiated rulemaking would be “more expeditious”¹⁸⁸ than normal rulemaking, which echoed the findings of a National Performance Review Report on this subject.¹⁸⁹ Because DNC does not require a clear consensus, as negotiated rulemaking does, it is likely that DNC would move along even more rapidly, conferring a meaningful benefit.

Even assuming, though, that DNC was resource intensive and potentially more time consuming than negotiated rulemaking, it still does not fundamentally interfere with agency autonomy. Agencies will have selected, with clear knowledge of the consequences, this particular form of rulemaking. And, more fundamentally, even if it takes more time and more resources to use this kind of process, agencies have a much greater chance that their rule will be upheld in court than they currently enjoy. It seems rather clear that, even if it requires slightly more money and slightly more

186. The EPA's first study of its initial regulatory negotiations concluded these rules were promulgated more quickly and at less cost. Reg. Neg. Sourcebook, *supra* note 36, at 29. The EPA calculated that regulatory negotiations took half the time and money it would have to expend otherwise. *Id.* at 29, 32.

187. Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. Pub. Admin. Res. & Theory 113, 134 (1992).

188. *Id.* at 124.

189. Office of the Vice President, Accompanying Report of the National Performance Review: Improving Regulatory Systems 32-33 n.8 (1993) (citing Kerwin & Furlong, *supra* note 187, at 124). Cary Coglianese has disagreed with this assessment:

In contrast to the eleven-month time savings suggested by Kerwin and Furlong, my analysis of all of EPA's negotiated rules suggests (at most) little more than three months savings compared with the rules issued in the period studied by Kerwin and Furlong, a difference which could well be accounted for by choices of measurement. When the EPA's three pending negotiated rules are added, the time savings between the two procedures disappears altogether. If we were to assume, for sake of estimation, that the EPA had promulgated all three pending rules at the end of December 1996, the average time for promulgating negotiated rules at EPA would increase to 3.1 years (1129 days), three weeks longer than the average reported by Kerwin and Furlong for all EPA rules.

The whole of the available evidence on the time span of EPA's negotiated rules markedly contrasts with the claims of considerable time savings attributed to negotiated rulemaking. Of course, any comparison of negotiated and conventional rules may have its limits because the time it takes to develop rules is surely affected by factors other than just the use or nonuse of formal negotiated procedures. Even though the EPA has conducted the most negotiated rulemakings of any agency, it still has only promulgated 12 rules (and has only three others pending).

Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255, at 1283-85 (1997).

time initially, an agency is much less likely to have to go through the rulemaking process again to try to create a new rule, which will result in saved resources.

Those who would argue that agencies responding to democracy index rulemaking incentives would be subverting the technocratic rationales for the existence of agency rulemaking are misunderstanding the nature of public participation and what it contributes to democracy index rulemaking. For one thing, as we know from research into forms of jury activity, average citizens do not generally reach different results than do legal professionals in evaluating complex facts. We know from empirical research into civil juries that average-citizen jurors can be competent as fact finders.¹⁹⁰ Even in complex cases—cases that might involve a degree of technical complexity similar to many agency determinations—jury decisions have overlapped with expert determinations.¹⁹¹ True, many if not most agency determinations really are not “legal” determinations, but the complex factual issues that must be resolved in these challenging civil jury trials are not that different. Beyond that, because the agency has complete control over notice and comment pursuant to democracy index rulemaking, it might be able to manipulate the system to give it more helpful information, furthering its technocratic expertise.

In the case of DNC, this continued technocratic capacity would be present while not undermining the participatory virtues of DNC. The precise manner in which DNC is designed might mitigate concerns that small group members will defer to the expertise of the agency, as displayed by the agency briefing book and the initial agency presentation to the larger group. In one study of seven regimes of deliberative democracy, for instance, Mark Button and Kevin Mattson found that participants deferred to experts quite a bit.¹⁹² With DNC, though, because small groups would have their own counsel and would meet without the agency members always present, members of these juries should avoid excessive deference to perceived expertise, a more significant problem (because of the hyper-technical nature of many agency rules) in the context of democracy index rulemaking than in the context of the Deliberation Day discussions (which involve major national political issues).

Some might worry that using DNC would create an unnecessary degree of polarization within the agency, or, at a minimum, within the deliberating small groups if the agency uses DNC. As Cass Sunstein has argued, “[g]roup polarization is among the most robust patterns found in

190. See Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in *Verdict: Assessing the Civil Jury System* 181, 233-35 (Robert E. Litan ed., 1993); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 *Ariz. L. Rev.* 849, 898-99 (1999).

191. Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards* 49-173 (1995).

192. Button & Mattson, *supra* note 128, at 610.

deliberating bodies.”¹⁹³ Sunstein has further argued that the deliberative settings envisioned in DNC “do not polarize, at least not systematically; this result is undoubtedly a product of the distinctive setting, in which materials are presented on each issue, with corresponding claims of fact and value.”¹⁹⁴

This is because DNC discussions are “overseen by a moderator”¹⁹⁵ and are “highly diverse.”¹⁹⁶ Participants receive “a set of written materials that [attempt] to be balanced and that [contain] detailed arguments for both sides. The likely consequence would be to move people in different directions from those that would be expected by simple group discussion, unaffected by authoritative external materials.”¹⁹⁷ Because small group members can submit questions to outside experts, there is not the problem that many regular juries have of being locked into a secluded and therefore polarizing conversation. Participants do vote, and may disagree, but their votes are secret. There could even be disagreement; it is conceivable that the final small group report could indicate why some members of the group felt *x*, but why some members of the group believed not *x*. Finally, the fact that there is not a clear binary answer that the group must eventually reach (even if it must vote on a series of issues along the way), but rather must submit a general evaluation of a rule, means that the group will most likely not polarize.

Those who might view agencies more cynically might have opposite concerns; agencies might manipulate democracy index rulemaking to receive deference for unwise and possibly rent-seeking rules, and thereby become more powerful. As a matter of institutional design, though, this seemingly would be quite difficult. If the agency used NNC and received any kind of deference it would be because the agency received many comments (and many helpful and probing comments), to which the agency would have to respond, or have its rule invalidated (even using deliberative deference).¹⁹⁸

If the agency used DNC, one might worry that the agency would convene these juries and manipulate their operation, possibly to secure approval for their rules, or, in the alternative, not secure the approval of the jury for the rule, but ignore the jury suggestion and provide some sort of suggestion. The ALMs—and the presence of outside counsel retained by the juries—would hamper the capacity of the agency to manipulate jury deliberations. The hard look review of agency departure from jury suggestions would

193. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 85 (2000).

194. *Id.* at 73 n.6.

195. *Id.* at 117.

196. *Id.*

197. *Id.*

198. See *Int'l Harvester v. Ruckelshaus*, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring) (“[An] agency [must] set forth with clarity the grounds for its rejection of opposing views.”).

ensure that agencies could not, in the absence of a compelling reason, ignore the jury suggestions.

B. *Judicial Review*

It may be argued that democracy index rulemaking does not really provide agencies with any true incentive at all, because in return for a potentially more laborious rulemaking process they will be presented with a classic non-reward: a change in the standard of judicial review. Perhaps standards of review do not matter because, as Richard Pierce once wrote, “the fate of a major agency policy decision reviewed by the D.C. Circuit will vary with the composition of the panel that reviews the agency action.”¹⁹⁹

This statement resembles (if not exactly replicates) the “attitudinal model” that political scientists sometimes use to study judicial decisions.²⁰⁰ We have also seen this concept in administrative law scholarship, most notably in the study of D.C. Circuit decisions conducted by Richard Revesz.²⁰¹ Of particular relevance to democracy index rulemaking, Revesz found that the party that appointed a judge was an important factor in predicting whether that judge took a “hard look” at the problem the court was addressing.²⁰² Studies of judicial review in the aftermath of *Chevron*,²⁰³ however, seem to indicate that the standard of review in administrative law does matter.²⁰⁴ Even if standards of review did not affect cases as a legal matter, consider the political pressure brought to bear on a court by a deliberative deference-inducing agency process: many powerful interests and members of the public coalescing in order to participate in, and eventually agree, to an agency rule. A court does not need a lenient standard of review—and one need not be a legalist—to believe that a court is more likely to defer to the agency in that context.

199. Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, 300.

200. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. Rev. 251, 252-53, 265 (1997).

201. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1719 (1997) (concluding, in part, that “ideology significantly influences judicial decisionmaking on the D.C. Circuit”). Judge Harry T. Edwards of the D.C. Circuit criticized the Revesz study. Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335 (1998).

202. Revesz, *supra* note 201, at 1729-31.

203. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

204. See Schuck & Elliott, *supra* note 109, at 1060. Later articles seem to have modified this conclusion. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 59 (1998). See generally Elizabeth Garrett, *Legislating Chevron*, 101 Mich. L. Rev. 2637, 2645 (2003) (“Several commentators have observed after conducting various studies of the case law that the effect of *Chevron* on judicial outcomes has not been as significant as one might have expected, although many have found some increased level of judicial deference to agency interpretations.”).

Assuming that standards of review do matter, one might argue that agencies promulgating legislative rules already receive substantial deference. But we know from Schuck and Elliott's study that the standards of review currently used by courts are not fully deferential. If standards of review do matter, and if they could be more relaxed, do agencies truly care about them? The Mashaw and Harfst study, as much as any ossification study, showed how the activities of agencies are thwarted by courts, so it is hard to imagine that the answer is no. In any event, the enticement of no pre-enforcement review plus a more deferential standard of review might do together what either inducement could not do on its own.

What about the argument that democracy index rulemaking would create standards of review which are either too ambiguous (in the case of NNC, because it is a sliding scale) or too determinate (in the case of DNC)? In the context of NNC, some might enter the debate about rules and standards²⁰⁵ and argue that judicial review would be unclear because it would not be fixed. A floating standard of review would be used to analyze the possibility of pre-enforcement review and eventual review. But this standard, while floating, would be fairly easy to ascertain; it would involve the simple exercise of counting the number of comments submitted, discounted by the range of parties submitting these comments. Because administrative law relies so much on the activities of perhaps only two courts (the D.C. Circuit and the Supreme Court), over time even these standards would begin to adopt rule-like qualities. And, if the agency found these standards to be troubling and hard to predict, it could always opt either for NNC rulemaking with no deliberative deference or for DNC and guaranteed deliberative deference.

205. See Reed Dickerson, *The Interpretation and Application of Statutes* 49-50 (1975) (criticizing the use of rules); Mark Kelman, *A Guide to Critical Legal Studies* 15-63 (1987) (introducing the debate); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 Va. L. Rev. 1217 (1982) (analyzing rules and standards in the commercial context); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65, 75 (1983) (noting that using rules may help avoid litigation); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423, 458 (1988) (stating that rules make it harder to draft statutes); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992) (discussing rules versus standards); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 Or. L. Rev. 23 (2000) (using behavioral science analysis to study rules versus standards); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989) (stating that rules are essential to the idea of the "rule of law"); Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985) (highlighting and criticizing the controversy between rules and standards); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L.J. 819, 841-42 (criticizing the use of rules in drafting administrative law statutes); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. Cal. L. Rev. 585, 599 (1994) (arguing that rules almost inevitably become "impossibly cumbersome and complex"); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 62-69, 95, 98 (1992) (discussing debate on the Court about rules versus standards); Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 956-57 (1995) (outlining major rules versus standards arguments).

Even more fundamentally, of course, it is hard to argue that using this floating standard of review would make judicial review of agency action less determinate than the current system of review. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,²⁰⁶ the Supreme Court outlined a fairly straightforward list of four parts of an agency decision that would be evaluated in ruling on the agency action.²⁰⁷ As Sidney Shapiro and Richard Levy have documented, this clear standard was not clearly and consistently applied in later cases.²⁰⁸ Courts and agencies survived for decades, even before any attempts were successful to bring rules into judicial review, and this is not even mentioning the age of administrative common law that preceded the APA. Before *Chevron*, for instance, there was *Skidmore v. Swift & Co.*²⁰⁹ and its standards-like system, which stated that the standard of review would be determined by agency consistency with prior interpretations, the degree of expertise the agency brought to the issue, and other contextual issues.²¹⁰ These considerations may continue to be relevant in the supposedly rules-like system of *Chevron*,²¹¹ leaving us still in a standards-like system.

C. Institutional Political Control

What would democracy index rulemaking do to the regime of institutional political oversight that is at the heart of administrative law? Take Congress, for instance. On one hand, it is possible that Congress has

206. 463 U.S. 29 (1983).

207. *Id.* at 43 (stating that reviewing courts should examine whether the agency analyzed issues that Congress wanted it to, whether the agency ignored an important part of the regulatory problem, whether the agency's explanation was consistent with the evidence, and whether the agency's decision was objectively implausible).

208. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 Duke L.J. 1051, 1067 (1995). Shapiro and Levy note the following:

In the fifty-six cases that we surveyed, the Court cited *State Farm* only fifteen times in applying the arbitrary and capricious standard to an adjudicatory or rulemaking decision, and only four of the fifteen opinions mention the *State Farm* criteria.

Because the Supreme Court has not promoted use of the *State Farm* criteria, the definition of "arbitrary and capricious" remains relatively indeterminate. In the 118 cases that we surveyed, circuit courts cited *State Farm* only forty-five times in applying the arbitrary and capricious standard to an adjudicatory or a rulemaking decision, and only thirteen of the forty-five cases mentioned the *State Farm* criteria.

Id. (footnotes omitted).

209. 323 U.S. 134 (1944).

210. *Id.* at 140.

211. The considerations that *Skidmore* stated are relevant to the standard of review might be relevant at the second stage of *Chevron*. See, e.g., *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 416-20 (1993) (discussing how the administrative agency had adopted "a variety of approaches" to the question over the years, and noting that the lack of consistency was relevant but not dispositive to the reasonableness of the interpretation); *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (mentioning that the particular agency position had been "consistently held" in finding that it was reasonable).

exercised no control over administrative agencies in the first place,²¹² so democracy index rulemaking could not interrupt something that does not even exist. When Congress has tried to use procedures to control agencies—such as the legislative veto—it eventually utilized these procedures so infrequently that they became ineffective.²¹³

Assuming this view is wrong, and that the more contemporary view that a system of “congressional dominance”²¹⁴ or something less drastic is a reality, Congress still would have the same powers of oversight pursuant to democracy index rulemaking that it did under the old regime. Congress would still be able to monitor the actions of administrative agencies at a formal and informal level.²¹⁵ Congress would still be able to hold hearings²¹⁶ and initiate investigations, and by so doing would be able to communicate to the agency how Congress felt about particular issues. The possibility that Congress could cut funding—or require or prevent the agency from taking action—would still serve as real threats to an agency, which may decide to initiate or not initiate a rule as a result, or may choose a particular rulemaking form because of these threats. In the context of democracy index rulemaking, this might mean that agencies would not initiate rulemaking and thereby even raise the possibility of popular influence. If they did initiate rulemaking, and particularly if they used

212. See, e.g., Lawrence C. Dodd & Richard L. Schott, *Congress and the Administrative State* 2 (1979) (“Although born of congressional intent, [the administrative state] has taken on a life of its own and has matured to a point where its muscle and brawn can be turned against its creator.”); James Q. Wilson, *The Politics of Regulation*, in *The Politics of Regulation* 357, 391 (James Q. Wilson ed., 1980) (“Whoever first wished to see regulation carried on by quasi-independent agencies and commissions has had his boldest dreams come true. The organizations studied for this book operate with substantial autonomy, at least with respect to congressional . . . direction.”). Legal scholars seem to share this view. See, e.g., Jerry L. Mashaw et al., *Administrative Law: The American Public Law System* 160 (4th ed. 1998) (noting that some “doubt whether existing connections between Congress and administrative bodies are effective means for accomplishing any of several plausible objectives, including assuring fidelity to congressional intent, preserving the political responsiveness of administration, or dispassionately assessing the strengths and weaknesses of regulatory programs”).

213. Prior to the Supreme Court’s invalidation of the legislative veto technique in *INS v. Chadha*, 462 U.S. 919 (1983), Congress had incorporated these provisions into at least 300 statutes. *Id.* at 944. It used these provisions, though, only about 230 times. See Richard B. Smith & Guy M. Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983); see also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469, 483 (1985) (“[T]he putatively systematic congressional review that the legislative veto power implies was chimerical; any such review inevitably was sporadic and haphazard.”).

214. Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. Pol. Econ. 765, 767 (1983); see also Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243, 274 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. Pol. Sci. 165, 176 (1984).

215. See Joel D. Auerbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* 14-15, 130-44 (1990).

216. See Morris S. Ogul, *Congress Oversees the Bureaucracy* 155 (1976) (analyzing the role of hearings as a form of legislative oversight).

DNC, agencies would still have this congressional control and power in mind when they decided what rule to propose to juries, and whether to accept the suggestions of these juries.

If this was not enough, the Congressional Review Act²¹⁷ would still be in effect as a means of asserting congressional control over agency action.²¹⁸ The agency acting under democracy index rulemaking would still have to submit reports to the comptroller general and to each house of Congress about legislative rules.²¹⁹ The agency would still have to provide Congress with information about this rule,²²⁰ and Congress would still have the capacity to disapprove the rule within sixty days of the receipt of the agency report.²²¹ Congress would still have the power to request the comptroller general to conduct an independent examination of the rule before deciding if it wants to overturn the rule.²²² Congress could still alter notice and comment by passing revisions of the APA, or more realistically by changing notice and comment procedures in agency-enabling or re-authorization statutes.

Likewise, the executive would still have many of its traditional powers over the administrative state. The executive would have substantial control over agency appointments, formal and informal control over budgets and general agency rules, and so on. And even though analytical requirements—requirements that the agency was required to follow in the previous regime—would be reduced, if an agency issues a rule, it might give that rule a form of legitimacy because of its popular pedigree, thereby giving the executive branch potentially greater power by giving it the chance to issue rules with greater perceived legitimacy. The President could stand forward and declare that the rule had a form of popular legitimacy, and that was why the administration supported the rule. Given that this rule would likely face a less problematic legal path, this less problematic political path would be a welcome alternative.

Recall also that one of the items that courts would be examining when they review administrative actions under democracy index rulemaking would be whether the agency has followed what Congress and the executive have said that the agency should do. In the context of negotiated rulemaking, Bill Funk has argued that negotiated rules largely ignored the desires of the relevant statutes.²²³ Funk argued instead that negotiated rules

217. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 857, 868-74 (1996) (codified at 5 U.S.C. §§ 801-808 (2000)).

218. See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95, 99-102 (1997); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking? A Brief Overview, Assessment, and Proposal for Reform*, 51 Admin. L. Rev. 1051, 1053-57 (1999).

219. 5 U.S.C. § 801(a)(1)(A)-(B).

220. *Id.*

221. *Id.* § 802(a).

222. Truth in Regulating Act of 2000, Pub. L. No. 106-312, 114 Stat. 1248 (2000) (codified at 5 U.S.C. § 801 (2000)).

223. See William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 *Env'tl. L.* 55, 97 (1987).

reflect the interests of powerful interest groups.²²⁴ Funk might argue that the same might happen with the introduction of the democracy index system. Yet Funk's article, in the context of its discussion of negotiated rulemaking and in the context of its application to the democracy index system, ignores one simple fact: Courts would still review rules to ensure compliance with congressional wishes. Indeed, it is the potentially limited intrusion on the role of Congress and the President that makes the democracy index system one that could actually be passed, in contrast to some of the other institutional design ideas of other civic republican scholarship.²²⁵

It is true that, unlike with agency and congressional control, many of the pillars of executive control over the administrative state would be dismantled by democracy index rulemaking. Starting with Executive Order 12,291, issued during the first thirty days of the Reagan Administration, a greater portion of executive control over agency action has been centralized in the OMB.²²⁶ These orders required a "regulatory impact" analysis of rules, including a cost-benefit analysis.²²⁷ They gave OMB the capacity to prevent the publication of a final rule.²²⁸ Democracy index rulemaking would largely do away with many of the analytical requirements that are part of executive orders.

As a practical matter, this will not make much difference. Even at the peak of the use of this power, only one out of thirty rules that OMB even reviewed was returned to the agencies or otherwise withdrawn because of OMB action, even at the peak of the use of this power.²²⁹ The analytical requirements issued in these executive orders would still be in place during many NNC procedures because of the sliding scale of analytical requirements. Indeed, it is very possible that democracy index rulemaking would increase executive power.

224. *Id.* at 61.

225. Croley, *supra* note 31, at 81. Croley states that civic republican theory provides no account of how parties emerge to engage in regulatory deliberation. How do they overcome the organizational barriers which [are] identified? But if collective action is in fact difficult, the civic republican theory risks dismissal as naive or panglossian. To be sure, a civic republican theorist might construct some account of collective action according to which ideological motivations provide a catalyst to group behavior. As it stands, however, the theory provides no such account.

Id.

226. Exec. Order No. 12,291(3), 3 C.F.R. 127, 128-130 (1981), *repealed by* Exec. Order 12,866, 3 C.F.R. 638, 649, *reprinted in* 5 U.S.C. 601 note at 642 (2000).

227. *Id.*

228. *Id.* § 3(e)-(f), 3 C.F.R. 129-30.

229. OMB probably achieved its greatest influence in the early to mid-1980s. By the end of that decade, with enthusiasm for deregulation on the wane, agencies appear to have regained strength in their negotiations with OMB. *See* W. Kip Viscusi, *Fatal Tradeoffs: Public and Private Responsibilities for Risk* 251, 259-60 (1992).

D. *Constitutional and Statutory Law Concerns*

Does democracy index rulemaking have any significant constitutional flaws? NNC (with deliberative deference) seems to be much less constitutionally problematic than DNC. DNC clearly involves the empowerment of a group of citizens, but it involves empowering these citizens as agents and parts of the government, like juries, and is therefore unproblematic. Even if we assumed that this was not like a jury system, but was instead a “double delegation”²³⁰ from a constitutionally identified branch of government, to an agency, to another institution, this would not be problematic. One might presume that private entities acting as public officials will still pursue their private interests,²³¹ and that empowering private groups raises accountability concerns because these private groups are not beholden to citizens or other parts of the government as true public officials would be.²³² This is why the two examples of the Court using the non-delegation doctrine to invalidate a statute both involved congressional delegation to private organizations or entities.²³³

These so-called “subdelegations” or “double delegations” are unproblematic if the agency still maintains effective control over the actions of the private entity. In *Sunshine Anthracite Coal Co. v. Adkins*,²³⁴ for instance, the Court upheld a federal statute that allowed coal producers to propose minimum prices to a public commission, because the public commission itself could decide whether to approve, disapprove, or modify them. In the case of democracy index rulemaking, if the agency used DNC, it would still have final authority over whether or not to adopt the comments proposed by the two juries, and the agency would have the initial authority to decide whether or not to use DNC in the first place.

Democracy index rulemaking would also not run afoul of existing statutory regimes. FACA has been cited by some as a provision that may make negotiated rulemaking problematic,²³⁵ and likewise might be cited as

230. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (calling delegation to private entities “legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business”).

231. *See, e.g., id. Compare* *Gibson v. Berryhill*, 411 U.S. 564 (1973) (noting due process problems with decision by state board, composed of independent optometrists, to revoke licenses of competitor corporate optometrists), *with* *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690 (3d. Cir. 1979) (validating self-regulation of the securities industry because regulated parties participated in the licensing process and a neutral government board oversaw the decisions), *and* *Rite Aid Corp. v. Bd. of Pharmacy*, 421 F. Supp. 1161, 1169-78 (D.N.J. 1976), *and* *Wall v. Am. Optometric Ass’n*, 379 F. Supp. 175 (N.D. Ga. 1974) (noting a due process violation by an industry disciplinary board because of the economic self-interest of the board members), *aff’d mem. sub nom.* *Wall v. Hardwick*, 419 U.S. 888 (1974).

232. *See, e.g., Hetherington v. McHale*, 329 A.2d 250 (Pa. 1974).

233. *Carter Coal Co.*, 298 U.S. at 238; *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

234. 310 U.S. 381, 399 (1940).

235. *See, e.g.,* Admin. Conference of the U.S., 1982 Report 41 (1983) (Recommendation 82-4) [hereinafter ACUS Recommendation 82-4] (“The Federal Advisory Committee Act

a law that would make democracy index rulemaking problematic. FACA creates a system of rules regarding the creation of “advisory committees,” but by ensuring that all meetings of DNC juries be open to the public,²³⁶ even with the negatives that would entail,²³⁷ democracy index rulemaking would satisfy one major FACA requirement. Also, if an agency decided to use DNC, it could submit its final design of the relevant juries to the General Services Administration, as currently required, thereby avoiding another major FACA hurdle.²³⁸ The system of picking representatives during DNC (requiring “fairly balanced” stakeholder representation, and using a random process for selecting general members of the public) would ensure that DNC meets the FACA “fairly balanced” requirement.²³⁹

Democracy index rulemaking also does not seem to cause any problems under the APA (aside from the obvious issues related to the new standards and systems of judicial review). If the agency decides to use NNC, then there are clearly no APA concerns. If the agency decides to use DNC, it would still have to submit the proposed rule for NNC.

In *Vermont Yankee Nuclear Power Corp. v. Nuclear Resources Defense Council*,²⁴⁰ the Court indicated that many parts of the language of section 553 of the APA²⁴¹ are mandatory (ceilings as well as floors).²⁴² Democracy index rulemaking, by so strongly encouraging the use of special and perhaps additional procedures (more efforts during NNC, or the use of DNC), repudiates *Vermont Yankee*. But *Vermont Yankee* was concerned about courts “impos[ing] [additional procedural rights] if the agencies have

(FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations.”).

236. See 5 U.S.C. app. § 10(a), at 5-6 (2000). But see Admin. Conference of the U.S. 1985 Annual Report 46 (1986) (Recommendation No. 85-5) (noting that FACA had not impeded effective negotiations, and that under judicial and agency interpretations of the Act, meetings could be held in private where “necessary to promote an effective exchange of views”).

237. See, e.g., Harter, *supra* note 9, at 84 (listing the virtues of closed meetings as: (1) they make it easier for negotiators to explain concessions to their constituents, thereby promoting concessions as a means to maximize their own goals; (2) parties are able to discuss confidential data that would be useful in the negotiations without fear of the information becoming public; (3) closed meetings promote a give-and-take atmosphere because the parties do not have to fear that a tentative position raised during the negotiations will be used against them in later, different negotiations; and (4) a public forum may cause some parties to maintain a hard, unyielding position); Perritt, *supra* note 120, at 1664-65 (“Open meetings would hamper good faith negotiations . . . because risks to individual participants of making concessions would be increased.”).

238. See 5 U.S.C. app. § 9, at 5; *id.* app. § 7, at 4; see also *id.* app. § 7 (providing for General Services Administration oversight of existing advisory committees). See generally ACUS Recommendation No. 82-4, *supra* note 235 (recommending enactment of legislation to “provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings . . . free of the restrictions of [FACA]”).

239. 5 U.S.C. app. 2, § 9, at 5.

240. 435 U.S. 519 (1978).

241. 5 U.S.C. § 553(b)-(c).

242. *Vermont Yankee*, 435 U.S. at 524 (Administrative Procedure Act rules regarding notice and comment “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures”).

not chosen to grant them.”²⁴³ Incentives are not the same thing as the kinds of impositions that *Vermont Yankee* was referencing.

CONCLUSION

It is hard to argue that, no matter what the institutional arrangement, public participation in administrative rulemaking is a bad idea. The founders of the administrative state did not think this, which is why they created the notice and comment procedure in the first place. The members of Congress do not think this, which is why they include seemingly greater and greater provisions for public participation in each new statute related to agency rulemaking. But the critics of public participation in administrative rulemaking are on to something: Public participation can have its costs.

Democracy index rulemaking tries to create a way around this, by encouraging rather than requiring public participation. This structure makes participation more likely, but balances that with a respect for agency autonomy and expertise. Of all of the incentives that could be used, democracy index rulemaking seemingly picks one that agencies truly care about, judicial review, thereby strongly encouraging agencies to involve the public but also creating the potential for de-ossification and avoiding double and excessive oversight of agency action. Because of these clear positives, the central idea behind the democracy index concept has wide applicability, to areas like *ex parte* contacts, the interpretation of agency-enabling acts, and so on. The simple idea behind the democracy index—the more and the better the democratic process, the better the result should be treated—has profound implications for administrative law and for other areas of law. But every big idea has to start with one compelling example of why it would work, and the creation of democracy index rulemaking is perfect for this task.

243. *Id.*