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Articles

In Search of Goldilocks: Democracy, Participation, and Government

Philip J. Harter*

I. Introduction

Our assigned topic is to consider the considerable challenge of resolving technology-induced disputes in the midst of uncertain or changing science and volatile public perceptions. These certainly are the hard issues, and there is example after example of government agencies having extraordinary difficulty in making final decisions involving these issues. My particular dimension of the debate is to use democracy to resolve these issues by having those directly affected by the outcome actually making the decision instead of pleading their cases to some authoritative figure or body who will then impose the verdict.

This analysis necessarily has two dimensions, just like the good news/bad news jokes. The good news is that the use of direct democracy addresses many of the obstacles that make these choices so hard. The bad news is the difficulty in establishing broader use of properly structured processes.[1]

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II. The Structure of Government

Before beginning that analysis, however, we need to step back and review some fundamentals — some high school civics – as to how the *government* makes these kinds of decisions. Understanding the government decision-making processes is critical for two reasons: First, it provides the "as compared to what" for the use of direct democracy. Second, understanding the structure of government is also essential in assessing the legitimacy of decisions made directly by the affected interests.

Although it is well known that there are three branches of the Federal government, some of the details are less well known and bear review. Congress makes the laws[2] and cannot give that power away.[3] Nor can it veto actions of the executive branch shy of passing overriding legislation that the President signs.[4] The President is the chief executive officer.[5] He nominates Officers of the United States[6] who alone may make regulatory decisions that have bite.[7] It is his duty to see to it that

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Rulemaking Act and the Administrative Dispute Resolution Act. A.B. Kenyon College, M.A., J.D., the University of Michigan. The author would like to thank Todd McGarvey, a Symposium Articles Editor, and Lauren Carothers, Editor-in-Chief, for their role in editing his paper.

1. For an elaboration on agencies taking shortcuts in public participation and nominally consensus-based processes, *see* Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997).

2. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. U. S. CONST. art. I, § 1.

3. While it can vest agencies with broad powers to make policy, it cannot give any one branch or any other body the power to make wide-ranging legislation or regulatory requirements. The exact dimensions of that limit, however, are far from clear, and the scope of Congress' authority was put to the test just last term in the Supreme Court in the case of Whitman v. American Trucking Associations, 531 U.S. 457 (2001). The Court there said:

> Article I, '1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States. This text permits no delegation of those powers, . . . and so we repeatedly have said that when Congress confers decision[-]making authority upon agencies *Congress* must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform . . . . Whether the statute delegates legislative power is a question for the courts . . . ." *Id.* at 472.

4. INS v. Chada, 462 U.S. 919 (1983).

5. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

6. U.S. CONST. art. II, § 1. Such officers assume their duties only "by and with the Advice and Consent of the Senate." *Id.*

7. Buckley v. Valeo, 424 U.S. 1, 125-126 (1976). "We think that the term 'Officers of the United States' as used in Art. II, defined to include 'all persons who can be said to hold an office under the government' in United States v. Germaine, . . . is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United

the laws are faithfully executed.[8] The Courts review what is done to make sure the substance and the procedure by which the decision is made are in accordance with law.[9]

Interestingly, given our administrative state, agencies are not directly described in the Constitution. There is a passing reference to "[m]inisters"[10] and one would think there must be ministries — agencies— if there are to be ministers. And, there are several mentions of those Officers of the United States.[11] Again, one would think these officers must have something to officiate over. There is a brief mention of executive Departments,[12] but the notion is neither developed nor is any of their contours delineated. Rather, agencies are a political creation. Given the Constitutional structure that largely ignores them, how do agencies and the powers they exercise fit into our democratic scheme? Congress establishes them and defines their authority and the process they must use to make decisions. The President appoints the head of the agency and many of its senior officials with the advice and consent of the Senate. This ensures that they will be part of the President's team and loyal, at least at first, to the President. But, loyalty once in office is more dependent on who can remove you, and so for most agencies and all within the Executive Branch, the President can fire the political appointees.[13] The courts then review what was done to make sure it comports with the law, with a healthy dose of judicial interpretation as to just what that is. Thus, all three branches play a role in the day-to-day

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States,' and must, therefore, be appointed in the manner prescribed by '2, cl. 2 of that Article." *Id.*

8. U.S. CONST. art. II, § 3.

9. "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. For the types of cases we are dealing with, many of the procedural challenges will come via the Administrative Procedure Act, 5 U.S.C. § 706(2), which provides: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence . . . ." Administrative Procedure Act, 5 U.S.C. § 706(2).

10. U.S. CONST. art. II, § 2, cl. 2.

11. U.S. CONST. art. II, § 2-4.

12. "The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ." U.S. CONST. art. II, § 2, cl. 1. "And, the Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

13. *Compare* Myers v. United States, 272 U.S. 52 (1926) *with* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

functioning of an administrative agency.

Agencies tend to combine at least two and sometimes all three roles. An agency makes policy, filling in the details of broad legislation by issuing substantive rules. It then enforces the statute and the implementing regulations by bringing enforcement actions and issuing permits. In some instances, but not all, the hearing as to whether an offense occurred will be before someone, an administrative law judge or other hearing officer, who is a part of the agency itself.

III. The Evolution of Administrative Procedure

A. *Why Are These Constitutional Niceties Relevant?*

These are the fixed points provided in the Constitution, and any system of government must be built around them. But, notice that the process by which those mysterious agencies make decisions is not specified, other than the outer boundary of the due process clause of the Fifth Amendment. Thus, importantly, there is no bedrock or canonical process specified in the Constitution so that any procedure that fails to comport with it precisely is somehow deviant. And, what is regarded as good process or administration has evolved over time, and may even be in flux at the moment.[14] Many of the early agencies were built on a judicial model and functioned much like courts with witnesses, evidence, records, decisions, and the like.[15] Then, during the great growth of agencies during the 1930s and the New Deal, the notion became prevalent that agencies should be neutral experts.[16] Professor Richard Stewart explained the theory with a wonderful simile: The agency would study the situation and, like a doctor, prescribe a remedy for everyone to live happily ever after.[17] For that system to work, however, the bureaucracy needed to be free of political interference. In practice this would mean a detached assessment of the facts and law, which was also

14. There is considerable debate currently over the roles of agencies and the relationship between public needs and private activities. Jody Freeman, *The Private Role in Public Governance,* 75 N.Y.U. L.R. 543 (2000). In addition, the tools used to achieve public goals are also evolving, such as the use of marketable permits, *see* Adler, *Free & Green: A New Approach to Environmental Protection*, 24 HARV.J.L. & PUB. POL'Y 653 (2001), and contracts between an agency and a company, *see* William Pedersen, *Contracting with the Regulated for Better Regulations*, 53 ADMIN. L. REV. 1067 (2001); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

15. Attorney General's Committee on Administrative Procedure, *Final Report* 105-108 (1941).

16. Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

17. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1678 (1975).

assumed to require broad discretion and then a determination of the appropriate policy. This is often called the "expert model of administration" or, as some have recently called it, a "technocracy." It was based, in short, on an assumption that the government officials had the requisite technical expertise, were free from any bias, and would do the right thing under an unfathomable array of circumstances. The model was fashionable for about 30 years. The Administrative Procedure Act, which was passed in 1946 and which codified the process by which agencies make the regulatory decisions, has strong overtones of the model built into it,[18] but not exclusively. Under the bare-bones of the APA the process of developing a new rule is:

> the agency initially drafts a proposal (a Notice of Proposed Rulemaking or NPRM) and publishes it in the Federal Register,
>
> members of the public are then allowed to comment on the proposal,
>
> the agency is required to read those comments and to discuss them in the preamble to the rule when making the final decision to show the world that it did indeed read what was submitted,
>
> the agency then publishes the final rule in the Federal Register, and
>
> the courts would uphold the decision so long as the agency could come up with a rational basis for it; that is, the rule would be sustained if it survived the "hee-haw" test.

While the process in which members of the public were encouraged to submit comments to agencies is the precursor to public participation or even stakeholder involvement, at this stage it was a means of informing the agency and making sure those experts had the right information.[19] The expert model probably never really worked very well; it clearly was not up to the task of providing legitimacy to all the decisions entrusted to agencies during the great growth of the regulatory state beginning in the mid-1960s. The courts took over and required far more detailed information and analysis from the agencies and far more opportunities for public participation.[20] Moreover, regulatory decisions came to be

18. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) at 8-10 and accompanying notes.

19. "Participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Final Report*, *supra* note 15, at 103.

20. For a detailed discussion of this evolution, *see* Stewart, *supra* note 17; Harter, *supra* note 18 at 10-18; DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979).

recognized as having a significant political component.[21] Given this, it is surely not surprising, although it was initially controversial, that the White House became more explicitly involved in making regulatory decisions.[22] Another dimension of these developments, which could be seen either as a withering of the total confidence in agencies that is a predicate of the expert model or as the growth of viewing the regulatory decisions as inherently political,[23] was that during the late 1960s and early 1970s many calls were made for "public participation" in the regulatory process.[24]

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21. For example, the D.C. Circuit described the situation in the following manner:

> From extensive and often conflicting evidence, the Secretary in this case made numerous factual determinations. With respect to some of those questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions from it. The court can review that data in the record and determine whether it reflects substantial support for the Secretary's findings. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision[-]making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis. Thus, in addition to currently unresolved factual issues, the formulation of standards involves choices that by their nature require basic policy determinations rather than resolution of factual controversies.

Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974).

In an early commentary on these developments which has become classic, Professor Stewart describes that nature of regulatory decisions:

> The ideal of rational decision assertedly consists in the best resolution and harmonization of conflicting interests, but since there is generally no agreed-upon criteria of what constitutes a "best solution," decision[-]making will normally be a question of preferring some interests to others. After even the most attentive consideration of the contending affected interests, there is still the inescapable question of the weight to be accorded to each interest and the values invoked in its support. Statutory directives will generally be of little assistance in assigning weights to the various affected interests, since the problem of broad agency discretion generally grows out of a legislative inability or unwillingness to strike a definitive balance among competing values and interest groups.

Stewart, *supra* note 17 at 1683-84.

22. President Carter issued Exec. Order No. 12044, which provided for White House review of major agencies rules as well as imposing various management requirements on agencies. President Reagan extended that review and involvement in Exec. Order 12291. President Clinton continued the practice with Exec. Order No. 12866.

23. For a review of the various theories of regulation and the regulatory process in political science terms, *see* Rossi, *supra* note 16; Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998).

24. *See, e.g.*, Recommendation 71-6 of the Administrative Conference of the U.S. It should be noted that public participation in this vein meant that members of the public

B. So Where Are We Now?

Very few people of any stripe would actively advocate a return to the expert model of administration in which we are to simply trust the agencies to make the right decision with very little input from the public or oversight or involvement from the political branches of the government. The administrative law developments of the 1960s-1970s largely remain in place and the procedures serve to legitimize many of the decisions:

> agencies must develop an extensive factual background for their decisions and explain in detail how you get from that to the rule,
>
> members of the public must be able to participate in the process at minimum by commenting on proposals that are considered by the agency,
>
> the agency must examine the implications of the rules on a whole host of issues,[25]
>
> the decision is reviewed politically at the White House both as a preliminary matter and before issuing the final decision,[26] and, finally,
>
> courts will review to make sure the facts are straight, but will provide considerable deference to the policy decisions.[27]

Agencies have now broadly accepted public participation. It serves a number of quite different functions in the regulatory process. First, it fosters a type of citizenship and buy-in that result when members of the public take the time to be involved in making their government work and seeing the decisions made. Second, it provides direct accountability since the agency has to tell the people what it is up to and justify why it is taking the action it is. Third, it develops better information for the

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could submit information, data, and arguments to the agencies for their consideration and could challenge agencies in court. Importantly for these purposes, it did not mean actually sharing in the decision. Decisions remained reserved for agencies.

25. For a partial list, *see* Exec. Order No. 12866 § 6; Unfunded Mandates Act, 2 U.S.C. § 1532; Regulatory Flexibility Analysis, 5 U.S.C. §603, and a host of individual executive orders that direct agencies to consider a particular concern, such as the effect of the policy or rule on energy supply, Exec. Order No. 13211, or the impact on recreational fisheries, Exec. Order No. 12962.

26. Exec. Order No. 12866; John D. Graham, Speech at the Weidenbaum Center Forum, *Executive Regulatory Review: Surveying the Record, Making It Work*, (Dec. 17, 2001), *available at* http://www.whitehouse.gov/omb/inforeg/graham_speech121701.html.

27. Chevron, U.S., Inc. v. NRDC, 467 U.S. 837 (1984).

agency's consideration. Fourth, it helps ward off capture by interests that have preferential access to decision-makers, and discourages agencies from being unresponsive to important issues because public participation serves as a means by which these issues are presented squarely for resolution.

But note, even though agencies widely follow and advocate public participation in a broad spectrum of matters, the mere fact that the public participates does not answer the essential question: Who decides and how. As we have seen from history,[28] public participation can still be grafted onto the expert model, so that all this outpouring from the public as it participates is really designed to supply information to the agency so that it, and it alone, can decide the issue, subject, of course, to the accountability to Congress and the courts. Thus, public participation often does **not** mean a sharing in the decision; rather, it means an opportunity to tell your views to those who will decide, with or without any dialogue or other feedback.[29] Or, the agency can use public participation to try to defuse the whole situation and come up with an answer to maximize the overall benefits to the participants. Seen another way, public participation minimizes the discomfort to the agency. In short, through the participation, the agency seeks to make a deal.[30] This is a type of pluralism of the very sort that led Madison to fear factions in the Federalist Papers (No. 10). This, in turn, leads to "satisficing"[31] or "muddling through."[32] Or, in our current parlance, this is the battle of the special interests.

As a number of people have recently pointed out, however, there is a third model of administrative decision-making called "deliberative democracy."[33] It is reaching governmental decisions through a dialogue

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28. *See Final Report*, *supra* note 15.

29. One of the major complaints of public meetings that are held under the guise of public participation is that while the agency encourages those attending to make short statements, the agency itself does not sufficiently reveal its own thoughts nor joins the issues either with one participant or among a number of them. In that case, there is the common compliant that the agency is fooling the public by making it appear that they are participating when, in fact, the agency is firmly in charge, and the issues rarely developed in any significant way. Instead, a series of brief sound bites informs the agency as to the outer boundaries of the feelings of the populace.
It would be preferable in these situations if the agency made it abundantly clear that the only purpose of the meeting is to hear from the public. There would, therefore, be no illusion of "participation" by the public.

30. *See* Rossi, *supra* note 16, at 198-203.

31. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955).

32. Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

33. *See, e.g.*, Croley, *supra* note 23 at 76, who calls this the Civic Republican theory; *see also* Rossi, *supra* note 16.

based on communication and reason, not simply assertions of desires and positions met by counter positions. The goal is not just the aggregate of individual preferences, but rather a group quest for what is the public good or, as it is more commonly expressed, the public interest. Each of these theories has been used to legitimize various agency decisions. While fostering a deliberative democracy is certainly a key element of the developments of administrative law[34] and has many direct supporters, it has not been given enough attention.

IV. A Discussion of Deliberative Democracy

What are the basic requirements of this approach? First, it is deliberative and that requires for its legitimacy a conversation, discussion, dialogue, or negotiation based on reason, and not just the raw preferences of the aggregated interests. In effect, it is a search for what is the best, appropriate thing to do when reaching a decision. The deliberation could, of course, take place solely within the agency. And, indeed, that is how the term is commonly used — the deliberations are within the agency and do not include members of the public. But, that would ignore its democratic dimension — a deliberative democracy is perforce a democracy, and that means citizens need to participate by some means or another. The question then becomes: Just what is the form of participation? Is it solely in choosing a government — picking a king or queen — that will then make all the decisions, or is the participation in making the actual, individual decisions? The implication of much of the literature is that the definition seems to apply to the election of an administration as a whole. But, the term can also be used to describe an individual, specific decision by an administrative agency. Thus, it seems appropriate to look at some democratic process in which "the people" make the individual decision and see: (a) if it can be squared with the constitutional prerequisites and (b) if it would solve those hard cases we are talking about here today.

Critics often pointed out that a direct democracy that resembles a town meeting simply does not work with 250+ million people.[35] So, it needs to be a representative democracy in which everyone who has an interest in the matter can in some way be represented in the deliberations;[36] in particular, a major interest must not be excluded.

34. For example, the requirement that agencies develop a sound factual basis for their decisions, respond to any comments on that process, and explain in detail the basis and purpose of their action can be seen as a means to foster or enforce precisely the type of rationality and dialogue envisioned in a deliberative democracy.

35. Indeed, from the vantage point of this recent transplant to New England, it is not so clear that a town meeting itself would constitute a "deliberative" democracy.

36. Note that under customary democratic norms the representatives are chosen from

If the process is to meet constitutional requirements, it is clear the agency cannot delegate its authority to even a democratically elected group, and it must make, or at least be able to review and control, the decisions that are binding on others. This is important not only for legal legitimacy but also as a practical matter in how the system works. If the deliberations break down, the *agency* will still be called upon to make the final decision. Indeed, even if the deliberations among the representatives do not break down, the agency still has the authority under the constitution to make the decision and, hence, might change the consensus of the deliberations. Thus, the default is *not* the status quo, but rather what the agency will do if the deliberators hit an impasse. And, if it is to be a decision of the agency, then under the constitutional scheme of things it must be within the boundaries set by Congress and subject to Congressional oversight, and a court must be able to review it to make sure it is within those boundaries.[37] This accountability prevents sweetheart deals that are outside the Congressional purview and ensures that the decisions implement the appropriate criteria, since, were it otherwise, someone would be better off by adhering to Congressional limits and would refuse to accede to the agreement.

These are precisely the types of processes we are talking about here: The use of direct democracy to resolve difficult, contentious policy matters that are grounded on changing law or uncertain science.

A. *Anatomy of a Policy Fight Involving Uncertain Science*

In a typical case, powerful interests, those ornery factions, will be opposed to one another, and some agency or another will be called upon to make a decision.[38] Since we are positing that the science or policy is uncertain, these decisions are not the sort that will have a single, precise answer if only enough research is conducted, and, hence, a range of discretion remains in the agency.[39] Rather, their resolution will

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geographical areas. Thus, their loyalty is to everyone within those boundaries, regardless of the potentially widely differing points of view. The representatives could, as well, be chosen to represent the various interests involved in an issue so that everyone would still be represented, but the perspective of the representative would be more substantive.

37. Harter, *The Role of Courts in Regulatory Negotiation: A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51 (1986).

38. The agency may be involved in issuing a new regulation or policy, in issuing a permit, or in bringing an enforcement action. The discussion in this paper addresses the development of policy, no matter what the context. Although many of the examples are drawn from negotiated rulemaking, the same procedures could be used for the policy component of other types of decisions. Indeed, the American Bar Association has recommended doing precisely that. PUBLIC PARTICIPATION IN ENVIRONMENTAL AGREEMENTS, ABA HOUSE OF DELEGATES, (Feb. 1995).

39. *See supra* note 21 and accompanying text.

inevitably involve the clash of values, which is the very essence of a political decision. As in any political dogfight, the factions will draw upon whatever resources are available to influence that decision.

Contentious fights arise over what the science means. It has surely become fashionable for one side, or even both, to accuse the other of engaging in "junk science." The science is pushed to the breaking point, well out to the fringes, and beyond consensus within the scientific community. The reason, of course, is that if an advocate can control the facts, the discretion of the decision-maker is confined. In the cases we are talking about, that decision maker is the agency in the first instance and often a court in the second. The decision-maker may or may not be able to understand and reconcile subtle and complex scientific points.

Another component of the fight uses the tools of accountability and the political process to sway the decision. While the "expert model" or a technocracy would seek to insulate the decision-maker from the vagaries of politics, it never fully lived and certainly does not now. Rather, agency decisions are made in a political context. Hence, on the national level the White House and Congress both have roles to play. Even though the decision must still meet the standards of the statute and procedure, nasty old politics still plays a significant role in terms of emphasizing some criteria over others, of forcing some decisions and withholding others, of pushing some polices, stated or unstated, over others. Thus, parties turn to the political branches. And, to be sure, that process is replicated on the local level as well.

Because these are political decisions, the public plays a role in deciding what is important. Thus, the media becomes influential, whether through the specialized publications that deal with narrow topics, papers of general circulation, or TV and radio. There is also an increasing use of polls and focus groups. This activity not only shapes the views held in agencies as to what is right, it also influences the political branches of government which in turn influences the individual agency and its decisions.

These politically controversial decisions that are based on, but not controlled, by science are often extraordinarily difficult for agencies to make. The many leverage points that can be used to influence an agency's decision make it far easier to stop a decision than to push one through. It will often take multiple iterations to reach a decision,[40] with

40. A particularly vivid example of this is the original airbag rule (as opposed to the recent amendments that were designed to prevent airbags from killing children). As the Supreme Court said when reviewing a rescission of one of its incarnations, "The regulation whose rescission is at issue bears a complex and convoluted history. Over the course of approximately 60 rulemaking notices, the requirement has been imposed, amended, rescinded, reimposed, and now rescinded again." Motor Vehicle Mfrs. Assoc.

the agency creeping up on the final resolution so that instead of making the decision in a strong, bold stroke, the agency will engage in a form of incrementalism. It may, as a result, take a long time to get finality, and, even when finality is reached, it may reflect more of a pluralist balance of the interests than a crisp technocratic resolution.

In many ways, these fights take place precisely because the affected interests are not allowed to actually participate or share in the decision. As such, they try to influence it from afar through whatever tools are available.

B. Democratic Participation in These Decisions

The experience over the past 20 years has shown that using a form of direct participation by representatives of those substantially affected by the decision can solve many of these difficulties for the types of problems we are discussing. This has indeed been the case for a number of negotiations in which I have served as the mediator or been a close observer of the process.[41] This is also the observation of those who have actually studied the processes and talked to a diverse sample of participants[42] — from personal discussions with participants themselves and from discussions with senior agency officials who have used them.[43]

While a direct democratic process for resolving these contentious issues has proven itself time and time again and there are a number of ways that the process can be organized, its use is not appropriate for all decisions and there are some basic requirements that should be followed.[44] There needs to be sufficiently diverse representation so that virtually anyone with an interest in the issue can be confident that his or her perspective will be raised at the table. The flip side of that requirement is that there also needs to be some process to ensure that no interest is left out or purposefully excluded.[45]

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v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) at 34.

41. For example, I have been involved in the negotiation process over the following topics: reformulated gasoline, national park over-flights, pilot flight-duty status time and reserve time, steel erection, oil spills, and equipment leaks.

42. Jody Freeman & Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000).

43. I have had many, many conversations with Neil Eisner, Assistant General Counsel for Regulation and Enforcement of the U.S. Department of Transportation; Joseph A. Dear, Testimony before House Judiciary Committee (June 27, 1996) during the reauthorization of the Negotiated Rulemaking Act, as described in OSHA Press Release, *available at* http://www.dol.gov/opa/media/press/osha/osh96253.htm.

44. As has been pointed out before, *supra* note 1, a number of agencies have attempted to take shortcuts or simply did not pay heed to structuring the negotiations in a way that would produce a well-reasoned deliberative decision. *See infra* p. 22.

45. The Negotiated Rulemaking Act provides:

If . . . an agency decides to establish a negotiated rulemaking committee, the

Many critically important decisions can and are made with less than a consensus. Indeed, that is the entire function of any committee that operates under Robert's Rules of Order as do most Federal Advisory Committees. Important guidance can stem from policy dialogues and other forms of cooperation and collaboration. But, for the types of decisions we are talking about here, consensus in which each interest has a veto, or at least needs to be able to "live with" the decision when viewed as whole, plays a fundamental, irreducible role. First, it makes it safe to come to the table; otherwise each party would likely continue to build support and make its case in other forums. Under consensus, however, each party knows it cannot be out-voted and, hence, that an adverse decision will not be imposed on it; as a result, that interest can relax the power-building while the talks are productive. Consensus also

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agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include (1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule; (2) a description of the subject and scope of the rule to be developed, and the issues to be considered; (3) a list of the interests which are likely to be significantly affected by the rule; (4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency; . . . (7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the . . . committee, and (8) an explanation of how a person may apply or nominate another person for membership on the committee . . . . Negotiated Rulemaking Act, 5 U.S.C. § 564(a).

This "Notice of Intent" serves a couple of important roles. First, it means that no one can be excluded by putting together a committee behind closed doors. While a court may not feel comfortable overruling an agency's decision on the science or policy, a cry of "I was excluded" resonates with generalist courts. Of course, an agency might still deny membership on the committee even to one who applies, but that decision is then out in the open and the agency would likely have to justify it. Second, the Notice makes it clear to everyone that the agency intends to make the decision in the negotiations, so that anyone who wants to play in the process will need to come forward up front to do so and cannot sit back and wait to challenge the process later. Thus, the notice helps ensure that all appropriate viewpoints are sitting at the table.

To be sure, it is unlikely that *all* interests, every single one, will be represented. That alone is sometimes taken as a criticism of negotiated rulemaking. But, it is a shallow criticism indeed: far more interests are represented in the decision than participate in any way in notice and comment rulemaking and all the protections afforded by notice and comment remain available. In fact, the convening process envisioned by the Negotiated Rulemaking Act, 5 U.S.C. § 563(b), ensures a form of outreach to bring people into the regulatory process that is rarely followed otherwise. Thus, the major general interests will likely be represented if not the narrower, specific ones; moreover, the opportunity is provided to any interest to come forward for inclusion, something certainly not done when drafting an NPRM.

forces the parties to deal with each other[46] and to look at the entire decision and not just its individual parts.[47] This, in turn, can lead to sophisticated trade-offs that are simply unavailable under a less rigorous mode of decision.[48] The use of consensus, therefore, stimulates a "deliberative democracy" approach.

The agency plays a crucial role in the deliberations. First, the private parties need to recognize that if they do not reach an agreement, the agency will impose one. Thus, when assessing their "Best Alternative To a Negotiated Agreement" or BATNA, the parties must take into account what the agency will do.[49] Simply doing nothing or avoiding a decision will not be helpful to a private party. Because the agency will eventually make *some* decision, the negotiations provide the participants with the opportunity to actually control the outcome. Further, the agency will represent in the negotiations whatever interests it has in the subject. It will then use the creative ideas and information available to the private parties to enhance those interests. Importantly for the constitutional theory, no decision will be imposed on the agency. Rather the agency, like the others, agrees that when considered as a whole and when compared to what it can achieve otherwise, *it* concurs in the decision. Thus, the entire decision can be viewed as that of the agency alone, even though the others agree with the agency.[50] When these processes are followed, the results have largely been very good

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46. Under a decision process short of consensus, if someone raises a point and someone else thinks they have the votes, the powerful one can simply roll the other by calling for a vote with no discussion, no deliberation, no consideration for what the other party has to say. That is certainly not conducive to decent relationships. But under a consensus process, the other party can simply say "no." Thus, everyone must listen to each other and try to work out a mutually acceptable outcome. Note as well what this does to perceived power imbalances.

47. In making a decision by consensus, it is essential that the consensus applies to the whole agreement and not its constituent parts. It is likely that no one will agree with every paragraph. The question for each, rather, is when considered as a whole and considering everything that might occur outside the negotiations: Am I better off with the consensus than I would be without it?

48. For example, if a party could accept outcome A *if but only if* it got outcome B, that party would likely not suggest A in a voting process for fear that the majority would decide to include A but not B.

49. This is one reason why it is essential for the agency to play an active role in the discussions. If the agency is either not present or takes a passive role, the other parties cannot assess what its interests are nor what it is likely to do in case of an impasse. As a result, the parties cannot calculate their individual BATNAs and hence will find it difficult to assess either what to propose or what to accept. In such situations, the parties frequently do not reach closure.

50. This is, of course, precisely the situation when the agency is satisficing or reaching a pluralistic decision: it will keep trying until enough of the constituents agree to stop trying to get more. In that case, the agency will not make its decision until it has an appropriate level of acceptance. Except here that concurrence flows from detailed deliberations instead of backroom deal-making.

time wise,[51] substantively,[52] and as measured by the parties' satisfaction.[53]

It can, moreover, be viewed as a deliberative democratic approach to administrative decisionmaking. It is a representative democracy: Representation is based on interests and not geography. And it is deliberative: One of the main issues is how much information, data, or scientific certainty is needed to make a responsible decision, not trying to gather everything possible nor trying to decide who is "right" to the exclusion of others. Further, the parties and their technical experts can engage in a form of peer review with the scientists discussing science with other scientists. That can clarify assumptions and limitations and deepen the mutual understanding of the science and its uncertainties. The parties may continue to disagree about the science, but the question then becomes: What are we collectively going to do about solving the issue at hand? The role of science is different in this process than in the traditional process. Here, science is not being used to corral the decision precisely because the parties themselves make the actual decision.[54] The end result is likely to be a more scientifically accurate picture since it does not try to force precision where there is none. Instead, it recognizes the disagreements and uncertainty.

Moreover, the process still meets the requirements for accountability. First, the decision of the agency can be envisioned as the decision of the requisite Officer of the United States because the agency did indeed concur in the outcome and decided that it would be better off with the decision than without it. Courts can review the decision, and it must meet the statute and have the necessary underpinnings. This prevents logrolling and makes sure no one is zapped. Congress

51. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

52. Measuring substantive quality is necessarily difficult. I am prepared to assert this quality at least for the negotiations I am intimately familiar with based on a comparison of what the regulation likely would have been without the negotiations as compared to what was in fact issued following them. Interestingly, it is at least my *impression,* I have no explicit data other than talking to participants, that the negotiated rules tend to be *both* more stringent and cheaper to implement than those developed traditionally. The reason for this is that the committee knows and can focus on the items that make significant differences in the outcome and which are worth their cost and which are not. The outcome is the result of a collective decision of practical experts.

53. Freeman & Langbein, *supra* note 42.

54. One particular case in which this happened stands out in my mind. A considerable liability was at stake and when the issue was framed as to only the science, the company took a strong stand against some of the proposals of others; when, however, the issue of liability ("what are we going to do about it") was coupled with the science, the company partook in the discussions, agreed to a number of the proposed findings, but was able to do so because it was also able to address the liability issue directly. Otherwise, it had to deny the science to reduce exposure to the liability.

continues to have oversight and the White House remains involved, preferably through the political appointees in the agency.

If that is the case, then why are these processes not used more widely and recognized more as a legitimate way of making these types of administrative decisions? The first answer is, happily, there are not all that many administrative decisions involving these highly controversial issues at the edge of science, at least as a percentage of all the decisions that have to be made. The second is a misunderstanding as to how the processes work and what they have to offer both in terms of agencies achieving their goals and political legitimacy.

C. Academic Analysis and Advocacy

There has been a healthy amount of support of these processes politically and in the academic literature, and an urging of more widespread use, especially among those who have actually examined the processes and talked with those who have participated in them. But, some of the academic literature views these procedures as somehow illegitimate or ineffective. While few, if any, would actively advocate a technocracy, a strong, virtually unspoken undercurrent continues to favor it. Implicit in much of the administrative law literature is the view that only agency *staff* can make the "right" decisions, so there should be no political interference with them and any efforts to influence those decisions are somehow illegitimate. The literature often does not recognize the political fights surrounding agency decisions and the difficulty in making timely and widely accepted choices or decrying them as inappropriate. Thus, some academics see a participatory approach as derogating from the ability of the agency to make the decisions on its own.

Some have argued that participating in a consensus process "de-centers" the agency and reduces its role to precisely that of a private sector interest,[55] that is, it somehow diminishes the agency's role as an agent of the sovereign. Coglianese, for example, misinterpreted some of my writing where I said there is no "right" answer to these issues[56] to mean that the agency does not even have to care whether it is doing the "right" thing so long as it gets a deal.[57] This is not only intellectually

55. Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93-113 (Eric Orts & Kurt Deketelaere eds., 2001).

56. *See supra* note 21.

57. For example, "Philip Harter . . . has suggested that agencies should not think of themselves as seekers of correct decisions: The agency retains a wide range of discretion and is called on to make choices that are inherently political. Political choices, however, have no 'right' or 'wrong' or even 'rational' answers." Coglianese, *supra* note 55.

dishonest, it is just plain silly[58] and it shows the bankruptcy of the argument. A deliberative process that involves representatives of the private sector does indeed mean that the agency cannot unilaterally impose its will on the private sector, at least during the deliberations themselves. But, chances are pretty good that the agency would have been unable to do so in the first place because of the political entropy surrounding the types of decisions we are addressing. Nor does it recognize the positive values that stem from a deliberative democracy in the form of new information and new ways of approaching the issues: the agency continues to seek the same values and goals it would were it to make the decision unilaterally, so that its mission has not changed, and it should not — repeat, should not — accept an outcome that does not meet its goals. This is *not* a pluralist approach where the agency simply seeks to "satisfice" or "muddle through" by getting the parties off its back, but rather is a reasoned dialogue that seeks a better outcome.

This leads to an important observation concerning the role of the agency in a consensus process or as part of a deliberative democratic process. The agency is responsible for ensuring that the group reaches a decision that remains faithful to the essential criteria that must enter into and be resolved as part of the decisional process.[59] The private sector participants can, in turn, clarify and extend those values and supplement them with other permissible factors. They then join as a group in a quest for determining the right thing to do. The agency will frequently take the lead in providing a first cut at the technical issues, but they are then refined and extended through the scientific deliberations described above. The result of the process is usually a considerably clearer understanding of the issues at hand and ways to address them. The agency continues to play an important role in the process, and indeed the process does not work nearly as well when the agency fails to do so. The agency's role remains central,[60] it is just different from its customary role in which it attempts to make the decision alone. This process happens far more rarely than is often assumed in the literature, since in fact the agency will customarily try to work things out before issuing a rule.

58. Indeed, Coglianese also reveals an astonishing lack of understanding or appreciation as to what actually goes on in these processes, as opposed to simply opining about them. *Id.*

59. For example, it would not be too far fetched to imagine a negotiation resulting in a weak occupational safety standard in return for a higher rate of pay. That option is simply not acceptable under the Occupational Safety and Health Act, however, and OSHA would reject the proposal out of hand.

60. It is also important to note that the goal of the rule, either environmental protection or public safety or health for example, is simply put on hold while the agency fights the political battles that surround traditional rulemaking: nothing happens in the interim. Thus, the agency sooner achieves its goal by engaging in the negotiations.

Another argument is that only the agency can determine what is in the public interest.[61] It is almost as if the "public interest" actually exists just like the "brooding omnipresence" that Mr. Justice Holmes derided.[62] In the abstract, one would wonder just why it is that someone in the private sector cannot divine this thing called the "public interest," but as soon as they take the oath to become a Federal employee they can? That surely would be a powerful, even magical oath. But, of course, neither "the public interest" nor the "brooding omnipresence" of the common law exists as an independent, determinable spirit that is implemented but not decided in individual decisions. In fact, the whole purpose of the "deliberative democracy" is to develop a collective view of what constitutes "the *public* interest" in the particular circumstances. The deliberations need to take account of the factors determined by Congress and of practical judgments as to "what works." Deliberations, therefore, result in a better-informed agency decision.

Some simply posit, virtually without analysis as to the issues that have been resolved this way, that groups cannot reach agreements on significant issues, so that any process like this will be relegated to the fringes.[63] There is no recognition of the difficulty agencies have in making these types of decisions, and hence they are comparing these processes to something that does not exist in reality. Somewhat paradoxically, they also argue that because these processes are not used for the vast bulk of administrative decisions, they therefore do not work in those situations for which they were designed, those we are talking about here today. Others argue that the same benefits can be achieved by far less intrusive means than a quest for agreement.[64] A better understanding of the dynamics of the process and better insight as to what really happens and hence why they do in fact work would help the analysis significantly. Indeed, it would be extraordinarily helpful if there were a balanced, informed analysis as to the dynamics of the processes and their effects.

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61. William Funk, *Bargaining Toward the Millennium: Regulatory Negotiation and the Subversion of the Public Interest,* 46 DUKE L.J. 1351 (1997); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest — EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

62. Holmes argued that there is no "transcendental body of [common] law" that is obligatory unless specifically changed statute. Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer, 276 U.S. 518, 533 (1928). Justice Frankfurter later characterized this notion: "Law was conceived as a brooding omnipresence of Reason, of which decisions were merely evidence and not themselves the controlling formulations." Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945).

63. *See, e.g.*, Davis and Pierce, *Administrative Law Treatise* § 7.14 (1994).

64. *See, e.g.*, Coglianese, *supra* note 55.

D. Agency Practice

Some serious hurdles must be overcome at the agency level before folks will be comfortable with these processes. To a very real extent the broad "stakeholder involvement" and "public participation" activities that agencies now engage in for virtually every rule or major policy is a result of the success of regulatory negotiation (or reg neg) and is its direct offspring. To figure out what is happening currently with respect to negotiated rulemaking and the use of direct democracy to resolve issues, it will help to briefly review several cases that have happened in the last 5 years:

> In one agency the issue on the table had been on the agency's docket for 20+ years, and it had unsuccessfully tried twice to get a rule out; the committee reached full consensus on a rule much broader than initially charged; the agency then spent four years rewriting the rule, even though the agency itself had agreed to the consensus and was represented throughout by multiple participants; one close observer said that parts of re-write were both unintelligible and affirmatively dangerous; after considerable turmoil, the agency finally put Humpty-Dumpty back together again and issued the original consensus.
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> Another took a full year to clear a seven page Notice of Intent; just before the negotiations were to begin, political management of the agency wanted to tinker with the composition of committee even though he had already signed off on it — twice; the agency participants were told not to say anything or take any position in the negotiations, and the agency lawyers would not write a memo of law to clarify a key provision of the underlying statute that was asked for by the committee; notwithstanding all that, the committee did reach a workable compromise, although there was no consensus; but in drafting a proposed rule, the agency trashed it entirely; needless to say, there is no rule, not even a proposal on the street.
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> In two agencies, political officers said they had a very difficult situation on their hands and wanted to use reg neg and announced it publicly; the agencies went through convening; but, the staff said no, it would not use reg neg; in one situation, there is no rule, in the other it has not yet become final.
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> One agency had been reversed by two courts of appeals and enjoined by Congress from doing anything to resurrect a rule; the staff met for a couple of hours each week for a year to figure out what to do; it finally engaged in a reg neg and a **final** rule was in effect six months later; the agency staff then complained that the reg neg process took

too long!

So what are the lessons from these and other examples as to the current status or at least what *was* the status in the final days of the Clinton administration? Several of these evince a clear trend towards middle level staff not wanting to share decisions. There is at least one example, and possibly three, of the "we know best" syndrome. There is also a reluctance to give up or share power, even if it is clear from any observation that the staff did not have the power to get its way anyhow. And, there are elements of capture here: Staff and politicians have differing perspectives.

The vignettes demonstrate a lack of appreciation for the benefits of process or structure. There is the feeling on the part of agency staff that it does not need to undertake a formal process because the staff asserts it always engages in stakeholder involvement and public participation.[65] There is also a lack of understanding as to the benefits of consensus processes. The agency staff gets pulled in many directions and hence they do not have the time or inclination to follow through on any one item — the "crisis de jour" effect: this is especially the case in reg negs since they are resource intensive. No one holds the staff accountable for meeting a goal and hence providing an incentive to make the time. Agency management says go do something without providing the wherewithal or direction to do it right. It seems clear that in several instances agency representatives were afraid to take a position for fear that it might turn out to be wrong and senior officials might blame them. This reflects an overall lack of confidence and, perhaps its source, a lack of managerial guidance. The agency staff talks to each other, but not the private sector; they are not focused on output goals but like to talk about the ultimate goals.

There is also a disconnect between the staff and political levels that interferes with the use of the process. The political level appears to be far more comfortable with them than does the staff. But, the confirmation process now takes so long that the political slots are empty for long periods and the staff knows it can wait until it is in charge again. There have been a couple instances where the staff refused to communicate with the political/SES level so that those who had to sign off balked when it came time to do so both because they had not been consulted and because they had substantive problems with the agreement. And, many of the adverse comments that are reported in the literature are from mid-level staff who decry these processes since the

65. Note this is the functional equivalent of "I'd be glad to talk with you, but I'll be damned if I'll give up the pencil." Another slice at it would be, "But, I know what they want and therefore do not need them to tell me."

end result is not exactly as they would have written— never mind that it would have ever seen the light of day. Moreover, several agencies are not paying close heed to the processes that make deliberative democracy work — many take shortcuts in convening and often want to maintain control to impose a solution, and hence do not work for consensus.

Agencies need to recognize that reg neg can be a powerful tool in addressing difficult cases. Agency management needs to set goals, provide resources, and follow through. People whether senior managers, line officers, or staff, do not want to be second-guessed and criticized. For example, someone may be criticized for cooperating with industry, which would, of course, be a quite legitimate complaint if it were done to the exclusion of others. It is not legitimate, however, when others who would be affected by the outcome participate as well and the resulting decision clearly meets the public goals defined by agency management. We need to provide the means for getting clearances and blessings along the way and to hold people accountable for not paying attention to details and doing it right. And, if some staff member decides to buck senior directives, one would think the senior manager would require explicit reasons for not following through. Much, indeed most, depends on sensitive agency management.

Using a deliberative democratic approach to make these decisions requires the agency to charter the committee as an advisory committee. Because hell hath no fury as a regulated regulator and chartering is just that, it would help greatly if the process of chartering were streamlined and made far easier than it has been, or at least agency officials have to understand that it is not such a big deal. It would also help if agency staff understood that participating in these processes is a way to greatly leveraging their expertise and insights by taking advantage of the insights and information of the private sector on all sides of an issue.

If this is done, reg neg and other forms of consensus processes has a promising future; without it, they are likely to be used only when a agency gets really "stuck" and must get something out the door.[66]

E. Our Role

We need to educate agencies, potential users, and even academics as to how the processes work and their advantages as opposed to normal, customary administrative procedures. We also need to hold agencies accountable for "doing it right" and not passively acceding to shortcuts.

66. Congress has also taken to requiring it, but often does it badly either in terms of when or how to use the processes. Likely this imposition derives from a frustration within important constituencies that feel they have been unable to get the agency to engage in a dialogue as to what should be done.

Finally, we need to listen to the needs of the mid-level government officials because the procedures will never be widely used without their feeling more comfortable with them.

V. ISO Goldilocks

Much of the criticism of these procedures is based on assertions, not data, that the mediation procedure does not work, that someone might be excluded from the process, that mediation does not comport with some mid-level guy's views as to what it should be, that business always wins, that the only role of the agency is to make a deal no matter what the substance, or some other conjured up view. Then, based on these views, the process as a whole is rejected as a sell out. The other opposing political theory would be to embrace technocratic decisions — trusting the agency alone to make the right decisions unfettered by dirty old politics.

There is here, as in the story of Goldilocks, a middle ground that relies on careful attention to detail as to how the processes operate and how the government participates in them that can lead to mutually beneficial results, especially when the issues are particularly difficult as in the types of issues being discussed here. In these cases, the agency plays the central role of assembling the representatives together to solve a difficult problem and ensures that the decision is faithful to the criteria that are to enter into the resolution. That is a powerful role indeed for an agency to play. It is to be sure somewhat different from the one envisioned under a technocratic theory but one that comports more to what actually happens in these terribly difficult cases.

To address the grave malaise facing administrative law today, those who would wish agencies were better able to address problems based on complex scientific and technical issues should join Goldilocks in her search for a reasonable middle ground based on careful attention to detail.