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Representative Rulemaking

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ABSTRACT: The dominant form of lawmaking in the United States today—notice-and-comment rulemaking—is not a representative process. Notice-and-comment simply invites public participation, leaving the overall balance of engagement with the proposed regulations to the choices of individuals, public interest groups, trade groups, and regulated businesses. The result is a predictable one: In most rulemakings, industry voices dominate, and in many rulemakings, there is no participation by citizens or public interest groups. This representation deficit must be taken seriously. The basic rationales for a notice-and-comment rulemaking process depend upon some level of representation for those affected. The goal of providing the agency with higher-quality information, for instance, cannot be achieved if information flows in only one direction. So too, participation in rulemaking could only function as a forum of accountability to the public if those affected by the proposal have engaged substantively with the proposal. At the most basic level, lawmaking powers should be constrained by some structural provisions for representation.

To address this representation deficit, this Article defends two proposals. First, it argues that agencies should be required, at the outset of their rulemakings, to identify the key stakeholders from whom they expect engagement, and in their final rules, to identify the extent to which participation lived up to those expectations. This "representation floor" would provide a baseline for representative participation to which the agency would be accountable—to itself, the public, Congress, and the courts. Second, in rulemakings where less powerful interests are likely not to participate, this Article argues agencies should hold proxy representation contests to solicit and select an interest group or groups to serve as a representative of underserved interests. These proposals would institutionalize mechanisms to ensure that rulemakings include representation from all those it affects. In terms of implementation, these proposals could be adopted by agencies, through an Executive Order or OMB directive, or by legislation. More generally, this Article reflects a shift in thinking about administrative law by insisting that representation deserves a place as

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a foundational administrative law value on par with the traditional values of the field of law such as notice, transparency, and reason-giving.

INTRODUCTION

The dominant form of federal lawmaking today—notice-and-comment rulemaking—is not a representative process. Notice-and-comment rulemaking is primarily structured around the notion of equal opportunity to participate.[1] The process, outlined in the Administrative Procedure Act ("APA"), requires

1. Edward Rubin characterizes the Administrative Procedure Act as essentially a "one-trick pony": "All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties." Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003).

that the public receive notice of an agency's proposed regulations and have an opportunity to comment on them.[2]

These legal protections in administrative procedure idealize an open, participatory rulemaking system: Any person can comment on a proposed rule, and agencies regularly receive thousands, and sometimes tens of thousands, of comments.[3] In operation, however, the agency rulemaking process is not one that could be described as "representative," in the sense that American democracy commonly values. It is now well established that participation in rulemaking—and in particular participation that actually engages with the substance of an agency's proposals—is often dominated by those subject to regulation or other business interests.[4] In many agency rulemakings, there is a complete lack of any comment from individual citizens or from interest groups representing the public, including labor, consumer, or environmental concerns.[5] In rulemakings that attract significant media attention, there may be numerous form letters, or slight variants on them, submitted by the public. But comments that actually address the agency's proposals in some meaningful manner—often filed by nongovernmental organizations ("NGOs")—are often dwarfed by those filed by a multitude of industry or trade group participants.[6] Empirical studies consistently reveal that actual participation by the public in agency rulemaking is deeply unrepresentative, across a range of different substantive regulatory contexts and types of issues.[7]

From the perspective of political economy, this result is hardly surprising. Generations of scholars, launching from Mancur Olson,[8] predict that those

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2. Administrative Procedure Act § 4(a)–(b), 5 U.S.C. § 553(b)–(c) (2018).

3. Steven J. Balla et al., *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 101 (2022) (noting the variety of public participation, ranging from comments from a few stakeholders to thousands and millions). *See generally* N.Y. STATE OFFICE OF THE ATT'Y GEN., FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021) [hereinafter N.Y. STATE OFFICE OF THE ATT'Y GEN., FAKE COMMENTS], https://ag.ny.gov/sites/default/files/oag-fakecommentsreport.pdf [https://perma.cc/7PH7-9A3F] (recounting campaigns generating millions of comments, with the vast majority being fake).

4. *See* discussion *infra* Sections II.A–.B; *see, e.g.*, Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. (SPECIAL ISSUE) 66, 67 (2006) (noting that voluntary participation is "frequently . . . unrepresentative of any larger public"); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 827 (2021) (noting same with regard to notice-and-comment rulemaking) [hereinafter Sant'Ambrogio & Staszewski, *Democratizing*]; Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 432 (2022) (suggesting that there is "reason to condition legislative delegation on . . . improvements to public participation in administrative policymaking").

5. *See infra* Section II.B.

6. *See infra* Section II.B.

7. *See infra* Section II.B.

8. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (arguing concentrated minorities will overpower diffuse majority).

with the most to lose (or gain) from regulation and with the lowest cost of organization will have the greatest incentive to invest in convincing the government to adopt favorable positions.[9] That is largely what has occurred in our rulemaking process.[10]

The process allows access and invites open participation, but does not create general structures to facilitate, much less guarantee, representation. Instead, it is simply an invitation to engage, leaving the overall balance of stakeholder participation entirely to the private choices of stakeholders—citizens, interest groups, and regulated business.

But does representation in the administrative decision-making process really matter? This Article argues that representation does matter, that the representation deficit is often most severe for the very agency rules that could benefit the most from it, and that administrative law should respond to this representation deficit. The procedural ideal against which we should measure the quality and democratic legitimacy of rulemaking is what we call "representative rulemaking"—not merely the kind of open, participatory rulemaking that administrative law has historically embraced. We offer our own structural reforms aimed at promoting representative rulemaking.

We begin, in Part I, by defining what we mean by representation and why it is necessary to achieve the core aims of the notice-and-comment process. We offer a self-consciously minimal requirement that a representative notice-and-comment process involve a diversity of views of those affected and that the decision-maker be responsive to those views. We then argue that the dominant rationales for notice-and-comment—improving the information available to the agency, facilitating monitoring of the agency, and making rulemaking more democratic—all require that rulemakings be representative in this sense.

Consider each of these rationales in turn. The leading and original rationale is that participation in rulemaking improves the quality of information before the agency, thus producing more thorough scientific or technical analysis and more accurate decisions.[11] But empirical studies show that most

9. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 812–13 (explaining this prediction).

10. *See infra* Part II.

11. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1330–31 (2010); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174–75 (1997). Indeed, this may be the primary, original justification for participation in the view of the drafters of the APA. *See* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 75 (2022) ("As originally conceived within administrative agencies, the consultative component of the rulemaking process was a method for bringing privately held expertise into the rulemaking process."); Kevin M. Stack, *Rule-Making Regimes in the Modern State*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 553, 561 (Peter Cane, Herwig C.H. Hofmann, Eric C. Ip & Peter L. Lindseth eds., 2021) ("[Rulemaking's] procedural structure was originally conceived and justified in largely rationalist terms."); *see also* ROBERT H. JACKSON, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 102 (1941) (noting that the

comments to an agency seek to influence the agency to regulate in a way that serves the interest of the commentators (and those they represent).[12] As a result, the regulated have a strong incentive to point out issues to the agency and provide the agency with information (both data and theories) that favor their interests. Moreover, the detailed information most useful to the agency is costly to produce; it frequently includes studies commissioned for the purposes of submitting it to the agency. To the extent that information received only from, or predominantly from, those likely to be burdened by the regulation information, the information an agency engages and relies upon is more likely to suffer from selection bias. For participation to improve the quality of agency decision-making, not merely the extent to which it takes into account the interests of the regulated, there must be some significant representation of those likely to be benefited by the regulation.

Second, participation and access rights are often justified as checking against an agency decision that deviates from the concerns of politically accountable principals. But again, participation can effectively set off "fire alarms" to alert political supervisors of a wayward agency only when there is some assurance that the participants in the agency rulemaking process are representative of the substantive concerns that principals care about. If industry groups are the only participants in the rulemaking process, there may be many fire alarms pulled where there is no fire and many fires where no one had an interest in pulling the alarm on behalf of the public. For participation to be a balanced monitoring mechanism, it also must be representative of those interests impacted by the rule.

Third, and most generally, some argue that participation is valuable because it makes rulemaking more "democratic."[13] But a rulemaking process can only be "democratic" to the extent that there is actual representation of the interests of society present in the process. Put another way, the right of participation enhances the democratic quality of rulemaking only to the extent that participation in rulemaking has a claim to be representative. This

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new rulemaking process's aims should be "eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action") [hereinafter 1941 ATTORNEY GENERAL'S REPORT].

12. *See infra* Section II.A.

13. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 796 ("Public engagement also enhances the democratic legitimacy and accountability of federal agencies and the regulations they promulgate."); Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) (noting that agency's use of notice and comment can help us "view the agency decision as democratic"); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1318 (2016) (noting "[o]ne prominent justification for public participation in agency decision-making, advanced by scholars, courts, and the executive branch itself, is that participation makes the administrative process more 'democratic'"); *see also* Bremer, *supra* note 11, at 73 (noting that the dominant understanding of notice and comment is that it is "a tool for legitimating administrative rulemaking by holding agencies democratically accountable . . .").

is especially true for marginalized or historically excluded groups.[14] A rich public administration literature celebrates "bureaucratic representation" (i.e., that the staffing of agencies should look like those affected by their decisions),[15] and it has been argued that delegation to an agency can allow interests that lack sufficient representation before Congress to have meaningful input in formulating policy.[16] But even these accounts of agency legitimacy ultimately rely on the agency getting information from those with the greatest stakes in the agency's rules. In sum, participation achieves its values for agency rulemaking—enhancing decision quality, checking agencies' alignment with their principals or being "democratic"—only if it is representative.

How well does the current system, which structures rulemaking as an invitation to participate, work in creating representative participation? In Part II, we show that the actual forms of representation common in much modern administrative rulemaking fail to reflect sufficient representation. Based on our empirical assessment of the practice of rulemaking today, we highlight three related representation failures. First, in a significant number of rulemakings, there is simply no public or public interest participation; the *only* commentators are from the potentially regulated parties. Second, where there is some public interest representation, the sophistication reflected in the comments of public interest commentators frequently lags well behind that of commentators from regulated industry. Third, the overall distribution of comments engaged by agencies strongly tilts toward industry. The third problem—disproportionate representation in rulemaking—seems to be an especially difficult one to solve to the extent that we see rulemaking as embracing an open participation right. Still, if progress is made in addressing the first two problems—ensuring at least some representation beyond regulated industry and providing a public-interest counterbalance in comments—the impact of disproportional representation can be reduced without abandoning a right of participation.

To the extent we are committed to representation as a constraint on lawmaking power, rulemakings require structures of representation. Even rulemakings that are focused on finding facts or making highly technical

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14. *See, e.g.*, Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 76 (2022) ("[B]roadening access to equity and justice for marginalized groups in a conception of democracy requires more expansive thinking about participatory processes in the administrative state.").

15. *See generally* Kenneth J. Meier, *Theoretical Frontiers in Representative Bureaucracy: New Directions for Research*, 2 PERSPS. ON PUB. MGMT. & GOVERNANCE 39 (2019) (surveying this literature, which focuses heavily on representation in local governmental services such as policing and education).

16. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1522 (1992) (noting that "the size of Congress and constitutional checks and balances slow legislative action and virtually assure that Congress cannot keep pace with the often rapid changes in circumstances that help shape interest groups' immediate political wants" and that in many instances "[a]n interest group can register its wants more effectively with an agency authorized to regulate a focused set of issues related to the group's interests").

determinations could benefit from the additional information provided by those with different perspectives and interests. The representation deficit becomes more troubling where an agency uses notice-and-comment rulemaking to make predictive judgments, as frequently occurs when the Environmental Protection Agency ("EPA") or the Federal Emergency Management Administration models environmental impacts. A lack of representation may present an even more glaring problem when an agency makes a policy choice that requires tradeoffs and involves balancing a broad range of stakeholder interests, as may occur when the Federal Communications Commission decides how to regulate access to internet platforms, or the Occupational Safety and Health Administration approaches the regulation of safety related to COVID-19 for healthcare workers. Likewise, representation is critical where policy design and implementation involves multiple centers of decision-making authority.[17] There is considerable evidence that the representative deficit in rulemaking is widespread, even in the kinds of rulemaking that could benefit the most from more representation.

In Part III, we evaluate some common administrative law reforms aimed at improving representation and propose our own solutions. Over the years, regulators and administrative law have taken some steps to address the representation deficit in rulemaking. These reform efforts vary in their scope and ambitions. From the more specific to the more general, they include: (1) appointing an agency ombudsman to represent particular interests in rulemaking (e.g., taxpayer advocates); (2) an agency choosing to delay the comment period and invite particular groups to participate; (3) an agency conducting prerulemaking workshops with a broad cross-section of the stakeholders; (4) requirements for an agency to target and actively consult with stakeholders about their proposed rules; (5) the statutory provision for negotiated rulemaking ("reg neg"), which, when invoked, requires identification interests likely to be affected and identification of their representatives; and finally, (6) reliance on the well-entrenched idea that more transparency and access allows for broader engagement.[18] These reform efforts rightly aim to address the problem with reliance on participation alone in rulemaking. But, by and large, these reforms have been utilized only in an ad hoc manner, addressed only a small sliver of agency rulemakings, and lacked sufficient

17. Modern political scientists describe this as "polycentrism"—a political system with multiple centers of decision-making that largely function formally independent of each other but depend on centralized coordination to resolve conflicts. *See* Vincent Ostrom, Charles M. Tiebout & Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831, 831 (1961). For discussion of the challenge polycentrism presents for rulemaking involving multiple federal agencies, see generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (discussing the challenges and advantages of interagency coordination in shared regulatory space).

18. *See* discussion *infra* Section III.A.

formality and enforcement. A more structural and systematic approach to addressing representation failures in rulemaking is needed.

We defend two reforms that have the potential to make rulemakings more representative across a broad range of agencies and types of rulemakings. First, we argue for a requirement that agencies, at the outset of the rulemaking, state an expectation for the sets of interests impacted and from whom the agency would expect to have significant engagement in the rulemaking process. The agency should then incorporate an evaluation of the actual participation in its rulemaking to its prior expectation in the statement of basis and purpose of its final rule. An agency may set its expectations for participation—its "representation floor"—for a specific rulemaking or, better still, could adopt a rule about rulemaking, setting expectations for representations under the statutes and programs it administers. This would help to produce a stronger rulemaking record (helping to improve the quality of an agency's decision) and also allow for more effective political oversight of rulemaking. Over time, an agency's statement of its expectations for participation could allow courts to review agency rules in light of the participation that actually occurred in the rulemaking process.

Second, in many rulemakings, there are systematic representation deficits. The least powerful interests in society—especially with respect to environmental impacts (including environmental justice concerns), impacts on future generations, and consumer impacts—often have no representation at all. In response, we propose that agencies introduce proxy representation competitions. Using a proxy representation bidding process to select a private representative for agency rulemaking would institutionalize a more balanced information production in the policymaking process (and do so at little cost to the agency). As important, such a proxy representation contest can help to better mobilize private interest groups to devote attention and resources to policy issues that are otherwise approached in an ad hoc manner. Both of these reforms—"representation floors" and proxy representation contests—could be adopted by agencies themselves, by an Executive Order or Office of Management and Budget ("OMB") directive to all agencies, or incorporated into legislation.

The reforms we propose are hardly a panacea for the representation deficit in agency rulemaking. Rather, we see them as an important step for administrative agencies to begin to institutionalize representative rulemaking. Our hope is that they would challenge administrative law to take representation more seriously in a manner that will improve both oversight and the production of important information for the administrative process. Ultimately, attention to representative rulemaking can improve the legitimacy and substantive outcomes of agency policymaking more effectively than reforms that focus on increasing participation.

I. REPRESENTATION'S VALUE FOR AGENCY RULEMAKING

This Part argues that representation, not merely participation, is fundamental to the value of notice-and-comment in rulemaking. It first elaborates what we mean by representation. It then shows that representation is critical to notice-and-comment. We examine three primary accounts of the rationale for participation in rulemaking—that it improves the quality of information available to the agency decision-makers, it helps to check deviations from the concerns of the politically accountable actors, and it lends the rulemaking a more democratic character—and show that, for each, the rationale works only to the extent that rulemaking is also representative.

A. REPRESENTATION

What do we mean by "representation"? Drawing on Hanna Pitkin's classic treatment, we view representation as the activity of making citizens' voices, opinions, and perspectives "present" in formulating and implementing public policy.[19] Representative democracy might institutionalize representatives as delegates, who may simply aggregate or rigidly follow the instructions of those they purport to represent, or as trustees, who may exercise independent judgment as to the best action to pursue on behalf of those they represent.[20] Either way, the idea of representation is central to democratic politics; that is, representation is part of what democratic political arrangements aim to achieve.

But there is a disconnect between standard accounts of democratic representation (grounded in territorially based elections) and political decisions by institutions, such as administrative agencies, with no direct political accountability and which depend on negotiation and deliberation to generate legitimacy.[21] In contrast to the statutory and constitutional law that governs elections, administrative law decisions do not treat representation as a fundamental value on par with other core values such as notice, transparency, and reason-giving. Scholarship is only beginning to do better. Outside of the theory of the unitary executive—which is committed to the normative link between agency action and the values represented by the President (as the only nationally elected official in American democracy)[22]—representation is

19. *See generally* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967) (offering a conceptual account of representation in modern democracy).

20. On the "trustee" versus "delegate" theories of representation, see Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214–15 (2009).

21. *See* Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 402–06 (2008) (arguing that there is a need for democratic theory to be attentive to nonelectoral forms of representation in democratic decision-making).

22. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (arguing that the President's national constituency, desire for reelection, and desire for a strong and favorable legacy create incentives that make administrative rulemaking through presidential administration more majoritarian); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994) ("But because the President has a

praised, if it is noticed at all, only as a byproduct of more basic values or legal rights, such as the right of participation,[23] or as an adjunct to conversations about democratizing regulatory policymaking.[24] We join those who think that it is a mistake to limit considerations of representation to debates over our electoral democracy. Representation deserves a place as a fundamental value of administrative law and in notice-and-comment rulemaking in particular.

What would genuine representation entail for administrative agency decision-making? For Pitkin, representation entails both *standing for* and *acting for* those who are not present.[25] Putting aside more radical reforms of changing who the agency decision-makers are, representation in the agency context involves the presence of key interest groups, which provide detailed information and advocacy to the agency on behalf of those who cannot be directly present. Key interest groups would include the corporation (representing the interests of its shareholders), a trade group (representing the interests of similarly situated businesses), a public interest group (representing the interests of environmental or other public interest goals) or a citizens group (representing the interests of similarly situated citizens, such as landowners or those who live in a specific geographic area), and a workers group or union (representing those whose jobs are implicated).[26] Each interest group would serve to present the views of its primary stakeholders.

But, as a practical matter, complete representation is often not achievable.[27] Generating high-quality information and advocacy can be particularly

national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration."); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193–95 (1994) ("[T]he President . . . is less vulnerable [than Congress] to targeted appeals by interest groups . . . . Significantly, the President sits atop the regulatory system as the leader of the federal bureaucracy. If anyone is positioned to coordinate diffuse regulatory policy, it is the President, as leader of the executive branch.").

23. *See, e.g.*, Seifter, *supra* note 13, at 1320–22; Rossi, *supra* note 11, at 193–94.

24. *See, e.g.*, K. Sabeel Rahman, *Democratic Agency as Regulatory Process*, *in* DEMOCRACY AGAINST DOMINATION 139, 139–65 (2017); BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 168–76 (2019).

25. PITKIN, *supra* note 19, at 112–15 (arguing that "actor-for-others"—or representative as agent that serves others—is central to the modern understanding of political representation).

26. *See, e.g.*, FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE 27–31 (1998); JACK L. WALKER, JR., MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS 28–32 fig.4-1 (1991); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 571 (2014). For a discussion of how public interest groups themselves can face internal challenges with representation, see generally Darren R. Halpin, *The Participatory and Democratic Potential and Practice of Interest Groups: Between Solidarity and Representation*, 84 PUB. ADMIN. 919 (2006).

27. A recent article by Christopher Havasy argues that an administrative outcome is legitimate only if all private parties potentially affected by the agency decision have equal opportunity to deliberate with the agency. Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 757 (2023). While this may be a helpful articulation of an ideal condition

challenging for public interest groups who represent mass members with professional, occupational, or political ties (e.g., NAACP, American Public Health Association, or United Auto Workers) but lack the resources of corporations, industry groups, or trade groups. The resource problem may be even more salient for private, foundation-dependent interest groups representing a status or role that virtually all members of a particular community share (e.g., Common Cause, Public Citizen, or the Environmental Defense Fund). In some instances, a group of stakeholders may lack the ability to organize at a level that would allow them to participate effectively in notice-and-comment rulemaking. For example, many environmental justice issues are most salient at the local or neighborhood level or may impact groups that are diffuse and who lack the ability to effectively organize and aggregate their interests over time. As many agencies make decisions regarding issues such as climate change, some interests that are relevant to agency policy decisions (such as those of children or future generations) may be so diffuse that their representation lacks any organizational interest group altogether.

Recognizing these practical impediments to ideal or complete representation, it makes sense to identify minimal conditions for meaningful representation in the agency context. We identify two such conditions for representative rulemaking. First, a representative rulemaking process must include some minimal diversity of engaged voices by those who are most likely to be affected by an agency's decision.[28] The basic notion of representation does not require that everyone affected by a decision have a direct means of voice to challenge it,[29] but rather, at the very least, a representative process for making a policy choice requires that the most obvious counterweight to a predominant factual narrative or perspective be presented to the decision-maker. Second, a representative process requires that the decision-maker be, in some sense, open minded enough to be responsive in some meaningful manner to a representative's participation in the process, including representatives who are in the majority and who do not prevail. At the very minimum, this requires that an agency do more than simply allow for an opportunity to participate as the only form of representation in agency rulemaking or treat representation as a kind of pallid symbolism. Instead, an agency must use representation to ensure that the evidence and arguments in the record do not just tell one side of the story and engage with at least the evidence and argument that challenges its chosen policy outcome.

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for administrative legitimacy, we focus on a more minimal, practical condition for rulemaking being representative.

28. PITKIN, *supra* note 19, at 235 ("[W]e cannot conceive that a political system could be truly responsive unless a number of minority or opposition viewpoints are officially active in its government.").

29. Rossi, *supra* note 11, at 247 (discussing how some approaches to identifying stakeholder representatives may, by necessity, limit participation or access for groups that are already at the decision-making table).

Why is representation in this sense—that is, involving multiple perspectives and responsiveness of decision-makers to those perspectives—necessary in notice-and-comment rulemaking? In the next sections, we argue that the three basic rationales for a notice-and-comment rulemaking process each require representation in the sense we identify.

B. REPRESENTATION AND INFORMATION PRODUCTION

Perhaps the strongest justification for notice and comment in rulemaking is a rationalist one, that comment can provide quality information to the agency, with the hopes that it might improve the agency's own decision-making.[30]

The drafters of the APA justified notice and comment in these terms. Emily Bremer's recent study of the historical foundations of notice-and-comment rulemaking clearly conveys that a primary concern of the drafters of the APA's notice-and-comment provisions was "informing the agency's expert judgment by giving the agency access to information it might not otherwise possess . . . ."[31] Prior to the adoption of the APA in 1946, federal legislation did not impose regular procedures on agencies, nor did it require consultation with outside groups.[32] Agencies developed internal conferences and processes to vet their rules[33]; they also engaged in a variety of forms of external consultations.[34] These "external consultation[s] entailed the targeted solicitation of views from representatives of organized industry or interest groups," with the goal of soliciting their views about the relevant subject matter.[35] Studies of particular agency practices that provided the foundation for the APA foregrounded concerns over whether an agency's "consultative process was too closed or might . . . produce insufficiently representative information."[36] The notice-and-comment procedures adopted

30. *See* Stack, *supra* note 11, at 561.

31. Bremer, *supra* note 11, at 116.

32. Stack, *supra* note 11, at 560 (citing 1941 ATTORNEY GENERAL'S REPORT, *supra* note 11, at 102).

33. Bremer, *supra* note 11, at 101–02.

34. *See* 1941 ATTORNEY GENERAL'S REPORT, *supra* note 11, at 103; Bremer, *supra* note 11, at 102–04.

35. Bremer, *supra* note 11, at 104.

36. *Id.* at 108. In some cases, these studies focused directly on whether the group solicited were adequately representative. *See id.* The following passage, highlighted by Bremer, directly considers whether the Federal Reserve Board's consultation practices are sufficiently representative:

> At first blush, it might appear that only the largest of legal, banking, and financial institutions are notified and consulted. But the generalization is too easy. The crux of the matter is the extent to which the several Federal Reserve banks and the American Bankers' Association represent large and small banks alike. In this connection, there is good reason to believe that, in fact, both groups are representative. As noted above, the directors of the Federal Reserve banks are deliberately chosen with a view toward giving representation to small banks; and similarly, each Reserve bank has one or more 'traveling representatives' whose duty,

in the APA sought to build on and formalize these forms of input. As the Attorney General's influential 1941 report put it, the point of the comment process was to "elicit[], far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action."[37]

But the value of notice and comment as a means for information production to the agency depends entirely on the quality of the information that comment produces. If the information produced is one-sided, biased, or *nonrepresentative*, then the process flounders. Put another way, for administrative agencies to realize their capacities to use information gathering to produce better decisions, the information produced needs itself to be representative. The information-production rationale for notice and comment thus depends upon notice and comment including views, opinions, and evidence from representative sources.

The underlying idea here is pluralist. The presumption is that those separate individuals or specific interest groups representing them are not only in the best position to assess the impact of any proposed regulatory action but also in the best position to provide information to the agency that is pertinent to the proposal. Given that consensus is often not possible on complex policy issues, more representative input from stakeholders allows regulators to make more factually grounded and reliable decisions. The perspectives of consumers, small investors, as well as labor and environmental groups, etc. can help to improve the data and the models that agencies are using to adopt policies and can help to overcome informational "blind spots" in policymaking. In contrast to a process dominated by business interest, representative policy processes will be more likely to present all data—not just an industry perspective. This "better information" rationale for caring about representation would suggest that rulemaking that is attentive to representation will also, on average, produce more rational agency decisions than rulemaking that is not representative. A representative agency decision-making process is also less likely to produce extreme outcomes; there is considerable evidence suggesting that inclusion of a diverse range of viewpoints in developing policy helps to

> among others, is said to be to sound out the opinion of the member banks in the district. In like manner, it is not apparent that the American Bankers' Association fails to act in a truly representative capacity; on the contrary, examination of its publication indicates that its spokesmen and officers are, in large part, recruited from the smaller country banks and its committees are composed in part of their representatives.

Id. at 110 (quoting S. DOC. NO. 76-186, at 15 (1940)).

37. 1941 ATTORNEY GENERAL'S REPORT, *supra* note 11, at 102; *see* Rossi, *supra* note 11, at 174–75; Wagner, *supra* note 11, at 1330–31.

steer agencies away from extreme policy choices[38] and toward more moderate policy positions, which tend to be more reliable and more stable.[39]

C. REPRESENTATION AND MONITORING

A second rationale for allowing participation in rulemaking derives from the idea that participation provides a means to help Congress police when the agency's policies deviate from congressional preferences. This justification relies on the underlying idea known as the "transmission belt" model, which understands congressional delegation of a law or policymaking function to an agency as an opportunity to approximate the will of what a majority in a democracy that adheres to norms of procedural fairness would want.[40]

To keep agencies in line with congressional preferences, it is critical to have adequate means to monitor the agency's compliance with or deviance from the preferences of Congress. One means of doing so is by requiring a notice-and-comment process. Notice and comment helps Congress take advantage of what positive political theory ("PPT") scholars call "fire alarm" oversight.[41] In fire-alarm oversight, Congress relies on constituents to alert it to threatened agency errors, allowing Congress to monitor agencies and, if agency decisions stray from the wishes of Congress, intervene more effectively.[42] On this view, the provision of notice gives a time and space for politics—it allows interested parties to get an idea of the agency's proposal before it has

38. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) (defining group polarization as involving "members of a deliberating group predictably mov[ing] toward a more extreme point in the direction indicated by the members' predeliberation tendencies"). On the significance of polarized partisan politics to modern American democracy, see Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 274–75 (2015).

39. On the argument that individuals surrounded by others with like-minded views will grow more extreme, while individuals exposed to a more diverse range of viewpoints tend to become more moderate, see generally Sunstein, *supra* note 38. "Group polarization . . . occur[s] when an initial tendency of individual group members toward a given direction is enhanced following group discussion." *See* Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCH. 1141, 1141 (1986).

40. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) ("The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases.").

41. *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 250 (1987) [hereinafter McCubbins et al., *Procedures*]; Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 473 (1989); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

42. *See* McCubbins & Schwartz, *supra* note 41, at 166 (describing various forms of congressional oversight fire alarms).

gone into effect, allowing them to pull a fire alarm in Congress if the proposal significantly deviates from congressional preferences.[43]

Although there has been a long endorsement of the idea that notice and comment can function to facilitate a fire-alarm model of oversight,[44] little serious attention has been paid to which representatives are likely pulling fire alarms and for which purposes. Indeed, efforts to enhance representation in agency policy choices can unintentionally (and sometimes even intentionally) result in "deck stacking" for the most powerful interest groups. For example, regulatory impact requirements can, in practice, favor groups such as businesses and do not always consider impacts on other groups such as consumers or labor. Other efforts might promote "false" fire alarms—i.e., alarms that heighten the cost of an agency adopting regulations, even when they are consistent with legislative preferences. And fire alarms can also give stakeholders strategic new opportunities to delay agency adoption of policy or enforcement. For example, if business firms are the only participants in the rulemaking process, there may be many fire alarms pulled where there is no fire and many fires where no one had an interest in pulling an alarm on behalf of the public. The simple reality is that who in fact participates in processes to trigger fire alarms can make a big difference to the effectiveness of notice and comment as a form of monitoring.

Careful design of fire alarms aimed at introducing representation in the agency decision-making process can help narrow the principal agency gap that can plague policymaking under the transmission belt account. At the same time, in many instances, no specific fire alarms have been tailored to agency regulatory programs, and as a result, Congress is forced to rely on the hope that equal opportunities for external representation in the agency rulemaking process will serve a monitoring role.[45] Creating targeted monitoring during the rulemaking process—such as, for example, a narrowly tailored consultation requirement for a systematically marginalized group

43. In response to the decline of the transmission belt model of legitimacy, Stewart argues that interest group representation may help increase the legitimacy of agency decision-making. Stewart, *supra* note 40, at 1760–61. Interest group representation before the agency, he writes, "will not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests, but is valuable in itself because it gives citizens a sense of involvement in the process of government, and increases confidence in the fairness of government decisions." *Id.* at 1761. Judicial review can also play a role. Judicial review of agencies "enables the 'citizen[s] to cast a different kind of vote, [which] informs the court that . . . a particular point of view is being ignored or underestimated' by the agency. Its ultimate aim is seen as 'a basic reordering of governmental institutions so that access and influence may be had by all.'" *Id.*

44. *See* McCubbins et al., *Procedures*, *supra* note 41, at 254; McCubbins & Schwartz, *supra* note 41, at 166.

45. *See, e.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751–52, 1769–70 (2007) ("Congress can 'stack the deck,' increasing the likelihood that agencies will reflect the preferences of its constituents without any further intervention, solving the problem of bureaucratic drift.").

that rarely comments on its own—could enhance the level of monitoring in agency rulemaking.[46] On the other hand, some efforts to enhance representation may provide for too little monitoring too late—especially to the extent that they encourage eleventh-hour legal challenges to agency regulations without requiring an interest group to actually participate in the regulatory process.[47] Effective calibration of fire alarms for oversight requires attention to the timing and nature of representation.

In short, for notice and comment to serve as an effective vehicle for monitoring an agency's compliance with the preferences of political principals, those participating in the monitoring must themselves be representative of the sets of interests to which the political principals are ultimately accountable.

D. REPRESENTATION AND MORE "DEMOCRATIC" RULEMAKING

A third rationale or understanding of notice and comment is that allowing public participation makes rulemaking more "democratic" because it provides a forum of direct accountability to the people. Although not part of the APA drafter's original rationalist justification for notice and comment, a look at high-profile rulemakings today makes clear that rulemakings have become important fora for citizen involvement in government. Some agency rulemakings generate tens of thousands or even millions of direct citizen comments. Excluding the well-documented problem of fake and fraudulent comments of various sorts (those produced by bots or generated using fake email addresses),[48] many public interest groups view mass submission of citizen comments as an important aspect of their missions.[49] Likewise, comment campaigns from industry, trade groups, and public interest groups also appear to be premised on the idea that the volume of comments expressing a view, one way or another, does and should make a difference to agency decision-making.

In what way and to what extent, if any, a high volume of commenting makes rulemaking more "democratic" is a difficult question. Notice and comment is not a plebiscite; more comments on one side or the other should not tilt a regulatory outcome one way.[50] At the same time, the use of notice and comment by organized groups of citizens resonates with core elements of our electoral democracy, including the right of citizens under the First

46. *See, e.g.*, Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 37–38 (2022) ("Consultation requirements with outside groups and, especially, advisory committees generate several substantial advantages for their members in influencing agencies.").

47. For elaboration of this criticism of citizen suits, see Rossi, *supra* note 11, at 195.

48. *See generally* N.Y. STATE OFFICE OF THE ATT'Y GEN., FAKE COMMENTS, *supra* note 3 (reporting on millions of fake comments submitted to support the repeal of net neutrality rules).

49. *See* Devin Judge-Lord, Why Do Agencies (Sometimes) Get So Much Mail?: Public Pressure Campaigns and Bureaucratic Policymaking (Oct. 4, 2021) (Ph.D. dissertation, Harvard University), https://judgelord.github.io/dissertation/whyMail.pdf [https://perma.cc/U76V-MPGY].

50. *See* Mendelson, *supra* note 13, at 1346 (noting that agency cannot treat the number of comments as a dispositive vote in one direction or another).

Amendment of the U.S. Constitution to petition their government, and to speak directly to it, including in numbers. For present purposes, we do not need to resolve the precise sense in which participation in notice and comment might render agency rulemaking democratic because any account of rulemaking as democratic requires that there be balanced or representative participation.[51] A societal process in which only one set of interests participates does not lend it any democratic legitimacy. Likewise, a rulemaking in which the agency received tens of thousands of comments all reflecting one perspective or set of interests has, at best, a claim to have generated considerable interest but not a claim that the process was more democratically legitimate. For any claim that notice and comment enhances the democratic legitimacy of the rulemaking, multiple parties and sets of interests all must be present—and represented.[52]

Indeed, because of the information demands of agencies, representation also has a special character in notice and comment. The structure of the political branches allows them to at least claim to aggregate individual preferences.[53] Because agencies are not merely aggregating preferences, effective presence in an agency proceeding requires more than merely saying yea or nay. It requires providing the agency information or engaging the inference the agency makes from the information it has. Since developing that information is costly, interest groups will generally be needed. They can be the repositories of pooled resources and thus can devote sufficient attention to issues before an agency to provide relevant information and analysis. For participation to be democratically legitimate, it must involve views from a diverse array of informed stakeholders and given the information and expertise demands for effective advocacy, typically an array of interest groups.

The idea that better and more democratic decision-making about public issues follows from a process that includes a broad array of perspectives finds parallels in the recent political science literature on epistemic democracy.[54] For this account of democracy, the benefits of representation for democracy are not merely procedural. Rather, representation helps to improve the

51. *See* Havasy, *supra* note 27, at 796–97 (arguing that the administrative processes can be democratically legitimate when people affected by rules have equal ability to influence their production).

52. *See* Seifter, *supra* note 13, at 1324–25 (noting that for rulemaking to live up to democracy's ideals, it is important to evaluate whom participating groups speak for and how they purport to speak on their behalf).

53. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32–33 (1985) (noting that for democratic pluralists, "[t]he common good amounts to an aggregation of individual preferences"). Some describe this form of democratic pluralism as requiring government to primarily be attentive to processes that reveal and aggregate "unreflective" preferences. *See* Robert E. Goodin, *Democracy, Preferences and Paternalism*, 26 POL'Y SCIS. 229, 230 (1993).

54. *See generally* DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2008) (advancing a theory of democracy that aims to get to the truth); EMERSON, *supra* note 24 (suggesting how participatory inclusion and deliberation also has information advantages).

quality of democratic decisions, making them more likely to both reflect substantive policy choices that map onto facts regarding the impacts of various policies. This echoes the argument for why representation is valued by the information-production account of rulemaking,[55] but an epistemic democracy account of representation in rulemaking connects the information-production function of representation to the democratic process. In addition to recognizing that representation produces better information, epistemic democracy appreciates that representation in rulemaking can help agencies to identify stakeholder preferences in formulating policies. It also places central emphasis on who actually participates in rulemaking, inviting agencies to confront the basic identification of those stakeholder interests that must participate in the rulemaking process in order for an agency to make a democratically legitimate policy decision.

* * *

This Part has sought to show that the rationales for notice-and-comment rulemaking depend upon it being a representative process. Participation enhances the quality of information available to the agency only if it comes from representative sources. Likewise, comment can serve as a means for monitoring the fidelity of agency officials to the preferences of political principals only if those participating actually serve as proxies for the preferences of those principals. And to the extent participation in rulemaking can enhance the democratic legitimacy of the agency rules, that participation itself must be representative. In short, representation needs to be taken seriously in rulemaking for all of the reasons that we consider notice-and-comment rulemaking a valuable tool in administrative law.

II. THE REPRESENTATION DEFICIT IN MODERN AGENCY RULEMAKING

As Michael Sant'Ambrogio and Glen Staszewski put it, "it is hard to imagine a government decision-making process more open and accessible to the public, at least formally," than notice-and-comment rulemaking.[56] Indeed, administrative law embraces public accessibility as the primary benchmark for the rulemaking process. Most basically, the APA requires agency rulemaking to provide notice to the public[57] and an opportunity to comment.[58] This participation right is somewhat bare, but courts have elaborated upon it in

55. *See supra* Section I.B.

56. MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 2 (2018), https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf [https://perma.cc/N87T-ZSYR].

57. The APA requires that the notice of proposed rulemaking "include— (1) . . . the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b).

58. Once adequate notice is provided, the agency must provide interested persons with a meaningful opportunity to comment on the proposed rule "through [the] submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c).

important ways. An agency's notice of its proposal must be meaningful enough to give commentators a right to engage the substance of the agency's proposal[59]; agencies must give commentators a "reasonable" time to submit comments[60]; and the agency must "respond in a reasoned manner to the comments received," showing "how the agency resolved any significant problems raised by the comments."[61]

But are agency rulemakings today representative? Who participates and whom do they purport to represent? At which junctures do they weigh in? When are the most important decisions made? How do interest groups and citizens engage the rulemaking process? When is their advocacy most effective?

This Part provides a snapshot of notice-and-comment rulemaking that provides answers to these questions. Based on recent empirical studies of the rulemaking process—which examine actual participation, interest groups' strategy, and agency decisions—our aim here is to offer an overview of what actually occurs in the notice-and-comment rulemaking process, with special attention to the aspects that bear on whether actual participation in rulemaking is, in any meaningful way, representative.

Recent empirical studies paint an especially disturbing portrait of actual public representation in rulemaking: Although the idealized form of notice and comment is often embraced as one of the APA's great innovations, the actual notice-and-comment process often falls short of these ideals. These studies show a process that is heavily skewed toward businesses and regulated firms and that often includes little or no representation of the public interests, such as consumers, labor, or vulnerable populations likely to be impacted by rules. Studies demonstrate that many agency rulemaking processes formulating important policies do not receive any comments from interest groups representing the public interest, and even where public interest comments

59. *See, e.g.*, Chesapeake Climate Action Network v. EPA, 952 F.3d 310, 319–20 (D.C. Cir. 2020) (describing the statement requirement that rules be a logical outgrowth of the notice to allow effective comment).

60. While there is no minimum period of time for which the agency is required to accept comments, in reviewing an agency rulemaking, courts have focused on whether the agency provided an "adequate opportunity for comment"—of which the length of the comment period represents only one factor for consideration. N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 770 (4th Cir. 2012) ("Our conclusion that the Department did not provide a meaningful opportunity for comment further is supported by the exceedingly short duration of the comment period. Although the APA has not prescribed a minimum number of days necessary to allow for adequate comment, based on the important interests underlying these requirements, the instances actually warranting a 10-day comment period will be rare." (citation omitted)). Some statutes require minimum comment periods. *See, e.g.*, 42 U.S.C. § 6295(p)(2) (requiring a minimum sixty-day comment period for a proposed energy conservation standard). Additionally, Executive Order 12866, which provides for presidential review of agency rulemaking via the OMB's Office of Information and Regulatory Affairs, states that the public's opportunity to comment, "in most cases should include a comment period of not less than 60 days." Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

61. Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 919 (D.C. Cir. 1982) (quoting Rodway v. U.S.D.A., 514 F.2d 809, 817 (D.C. Cir. 1975)).

are received, the distribution of engaged comments is heavily skewed toward regulated businesses and their trade group representatives.[62] Most alarmingly, many agency rules do not receive any comments at all.[63] To the extent that a basic balance of representation is missing altogether, agency rulemaking fails to achieve its basic functions of information production, facilitating better monitoring of agencies, or enhancing democratic legitimacy.

Before turning to these studies, several qualifications are worth noting. First, our survey here does not include every empirical study of rulemaking. Rather, our hope is to survey recent empirical studies. These help to provide a more nuanced understanding of the actual operation of agency rulemaking and also help to position the recent empirical literature against the backdrop of some of the classic treatments of rulemaking in law and political science.

Second, our focus is on the agency notice-and-comment process. But, as government reports and recent scholarship highlight, the standard notice-and-comment process no longer describes thirty percent or more of rules.[64] An important Government Accountability Office report found that more than one-third of major rules and forty-four percent of nonmajor rules issued between 2003 and 2010 were issued without a notice of proposed rulemaking,[65] and a recent study shows that only one-third of rule revisions proceed through notice and comment.[66] Rules issued outside of notice and comment pose important questions,[67] but we confine our focus to notice-and-comment rules, which still include the majority of significant agency rulemakings.

Third, even focusing only on notice-and-comment rulemaking, there is still tremendous variation among agencies and across substantive issues. Agencies have their own practices, and each rulemaking has its own dynamics and complexion. Our aim is to understand the general dynamics of rulemaking, acknowledging that individual rulemakings will reflect the diversity of the rules they produce. For the purposes of getting a picture of these general

62. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 814.

63. *See id.* ("[I]n fiscal year 2018 nearly one-third of proposed rules did not receive a single public comment; more than forty-five percent generated between one and ten public comments; and just over twelve percent received between eleven and one hundred public comments." (emphasis omitted)).

64. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 68–69 (2015) (finding that between 1995 and 2012 "[a]gencies exempted approximately [fifty percent] of rules from . . . notice-and-comment . . . ."); *see also* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800–01 (2015) ("More than one-third of major rules in recent years were promulgated without prior notice and comment, often citing the good cause exemption to APA notice-and-comment mandates."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (2012) ("[A]gencies published about [thirty-five] percent of major rules and about [forty-four] percent of nonmajor rules without an NPRM during those years.").

65. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 64, at 8–9.

66. Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 211 (2017) [hereinafter Wagner et al., *Dynamic Rulemaking*].

67. *See* Gluck et al., *supra* note 64, at 1807–11.

dynamics, we trace the chronological development of a rule, from the development of the proposal, to publication of the notice of proposed rulemaking in the Federal Register, to adoption and publication of the final rule.

A. PRENOTICE RULE PROPOSAL DEVELOPMENT

To understand our rulemaking system, it is critical to evaluate what participation looks like prior to the agency issuing a notice of proposed rulemaking. Just looking at the APA's provisions on notice and comment would lead one to think that participation has an impact when it takes the form of the filing of an official comment on an agency proposal.[68] But as practitioners, scholars, and policymakers have long understood, participation is likely even more important prior to the agency's formal proposal of a rule, in a notice of proposed rulemaking ("NPRM"),[69] something about which the APA's provisions on rulemaking have virtually nothing to say.

These pre-NPRM contacts and processes—that is, prenotice contacts and processes—play a critical role because, in the notice-and-comment system, agencies have very strong incentives to make their proposals as close as possible to the rules the agency aims to adopt. Numerous considerations reinforce these incentives. Agency proposals are typically very detailed specifications of the rules they plan to adopt, and therefore require significant investments of agency resources. The sunk organization costs, psychological sense of commitment to one's work product,[70] and organization momentum all contribute to the widely shared view that the important decisions about rules are made prior to the publication of the proposal.[71]

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68. *See generally* 5 U.S.C. § 553 (setting forth the notice-and-comment requirements of rulemaking).

69. *See* 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, 1267 (1974) (noticing how extensive prenotice process could lead an agency to view its rules as a "final test run of a fully designed and evaluated vehicle" rather than as "prototype[s]"); E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."); *see also* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 798–99 (observing that "agencies make many of their most important decisions in rulemaking well before the publication of a Notice of Proposed Rulemaking (NPRM)" and providing detailed recommendations for enhancing public involvement in rule development).

70. Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 624–27 (2002) (arguing that the framework development and causal arguments required for proposal create substantial cognitive "lock in" to the proposal for the agency).

71. William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 592 (2009) (noting these incentives to invest in proposals); Stern, *supra* note 70, at 591 (examining the role of maintenance bias in anchoring agencies on their proposals).

Administrative law has also reinforced the agency's incentives to "get it right" in its notice of proposed rulemaking.[72] The APA requires the agency to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[73] In order to ensure that the notice provides fair notice, and thus an effective opportunity for commentators to comment on the proposal, the courts of appeals have required "that the final rule the agency adopts must be 'a "logical outgrowth" of the rule proposed.'"[74] The logical outgrowth doctrine gives the agency an additional set of incentives to invest in its proposals so that the agency does not have to reissue another proposal.[75] If a court will force an agency to redo its extensive notice process if its final rule changes too significantly from its proposal or if it did not adequately disclose the basis for its final rule in its proposal, agencies have every incentive to invest in building everything into a near-finished product before they issue their notice of proposed rulemaking. An extensive study of rulemaking conducted during the Clinton Administration also found that the resources required to publish a proposed rule were so extensive that agencies were unlikely to adopt comments which required significant changes to the proposed rule.[76] Although agencies may issue an advanced notice of proposed rulemaking ("ANPRM") as a way of getting more preliminary feedback on directions prior to issuing a notice of proposed rulemaking, ANPRMs are only used infrequently.[77]

These incentives have implications for identifying when the most significant choices are made and when the agency has the most open attitude to evidence an influence. Simply, if agencies invest in trying to "get it right the first time [that is, in the proposal]," then the "most important decisions in rulemaking are tentatively made before procedural constraints go into effect"—that is, prior to the agency issuing its notice of proposed rulemaking.[78] This point is not lost on interest groups or on regulatory overseers. A study of interest groups found that they rank contact with the agency prior to the

72. Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–11 [hereinafter Wagner et al., *Rulemaking in the Shade*].

73. 5 U.S.C. § 553(b)(3).

74. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (quoting Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986)).

75. *See* Wagner et al., *Rulemaking in the Shade*, *supra* note 72, at 127–28, 127–28 n.106.

76. OFF. OF THE VICE PRESIDENT, IMPROVING REGULATOR SYSTEMS: ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW 35–36 (1993).

77. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70 (2004).

78. West, *supra* note 71, at 582–83; *see also* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (the more specific details agencies work into their proposals, the less flexibility they have to change them in the comment period).

issuance of notice as the most effective tool for influencing agency action.[79] Early contact allows the group to influence the agency's early thinking about the rule,[80] while the agency is still open to information and willing to make adjustments. Perhaps in recognition of the importance of prenotice input, President Clinton's regulatory review executive order required agencies, before issuing a notice of proposed rulemaking, to "seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials)."[81]

In light of the strong incentives to get to the agency before it issues a formal proposal, what does prenotice participation look like? The question is difficult to answer in part because agencies are not generally required to disclose their *ex parte* contacts prior to publishing the proposed rule; the duty to log in the public record is triggered only after the notice of the proposed rule is published.[82] As a result, for the vast majority of rulemakings, there are few records regarding the scope and distribution of participation when it is most likely to have the greatest influence on the agency—that is, prior to issuance of the notice of proposed rulemaking. To put together a picture of the scope of communications prenotice, researchers have conducted case studies following up on direct indications of contacts in agency records and have surveyed interest groups and agencies on participation and strategies.

By virtue of statutory quirks requiring prenotice docketing of contacts or distinctive agency practice, two detailed case studies directly evaluated the scope of prenotice contacts with agencies in rulemaking. The first and foundational study by Wendy Wagner, Katherine Barnes, and Lisa Peters examined ninety hazardous air pollutant standards set by the EPA.[83] The authors were able to reconstruct the scope of prenotice contacts because the EPA had a practice of docketing these contacts, though it had no legal requirement to do so.[84] Their findings were dramatic. With respect to the hazardous pollutant standards studied, the EPA had, on average, 178 contacts

79. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 196, 198 tbl.5-3 (4th ed. 2010); *see also* Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NAT. RES. & ENV'T 9, 9 (1990) (reporting that the most effective advice for representing clients before the EPA was to "[g]et involved during the preproposal phase of an Agency rulemaking"). *But see* Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RSCH. & THEORY 39, 54–55 (1998) (reporting a survey of high-level agency officials that viewed comments by interest groups during rulemaking as the "most effective" means of influencing outcomes).

80. KERWIN & FURLONG, *supra* note 79, at 175.

81. Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993). This requirement was also added in President Obama's Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

82. *See* Home Box Off., Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) (holding that prenotice communications do not, in general, have to be put in a public file, whereas those after the notice do).

83. Wagner et al., *Rulemaking in the Shade*, *supra* note 72, at 119.

84. *Id.* at 125 n.100.

during the development of the proposal, prior to the publication of the proposed rule, which was "more than double the [average] number of comments received on the rule."[85] The balance of these contacts was overwhelmingly from industry. Industry (and industry associations) had, on average, 170 times more communications in the preproposal stage than public interest groups.[86] Measured in another way, industry had, on average, eighty-four contacts per rule (including meetings, phone calls, and letters) compared to 0.7 contacts by public interest groups.[87] Thus, for some rules, there is no public interest contact prenotice.

The second direct participation study, conducted by Kimberly Krawiec, provides a detailed look at the participation during the development and notice-and-comment process for the Volcker Rule governing banks' proprietary trading—and reveals a very similar pattern of participation.[88] Rare transparency efforts in the implementation of the Dodd–Frank Wall Street Reform and Consumer Protection Act resulted in the agencies keeping logs of their contacts.[89] Using those logs, Krawiec found that in preproposal meetings, 93.1 percent of the agency's disclosed contacts were with "financial institutions, financial industry trade groups, and [major] law firms," whereas only 6.9 percent of the contacts were with "public interest, research, advocacy, and labor groups, and other persons and organizations."[90] Moreover, nonfinancial industry contacts disproportionately took place in group meetings, with nearly all of those meetings happening in a group meeting on a single day.[91] Thus the two existing case studies of direct contacts with an agency prenotice—Wagner's and Krawiec's—reveal an *ex parte* blitz of the agency in which the overwhelming majority of the contacts were by regulated parties and business.[92]

A similar picture emerges from studies that do not have the benefit of direct records of contacts. For instance, Susan Webb Yackee examined

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85. *Id.* at 124.

86. *Id.* at 125.

87. *Id.*

88. *See* Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 57–58 (2013) [hereinafter Krawiec, *Sausage-Making*]; Kimberly D. Krawiec, *Agency Lobbying and Financial Reform: A Volcker Rule Case Study*, 32 BANKING & FIN. SERVS. POL'Y REP. 15, 15 (2013) [hereinafter Krawiec, *Agency Lobbying*].

89. Krawiec, *Sausage-Making*, *supra* note 88, at 78; Krawiec, *Agency Lobbying*, *supra* note 88, at 19.

90. Krawiec, *Sausage-Making*, *supra* note 88, at 80; *see also* Krawiec, *Agency Lobbying*, *supra* note 88, at 20–21 (deducing the percentages further down: financial institutions seventy-eight percent, law firms 7.8 percent, financial trade and lobbying 7.3 percent, public interest, advocacy, and labor 4.2 percent, other 2.7 percent).

91. Krawiec, *Sausage-Making*, *supra* note 88, at 81.

92. *See generally* Keith Naughton, Celeste Schmid, Susan Webb Yackee & Xueyong Zhan, *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258 (2009) (finding substantial commenter influence at the advance notice of proposed rulemaking stage).

nineteen transportation rules in which the agency has issued an ANPRM.[93] She then conducted a follow-up telephone survey of those who submitted comments in response to the ANPRM, asking about whether they had contacts prenotice, and what type of contacts.[94] Among those respondents, a surprising forty percent (a set of forty-nine respondents) indicated they had *ex parte* contacts with the agency during the proposal development.[95] She found a more even distribution of parties who participated in prenotice contacts. Thirty-nine percent of the participants who indicated they had *ex parte* communications were from state and federal governments, thirty-one percent were from business interests, and another thirty-one percent were from nonbusiness/nongovernment, including citizens groups, labor unions, and individual citizens.[96] These are only percentages of those participants who had prenotice contacts. As a result, they do not speak to whether the overall number of *ex parte* contacts followed that same distribution. And indeed, Yackee notes that thirty-eight percent of those parties who engaged in *ex parte* contacts indicated that they used more than one strategy,[97] leaving open the possibility that business interests still have many more contacts than others. Yackee's study underlies that prenotice contacts are the norm, not the exception.

That same message comes through in examinations of interest groups. In an extensive survey of interest groups, Cornelius Kerwin and Scott Furlong find that "[i]nformal mechanisms and difficult-to-observe mechanisms for communicating views to agencies are used a great deal and are thought to be as or more effective than the traditional means—such as written comment—that figure so prominently in the procedural law."[98] Even more specifically, their study showed that interest groups rank prenotice communications with the agency and coalition formation as the most effective devices for influencing the agency.[99]

Several studies support the efficacy of prenotice contacts. In an early study, Wesley Magat and his coauthors compared the comments received in response to an EPA informal request for review distributed to industry insiders to the comments EPA received following publication of notice of proposed rulemaking.[100] They found that industry comments during the prenotice consultation substantially weakened the pollution standards and that the public

93. Susan Webb Yackee, *The Politics of* Ex Parte *Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RSCH. & THEORY 373, 380–81 (2012).

94. *Id.* at 381.

95. *Id.* at 384.

96. *Id.* at 387.

97. *Id.* at 383 n.23.

98. KERWIN & FURLONG, *supra* note 79, at 188.

99. *Id.* at 196, 198 tbl.5-3 (observing 42.5 percent ranking informal contact prenotice as "very effective" and 25.5 percent ranking it as the "most effective").

100. WESLEY A. MAGAT, ALAN J. KRUPNICK & WINSTON HARRINGTON, RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR 36–39, 157 (1986).

comments had very little effect. William West's study based on elite interviews also revealed that prenotice participation, anchored in the "administrators' past experience and by their sense of who the significant players were," and "tended to be dominated by established subsystem actors."[101] West also found that business interest groups participate more actively and effectively than public interest groups in development of the agency's proposals.[102]

Susan Yackee's study of transportation rules supports this perception of efficacy of prenotice contacts. She found, for instance, a twenty-four percent increase in the chance of obtaining a party's preferred proposal depending upon whether there was informal contact in the preproposal phase.[103] She also found that those who participated prior to the agency's development of its proposed rule were forty-one percent more likely to obtain a withdrawal of the rule than lobbyists who did not engage in such contacts.[104]

In sum, these studies reveal a consistent and clear message: Sophisticated parties recognize that prenotice contacts with the agency are the most important ways of influencing the agency's proposals. Regulated interests devote particular resources to those contacts, and at least in the best indicators of actual contacts with the agency on major rules, regulated industry's contacts vastly overwhelm that of citizen groups or other nongovernment organizations representing the interests of regulatory beneficiaries.

B. PARTICIPATION IN COMMENT

The formal solicitation of comment in response to the agency's notice of proposed rulemaking is the most public, and also the most publicly participatory part of the rulemaking process. Creating a right of public comment, widely heralded as innovation of the 1946 Administrative Procedure Act,[105] was viewed as a critical means of providing information to the agency. Indeed, as noted above, the notice-and-comment provisions were originally conceived in rationalist terms as a way to give "all persons affected [the opportunity] to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses [of action]" to assist the agency in "learn[ing] the frequently clashing viewpoints of those whom its regulations will affect."[106]

This rationalist design—comment as an opportunity for the agency to learn from the clashing viewpoints of those whom the regulations will affect—relies upon party initiative to produce information about the clashing views before the agency. It relies on groups with different views about regulation

101. West, *supra* note 77, at 70.

102. KERWIN & FURLONG, *supra* note 79, at 187 (reporting West's results).

103. Yackee, *supra* note 93, at 386.

104. *Id.* at 388.

105. *See* Bremer, *supra* note 11, at 90–115 (describing significant variations in the uses of rulemaking and consultation across agencies before adoption of the APA).

106. JACKSON, *supra* note 11, at 102.

actually participating. Concerns about the character of participation in the comment process—whether it is happening at all, who is making comments, and whether and what kind of comments have any effect on the ultimate rule—have prompted a sequence of studies both inside and outside of government.

The first major study, produced in 1977 by the Senate Committee on Government Affairs, chaired by consumer advocate Senator Abraham Ribicoff, defended the importance of participation in rulemakings by the public and public interest groups, recorded low levels of public participation in many rulemakings, and crafted several careful recommendations (which we discuss in Part III) to help ameliorate these problems.[107] The 1977 Senate Report includes one of the earliest empirical examinations of participation in notice-and-comment proceedings and recorded patterns that have been replicated in many respects in later empirical studies by scholars.

Examining rulemakings in ten agencies, the 1977 Senate Report makes two significant findings. First, in a large proportion of rulemakings the agencies identified as significant, there was no participation from the public, or more importantly, from organized groups representing the public interest for many agencies.[108] Second, the 1977 Senate Report found that when participation by organized public interests occurs, it "is consistently exceeded by the participation of regulated industries, and often constitutes only a tiny fraction of such industry participation."[109] The 1977 Senate Report's estimates of the overall balance of participation excluded individual comments both because it could not identify whether they were speaking on behalf of regulated or nonregulated interests and because agencies do not usually accord such comments "much weight because they frequently lack specific or technical knowledge."[110]

Since 1977, numerous case studies have sought to identify participants in the comment process and what influence their comments have.[111] In many

107. COMM. ON GOVERNMENTAL AFFS., U.S. SENATE, PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 95-71, at VII–X (1st Sess. 1977).

108. *See id.* at 13 (examining FCC, FPC, FTC, ICC, CAB, FDA, NRC, and SEC). In particular, at the Federal Power Commission, there was no public participation in six of the eight proceedings; at the FDA, there was no public participation in more than half of the rulemakings; and at the ICC, no public participation in more than sixty percent of the rulemakings. *Id.* The 1977 Senate Report found greater public participation before the CAB (in seventy percent of the dockets studied), and public participation in all three of the FCC dockets studied, and all of the FTC dockets. *Id.* at 14. The Report attributed the high levels of participation in FTC proceedings to recently enacted legislation. *Id.*

109. *Id.* at 12.

110. *Id.* at 13 n.*. The 1977 Senate Report found overwhelming industry participation, as compared to public participation, before the FPC (12:1, and 4:1), FDA (122:4; 29:1; 12:5, and 60:12), ICC (23:4; 13:5; 3:1), and somewhat more balance in participation before the FCC (64:14; 33:4; 3:4), CAB (ranging from 24:1 to 8:3), and the FTC (ranging from 346:21 to 843:130). *Id.* at 13–14.

111. *See, e.g.*, Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 252–53 (1998)

but not all cases, these subsequent studies have found the same patterns identified in the 1977 Senate Report—the complete absence of citizens group participation in some rulemakings and overwhelming participation by business interests in most rulemakings.

In a detailed study of EPA, the National Highway Traffic Safety Administration ("NHTSA"), and the U.S. Department of Housing and Urban Development ("HUD"), Marissa Martino Golden found that the rulemakings by EPA and NHTSA replicated the participation patterns observed in the 1977 Senate Report. Specifically, Golden found that between 66.7 and one hundred percent of the comments received in the EPA and NHTSA rulemakings were submitted by business interest (corporations, public utilities, or trade organizations).[112] In five of the eight rulemakings, citizens groups did not submit any comments, and no individual submitted any comments.[113] For those rules, citizen group participation never exceeded eleven percent.[114] With regard to the HUD rulemakings, Golden found the opposite: namely, minimal business participation and considerable participation by citizens groups and individuals.[115]

Later case studies have also found the complete absence of citizens or public interest groups in a significant number of rulemakings and the dominance of business interests in the comment period. The Wagner study of hazardous pollutant standards discussed above found that whereas industry groups submitted comments in ninety rulemakings in the study, "public interest groups . . . participated in less than half ([forty-eight percent]) of the rules."[116] The Wagner study also found an overwhelming majority of the comments submitted were by industry—eighty-one percent in total.[117] The mean number of comments by public interest groups, when they did participate, was 2.4 (four percent) as opposed to thirty-five (eighty-one percent) by industry.[118] Wagner's study also concluded that these industry comments had a substantive impact: Eighty-three percent of the changes from the proposed rule to the final rule weakened them, frequently eliminating a requirement EPA had initially proposed.[119] This study also found "that the number of

(reporting on the types of interest groups that comment); Wagner et al., *Rulemaking in the Shade*, *supra* note 72, at 123 (noting how little the notice-and-comment process affects the final rule); KERWIN & FURLONG, *supra* note 79, at 180–96 (measuring participation in the notice-and-comment process).

112. Golden, *supra* note 111, at 252–53.

113. *Id.* at 253.

114. *Id.*

115. *Id.* at 254.

116. Wagner et al., *Rulemaking in the Shade, supra* note 72, at 128.

117. *Id.*

118. *Id.* at 128–29.

119. *Id.* at 130–31.

changes weakening the [proposed] rule steadily increased as the number of industry comments increased . . . ."[120]

Other studies also find a predominance of business interests in the comment process and in its substantive impact. In an examination study of rules receiving between one and two thousand comments over a seven-year period from four agencies, Jason Webb Yackee and Susan Webb Yackee found that business interests accounted for fifty-seven percent of the comments submitted.[121] They found comments from business interests had a statistically significant effect on the content of the final rules issued but found no statistically significant relationship between comments from nonbusiness groups and private parties and changes in final rules.[122] Moreover, "[w]hen business commentators are united in their desire to see less regulation in a final rule . . . they will receive less regulation over [ninety percent] of the time."[123] Another study by Susan Webb Yackee revealed a more mixed effect but did document that business preferences are advanced more often when their comments are accompanied by other business participation; in other words, business influence decreases as participation from other groups increases.[124]

The dominance of business interests as a percentage of the overall comments submitted has an important exception: the high salience rulemaking which generates large numbers of individual comments from members of the public. The Volcker Rule is an example. Krawiec found that over ninety-three percent of the total number of comments submitted were from individuals, ninety-one percent of which were versions of three different form letters.[125] Of the total comments, only two percent were unique.[126] Among the unique comments, Krawiec found that industry trade groups, financial institutions, and asset managers produced the most sophisticated comments, as measured by length, percentage with attachments, percentage of letters with data or empirical analysis, or percentage that proposed specific changes in the rule.[127] In a sense, outside of the duplicate form letters, the distribution of comments

120. *Id.* at 131 (reporting "a correlation coefficient of 0.56 that is significant at the 0.01 level").

121. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POLS. 128, 133 (2006) (finding fifty-seven percent of public comments from four agencies came from businesses).

122. *Id.* at 133–35.

123. *Id.* at 135; *see also* Susan Webb Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 292, 318 (Daniel Carpenter & David A. Moss eds., 2014) (reporting that seventy-two percent of respondents in a Department of Transportation survey answered yes to the question: "Do you feel that big business or corporations have an advantage during rulemaking?").

124. Yackee, *supra* note 123, at 320.

125. Kimberly D. Krawiec & Guangya Liu, *The Volcker Rule: A Brief Political History*, 10 CAP. MKTS. L.J. 507, 514–15 (2015).

126. *See* Krawiec, *Agency Lobbying*, *supra* note 88, at 17–18.

127. *Id.* at 18–19; *cf.* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 479–80 (2005) (showing how the sophistication of a comment affects the probability of an having an accepted suggestion).

submitted on the Volcker Rule look much more like those in the typical, nonpublicly salient rulemaking.

Similar patterns arose in the context of the EPA's recent high-profile rulemakings. "[T]he Natural Resources Defense Council sponsored a campaign with 254,008 comments in support of [the EPA]'s Clean Power Plan and also a campaign with 108,076 comments endorsing [the EPA]'s WOTUS rule."[128] These kinds of mass comments can play some important role in signaling the degree of support for an agency initiative, but they do little to contribute to vigorous agency engagement of data, perspectives, and arguments about policy choices.[129]

While there is more empirical work to be done, the last three decades of empirical investigations of the comment process reveal two important trends identified by the 1977 Senate Report. First, there continue to be a significant number of rulemakings in which no public interest or citizen groups participate, and the only interest group participation is from the regulated. Second, putting aside the relevantly few rulemakings that generate a significant number of public comments in form letters, the percentage of comments, and even more so the percentage of sophisticated comments, is overwhelmingly from business interests.

C. RULE AMENDMENTS

The issuance of a final rule is not the end of the story. As the work by Wendy Wagner, William West, Thomas McGarity, and Lisa Peters shows, agencies frequently revise their final rules.[130] In their study of selected rulemakings at the EPA, OSHA, and FCC, they found that seventy-three percent of final rules were revised at least once, and more often multiple times.[131] Interestingly, this study also found that when agencies revise their rules, only one-third of the revisions involved the use of notice and comment,[132] and for another quarter, the agency provided some means of participation after the revision had been issued through direct final rules or other means.[133]

This initial study of repeated rounds of rulemaking, or dynamic rulemaking,[134] was not able to identify the percentage of these revisions that

128. Rachel Augustine Potter, *More Than Spam? Lobbying the EPA Through Public Comment Campaigns*, BROOKINGS (Nov. 29, 2017), https://www.brookings.edu/research/more-than-spam-lobbying-the-epa-through-public-comment-campaigns [https://perma.cc/U4JL-8SQ9].

129. *Id.* ("Compared to advocacy groups, campaigns sponsored by industry were much more likely to make a specific policy request (e.g., asking for a specific standard or a specific change to a rule); whereas [forty-five percent] of industry campaigns referenced a specific aspect of the policy in the proposed rule, only [twenty-five percent] of advocacy campaigns made similar appeals.").

130. Wagner et al., *Dynamic Rulemaking*, *supra* note 66, at 203.

131. *Id.* at 202–03.

132. *Id.* at 211.

133. *Id.*

134. *Id.* at 189 (defining "dynamic rulemaking").

were prompted by interest groups pressure or the types of contacts with the agencies that interest groups had prior to the agency initiating a revision. But it seems plausible that there would be significant industry pressure behind revisions. Most important, the final rule and its consequences for industry are already known. Those with significant stakes will know how the rule is affecting them. Moreover, an agency is not likely to bypass notice and comment when it knows that its revision will confront significant industry opposition and the agency has not otherwise given those affected by the revision a chance to convey their perspective. Given both agency and industry incentives, revisions to rules without notice and comment frequently reflect similar interest groups engagement as at the prenotice stage and perhaps even more skewed toward industry.

Accordingly, to address representation in rulemaking it makes sense to be just as attentive to rule revisions as to the initial adoption of agency rules, especially since the interest group environment for iterative changes to rules appears to mirror, and may even accentuate, the representation skew that plagues the making of (parent) rules in notice and comment. Public interest groups will often have valuable information to contribute to this stage of the rulemaking process, to the extent that they have been able to monitor agency enforcement and address concerns with the impacts of rules on various citizens. Encouraging interest group participation in dynamic rulemaking, through iterative changes to rulemaking, can help to advance a broad range of goals that are coextensive with the rulemaking process, including promoting more effective oversight of agencies.

D. SUMMARY

The empirical studies of rulemaking suggest some significant ways in which rulemaking as it actually occurs does not correspond to the visions of those who designed notice and comment as a means to facilitate the agency obtaining information from the clashing points of view affected by a rule. First, for legal reasons and organizational ones, agencies make their most important decisions about a rule prior to issuing the notice of proposed rulemaking. This makes participation and contact with the agency prior to the proposal development critical; in particular, providing information to the agency preproposal is viewed by interest groups and agencies alike as most effective. But studies of contact with the agency show that the predominance of regulated industry interests is even greater in the informal consultations that appear prior to the agency publishing its proposal. Second, a significant number of rulemakings lack any representation from a citizens or organized group that might have the resources to provide meaningful information to the agency. Third, outside of those rulemakings that prompt significant, if thin, public engagement, regulatory interest predominates in the comment process. Moreover, the best measures of influence on agencies show that agencies frequently make changes in their rules in response to business

interests, even when those same interests have already participated in the rulemaking prior to the issuance of the proposal.

The representation balance in rulemaking is deeply concerning if we want rulemaking to achieve its intended functions. However, empirical studies of rulemaking do not mean we merely need *more* representation, especially of the same kinds of stakeholders who already have a voice. Rather, the representation deficit in notice and comments more commonly reveals itself in the form of a missing perspective or voice that can make a difference in the vetting of various policy options and in improving the quality of the agency's record and ultimate decision. As Steven Croley observes:

> Because the value of comments received during a proposed rule's comment period is not closely proportional to their volume, a single organization with relevant and credible information can have about as much influence on a rulemaking as many organizations on the opposing side of the regulatory issue. . . . Indeed, a single interest group submitting unique arguments during a rulemaking can have more marginal influence on an agency's final decision than many groups presenting the same opposing arguments duplicatively.[135]

Susan Yackee has similarly demonstrated that the number of comments does not always translate into influence in agency rulemaking, which depends on a variety of strategies related to agenda setting that may occur outside of the actual notice-and-comment process.[136] Some minimal attention to missing representation or to important but systematically underrepresented interests thus presents an opportunity to generate large benefits for agency rulemaking. These benefits include information production in the tangible form of a more complete and better record, improved monitoring and oversight, and stronger democratic legitimacy—which map on to the very reasons that we consider notice-and-comment rulemaking valuable over other agency decision-making tools.

III. INSTITUTIONALIZING REPRESENTATIVE RULEMAKING

Administrative law has not ignored the representation deficit in notice-and-comment rulemaking. However, to the extent a deficit has been acknowledged, administrative law reforms have typically celebrated more participation or access as a means, albeit indirect, to better representation. To the extent representation has been central to administrative procedure reforms, it has received only ad hoc or episodic attention. There have been no comprehensive institutional solutions to the representation deficit in notice-and-comment rulemaking. This Part first identifies some important ways in

135. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 136 (2008).

136. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 104–05 (2006).

which administrative law has sought to address the issue of representation, through general reforms or through more targeted means. It shows how these efforts fail to comprehensively address the representation deficit in a meaningful manner. This Part then defends two proposals designed to address the representation blind spot in notice-and-comment rulemaking, in a manner which could be institutionalized across a large range of different regulatory agencies.

A. PAST REFORMS TO ENHANCE REPRESENTATION IN RULEMAKING

The spirit of the past sixty years of administrative law reform has focused on expanding access points. Representation comes into these proposals as a byproduct of more participation—but increasing access points does not necessarily help in overcoming the organizational, mobilization, and participation cost barriers many public interest groups face in participating in rulemaking.

Consistent with the spirit of improving access, many reforms to administrative procedure focus on ways to lower the costs of citizen or public interest group participation in the administrative process. For example, early on, efforts to move agencies toward e-rulemaking were celebrated as a way to reduce participation costs for public interest groups, in a manner that could potentially even transform democracy.[137] Today, no one believes that shifting political participation to the internet has produced transformative and positive benefits for democracy, and most seem to see the effects of this as producing significant misinformation and increasing, not decreasing, political polarization.[138] E-rulemaking can also reduce participation costs for everyone else. This can result in sham or abusive comments, or it can lead to

137. *See* Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 170 (2004) (arguing that "[a]dministrative law especially stands to be transformed by trends toward increased openness" created by e-rulemaking); *see also* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 435 (2004) (describing how e-rulemaking "make[s] citizen participation more manageable for regulators and more collaborative between government and citizens"); Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1423 (2002) ("[T]he focus [of implementing e-rulemaking processes] is instrumental with a simple goal of building a more transparent policymaking environment online."); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 279 (1998) ("These technologies can also increase the public's ability to participate in agency decisionmaking processes."). Administrative law here was largely echoing what was being said about democracy and the internet more broadly. GRAEME BROWNING, ELECTRONIC DEMOCRACY: USING THE INTERNET TO TRANSFORM AMERICAN POLITICS 2 (2d ed. 2005) (arguing that by allowing citizens access to information and offering an easier means to communicate, the internet has the "potential to influence not only the course, but the very essence of national politics").

138. *See* N.Y. STATE OFFICE OF THE ATT'Y GEN., FAKE COMMENTS, *supra* note 3, at 10.

comments that echo the positions of those who already participate in and influence rulemaking proceedings.[139]

The consensus of those who have studied e-rulemaking proceedings is, with the exception of producing significant amounts of mass comments, that e-rulemaking has not improved the breadth or nature of comments during the rulemaking process.[140] Those designing e-rulemaking have thus turned their attention to ways to encourage participation by those who typically do not weigh in during the comment process, which requires agencies to be even more proactive in encouraging new forms of participation.[141] For stakeholders who are most systematically missing from the rulemaking process, if increasing access only works to bolster the influence of those who are already participating effectively before an agency, they could entrench an imbalance of perspectives (as may occur, for example, if business interests dominate rulemaking to set environmental standards), doing even more harm than good. The need to be proactive about participation, with an eye toward improving the kinds of representation that are likely to produce useful information, improve agency oversight, and encourage more democratic and deliberative decision-making, becomes even more important as administrative law reforms produce new access opportunities.

There are several other ways that administrative law has sought to encourage better representation in notice-and-comment rulemaking and other agency decision-making processes. Some of the more systematic approaches in administrative law include the use of advisory committees before and during rulemaking, deployment of agency ombuds for underrepresented perspectives, negotiated regulation, and targeted outreach initiatives rulemaking. These efforts have not been futile—and many of them hold promise for producing

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139. *See, e.g.*, Balla et al., *supra* note 3, at 96–97 ("In some rulemakings, questions have been raised about whether public comments were submitted under false names, or were automatically generated by computer 'bot' programs."); N.Y. STATE OFFICE OF THE ATT'Y GEN., FAKE COMMENTS, *supra* note 3, at 28; Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41, 45 (2006) ("[T]he emergence of first generation electronic rulemaking has had the singular effect of increasing the flood of duplicative, often insubstantial, mass mailing campaigns.").

140. *See, e.g.*, Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REGUL. & GOVERNANCE 46, 61–62 (2007); John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 992–93 (2006).

141. *See, e.g.*, Cynthia R. Farina, Mary Newhart, Josiah Heidt & Cornell eRulemaking Initiative, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T & ADMIN. L. 123, 153 (2012) (arguing for best practices in e-rulemaking that would entail "the exercise of *first*, trying to identify stakeholders who do not generally participate on their own behalf in the rulemaking; *then* trying to imagine what kind of germane experiential knowledge they may have; and, *finally*, considering what sort of information they would need to participate meaningfully in the particular rulemaking, through the revelation of situated knowledge or the expression of informed or adaptive preferences").

more representative rulemaking—but there are also limits to their application and benefits.

1. Use of Advisory Committees in Rulemaking

Agencies can proactively enhance representation in their decision-making process by seeking the aid of a panel of volunteer consultants, which offer expertise and perspectives on the issues an agency anticipates confronting in future rulemakings. The Federal Advisory Committee Act ("FACA") "require[s] [committees] to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."[142] FACA envisions advisory committees providing advice or recommendations (not binding agencies), and a representative committee can provide a proactive mechanism to produce new evidence, information, and perspectives that can improve the rulemaking process.

According to Steven Croley and William Funk, "the main virtue of the FACA is that it enables the federal government to solicit what is tantamount to free advice."[143] Some agencies reserve membership seats for representatives of specific groups, such as patient representatives in Medicare coverage advisory committees[144] or representatives for Indian tribes and other affected groups on Bureau of Land Management Resource Advisory Councils.[145] In the case of the National Environmental Justice Advisory Council, established by the EPA in 1993, a committee was constituted in part for the purpose of counteracting a perceived lack of voice in normal agency decision-making procedures.[146] One particularly interesting approach is to use representative advisory committees as a type of crowdsourcing to help inform an agency's rulemaking agenda or its enforcement practices.[147] The Aviation Rulemaking Advisory Committee is a standing FACA committee that consists of representatives for aviation associations, the aviation industry, public interest groups, advocacy groups, and foreign civil authorities to provide the Federal

142. 5 U.S.C. app. § 5(b)(2).

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

144. *See FAQs About the FDA Patient Representative Program*, U.S. FOOD & DRUG ADMIN. (June 20, 2019), https://www.fda.gov/patients/about-office-patient-affairs/faqs-about-fda-patient-representative-program [https://perma.cc/8KEQ-R3WZ].

145. 43 C.F.R. § 1784.6-1(c) (2023).

146. *See National Environmental Justice Advisory Council*, U.S. ENV'T. PROT. AGENCY (June 27, 2023), https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council [https://perma.cc/UC8Y-YRKV].

147. For example, the Consumer Advisory Board of the Consumer Financial Protection Bureau helps to identify "emerging practices or trends in the consumer finance industry, and shares analysis and recommendations." *See Consumer Advisory Board*, U.S. CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/rules-policy/advisory-committees/consumer-advisory-board [https://perma.cc/UG9N-6RNZ].

Aviation Administration ("FAA") with recommendations concerning various rulemakings.[148]

Although an advisory committee can help in reporting information to an agency or providing analysis and recommendations outside of the rulemaking process, their effectiveness in producing representative rulemaking is limited. Agencies could benefit, as many already do, from systematically deploying advisory committees at the prerulemaking and rule proposal stage, making sure that these committees include stakeholders that are systematically underrepresented in rulemakings. In principle, advisory committees could help to address the imbalance of contacts with the agency prior to the agency issuing its notice of proposed rulemaking. Advisory committees can file comments. In practice, few advisory committees end up filing comments, and agencies often face procedural barriers to formation of a FACA committee (as well as political backlash from those who are not included). As a result, agencies often find it more efficient to bypass the formalities of the FACA through the use of technology or new media.[149] Even when utilized, FACA's procedures can introduce significant barriers to grassroots participation.[150] Agencies forming and staffing FACA committees face incentives to select political appointees (rather than focus on those with scientific or technical expertise) in order to leverage outside constituencies that will provide support for partisan initiatives.[151] Moreover, though there is a statutory requirement of fair balance for FACA committees, courts do not actively police this,[152] so FACA seems to be used most routinely by agencies to produce scientific or technical reports and is still staffed heavily by those with industry support.[153]

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148. *See Advisory and Rulemaking Committees: Aviation Rulemaking Advisory Committee (ARAC)*, U.S. FED. AVIATION ADMIN., https://www.faa.gov/regulations_policies/rulemaking/committees/documents/index.cfm/committee/browse/committeeID/1 [https://perma.cc/TNU7-VS3H].

149. *See* JAMES T. O'REILLY, FEDERAL ADVISORY COMMITTEE ACT: INHIBITING EFFECTS UPON THE UTILIZATION OF NEW MEDIA IN COLLABORATIVE GOVERNANCE & AGENCY POLICY FORMATION 1 (2011), https://www.acus.gov/sites/default/files/documents/OReilly-FACA-Report-4-15-2011-FINAL.pdf [https://perma.cc/HR7S-TGUM]; *see also* REEVE T. BULL, THE FEDERAL ADVISORY COMMITTEE ACT: ISSUES AND PROPOSED REFORMS 45–47 (2011), https://www.acus.gov/report/reeve-t-bulls-report-faca [https://perma.cc/VU33-KPRK] (recommending that advisory committees convene asynchronously via virtual meetings more often).

150. *See, e.g.*, Rebecca J. Long & Thomas C. Beierle, *The Federal Advisory Committee Act and Public Participation in Environmental Policy* 9–10 (Res. for the Future, Discussion Paper No. 99-17, 1999), https://media.rff.org/archive/files/sharepoint/WorkImages/Download/RFF-DP-99-17.pdf [https://perma.cc/Q5YW-X42A] (noting that for FACA committees "all roads lead to Washington"—which can be a significant participation barrier for many public interest groups).

151. *See* Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1144 (2020).

152. *See* Daniel E. Walters, Note, *The Justiciability of Fair Balance Under the Federal Advisory Committee Act: Toward a Deliberative Process Approach*, 110 MICH. L. REV. 677, 681 (2012) (observing that some courts treat fair balance as nonjusticiable, while other apply a high degree of judicial deference to its review).

153. *See, e.g.*, Steven J. Balla & Jack R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799, 807–09 (2001) (documenting

To the extent that this is all that an agency does with FACA, it is not fully meeting its promise to enhance representation in rulemaking.

2. Assigning an Ombudsperson to Comment in Rulemaking

In Swedish, the term "ombudsman" (derived from the old Norse term *umboðsmaðr*) literally means proxy or representative.[154] Ombudspersons are widely used by agencies in other countries,[155] and for the past half-century, U.S. agencies have begun to use them for a wide range of functions. Ombuds appear especially commonplace in many state agencies, such as the assignment of consumer advocates for utility ratemaking proceedings[156] or Florida's assignment of long-term care ombuds in nursing home permitting proceedings.[157] Some federal agencies have also benefitted from appointing an ombuds to address the concerns of specific stakeholders. The Taxpayer Advocate, for example, is an independent officer of the Internal Revenue Service ("IRS") (with offices in all fifty states) that represents taxpayers; it reports annually to Congress, too, helping to improve political oversight of the agency.[158]

A 2016 Administrative Conference of the United States ("ACUS") report "urge[s] Congress and the President to create, fund, and otherwise support ombuds offices across the government," and encourages agencies to align their use of ombuds to several best practices to improve agency decision-making.[159] The focus of ACUS's recommendations is on the use of ombuds for dispute resolution in agencies, so most of its best practices relate to "independence, confidentiality, and impartiality."[160] Though ACUS recommendations originated with its rulemaking committee, there is no mention of notice-and-comment rulemaking in its report. Indeed, there appear to be few instances of federal agencies systematically using ombuds to

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success rate of candidates endorsed by industry on the National Drinking Water Advisory Council). Long & Beierle, *supra* note 150, at 5.

154. *See* William B. Gwyn, *The Discovery of the Scandinavian Ombudsman in English-Speaking Countries*, 3 W. EUR. POL. 317, 317 (1980) (noting that "[u]ntil the 1950s, the institution of the ombudsman existed in only two Scandinavian countries").

155. *See generally* WALTER GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1966) (surveying the use of ombudsmen in other countries).

156. *See* JAKE DUNCAN & JULIA EAGLES, PUBLIC UTILITIES COMMISSIONS AND CONSUMER ADVOCATES: PROTECTING THE PUBLIC INTEREST 2–3 (2021), https://www.imt.org/wp-content/uploads/2022/01/FINAL_NCEP_Consumer_Advocates_Mini_Guide.pdf [https://perma.cc/9Q97-QKPD]. The most common state approach is to designate a consumer advocate as a separate agency, though many states assign this function within the office of the attorney general. *See id.*

157. FLA. STAT. § 400.0061(2) (2022).

158. *See Who We Are: We're Your Voice at the IRS*, TAXPAYER ADVOC. SERV., https://www.taxpayeradvocate.irs.gov/about-us [https://perma.cc/F9PH-JE5Z].

159. ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2016-5: THE USE OF OMBUDS IN FEDERAL AGENCIES 3 (2016), https://www.acus.gov/sites/default/files/documents/Recommendation%202016-5.pdf [https://perma.cc/RL6L-VJY8].

160. *Id.*

file comments on behalf of stakeholders during the notice-and-comment rulemaking process.

Perhaps the lack of the use of ombuds in rulemaking is not surprising, given that ombuds are typically deployed to receive, process, and assist in the resolution of employee or citizen complaints within agencies, not to help shape and inform agency policies. But the ombuds model presents a potentially promising—albeit largely underutilized—opportunity to address the representation deficit in rulemaking. Half a century ago, Arthur Bonfield observed that the "interests of poor people are inadequately represented in the rulemaking process" and proposed that federal rulemaking concerning the poor could benefit from the creation of a governmental office to represent the poor and comment in agency rulemakings on behalf of them.[161] This use of an ombud designated to represent certain missing perspectives or voices seems to have largely been ignored in rulemaking reforms, though agencies like the Small Business Administration or the Bureau of Indian Affairs routinely represent stakeholders and comment on, or play a consultative role in, the rulemaking of other agencies.[162]

One challenge with the use of an ombud to comment in rulemaking is institutional design. Assigning an internal staff member to an agency the role of an ombud presents some difficult agency design questions that need to be addressed in order to avoid the appearance of bias and, to the extent *ex parte* contracts are limited, to address this concern in rulemaking.[163] In contrast to ombuds who may address issues such as complaints or whistleblowing concerns that are internal to an agency, an "[e]xternally-facing ombud[] [is] more likely to report supporting the agency with specific mission-related initiatives; helping the agency to improve specific policies, procedures, or structures; making administrative decisions to resolve specific issues; helping within the agency to keep its organizational processes coordinated; and advocating on behalf of individuals."[164] With respect to rulemaking, an ombud that is external to the agency may provide the most impartial form of representation for stakeholders who are not typically present during rulemaking. However, there are no clear standards or best practices related to the process and criteria for identification of an external ombud related to rulemaking representation, nor

161. Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 512, 535–36 (1969).

162. For discussion, see J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2262–63 (2005) (describing how Congress may require one agency to comment on another agency's decisions as a way of encouraging agencies to take a broader range of considerations into account in the policymaking process) and Freeman & Rossi, *supra* note 17, at 1157–61 (discussing various forms of interagency consultation in agency rulemakings that address polycentric policy issues).

163. For this reason, ACUS recommends that "agencies should consider structuring ombuds offices so that they are perceived to have the necessary independence and are separate from other units of the agency." ADMIN. CONF. OF THE U.S., *supra* note 159, at 7.

164. *Id.* at 2.

are there clear practices or guidance for how this kind of ombud would interact with the agency or agency staff during the rulemaking process.[165] It is also unclear who—the agency or outside interest groups—would fund external ombud participation in rulemaking. Agency funding of an outside entity group can raise serious concerns with the appearance of bias and agencies do not have the authority to create an agency on their own, so unless Congress has authorized such funding of an external ombud, this likely would bump up against legal constraints. The most successful and durable uses of ombuds appear to be instances where Congress has set up an external commenting or consultative mechanism as a part of another agency's operations,[166] but apart from allowing or requiring interagency consultation in rulemaking Congress does not seem to have given significant attention to the issue of assigning an external ombud to comment in federal agency rulemaking.

3. Representation in Reg Neg

Negotiated regulation (also known as "reg neg") is an effort to convene a negotiated "consensus" rule prior to the initiation of notice and comment.[167] Reg neg was adopted by Congress primarily to reduce the amount of time and resources agencies spend developing and defending their rules. But there may be other benefits to reg neg too: As much as any other administrative procedure, negotiated regulation requires an agency to identify the stakeholder representatives that will be central to the policies it anticipates being central to its rulemakings and thus provides a strong opportunity for an agency to think proactively about the representation of stakeholders before the actual notice-and-comment process commences. It is not clear whether reg neg actually reduces the amount of time agencies devote to the rulemaking process, and its use does not seem to have resulted in reductions in legal challenges to agency rules.[168]

Those who are selected to participate in reg negs appear to value the opportunity and have confidence in the process,[169] but it is not clear that reg

165. For an interesting exploration of the role of a regulatory intermediary in policy setting in the policing context, see Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 47–55 (2019) (examining role for permanent representatives of the public in policy rulemakings).

166. *See supra* note 163 and accompanying text.

167. *See* ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2017-2: NEGOTIATED RULEMAKING AND OTHER OPTIONS FOR PUBLIC ENGAGEMENT 1–2 (2017), https://www.acus.gov/recommendation/negotiated-rulemaking-and-other-options-public-engagement [https://perma.cc/AEP6-MWDR].

168. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1260–61 (1997) (reporting that the data do not support reg neg reducing the time of rulemakings or reducing litigation against agency rules).

169. *See* Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RSCH. & THEORY 599, 619–20, 625 (2000) (finding that for vast majority of respondents surveyed, the benefits of reg neg exceeded the costs).

neg produces effective forms of representation for the rulemaking process. To the extent that studies suggest that reg neg is likely to lead to proposed rules that are more in line with the dominant stakeholders at the table[170] and inadequately addresses the public interest,[171] there may be serious reasons for concern. To the extent adding reg neg to the front end of the rulemaking process serves to lengthen the process, reg neg can place additional strains on the limited resources of the very participants who are least likely to be involved in notice-and-comment rulemaking in the first place.[172] Even if reg neg were to facilitate actual consensus in support of an agency rule (as it is designed to), there are concerns that this agreement could stray from the public interest values that Congress has identified in a statute.[173] In this sense, some argue, the consensus of reg neg encourages agency rules that subvert, rather than encourage, the kinds of fire alarms that Congress intended in the first instance.[174] There is also the possibility that the use of reg neg to forge consensus too early in a process—before a rule has been disclosed to the public for comment—may serve to silence dissent and the production of data from those representatives who are mostly likely to be able to comment effectively during notice-and-comment. Whatever process benefits it might provide, reg neg simply cannot serve as a substitute for information and thorough analysis, and engagement of facts and policy positions, during the rulemaking process.

4. Targeted Representation Efforts

Consistent with the disappointing experience with participation that has plagued e-rulemakings, ACUS has also recognized the need to proactively focus on encouraging broader participation early in the process, such as at the prerulemaking stage.[175] For example, ACUS has adopted a recommendation on public engagement in rulemaking, encouraging targeted outreach to

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170. Coglianese, *supra* note 168, at 1334–35.

171. William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997) (stating that "the principles, theory, and practice of negotiated rulemaking subtly subvert the basic, underlying concepts of American administrative law . . .").

172. Langbein & Kerwin, *supra* note 169, at 609 (noting that participants in reg neg face higher participation costs). Despite this concern, resource and organizationally strained participants find reg neg at least as fair as participation in notice-and-comment rulemaking. Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 31 ENV'T L. REP. NEWS & ANALYSIS 10811, 10814 (2001).

173. Funk sees the problem with reg neg as facilitating, and potentially expanding, a gap between consensus and the public interest. *See* Funk, *supra* note 171, at 1386–87.

174. *See id.*

175. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 823–26; *see also* Havasy, *supra* note 27, at 820 (noting that the passive structure of traditional notice-and-comment proceedings can cause inequalities in participation to arise).

underrepresented groups.[176] These recommendations urge an agency, for instance, to proactively identify specific kinds of public interest groups that it wishes to hear from at the stage of rule development or to convene meetings or workshops to target broad inclusion of underrepresented perspectives in developing rules[177]—much as many agencies already hold "technical workshops" with the industries they regulate. An example of how this might work is the 1992 forest-management rules. Before initiating the rulemaking process, the Forest Service held public meetings and listening sessions aimed at soliciting the views of four diverse stakeholder groups: recreational and commercial users of national forests, Native American communities, subnational government officials, and scientists.[178] This is not a new innovation, so much as it is a recognition that good governmental decision-making by agencies cannot rely on a passive approach to participation in the agency rulemaking process.

Targeted participation makes sense and clearly needs to be encouraged and utilized by more agencies. For more technical rules, especially in areas that are likely to elicit some protest, Reeve Bull has suggested that rulemaking not just elicit general comments on a proposal but instead begin by asking narrowly targeted questions on particular issues, to keep the content comments focused on the substance of issues rather than polarized political reactions.[179] But even for nontechnical rules, most agencies could benefit from using targeted outreach to key interest groups that are unlikely to participate in the rulemaking, based on historical practice. The earlier this occurs in the process, the better: Early engagement could help in identifying potential participants and building the kinds of relationships that agency staff could then more proactively work to orchestrate as a part of the notice-and-comment process.

President Biden's Executive Order, *Modernizing Regulatory Review*, amounts to a culmination and extension of these efforts to make agencies more proactive in rulemaking.[180] The order, referred to as the *Modernizing E.O.*, requires agencies to "promote equitable and meaningful participation by a range of interested or affected parties,"[181] and, with regard to regulatory plans, "to proactively engage interested or affected parties, including

176. *See* ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2018-7: PUBLIC ENGAGEMENT IN RULEMAKING 7 (2018), https://www.acus.gov/recommendation/public-engagement-rulemaking [https://perma.cc/4HYB-PVAF].

177. *Id.*

178. *See* SANT'AMBROGIO & STASZEWSKI, *supra* note 56, at 53.

179. Reeve T. Bull, *Reimagining the Public's Role in Agency Rulemaking*, REGUL. REV. (Mar. 10, 2022), https://www.theregreview.org/2022/03/10/bull-reimagining-the-public-role [https://perma.cc/B44Y-MVJE]. Bull also suggests that for highly technical rules, agencies could request comment on only the technical aspects of rules, or to separate the submission and consideration of those kinds of comments from comments on policy independent of the data. *Id.*

180. Exec. Order No. 14094, 88 Fed. Reg. 21879 (Apr. 11, 2023).

181. *Id.* § 2(a).

members of underserved communities."[182] How much additional pressure these newly expanded duties on agencies have in practice will depend critically on how far the Office of Information and Regulatory Affairs ("OIRA") goes in monitoring them and issuing guidance to agencies as to how to comply.

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On the whole, these various procedural reforms to rulemaking have helped to improve the balance of representation in the rulemaking process. However, they all face some limits and challenges. By and large, their use by agencies to improve representation in rulemaking has been ad hoc. Most agencies and Congress cannot consistently depend on them to address representation deficit in a matter that advances the various functions of rulemaking. Ultimately, agencies need to embrace a bolder institutional approach to correct for the representation deficit in rulemaking. In this spirit, in the following Subsections we make two new proposals that aim at enhancing external representation in rulemaking and making it more central to administrative law. The first, which we call a "representation baseline," is aimed at making representation outreach more systemic and using it to create agency commitments for external representation in rulemaking. The second, which we call "proxy representation," is aimed at identifying and mobilizing interest group representation in rulemaking scenarios with the most glaring kinds of representation deficit.

B. IDENTIFYING A "REPRESENTATION FLOOR" FOR AGENCY RULEMAKING

A core concern, reinforced by recent empirical studies of rulemaking, is that many federal agencies wait passively to see how the notice-and-comment process unfolds and have no transparent expectations for representation in the notice-and-comment rulemaking process. This passivity leaves important values that Congress intended an agency to address without any voice in the process; does not enable vigorous engagement with arguments, data, and perspectives in the notice-and-comment process; and leads to an agency decision that is not based on a strong decision-making record. It can also impair agency oversight and legitimacy in the rulemaking process.

To address this problem, consider the following proposal: a requirement that an agency articulate, at the outset of the rulemaking, its expectations for participation and then, in the final rule, compare their expectation of participation to the actual process and comments received. That basic floor of expectations for representation would be included in every rulemaking notice, and the comparison in the statement of basis and purpose accompanying each final rule. This "representation floor" would thus become an element of two distinct procedural stages of the rulemaking process.

182. *Id.* § 2(c).

This statement of the "representation floor" would identify the key stakeholder interests that are relevant under the statute an agency is invoking as authority and would identify the level or type of participation, at a minimum, the agency believes is necessary from those stakeholder interests or communities. This statement of the "representation floor" could be incorporated into an initial rulemaking notice issued under Section 553(b) of the APA.[183] An individual agency could implement this rulemaking by rulemaking as part of the required notice of proposed rulemaking. Agencies could benefit, too, from setting this floor even earlier, at the prenotice rulemaking stage, in order to proactively encourage representation before the specific details of an agency's proposal has already been determined.[184]

Even better still, agencies that expect to adopt multiple rules under the same grant of authority should consider adopting a framework document to guide each rulemaking under the statute. This kind of an agency "rule on representative rulemaking" would articulate the agency's minimal expectations for representation in the rulemaking process—setting a general representation baseline (via a separate rulemaking or guidance document) for each statute under which it has rulemaking authority.[185] ACUS, for example, has recommended that agencies adopt rules on rulemaking to "facilitate more robust participation, including by underrepresented communities."[186] Some agencies already do this with respect to the representation of specific stakeholders that are deemed essential to the agency's decision-making process. For example, the Federal Energy Regulatory Commission has issued a guidance document that articulates a commitment to consulting with federally recognized Indian tribes in its agency proceedings, including rulemaking.[187] Likewise, the EPA has a guidance document on considering environmental justice in agency rulemaking, which requires the agency to provide transparent and meaningful participation for minority populations, low income populations, tribes, and indigenous peoples and to take into account the impacts of proposed rules on these groups.[188] Executive orders issued by the White

183. *See* 5 U.S.C. § 553.

184. *See* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 848–50 (praising the adoption of a precommitment to engage stakeholders as part of an effort to include more public engagement pre-NPRM).

185. *Cf.* ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2020-1: RULES ON RULEMAKINGS 2 (2020), https://www.acus.gov/recommendation/rules-rulemakings [https://perma.cc/G9NT-4UF5] (explaining such an approach can "provide accountability in connection with individual rulemakings by creating an internal approval process by which agency leadership reviews proposed and final rules").

186. *Id.*

187. *See* U.S. FED. ENERGY REGUL. COMM'N, DOCKET NO. PL03-4-000, ENCLOSURE D: TRIBAL POLICY STATEMENT 7–8 (2003), https://www.ferc.gov/sites/default/files/2020-04/tribal-policy.pdf [https://perma.cc/QE86-42F8].

188. *See* U.S. ENV'T PROT. AGENCY, GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF REGULATORY ACTIONS 1, 4 (2015), https://www.epa.gov/sites/def

House also set some basic expectations for representation in rulemakings that apply across multiple agencies, including for groups such as Indian Tribes.[189] There is still an advantage to each agency addressing this on its own under the statutes that it implements in a manner that requires some minimal level of representation so that there is a baseline, articulated by the agency, to which it can hold itself accountable.

Second, in addition to articulating some representation baseline for its notice-and-comment rulemaking, each agency would be expected to apply its representation floor in each rulemaking. In the statement of basis and purposes accompanying a final rule, each agency would assess how representation in its rulemaking process actually measured up to its articulated representation floor. Thus, both the representation floor and the agency's assessment of actual representation in the rulemaking would then become a part of the record that accompanies the final rule.[190]

Regardless of how a representation floor is adopted by an agency, the simple articulation of a floor for representation would create the expectation that an agency make *some* affirmative effort to address the balance of interests represented in the rulemaking process, consistent with the purposes of the statute—improving both public scrutiny and legislative oversight of the rulemaking process. In addition to encouraging more public scrutiny, the agency's assessment in the final rule of the actual level of participation could be evaluated by courts in arbitrary and capricious review. Greater judicial attention to representation in applying the *Overton Park*[191] and *State Farm*[192] standards of review would allow courts to better monitor an agency's

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ault/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf [https://perma.cc/KEV7-WHG8].

189. The President has ordered all executive agencies to consult with Native American "tribal officials in the development of regulatory policies that have tribal implications." Exec. Order No. 13,175, 65 Fed. Reg. 67249 (2000). Before issuing a covered final rule, executive agencies must provide OMB with a summary of that consultation, the concerns that tribal leaders raised, and the agency's response. *Id.*; *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-01-07, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES 4–6 (2001), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/memoranda/m01-07.pdf [https://perma.cc/S9XG-DN2P] (providing guidance on the consultation requirements in Executive Order 13,175).

190. *Cf.* Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 848–49 (suggesting advantages of agencies "incorporat[ing] summaries of their public engagement efforts into the preambles of their proposed and final rules").

191. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (explaining how judicial review to determine if agency has considered relevant factors relates to review for arbitrariness and capriciousness, and how the latter relates to review for errors in legal or factual determinations).

192. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that an agency's decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be . . . the product of agency expertise").

performance in rulemaking against the minimal expectations the agency has set for representation. In this sense, our proposal is consistent with others that call for greater judicial attention to representation in arbitrary and capricious review by courts.[193] But rather than asking courts to apply their own notions of representation or deliberative democracy, however, our proposal would provide review courts clear and meaningful standards to apply in arbitrary and capricious review under each agency's antecedent criteria for representation in rulemaking.[194]

Even without judicial review, an agency representation floor stands to produce significant improvements to an agency's internal rulemaking process and the quality of its decisions. An agency that is seeking to meet a previously articulated representation floor would find it advantageous to act more proactively during the notice-and-comment process. It could seek prenotice input from underrepresented groups, identify a need for comments from particular groups in its formal NPRM, or might seek multiple rounds of comments specifically aimed at soliciting additional comments from particular stakeholder groups that did not file comments in the first round of the notice-and-comment process. Where the agency has been attentive to how representation in an actual agency rulemaking compares to the baseline set by a representation floor, the agency is more likely to have fully considered a range of alternatives based on better evidence—and may also be less likely to invite political or judicial oversight. If no input from key stakeholders is provided in a rulemaking, such a statement (which would be subject to the scrutiny of Congress and the White House, as well as courts) would provide clear incentives to agencies to engage in multiple rounds of comment where representation is initially lacking in the rulemaking process. Indeed, the articulation of a representation floor may encourage iterative proposals—long thought to encourage greater deliberation—to correct for weak representation in the initial rulemaking process.[195]

C. PROXY REPRESENTATION IN RULEMAKING

Another (perhaps more ambitious) proposal to improve representation in rulemaking is designed to build the promotion of proxy representation

193. *See generally* David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81 (2005) (proposing that normal notice-and-comment rulemaking with little or no participation from key stakeholders should receive weaker deference by courts on review, and that agency rulemakings seeking input from democratic juries of citizens should receive greater deference).

194. Under *Vermont Yankee*, courts cannot impose additional procedural right beyond those in the APA "if the agencies have not chosen to grant them." Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978). Of course, this does not limit the ability of an agency to impose additional procedures of its own accord, which a court can review as a part of the agency's precommitments in the conduct of its rulemaking.

195. *See supra* notes 130–34 and accompanying text (discussing the advantages of dynamic rulemaking).

into the institutional culture of an agency. As discussed above, past reforms have focused on the creation of ombuds or establishing an office of an agency that focuses on representing stakeholders such as taxpayers or consumers. Outside of one agency commenting on the proposed rules of another agency, actual agency use of ombuds to comment in rulemaking is not commonplace.[196] In contexts where a representation deficit persists for certain types of agency rulemakings,[197] a more fundamental repurposing of notice-and-comment rulemaking to ensure some basic balance of representation may be in order.[198]

We think that there are some untapped opportunities for agencies to look to specific interest groups to serve a "private ombud" function as a way of identifying and using an ombud without devoting agency resources to hiring staff or creating an internal office for representation of stakeholders. Targeted outreach might be one way to do this, but if key stakeholders still do not respond, an agency could make even more tangible efforts to mobilize public interest representation as a counterbalance to the predominant stakeholders who are likely to comment.

In this sprit, we propose that an agency take the initiative to identify and mobilize "proxy representation" for perspectives that are systematically absent from the notice-and-comment rulemaking process. Proxy representation could be institutionalized in the following way: Once an agency has identified a representation floor, to the extent that stakeholder interests still appear to be systematically underrepresented (or unlikely to participate) in certain rulemaking proceedings, an agency could make a request to the public for identification of an external public interest representative that meets certain criteria. The agency would then consider proposals—in effect, holding a contest to identify and certify a private proxy representative—or, for more complex issues, a set of proxy representatives—for those interests in notice-and-comment rulemaking.

Many proposed rules do not generate any comments at all. Michael Sant'Ambrogio and Glen Staszewski have shown that close to one-third of the proposed rules in 2018 did not generate a single public comment.[199] Still others include no participation by stakeholders other than the regulated industry.[200] To encourage participation of underrepresented environmental interest groups under a toxic waste statute, the EPA could put out a request

196. These include a 2016 ACUS study and recommendation on agency ombudsmen. *See supra* note 159 and accompanying text; Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 842–43 (advocating for appointing a government representative when, despite targeted efforts to reach those interests, none appear in the rulemaking).

197. *See supra* Part II.

198. Similarly, Daniel Walters has noted the need to "repurpose notice and comment so that it no longer seeks to sample the public passively with the goal of reaching polyarchal settlements but instead seeks to find and amplify dissenting perspectives." Walters, *supra* note 14, at 77.

199. Sant'Ambrogio & Staszewski, *Democratizing*, *supra* note 4, at 814.

200. Wagner et al., *Dynamic Rulemaking*, *supra* note 66, at 233 (noting an EPA rulemaking without any nonindustry comments).

for proposals for private interest groups to comment on behalf of certain interests across rulemakings under particular statutes.

We envision a *contest* of sorts for proxy representation, leading to a presumptive commentator for a particular stakeholder interest group that is systematically underrepresented in rulemaking.[201] Depending on the circumstances, the agency may identify several underrepresented interests in need of proxy representation. An interested private interest group would respond to an agency's request for proposals with its own proposals to represent a group of stakeholders, such as those concerned with protecting health or safety, and the EPA would then select a specific group to play that role across multiple rulemakings for a period of, say, three to five years. That interest group would be obligated to file comments in each rulemaking, and a failure to do so would lead to revocation of its presumptive commentator statute.

This proposal for proxy representation would help to ensure that when an agency such as the EPA engages in notice-and-comment rulemaking, it receives at least some representation by and comments in the rulemaking process from stakeholders other than industry, such as public interest groups concerned with health, safety, or environmental values, or consumer or labor interests. Proxy representatives could also be one way of providing for better participation in rulemaking by states, regions, cities, or other political subdivisions, which could also provide important forms of oversight and monitoring during the rulemaking process. Moreover, if a proxy representative were designated for more than one rulemaking, it would put the representative in a position to engage with the agency prior to the announcement of the notice of proposed rulemaking.

Such a proxy representation contest would help to overcome some of the significant barriers to interest group formation and participation in agency rulemaking. Miriam Seifter, for example, has highlighted how many public interest groups struggle to organize and make the kinds of investments that are needed to effectively represent their members.[202] For example, many environmental justice issues are most salient at the local or neighborhood level or may impact groups that are diffuse and who lack the ability to effectively organize and aggregate their interests over time. As many agencies make decisions regarding issues such as climate change, some interests that are relevant to agency policy decisions (such as those of children or future

201. In a loose sense, this presumptive proxy would serve a role similar to class action representatives in civil litigation. In a similar fashion, Ganesh Sitaraman has proposed that agencies appoint interest groups to serve as an "amicus agency" or "friend of the agency" to fill the gaps in interest group participation. *See* Ganesh Sitaraman, *Reforming Regulation: Policies to Counteract Capture and Improve the Regulatory Process*, CTR. FOR AM. PROGRESS 6 (Nov. 1, 2016), https://www.americanprogress.org/wp-content/uploads/sites/2/2016/10/RegulationReformBrief.pdf [https://perma.cc/2PFD-22DU].

202. *See* Seifter, *supra* note 13, at 1338–47.

generations) may be so diffuse and, at times, abstract that their representation lacks any organizational interest group altogether.

Where a group of stakeholders lack the ability to effectively organize and participate in notice and comment rulemaking, selection of an interest group proxy could help better incentivize formation of groups to more effectively represent their interests. Public interest groups proposing to serve as a proxy for otherwise missing perspectives or voices would find it to their benefit to be approved by the EPA or another agency, which would give them status among current or potential members, help with fundraising, and encourage them to hire staff and invest in expertise focused around the specific issues that they have been selected to provide proxy comments on. In this sense, holding a proxy representation contest would (at least in some contexts) help to overcome some of the organizational costs confronting groups that represent mass members seeking diffuse (rather than concentrated) benefits. The winner of this contest would also be encouraged to develop better quality information to help inform the EPA or another agency since it would be a repeat player. Moreover, to effectively serve as a proxy before an agency, the group would need to establish a reputation for quality information and analysis to continue as a presumptive commentator. Selection as a representative proxy thus would encourage some interest groups to invest their resources and efforts into developing the kind of expertise that would improve an agency's decision-making record and produce greater benefit for agency rulemakings.

The selection of a proxy representative for certain agency rulemakings of course would not preclude the participation of other private environmental or health interest groups from making comments. Indeed, the hope is that holding proxy representation contests would spur even greater competition among interest groups to make rulemaking comments more central to their missions.

There are, of course, a host of operational questions that would need to be addressed to make proxy representation workable for administrative law. Most significantly, this may not be necessary or appropriate in every decision-making context. It is likely to produce the most benefits in contexts where there is a systemic representation deficit, especially for public interest groups. This might include circumstances in which there is a need to address environmental impacts given the long history of disproportionate impacts on less powerful populations.[203] Another context in which a competition to identify a proxy representative could be particularly useful is in rulemakings which have a significant impact on labor or workers where these stakeholders are not expected to be actively involved in the rulemaking process. That might

203. Marginalized communities by and large have not been able to mobilize to use commenting in the rulemaking process, even though they often bear as much of the burden of agency action and inaction as regulated entities. For discussion of this problem, see Feinstein, *supra* note 46, at 8–19.

be the case, for instance, where the Securities and Exchange Commission is adopting rules related to investment disclosure related to labor or employees' issues. This proposal could also be effective in ensuring that consumers are adequately represented in proceedings that affect energy or telecommunications services and prices, or in setting safety or other standards related to retail products. In contexts where agency regulation is likely to have concentrated impacts on those who cannot be directly represented at all—such as children or future generations—proxy representation would provide a way to institutionalize these perspectives into the agency decision-making process.

An obvious advantage of proxy representation over proposals to use an ombud to enhance representation in rulemaking is that it does not require any expenditure of public funding to support interest group representation. Indeed, the hope is that it would incentivize interest groups to mobilize members and invest resources in the production of useful information. Still, in some instances, where there is funding to support it, it could make sense for Congress or an agency to offer grants to particular groups who otherwise may not be able to overcome the collective action challenge of organizing.

Finally, the selection of proxy representation for rulemaking does not entail any kind of special treatment during the actual rulemaking process. The comments submitted by a proxy would be given the same treatment as any other commenter. However, to the extent that a proxy representative has been selected for a certain kind of rulemaking, it would be expected that the proxy's status as a repeat player would allow it to develop familiarity with the issue and expertise to aid in the presentation of information and data. As a repeat player, a proxy would have an opportunity to develop credibility before regulators but no more so than other repeat commentators. A proxy representative may be particularly helpful where agencies are likely to receive mass comments from industry or from the public. In those cases, the use of a proxy can serve as a counterbalance, offering detailed comment on the rule.

At least in those contexts where stakeholder interests are systematically absent from or underrepresented in agency rulemaking or in those situations where agencies want to encourage individual commentators to use a single organization to filter their perspectives in comments, proxy representation contests could produce some significant informational benefits for agency rulemaking while helping to mobilize greater interest group participation. They also hold significant promise to help improve political oversight in agency rulemaking.

CONCLUSION

For too long, the values of administrative law have included notice, transparency, and reason-giving, but not representation. To the extent that representation has received attention, it has been in connection with claims that administrative processes be more democratic in one sense or another. That focus fails to appreciate that representation is just as critical for the

production of quality information before the agency and for the monitoring of agency behavior. Based on that insight, this Article argues that the representation deficit in notice-and-comment rulemaking—with many rulemakings without a public interest presence and many more dominated by industry actors—poses a serious problem. Without representation in rulemaking, the claimed virtues of the notice and comment exist only in theory. Representative rulemaking requires, at a minimum, a diversity of engagement from those likely to be most affected by the agency's decision, and that the decision-maker be open-minded enough to be responsive to those representatives' participation.

The critical question, then, is how to foster greater engaged participation in rulemaking. This Article offers two proposals. First, it defends a requirement that agencies establish expectations about those stakeholders they believe will be impacted and thus should participate in the rulemaking proceeding, and an assessment of the process in light of those expectations could go a long way toward making agencies more proactive in creating representative rulemakings. Second, where there are likely to be systemic gaps in representation, this Article proposes agencies adopt proxy representation costs to select an interest group to serve as a representative of a set of interests in one or more rulemakings. The proposals could be adopted by individual agencies, as part of an Executive Order, OMB directive to all agencies, or legislation. These proposals would recognize the place of representation among the central values of administrative law—and implications of that place for notice-and-comment rulemaking.