

Rethinking Public Engagement in the Administrative State

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This Article presents an empirical, doctrinal, and theoretical critique of public engagement in the modern administrative state. The legitimacy of the administrative state depends on the claim that it provides opportunities for public engagement as well as a mechanism for expert scientific decisionmaking. A typical rulemaking proceeding lets experts make technical judgments about terrorism, transportation, or telecommunications subject to court review guarding against arbitrariness. The whole process is then enmeshed in a system that is supposed to provide engagement – and therefore democratic accountability -- through presidential appointments and control, congressional oversight, and the public notice-and-comment process. This existing approach is legitimated by “administrative pluralism,” a way of thinking that emphasizes the value of interest-group competition in shaping regulatory policy. While administrative pluralism helps legitimate regulatory policy in the eyes of jurists, scholars, and the public, it also suppresses implicit questions about how much expert judgment is required in regulatory decisions, and whether the extent of participatory democracy and responsiveness is sufficient. The problems are not abstract. They are easily demonstrated in the course of a specific regulatory rulemaking proceeding, involving Section 314 of the USA Patriot Act (governing law enforcement’s access to financial information). The task of balancing privacy concerns and law enforcement objectives hardly seems like the exclusive province of experts. Individuals and interest groups did have a chance to submit comments in the rulemaking proceeding, but virtually all the comments taken seriously by the regulatory agency were sophisticated statements made by financial institutions and their lawyers. While over 70% of comments came from individuals concerned about privacy, the agency did not even address these in its final rule. Despite the administrative pluralism model’s tenacious hold, at least two alternatives exist to involve the public in rulemaking proceedings such as those governing Section 314, both of which involve constituting a small group of people whose discussions can inform the regulatory process. Participants can be either selected by lot from the entire population (a “majoritarian deliberation” approach), or chosen by the agency from among constituencies (such as outside experts) who may be especially impacted by the regulation but are essentially unrepresented (a “corrective” approach). These approaches can generate valuable information about what informed citizens think of regulatory proposals. The technical challenge of implementing the alternatives is far from insurmountable, though difficult questions arise about selecting deliberation groups, framing the issue, and giving legal effect to the public’s participation. Instead, two larger challenges remain. First is the challenge of choosing among different concepts of “administrative democracy” to combine expertise and participation. Second is the challenge of overcoming a political economy that strongly favors the status quo.

INTRODUCTION3

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Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are awash in agency “expertise.”¹

--Antonin Scalia

Judicial Deference to Administrative Interpretations of Law

[T]he express role of the public in democratic politics is not to act narrowly as a jury, as finders of fact. They are instead empowered to serve as judges, as arbiters of what ought to be done.²

--Paul Sniderman

Taking Sides: A Fixed Choice Theory of Political Reasoning

[A] well-functioning democracy seeks above all to produce policies that will, in fact, improve people’s lives... The task for the future is to develop institutions that will respond to people’s values, not to their errors.³

--Cass Sunstein

Risk and Reason

INTRODUCTION

Suppose after a terrorist attack federal officials want more access to the public’s private financial information. Prosecutors, investigators, and their superiors contend such access could help reduce the risk of terrorist attacks and fight serious crimes. The legislature passes a statute to that effect, but does not work out the details. The question then arises how those details will be worked out, and how the public will take part in developing a regulation that will potentially affect just about everyone in the country.

¹ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17.

² Paul Sniderman, *Taking Sides: A Fixed Choice Theory of Political Reasoning*, in ELEMENTS OF REASON 79 (Arthur Lupia, Mathew McCubbins, & Samuel Popkin, eds. 2000).

³ CASS R. SUNSTEIN, RISK AND REASON 295 (2002).

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To be more specific, consider the implications of Section 314 of the USA Patriot Act. This obscure little post-September 11 provision calls for regulations encouraging “further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities.”⁴ Because of the statute’s ambiguity, the agency wielded a lot of discretion when it wrote the regulations. It could engineer anything ranging from a pipeline for law enforcement access to private financial information, to mild requirement for financial institutions to have informal meetings with law enforcement every year.⁵

According to the prevailing approach to public engagement in the administrative state, the rulemaking process governing the Section 314 regulations should reflect a distinctive blend of ingredients: expert decisionmaking by the Treasury Department, democratic accountability through representative democracy and public comments taken seriously by the agency, and judicial review against arbitrariness.⁶ One might surmise that banks would have something to say about these rules. But only under the narrowest definition of “interest” could anyone say that *only* banks possess an interest in those rules. Individuals ranging from bank employees to farmworkers can have some sort of disaggregated interest in the efficacy of national security and law enforcement policies. Immigrants who make international money transfers, investment bankers, and many other people in between might have some concern about how their financial records would give away their secrets. The public at large might care how the Section 314 regulations fit into a larger web of laws affecting privacy.

All of which makes what actually happened with Section 314 somewhat striking: the agency took a little-noticed, vague statute and turned it into an efficient new mechanism for channeling private financial information to federal law enforcement while prohibiting notification of the subjects of the request.⁷ While over 70% of the public comments received came from laypeople

⁴ See USA Patriot Act of 2001, Pub. L. 107-56 (USAPA). Section 314 of the Act is an uncodified provision that appears in the Historical and Statutory Notes to 31 U.S.C. 5311. Section 5311 is part of the BSA, and regulations implementing it appear at 31 CFR part 103. Since the authority of the Treasury Secretary to administer the BSA has been delegated to the Director of the Financial Crimes Enforcement Network (FinCEN), then FinCEN has responsibility for developing the regulations under Section 314. The statute admittedly provides a bit – though not much – more detail than what I have quoted above in establishing goals for the regulations. For the full statutory text and additional details on the regulatory scheme, see *infra* Part II.a.

⁵ The regulations the agency actually crafted, discussed in Part II, are reported in *Financial Crimes Enforcement Network; Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, 67 FED. REG. 60579, 60580-82 (September 26, 2002) (discussing comments received and making no mention of privacy concerns raised by commenters) (hereinafter, “Section 314 Final Rule Statement”).

⁶ See *infra* Part I.

⁷ See *infra* Part II.a.

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concerned about their privacy, the agency appeared to ignore these unsophisticated comments, failing even to mention privacy as a concern in its discussion of the final rule. Instead Treasury made various administrative changes in its proposed rules in response to the roughly 30% of comments from businesses and their representatives.⁸ Public interest organizations that normally care about privacy did not appear to participate in the rulemaking proceeding, perhaps in part because they had their hands full with other activities at a time of massive legal changes.⁹

Of course it's possible to take this as little more than a parable about the futility of mass public involvement in the regulatory process. No regulatory "public defender" stands ready to help laypeople plead their case to the agency. Clearly the political economy of regulation favors strong organized interests, not unsophisticated laypeople concerned about financial privacy.¹⁰ An agency facing time and resource constraint can hardly be expected to digest a jumble of unsophisticated comments from the public. If there is any real source of democratic legitimacy in the administrative state (in this view), it is found in oversight from representative politicians who can reverse the agency anytime.

There is, however, a different way to think about the Section 314 story, one that begins with two insights: that public engagement is supposed to make the administrative state more legitimate, and that in practical terms, engagement can mean something other than just waiting for interested parties to participate. Regardless of the substantive merits of the new regulations, Section 314 seems to raise the kind of balancing issue that calls for some sort of democratic participation. Indeed, upon reflection it's not altogether obvious that the political logic of the administrative state would preclude some alternative means of public consultation about how to balance security and privacy.¹¹ If some kind of public participation in the regulatory process is supposed to engender legitimacy, what then do we make of the experience with Section 314? Indeed, what is public engagement *supposed* to accomplish, and what should it be *expected* to actually achieve given practical and political constraints?

This article tries to make sense of these questions. My method is to conduct an empirical case study of public participation in an unfamiliar regulatory context – involving criminal justice and the war on terrorism – and then to illustrate how the insights obtained are also relevant to more familiar

⁸ See *infra* Part II.b.

⁹ See *id.*

¹⁰ See *infra* Part I.b.

¹¹ See *infra* Part V. See also JOHN P. HEINZ ET AL., THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICY MAKING 11 (1993) ("The interest group literature, on the whole, is remarkably unclear about the nature of the roles of government actors in the policy-making process – that is about the nature of the relationships between private groups and public officials. Much of the literature virtually ignores the officials and appears to assume that, like billiard balls, they will go wherever the interest groups send them.").

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regulatory domains.¹² Surprisingly few academic studies assess public participation in regulatory policy,¹³ and the prescriptive literature on reforming the process also appears relatively thin.¹⁴ This is ironic since commentators and lawyers alike often assume that public participation – when coupled with judicial review and legislative oversight – is part what makes the administrative state legitimate.¹⁵ What often remains unclear is what kind of participation should be expected, or even what should be sought in order to make the administrative state legitimate. Some critics might deride the link between legitimacy and public participation, and the notice-and-comment process in particular, as a charade that simply lets powerful interest groups engage in rent-seeking.¹⁶ But that view does not obviously follow from a belief that incentives shape political activity,¹⁷ nor does it explain the complicated institutional details of the

¹² While most of my attention here is on federal regulation, my argument is also relevant to local, state, and transnational regulation. Obviously regulatory systems are somewhat different across legal systems and levels of government. But they all have to grapple with questions about the legitimacy of the regulating authority, the extent of desirable and feasible participatory democracy, and the centrality of expert decisionmaking.

¹³ For two notable exceptions, see Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POLI. SCI. REV. 663 (1998)(finding that Medicare regulations developed pursuant to the regulatory notice-and-comment process appeared to have been impacted by comments from physicians expecting reductions in payments under the new rules); CORNELIUS M. KERWIN, RULEMAKING 157-203 (2ND ed. 1999)(discussing the extent of public participation in regulatory rulemaking proceedings, and concluding that such participation primarily reflects a process where “interest groups are the major forces”).

¹⁴ The prescriptive literature on participation in policymaking (and, by extension, in regulation) tends to fall into two categories: (1) philosophical discussions of the value of participation in policymaking in general (without strong attention to the intricacies of regulatory policy, or institutional detail); or (2) discussions of specialized issues like regulatory negotiation or the use of technology to facilitate participation. For some interesting examples of the former, see Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 27-29 (1986); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995). For examples of the latter, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Cary Coglianese, *The Internet and Public Participation in Rulemaking*, KSG WORKING PAPER SERIES NO. RWP03-022 (2003), avail. at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=421161.

¹⁵ See, e.g., *Administrative Procedure Act: Legislative History*, S.Doc. No. 248, 79th Cong., 2d Sess. 191 (1947) (noting that the “principal purpose” of the notice and comment provisions in the APA was to “provide that the legislative functions of the administrative agencies shall as far as possible be exercised only upon participation on notice...”). See also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (public participation in rulemaking proceeding is meant to ensure that the regulation is response to the interests and needs of those regulated); *Texaco, Inc. v. Federal Power Commission*, 412 F.3d 740, 744 (3d Cir. 1969) (participation by parties with an interest in the regulatory rulemaking proceeding ensures that agencies’ decisions are based upon relevant information).

¹⁶ See, e.g., JAMES M. BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-48 (1962). See also Jonathan Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280 (2002).

¹⁷ See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. LAW, ECON & ORG. 180 (1999) (where the focus is not on creating a “charade” but on obtaining

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administrative process.¹⁸ Still other observers might defend the existing approach to public engagement – which seems to be premised on the idea that most of what an agency does is just to apply expert judgment to a problem defined by the legislature and overseen by the political branches.¹⁹

Admittedly, people’s views about the appropriate degree and kind of public engagement in the administrative state should be driven a lot by their overall conceptions of democracy, and particularly their conceptions about what makes the administrative state itself legitimate in a democracy. Section 314 may have been enacted by the legislature, but the legislators entrusted the regulators with the harder task of figuring out exactly what balance to strike between security and financial privacy. This illustrates how the administrative state often combines a lot of power with broad legislative delegation. The legitimacy of any legal or political institution might always be questioned, but the administrative state’s power and the indirect nature in which it exercises power might be seen to exacerbate uncertainties about its legitimacy.²⁰

In response to such doubts, defenders of the administrative state often point to certain institutional features that help legitimize things like the Section 314 regulations, or in fact the entire administrative state.²¹ While the details depend on who you ask and for what purpose (i.e., theoretical exploration versus formal legal argument), the legitimacy-enhancing features are often taken to include the opportunity for the public to get involved in regulatory

information about the strength and preferences of interest groups competing over policy outcomes).

¹⁸ See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (noting that existing positive theories, by themselves, do not fully explain the institutional details of the regulatory process).

¹⁹ Courts constantly emphasize the importance of deferring to expert agencies. See, e.g., *Pattern Makers’ Leage of North America, AFL-CIO v. NLRB*, 473 U.S. 95, 115 (1985) (upholding agency decision regarding an unfair labor practice because the “Board has the primary responsibility for applying ‘the general provisions of the Act to the complexities of industrial life’”); *National Rifle Ass’n v. Reno*, 216 F.3d 122, 134 (D.C. Cir. 2000) (affirming dismissal of a complaint against a Justice Department practice of creating a temporary audit log of gun purchasers, on the ground that “it is the agencies, not the courts, that have the technical expertise... to carry out statutory mandates”).

²⁰ See *infra* Part III.a. But see Posner and Vermeule, *supra* note ____, at ____.

²¹ A lot has been written defending the legitimacy of the administrative state on the basis of its institutional features. The literature tends to emphasize the impact of political constraints on agency decisionmaking. For some examples, see, e.g., Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1748 (2002) (“Congress is accountable when it delegates power – it is accountable for its decision to delegate power to the agency. If the agency performs its function poorly, citizens will hold Congress responsible for the poor design of the agency, or for giving it too much power or not enough...”); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 491 (1986) (defending rulemaking from a perceived “wholesale synoptic attack on rulemaking discretion,” and implying that rulemaking requires little judicial scrutiny because of its “political, discretionary, incremental nature”).

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decisionmaking.²² Public involvement could help constrain the abuse of power in the administrative state. It could be part of the process for developing accountability between the key constituencies of the administrative state and the real-world actions of its institutions. Some form of public involvement could also provide regulators with valuable information about the costs, benefits, and administrative challenges associated with certain proposals. Of course such involvement is not taken to call for some kind of direct democracy.²³ On the contrary. It borders on madness (one would think) to believe that members of the lay public could play some constructive role in regulatory policy. But then what *is* the sort of public involvement that is legitimacy-enhancing?

If the question is taken to mean, “what are the specific legal features allowing for public involvement in the administrative state?” then it is pretty easy to answer: formally the public can get involved in the administrative state through a mixture of mechanisms. One is the notice-and-comment process that governs most regulatory rulemaking.²⁴ Interest groups also have occasional direct contact with the agency.²⁵ The public can also have an indirect impact through legislators and the president – who share power to oversee the agencies of the administrative state. But how should we evaluate these structures and their real-world operation? Without broadening the question, we end up with something pretty circular: the structures that exist are adequate because those are the ones that exist. If the question is understood to be more broad, in the sense of how these legal structures should be evaluated, then there are really two strands of thinking about what kind of participation contributes to legitimacy.

The first strand is *participatory democracy*. It focuses on the importance of involving the public at large – whether they are individuals, unofficial associations, organized interest groups, or powerful interested parties – in developing rules like those implementing Section 314.²⁶ In this approach, broad-based participation matters for two reasons: individual members of the public

²² See *infra* Part I.

²³ And why not just a referendum on regulatory policy? The short answer is that voters’ initial, uniformed, and unsophisticated impressions may not correspond with the views they would have given more information and a chance to talk about the issue. When voters have time, information, and a chance to deliberate, their opinions often change. See generally JAMES F. FISHKIN & ROBERT C. LUSKIN, BRINGING DELIBERATION TO THE DEMOCRATIC DIALOGUE, IN THE POLL WITH A HUMAN FACE (Maxwell McCombs & May Reynolds eds., 1999).. See also Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503 (1990).

²⁴ See Administrative Procedure Act, 5 U.S.C. § 551. Most of the exceptions to the APA notice-and-comment rulemaking process involve foreign affairs and national security. See *id.*, at Section 553. But as Section 314 demonstrates, some of the default requirements for rulemaking contained in the APA still apply to a number of regulations affecting areas ranging from criminal finance enforcement to immigration.

²⁵ Ex parte contacts are generally allowed in notice-and-comment rulemaking, but courts have imposed restrictions when the proceedings functionally resemble adjudication or licensing. See, e.g., *Sangamon Valley Television Corp. v. United States*, 269 F.d 221 (D.C.Cir. 1959).

²⁶ See Part I.a, *supra*.

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will be affected by regulations, and policy choices should not be driven only by those who think in terms of their self-interest.²⁷ Nothing here implies a need for direct democracy on every issue, nor is there necessarily a sense that the legislative process is always participatory. But the focus here is on trying to ensure that regulatory policy issues attract a decent share of public attention.²⁸ This is represented in the impulse some regulatory agencies occasionally have for public hearings and “town meetings” that go “past” organized interests. Much of the early rhetoric about the administrative state is at least consistent with this approach, even if it’s not exactly clear what it should mean in terms of institutions.

The second strand, which I call *administrative pluralism*, is more pragmatic.²⁹ The focus is on groups and organized interests. They do the heavy lifting when it comes to legitimizing rulemaking proceedings like those involving Section 314. They should be expected to raise concerns ranging from administrability to privacy to the benefits to law enforcement that could be achieved through the regulation. Public engagement means engaging those groups, who have a measure of responsibility and expertise to supplement what is considered to be a really technical, complicated, scientific process. The competition between interest groups informs the regulatory process and also helps politicians control agency problems that they might otherwise have with regulatory agencies. More so than participatory democracy, it is the administrative pluralism strand that calls for what the existing approach to public engagement is able to deliver: a chance for expert, organized interest groups to take part in shaping regulations.³⁰

Despite their differences, both of these approaches have implicit positive and normative components. For example, the descriptive aspect of administrative pluralism might be grounded on two research traditions: skepticism of mass democracy, and an attention to the susceptibility of the administrative state to control from organized interest groups (with “agency capture” being just one crude way of putting things). Normatively, administrative pluralism takes the fact of political power vested in organized interest groups and suggests this is not a bad thing at all. In any case, the larger point is this. The two strands helping to define what is *really* meant by saying that public engagement is important are not just deeply felt, deontological positions. They are built on particular suppositions and intuitions (both positive and normative), all of which can (and should) be scrutinized.

As the reader will better grasp following Part II, once such scrutiny is provided for its suppositions, administrative pluralism turns out not to be very

²⁷ *Id.*

²⁸ Which is, by the way, why this strand implies that it is not enough to emphasize the role representative politicians play in the oversight of the administrative state. Mass electoral support rarely turns on questions of regulatory policy. *See infra* Part III.a.

²⁹ *See* Part I.b, *supra*.

³⁰ *Id.*

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satisfying as the exclusive approach to involving the public in the administrative state, for several reasons. First, some of its basic premises are questionable, or at least context-dependent.³¹ For example, an implicit premise of administrative pluralism is that agency problems between leaders and members of interest groups are not so great that they undermine the value of the participation by organized interest groups. Yet there can be substantial agency problems.³² And so too with another implicit claim, which is that interest groups will tend to provide expert, sophisticated commentary on the most normatively important dimensions of a particular regulatory problem.³³ But that did not happen with Section 314. Not a single organization concerned about civil liberties and capable of submitting sophisticated comments, such as the American Civil Liberties Union or the Electronic Frontier Foundation, provided comments. Indeed, doing so is probably a lot harder in times of crisis where a deluge of legal changes unfold at the same time. One can also question the implicit contentions that regulatory policy is primarily – if not exclusively -- about expert judgment,³⁴ and that the larger public does not care about it. While most comments came from individual people concerned about privacy, these comments displayed little understanding of the law or the agency's responsibility under it. In part as a result, the agency did not even address these in its Federal Register statement, nor did it make a single change in the proposed regulation as a result of these comments.³⁵ Second, administrative pluralism is not the only feasible means of involving the larger public in regulatory policy, both because (a) the lay public's sophistication and interest are not fixed, and (b) some groups that may not ordinarily participate in notice-and-comment rulemaking (like non-aligned experts) may have both an interest and sophistication.³⁶ Third, the

³¹ See *infra* Part II.b.

³² See TERRY M. MOE, THE ORGANIZATION OF INTERESTS __ (1981).

³³ See *infra* Part II.b.

³⁴ See *infra* Part II.b.

³⁵ See *Financial Crimes Enforcement Network; Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, 67 FED. REG. 60579, 60580-82 (September 26, 2002) (discussing comments received and making no mention of privacy concerns raised by commenters) (hereinafter, "Section 314 Final Rule Statement"). See the Appendix, *infra*, for examples of the comments. Note that the vast majority of non-business comments were not sophisticated yet they raised recognizable themes that (a) raised an arguably important substantive concern with the rules (i.e., privacy). For all their unsophistication, some comments even seemed to offer insights that are consistent with the positions that scholars take in academic debates. For example, some commenters implied that regulatory policies can be constitutionally problematic even if they are consistent with a judicial conception of the Constitution. See *infra* Part II.a. Others were concerned about unintended or even perverse consequences from law enforcement policies. See *id.* In any case, the commenters don't use the "right" language. For example, the ones concerned about the Constitution don't say, "The *Miller* case goes too far, and since I've read Larry Kramer and Mark Tushnet I believe that constitutional interpretation should be driven in part by the public's own thinking – and that's the sort of thinking I'm doing right here." But the comment is at least consistent with this more sophisticated formulation.

³⁶ See *infra* Part III.

underlying theory of democracy involved in administrative pluralism may not be persuasive to everyone, or for every issue. And in some cases this is for good reason. One may believe that majoritarian deliberation should inform regulatory policy, or that people with an interest but no representation in the existing arrangement should have some representation.³⁷

Having critiqued the administrative pluralism strand, I then consider in Parts III and IV how to advance realistic alternatives consistent with the participatory democracy strand. I develop *corrective* and *majoritarian deliberation* approaches. The corrective approach would involve designing a mechanism to sample people that should obviously have interest but are not adequately represented (with some appropriate metric for making this decision). The majoritarian deliberation approach would involve getting a random sample of the population as a whole.³⁸ Either one of the alternative approaches could involve selecting a small group or groups through random sampling (or stratified random sampling) of some population. In principle, individuals and groups consulted through these alternative approaches could offer both their raw initial opinions but also their reactions to information about the nature of the agency's mandate, the scientific and technical problems with different regulatory possibilities, and the views of different constituencies that would be affected by the regulation.³⁹ The existence of these alternatives does not mean the existing approach is always wrong: letting participation be driven by self-designated interested parties might make sense, or it might not. Like everything in life, these alternatives have costs – but they should be judged alongside their potential benefits. That is exactly the point: choosing between all these approaches poses the question of when it is just fine to use the existing pluralist approach, when we should be more interested in including people affected but not organized to participate, and when it is better to let regulatory decisions be informed by deliberation groups that are explicitly majoritarian in nature.

While there is plenty of reason to rethink public engagement, my project is not meant to *fix* all the limitations of regulatory policy by recalibrating public participation.⁴⁰ Enough has been written already about the virtues of dialogic

³⁷ Indeed, by using the alternatives to the existing approach – which I discuss in Part IV – agencies may be better able to do some things that could improve regulation. Regulators could gain insights about how to explain regulatory functions to the public, and how to foster compliance with regulations. *See infra* Part IV.

³⁸ Obviously, at some level the entire population has some kind of “interest,” so the distinction between the two approaches is driven by how low one sets the “interest” threshold.

³⁹ Nothing about these alternatives makes them incompatible with principled risk analysis, or with defensible versions of cost-benefit analysis. *See* Part IV.c.

⁴⁰ Some commentators have pointed out that the administrative state has a bias *against* regulation. *See, e.g.,* JOHN BRAITHWAITE AND PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000). Indeed, the political economy of regulation may give agencies an incentive to systematically under-regulate. I do not address this problem directly, but neither do I believe the proposals here would exacerbate the problem.

deliberation.⁴¹ My goal here is not to insist that whatever ails the administrative state can be healed through including more stakeholders in regulatory policymaking or through more public deliberation. Instead I want to show that the default embrace of the administrative pluralism approach to public participation in regulatory policy is neither indispensable nor particularly persuasive. Instead of an antidote to resolve all the difficult questions in regulatory policy, I am offering observations about how the law of the administrative state shapes the process of deciding on what those difficult questions really are.

I.

THERE ARE TWO STRANDS OF THOUGHT ABOUT PUBLIC ENGAGEMENT IN THE ADMINISTRATIVE STATE

Not a single major function of government escapes the influence of regulatory policy.⁴² Under the existing approach to public engagement in the administrative state, the public gets some opportunity to participate in regulatory decisions affecting matters ranging from campaign contribution rules to carcinogen control. Because of their role authorizing statutes, appropriating funds, and overseeing agency activity, the legislature and the President act as constraints on agencies.⁴³ Moreover, presidents hire and fire agency administrators. Even members of independent agencies may be sensitive to the White House agenda. In most rulemaking proceedings, people and interest groups have a right to participate through APA notice-and-comment procedures. The right for the public to comment, coupled with legal requirements that the agency must give reasons for what it does,⁴⁴ implies has some kind of legal responsibility to consider significant issues raised in public comments.⁴⁵

⁴¹ For a reasonable introduction to this burgeoning literature (replete with the obligatory cites to Habermas), see JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* (1996). But see James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 447 (1996).

⁴² The average number of pages in the annual Code of Federal Regulations grew about 50% between the Ford and Clinton Administrations, from an average of 71,982 during the Ford administration to 134,173 during the Clinton presidency. Kerwin, *supra* note ____, at 21.

⁴³ See JAMES Q. WILSON, *BUREAUCRACY* 235-276 (1989) (discussing how representative politicians act as shape and constrain the work of bureaucrats). See also *infra* Part V., at ____.

⁴⁴ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (agency must provide explanation for its decision, and decision reviewed on the basis of the full rulemaking record). The full record includes all the comments submitted by the public.

⁴⁵ Let me expand on this. It is generally accepted that an agency must consider all the important dimensions of a regulatory problem – and surely this includes significant dimensions of the problem elucidated in public comments. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) *cert. denied* 417 U.S. 921 (1974). See also Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 Duke L.J. 1497, 1501 n.19 (1992)

While it is clear that the public gets to participate directly through the notice and comment process and indirectly through representative politicians, it is much less clear what that participation is supposed to accomplish in the existing approach. Some might say that participation breeds legitimacy, but this just pushes the question back one step, since there are at least two different strands of thinking about *how* public engagement promotes legitimacy. One strand, which might be labeled *participatory democracy*, exalts the value of mass participation as an important ingredient in regulatory policymaking. Whether through letter-writing appeals to legislators or the notice-and-comment process, the participatory democracy strand emphasizes the value in counterbalancing the natural insularity of the regulatory process. This strand finds some support in the legal structures of the administrative state, which allow for participation from individual and informal groups as well as organized interests. Another approach, which could be called “administrative pluralism,” is more pragmatic. This strand not only acknowledges but lauds the role organized interests play in regulatory policymaking. Administrative pluralism does not expect citizens to rush home from their job so that they can send in comments to some regulatory agency. Instead the focus is on interested participants and the interaction between them. Their competition is thought to enhance the quality and legitimacy of regulatory policy. One has to disentangle these two strands to make any headway in understanding public engagement in the administrative state. Once the two strands are disentangled, two things become clear. First, administrative pluralism seems more pragmatic because it appears to be consistent with the way the public seems to get involved in regulatory policy. Second, the viability of administrative pluralism as a theory of legitimacy for the administrative state really depends on a number of empirical suppositions that should be subject to scrutiny.

(citing *Portland Cement Ass'n*); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 282 (1987) (agencies must respond to all serious dimensions of the problem raised in comments). On the other hand, courts tend to give agencies a good deal of discretion to decide precisely how to handle comments. This makes it hard to fix the precise counters of the agency's responsibility to respond to *individual* comments. See, e.g., *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1355 n.15 (D.C. Cir. 1985) (“An agency need not address every conceivable issue or alternative, no matter how remote or insignificant.”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *But cf.* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 27 (1995) (“To be sure, an agency has broad discretion to set its agenda and to deal with problems one step at a time. Nevertheless, the agency's self-interest lies in making a strong record to respond to pleas to go further than it would prefer; brushing such comments aside can be counterproductive.”) (footnote omitted). What must be reconciled is (a) the agency's responsibility to consider important dimensions of the problem, (b) the public's right to comment, and (c) the agency's discretion in handling individual comments. Perhaps the most viable way to reconcile these legal principles is to conclude that the agency may not ignore qualitatively important dimensions of the problem that raised in the course of the notice-and-comment process (i.e., by some substantial proportion of the comments in the aggregate). Moreover, if the notice-and-comment process is supposed to serve a valuable function

A. The Participatory Democracy Strand Emphasizes the Value of Participation by Individuals, Informal Associations, and Organized Interests

If we must accept an administrative state of faceless bureaucratic administrative agencies, how can we ensure that its decisions are both sound and legitimate? Proponents of the administrative state and courts reviewing administrative decisions have often emphasized the importance of participatory democracy in the administrative state as part of the answer. By “participatory democracy,” I mean some kind of process allowing individuals, informal associations, and organized interests to have a say in regulatory policy. Participation (goes the theory) is central to democracy,⁴⁶ and thus crucial to reconciling democratic aspirations with the bureaucratic machinery of the administrative state.

Defenders of the administrative state suggest that it is more legitimate because of such participation. So do courts reviewing administrative action. Indeed, the mechanisms of the administrative state seem to reflect a concern with some kind of participatory democracy. With few exceptions, members of the public have a legal right to take part in the regulatory process, regardless of whether they are savvy lawyers for a chemical products company or individual laypeople with no particular technical expertise.⁴⁷ This makes intuitive sense, since regulations are forged from statutes passed in the name of everyone.⁴⁸ The regulations themselves are obviously important: often they have the force of law just as a civil or criminal statute would.⁴⁹ They affect a pervasive and growing share of the nation’s domestic and international decisions. Participation helps render that power legitimate in two ways. Regulations affect the public and are promulgated in its name; members of the public should therefore be able to affect the regulation because they have an

⁴⁶ See SIDNEY VERBA, KAY SCHLOZMAN, AND HENRY BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 1 (1995) (“Citizen participation is at the heart of democracy. Indeed, democracy is unthinkable without the ability of citizens to participate freely in the governing process.”).

⁴⁷ Most of the exceptions to the APA notice-and-comment rulemaking process involve foreign affairs and national security. But as Section 314 demonstrates, some of the default requirements for rulemaking contained in the APA still apply to a number of regulations affecting areas ranging from criminal finance enforcement to immigration.

⁴⁸ By “regulations,” I mean primarily the regulatory rules enacted pursuant to the notice-and-comment process (also known as “informal rulemaking”) established by the Administrative Procedure Act, or pursuant to a similar process that allows the public to participate in rulemaking in some way.

⁴⁹ See, e.g., Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention* 116 *HARV. L. REV.* 467 (2002).

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interest in the regulation.⁵⁰ And mass participation can offset self-interested political activity involving organized interests, helping to offset this with some sort of deliberative citizen activity.

At least in some ways, the structure of the administrative state is set up to force it to react to citizen participation in administrative decisions. Legislators can influence the work of agencies in response to a rare but powerful burst of public attention to some matter of regulatory policy. Agencies are legally required to consider comments raising important issues, regardless of who they come from. Of course, nothing in the participatory democracy strand makes participation infinitely valuable: after some point decisions must be taken, and policies must be executed.⁵¹ What this strand seems to imply is rather that efficiency values should be balanced against the importance of participation, and that such participation should regularly allow people to have an effect on regulatory policy. If the existing notice-and-comment, expertise-focused structure of administrative law does not allow this to happen, then people interested in participatory democracy would ask what alternatives exist that could blend expert technical judgment with opportunities for public involvement in decisionmaking. Thus the impulse for occasional experiments like the Carter Administration's drive for expanded public hearings and television advertising soliciting public comments on regulations,⁵² or the more recent use of

⁵⁰ See Kerwin, *supra* note ___, at 158 (“The credibility and standing a rule enjoys with those who will be regulated by it or enjoy the benefits it bestows depend heavily on the accuracy and completeness of the information on which it is based”).

⁵¹ As I have defined it, this “participatory democracy” strand is potentially consistent with the recent enthusiasm for deliberative democracy. See, e.g., JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* (1996). But the “participatory democracy” strand does not depend on some sort of deep, slow deliberation as much as on participation in the process of decisionmaking. See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 248 (2002). Justice Breyer writes:

Serious complex challenges in law are often made in the context of a national conversation, involving, among others, scientists, engineers, businessmen and –women, and the media, along with legislators, judges, and *many ordinary citizens*... That conversation takes place through many meetings, symposia, and discussions, through journal articles and media reports, through legislative hearings and court cases. [Emphasis added].

Justice Breyer's list could well have included the notice-and-comment process or its close cousins like negotiated rulemaking. His vision seems to depend less on the notion that people can *participate* in the “national conversation,” whether they are scientists or “ordinary citizens.”

⁵² President Carter issued an executive order directing agencies to explore “holding open conferences or public hearings” to expand the scope of participation. See Exec. Order 12,044. The Carter reforms led to increases in the time for comment for many rules, the provision of advance notice that an agency was considering rulemaking in a certain area, and occasional use of television and radio advertising soliciting comments. See Kerwin, *supra* note ___, at 169 (discussing Carter-era innovations).

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“deliberative polls” to advise state utility regulators.⁵³ And while direct democracy may seem ill-suited for some regulatory issues, it certainly seems like a procedure that imbues a decision with legitimacy.⁵⁴

The deeper question that arises from this first strand is whether it is mostly just an aspirational standard -- a philosophical ideal that makes the administrative state sound benign to people. Despite the Carter reforms and other occasional experiments, laypeople as a whole hardly seem to have a persistent interest in regulation or technical sophistication to make meaningful contributions to particulate emission standards, FCC media ownership rules, or technical changes in campaign finance law. Even stakeholders trying to participate – whether they are experts or people more directly affected by a decision – may be drowned out by the power of organized interests who have overcome any collective action problems. To the extent that laypeople seem uninterested and unsophisticated, and unorganized stakeholders appear doomed to be drowned out by organized interests, then participatory democracy seems unrealistic at best.

B. The Administrative Pluralism Strand Focuses on the Role of Organized Interests

There is, nonetheless, a more pragmatic alternative to simply singing the praises of participatory democracy in the administrative state. A substantial chunk of the empirical and theoretical research on the administrative state emphasizes the role that interest groups play in shaping regulatory policy.⁵⁵ A lot of people have understandably concluded that organized interests have disproportionate power in shaping regulations like the Section 314 rules, compared to the lay public or to interested individuals or organized groups that lack organization and political resources. What makes the “administrative pluralism” strand of thinking about public engagement distinctive is not its recognition of the role interested parties play but its tendency to equate the positive

⁵³ See generally Robert C. Luskin, James Fishkin, & Dennis L. Plane, *Deliberative Polling and Policy Outcomes: Electric Utility Issues in Texas*, Paper Presented at Annual Meeting of the Association for Public Policy Analysis and Management (Nov. 1999) (on file with author) (describing changes in the opinions of a sample of people asked to consider electric utility pricing issues in Texas, following the provision of materials to the participants and a chance for them to deliberate about the issue).

⁵⁴ See *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668 (1976).

⁵⁵ There is a vast literature here addressing the role of interest groups in regulatory policy. The following are a few interesting examples. See, e.g., Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985); Mathew D. McCubbins, *The Legislative Design or Regulatory Structure*, 29 AM. J. POLI. SCI. 721 (1985); Randall L. Calvert, Mathew D. McCubbins, and Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POLI. SCI. 588 (1989).

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with the normative. Echoing Dahl and other pluralist thinkers,⁵⁶ proponents of this view emphasize that interest group competition is probably the best (if not the only viable) way to integrate the public in complex regulatory and administrative decisionmaking.⁵⁷ This is the sort of view that made the early architects of the Administrative Procedure Act celebrate the fact that – even before the structure of the modern administrative state had been formalized – many agencies had realized that their success as regulators depended on consulting with interested parties that had both a stake in the outcome of the regulatory process and the requisite expertise to inform that process.⁵⁸

Some of the positive theory is fairly persuasive.⁵⁹ The institutions of the administrative state seem to be politically efficient: they help legislators know what sort of regulatory policy is being imposed and how the most important political constituencies will react to the regulations. The existing mechanism for engaging the public seems perfectly suited to allowing organized interest groups to participate at various stages in the process: at the time legislation is written in the first place, later through the notice-and-comment rulemaking process that applies to most regulatory rules, and then subsequently through litigation and informal efforts to shape agency enforcement policy.⁶⁰ The harder question is

⁵⁶ See, e.g., Robert A. Dahl, *American Hybrid*, in CLASSIC READINGS IN AMERICAN POLITICS 205, 219 (Pietro S. Nivola & David H. Rosenbloom, eds. 1990) (“I defined the ‘normal’ American political process as one in which there is a high probability that an activate and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision”). Dahl not only describes interest group competition as a pervasive feature of the American political system. He also exalts this feature:

[T]he normal American political system... appears to be a relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining social peace in a restless and immoderate people operating a gigantic, powerful, diversified and incredibly complex society. This is no negligible contribution, then, that Americans have made to the arts of government – and to that branch, which of all the arts of politics is the most difficult, the art of democratic governance.

Id., at 222.

⁵⁷ See, e.g., Edward P. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001); Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL. REV. 553, 554 (1997) (“The provision of strong protection for a strongly reviled system of special interest politics thus appears to be less a paradox than an example, familiar in our system, of a sound political and constitutional commitment to take some risks and to bear some costs in return for larger social benefits.”).

⁵⁸ See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103-04 (1941) (hereinafter, “ATTORNEY GENERAL’S REPORT”). See also Kerwin, *supra* note ____, at 158 (noting that the lack of participation from interested parties may result in a rule “deprived of information that is crucial...”).

⁵⁹ See *infra* Part V.a.

⁶⁰ An advocate of the more ambitious participatory democracy approach might note that the formal institutions of the administrative state – such as the notice-and-comment process -- are set up to engage individuals and informal groups, not only interest groups. Rarely if ever does the law of the administrative explicitly restrict participation to interest *groups*. On the contrary: in

whether this arrangement is satisfactory in any deeper sense. It's possible to state a version of administrative pluralism like this: any degree of participation in regulatory policy is just fine, as long as agencies fulfill the legal requirements for issuing regulatory policies. After all, those legal requirements call on agencies to contend with any serious issue raised in the rulemaking record.⁶¹

In contrast, a richer understanding of administrative pluralism would concern itself with the role that organized interests should play in the whole enterprise of democracy. An adherent of administrative pluralism must ultimately believe in the power of groups and organized interests to enrich the process that serves up the Section 314 rules. To believe in administrative pluralism, one has to believe to some extent there are no devastating agency problems in the relationship between interest-group members and leaders. One must also believe in the social value of allowing competing interests to contribute their ideas, influence, and distinctive points of view to a regulatory process that is otherwise primarily driven by expert judgment. While both of these assumptions are contestable, at least a few things could keep the administrative pluralism model looking like a pretty desirable approach to participatory democracy. The agency problems might be assuaged by the fact that interest groups have to compete for members, and at least a few interests – such as large corporations, select not-for-profit associations, and highly-motivated individuals – have the options of representing themselves directly. Either way the agency has to respond to serious concerns. Moreover, while involvement in the regulatory process by interested parties may raise the specter of agency “capture,” perhaps the antidote is to be found in competition. Thus, while individual citizens with diffuse interests may not be able to contribute much to a regulatory proceeding on air quality, industry and environmental groups would have the resources to participate with the requisite technical sophistication. They could challenge each others' assumptions and provide the agency with new information, and blow the whistle if the agency neglected an important aspect of the problem.

Indeed, there might be a few important reasons why this reliance on organized interests should be perfectly acceptable, at least to some people. One might think that virtually all the work of the administrative state requires highly-

most cases, interest groups get to participate because the *individuals* they represent would have a chance to participate – whether because they have the standing to get judicial review or because the public at large has the power to submit their views during the notice-and-comment period. What the interest groups are supposed to do is to solve the collective action problems that would otherwise keep most individuals from following regulatory developments that would have an effect on them.

⁶¹ As one established doctrinal summary of the field put it: “Most remands [of regulatory rules] are based on a court’s conclusion that the rule is arbitrary and capricious because the agency did not discuss ‘adequately’ some decisional factor, comment, data dispute, or potential alternative to the action taken in the rule” RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, AND PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 334 (1999).

sophisticated technical expertise anyway, which raises questions about just how much we achieve by stepping up the involvement of the mass public in regulatory policy. That's how courts tend to talk about regulatory policy.⁶² It could be that interest groups are the only ones (along with directly interested parties) with the means and incentives to solve collective action problems to learn about the issues, organize a response, and otherwise meaningfully take part in regulatory policymaking. Moreover, the views of interest groups are often in conflict, so various interests might police each other throughout the regulatory process – including during the notice-and-comment process. Or at least this is supposed to be true in the administrative pluralist version of the world.

C. Each Strand Reflects a Theory of Administrative Legitimacy

The preceding approaches to public engagement are more than just descriptions of what sort of public involvement is supposed to be possible. They are also theories of legitimacy. No reasonable defender of the administrative state's legitimacy has suggested that the public (whether we think of them as groups or individuals) should be completely screened out of being involved in regulatory decisions. Nor would such exclusion be politically feasible in a system like our own.⁶³ But if complete exclusion of the public is neither possible nor desirable, the question is then how we might expect the public to get involved in these decisions.

If we look at the existing approach to getting the public involved – with its expert decisionmaking, and public comment process -- it seems most consistent with administrative pluralism. Notice-and-comment rulemaking allows interested parties that solve collective action problems to play a role, supplementing whatever else they do *ex parte* and through legislative pressure. Laypeople may not make sophisticated contributions to rulemaking, but competing interest groups do so. Expert decisionmaking is considered the key task of the administrative state by courts and in many cases by the agencies themselves. And yet intellectually honest observers have to conclude that the attractiveness of administrative pluralism depends substantially on its empirical assumptions. Notice that neither these assumptions nor the attractiveness of the administrative pluralism model itself should be considered in binary terms. There is some need for subtlety in judging these different strands of thinking about participation in the administrative state. Nonetheless, if the intuitions

⁶² See, e.g., *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 473 U.S. 95, 115 (1985) (upholding agency decision regarding an unfair labor practice because the "Board has the primary responsibility for applying 'the general provisions of the Act to the complexities of industrial life'"); *National Rifle Ass'n v. Reno*, 216 F.3d 122, 134 (D.C. Cir. 2000) (affirming dismissal of a complaint against a Justice Department practice of creating a temporary audit log of gun purchasers, on the ground that "it is the agencies, not the courts, that have the technical expertise... to carry out statutory mandates").

⁶³ See Part V.b, *infra*.

listed above turned out to be wrong, it would be harder to defend the administrative pluralism strand – which would then suggest the need to rethinking how the administrative state achieves public engagement.

One might thus group the potential problems with this second strand into two categories. First, how persuasive are the underlying assumptions of the second strand? Even if these turn out to be relatively convincing, how persuasive is the underlying interest-group centered vision of democracy that is implied by the administrative pluralism approach? We can get a better sense of how these assumptions fare if we turn to a specific case study. Since the case study may seem to raise issues that are less commonly seen in administrative law (i.e., law enforcement, national security, the war on terrorism), I also spend a little time placing the case study in context and trying to show why the problems raised in the case study are not as unique as they might seem.

II.

A CASE STUDY HIGHLIGHTS SOME LIMITATIONS OF ADMINISTRATIVE PLURALISM

In this Part, I examine the questions raised by the two strands of thinking about public engagement in light of the experience with Section 314. To do this, I place Section 314 in the broader context of scholarship on the reality of the regulatory process. I then consider how the experiences with regulatory policy conform to the implicit intuitions of the administrative pluralism model, which implies, for example, that concerns raised in the comments will be addressed and that sophisticated interest groups will articulate the concerns that *should* be relevant to the regulatory process. This exercise shows that the intuitions supporting the administrative pluralism model turn out to be rather shaky. The results are revealing: though the number of comments was small (172), the vast majority (over 70%) came from unsophisticated laypeople concerned about privacy. The agency appears to have ignored these, instead lavishing attention on sophisticated comments from businesses and their representatives.

A. *Section 314 Caused Regulators to Revise Law Enforcement Power to Obtain Private Financial Information*

I chose this case study because the rule is one that applies to virtually anyone in the country, because the issue in question is timely and obviously requires balancing various competing values, and because the statute gives the agency a lot of latitude with the rule. Although regulatory rulemaking proceedings involving law enforcement and national security may seem at first to raise unique issues, below I try to show how the case study sheds light on all of administrative law. Where there may be important differences in terms of

relevance to the questions, I have noted them. The appendix describes the methods I used to analyze the relevant comments.

i. The problem and the statute

Growing fears of crime and terrorism among legislators and the public provoke a sense of urgency about law enforcement. That urgency extends to both (ex ante) preventive investigation and (ex post) prosecution. Financial data are definitely useful in after-the-fact enforcement, where prosecutors must establish the elements of various offenses and prove their theory of the case, and is probably also somewhat useful in preventive investigation.⁶⁴ But before September 11, the question of government access to financial information for national security or criminal enforcement purposes created some frustration for law enforcement officials. Sometimes law enforcement investigators working on ex post enforcement had a hard time actually getting the records of people who were being investigated, because defendants did not always tell authorities where they had accounts. It was harder still to get access to financial records of suspects: that required a judicial subpoena, which in turn required authorities to figure out where their suspect engaged in financial activity and (in most cases) required persons whose records were targeted to receive notice and have a chance to oppose the subpoena in court.⁶⁵

Meanwhile, some financial institutions insisted that they did not know what (if any) information they could share with other financial institutions regarding people they considered suspicious, or whether they could act on such information (for example) to close the accounts of suspicious people. One might wonder why such institutions would be interested in sharing information at all. One possibility is that the prospects of subsequent government investigations leading to possible civil or criminal liability, coupled with the potential for bad publicity, might give rise to such pressures. Although the Suspicious Activity Reporting (SAR) system already had its own safe harbor provision, there were still questions about a financial institutions civil or criminal liability if it accepted business that had raised red flags at other financial institutions. Moreover, there was the slight chance that taking on a customer who turned out to be using her bank account to engage in criminal financial activity of some kind would lead to public embarrassment.

For all these pre-September 11 frustrations in using financial data to advance law enforcement goals, the executive branch could take at least small steps to address these concerns. It could use computers to analyze currency

⁶⁴ In other work I chronicle how law enforcers tend to use financial records for ex post rather than ex ante (i.e., preventive) enforcement, despite the official insistence that financial records are useful for both. See Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311 (2003).

⁶⁵ See *infra* notes ____.

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transaction records collected subject to existing regulatory authorities – but these provide only a tiny snapshot of the aggregate financial transactions in the country, the vast majority of which do not involve physical currency. Law enforcement bureaucracies could also try to expedite the process for obtaining judicial subpoenas for financial records of suspected criminals. If law enforcement agents knew where a suspect kept accounts and had enough suspicion, then they could obtain a judicial subpoena for her records.⁶⁶ But there was no enactment of broad statutory authority allowing some regulatory agency to prescribe uniform rules governing the mass dissemination of a request to all (or most) financial institutions in the country.⁶⁷ Doing a nationwide subpoena was questionable at best, on both legal and practical grounds.⁶⁸ In fact, efforts to streamline this sort of activity raised some warning flags for politicians and outside interest groups. For example, while financial institutions might be interested in further expanding the scope of their safe harbors (so they would not have to face liability if they voluntarily chose to share information), they were certainly not interested in being saddled with further legal obligations to provide records to government.

The September 11 attacks precipitated a staggering burst of legislative activity. Many legislative changes involving law enforcement and national security became possible that had previously not been politically-feasible. September 11 even dramatized the potential costs that could be faced by a private-sector entity thought to be unwittingly responsible for the tragedy, which probably heightened financial institutions' interest in sharing information and

⁶⁶ Under the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.* (hereinafter, "RFPA"), such a subpoena would ordinarily give notification to the person whose records are requested, as well as a chance to fight the subpoena in court. *See generally* Laura N. Pringle and Conni L. Allen, *Privacy and Related Issues for Financial Institutions and Other Regulated Entities*, 53 CONSUMER FIN. L.Q. REP. 28 (1999).

⁶⁷ The impact of such a rule obviously depends on how broadly one defines "financial institution." Although this may seem like a straightforward matter, even the original Bank Secrecy Act gives Treasury wide latitude over how to define a financial institution. *See* Bank Secrecy Act (hereinafter "BSA"), 31 U.S.C.A. § 5312. The statute gives Treasury the power to define "financial institution" to include, among other entities, commercial banks and trust companies, private banks, branches of foreign banks in the U.S., investment bankers, insurance companies, travel agencies, licensed money transmitters, casinos, or:

any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

⁶⁸ Before 2002, there was no nationwide system allowing law enforcement agencies to communicate a request for records to all financial institutions in the country, nor any legal requirement that financial institutions cooperate with law enforcement authorities in searching their records for information. On the contrary, RFPA established notable restrictions on the disclosure of any such information.

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otherwise minimizing the probability that they might turn out to be Osama bin Laden's personal banker. Financial institutions that had previously opposed expanding government request powers might now find it difficult to be completely opposed to this (given how popular the USA Patriot Act would be), but if the legislation provided for broad authority to be exercised by regulators, then they had another chance to shape the actual enforcement consequences of the statute. And so we end up with the USAPA, and its Section 314.

What Section 314 does is to give the Treasury Department the authority to encourage information sharing between financial institutions and the federal government, and among different financial institutions. Section 314(a) establishes authority for Treasury to create rules for the request and sharing of financial information between financial institutions and law enforcement.⁶⁹ Specifically, Section 314(a)(1) provides in part that:

[T]he Secretary shall... adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.⁷⁰

A fuller picture emerges when we consider what Section 314(a)(2)(C) states:

[The regulations may] include or create procedures for cooperation and information focusing on.... Means of facilitating the identification of accounts and transactions involving *terrorist groups* and facilitating the exchange of information concerning such accounts and transactions between financial institutions and law enforcement organizations.⁷¹

While subsection (a) addresses the link between financial institutions and federal authorities, Section 314(b) directs Treasury to develop rules for the sharing of information among financial institutions in the interest of preventing money laundering or terrorist financing.⁷² Under the statute, the regulations can

⁶⁹ See USA Patriot Act of 2001, Pub. L. 107-56 (USAPA). Section 314 of the Act is an uncodified provision that appears in the Historical and Statutory Notes to 31 U.S.C. 5311. Section 5311 is part of the BSA, and regulations implementing it appear at 31 CFR part 103. Since the authority of the Treasury Secretary to administer the BSA has been delegated to the Director of the Financial Crimes Enforcement Network (FinCEN), then FinCEN has responsibility for developing the regulations under Section 314.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

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allow such information-sharing to take place pursuant to a safe-harbor from legal liability for the institutions sharing the information. It provides:

Upon notice provided to the Secretary, 2 or more financial institutions and any association of financial institutions may share information with one another regarding individuals, entities, organizations, and countries suspected of possible terrorist or money laundering activities. A financial institution or association that transmits, receives, or shares such information for the purposes of identifying and reporting activities shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision thereof, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure, or any other person identified in the disclosure, except where such transmission, receipt, or sharing violates this section or regulations promulgated pursuant to this section.

The potential impact of Section 314(a) starts to emerge clearly if we think about the rules affecting how federal agents could get their hands on records before the legislation. For the most part, they had to use a subpoena, which meant federal law enforcement agents needed at least some *ex ante* suspicions about where the suspected wrongdoer might have her records. The latter could then be challenged in court, and the Right to Financial Privacy Act further provides for the challenge of a request for financial records.⁷³ In contrast, Section 314(a) could make it easier for law enforcement to get information from any bank in the country. That authority might be restricted to instances where law enforcement bureaucracies certify that the person whose records they want is credibly thought to be engaging in money laundering or terrorism,⁷⁴ but the statute does not provide any remedy for a failure in the law enforcement

⁷³ The Right to Financial Privacy Act, 29 U.S.C. §§ 3401-3422, previously restricted financial institutions from disclosing a person's financial information to the government unless the records were disclosed pursuant to a subpoena or a search warrant. Depending on the details of the regulations implementing Section 314(a), then, federal officials might easily sidestep the existing restrictions on information disclosure in the RFPA.

⁷⁴ Section 314(a)(1) explicitly notes that information sharing should only cover people on "individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities." Section 314(2) states that information sharing procedures *may* focus on "matters specifically related to the finances of terrorist groups" (Section 314(2)(A)); "the relationship... between international narcotics traffickers and foreign terrorist organizations..." (Section 314(2)(B)); or "accounts and transactions involving terrorist groups." Although someone might argue about the precise extent of the preceding list's restrictions on information disclosure, the most plausible explanation for why those apparent limits are in the statute is that legislators wanted to restrict the scope of disclosed financial information.

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certification process.⁷⁵ In short, Section 314(a) at least authorizes the creation of a simple means for law enforcement agents to “tell” banks what accounts to scrutinize with particular care. The payoff from this may be specific information, but also an implicit signal to financial institutions about whom they should scrutinize carefully.

If sharing information with government is valuable, presumably so too is sharing of information among private sector financial institutions. In a nutshell, Section 314(b) gives Treasury the regulatory authority to set up a system for financial institutions to share information among themselves.⁷⁶ How much they actually do that obviously depends on their incentives. But in a world where the potential penalty for unwittingly providing a haven for terrorist or criminal financial transactions may include not only a fine but also public disapproval, one might imagine that financial institutions might be interested in sharing information to minimize the risk of fallout. Such motivations might be patriotic or simply a means of minimizing economic and political costs. Either way, those motivations have to be adjusted for the risk of liability that a financial institution might face by disclosing financial information that would otherwise be private. Thus we might expect financial institutions to do whatever possible to avoid being caught between government policies encouraging the sharing of information and potential liability to customers for having disclosed the information.

But if one is not going to be economically impacted by Section 314, why spend any time thinking about it at all? Consider a few reasons why members of the public might be quite interested. Section 314 is part of a trend reducing the barriers faced by government to obtain information, which triggers what are commonly referred to as “civil liberties” concerns. Some of those concerns are about privacy. Some are about false positives, including the concerns of people whose allegedly suspicious behavior might prompt many banks to deny them services. Other concerns might arise from the fear of surveillance and harassment on the basis of improper motives, or unwarranted enforcement patterns, in which case the alleged harm isn’t just that someone who works for

⁷⁵ Cf. *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 2277 (2002). *Gonzaga* concerned the privacy interests that people claimed under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. A former university student sued under Section 1983, alleging that the university had violated his rights under the statute. The Court held that, absent specific “rights-creating” language, a statute did not create a right enforceable under Section 1983 (or through an implied right of action). *See id.* at 2275. Even if the statute includes “rights creating” language, the plaintiff must show Congress also intended to create a “private remedy.” *Id.* at 2276. There might be a theory under which a sufficiently egregious bad faith violation of the details of Section 314(a)’s limitations might give rise to a constitutional tort. But that’s at the extreme, and in any case it would be difficult for anyone aggrieved to discover the facts necessary to make out such a claim (under *Bivens*). Anything short of that would have to be resolved by a remedy created through the statute (which does not provide for a remedy) or the regulation (which could).

⁷⁶ *See* Section 314(b), *supra* note 72.

the government can get her eyeballs on where someone's transferred money, but that the information can lead to enforcement patterns that might be troubling. Still other problems might involve the so-called "slippery slope," a dynamic that can link Section 314 to more ominous and protracted legal changes.⁷⁷ It is also plausible that Section 314 and measures like it allow the government to improve its capacity to deter offenses, because it would allow the government to more easily ascertain how much money people have – and such money could subject to confiscation.

In addition, Section 314 could interact with other legal provisions and bureaucratic practices that might shape how law enforcement functions. This might be good or bad depending on one's underlying concerns about law enforcement. On the one hand, if law enforcement can do more things to people on the basis of suspicion with less judicial review, then perhaps there is more reason to be concerned about law enforcement access to records that can spark suspicion. Regardless of whether the initial suspicion was about terrorism or money laundering (as the statute requires, in principle), any criminal violation can be charged once it's discovered.⁷⁸ On the other hand, given a steady and substantial demand for enforcement performance, different detection strategies can be substitutes for each other. This raises the possibility that financial surveillance (to pick one example) might be a substitute for techniques such as preventive detention, voice communication wiretaps, or physical dragnets. Whether this is good or bad depends on one's outlook. How then did the agency treat these different kinds of issues?

ii. The proposed regulation

Notice the scope of flexibility that Section 314 leaves the agency. It directs the agency to consider law enforcement and national security benefits but also gives it explicit commands to limit the scope of information made available to that which pertains to people reasonably believed to be terrorists (including their financial supporters) or money launderers. Though the statute does not mention privacy in so many words, it does indicate that the power granted to law enforcement to request or share information is under restrictions. The larger statutory framework obviously evinces a concern with privacy and non-arbitrariness.⁷⁹

⁷⁷ See, e.g., Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

⁷⁸ See *Atwater v. City of Lago Vista* 532 U.S. 318 (2001).

⁷⁹ For example, although Section 314(b) provides a safe harbor for financial institutions sharing information, it restricts the uses of the information provided and prohibits it from being disclosed. The rest of USAPA also makes some concessions to privacy. For example, regarding USAPA's concern with privacy in the context of electronic surveillance, see, e.g., Orin Kerr, *Internet Surveillance Law After the USA PATRIOT ACT: The Big Brother That Isn't*, 97 NW. U. LAW REV. 607 (2003). Obviously this does not mean the statute is what civil libertarians would

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The initial draft regulations took the statutory mandate to “encourage” cooperation and mostly turned it into a mechanism for getting information to law enforcement. The proposal regulations had two major features. First, they would facilitate blanket, nationwide law enforcement queries to financial institutions regarding account information of people suspected of being involved in money laundering and terrorist financing.⁸⁰ Upon finding the records of the person in question, the financial institution would have to turn over any information gleaned from the customer when the account was established, and information about transactions made through the account.⁸¹ Information requests could therefore become quite routine.⁸² Not that the customer whose requests would ever know that, because the regulations forbid the requested financial institution from communicating the request with the customer. What the financial institution *can* do is use the information to make a number of decisions on its own, such as deciding not to offer banking services to a person. This could turn the provisions of part 103.100 into something like a warning to financial institutions not to offer services to someone. Second, although law enforcement authorities must certify that all persons whose account information is requested are suspects of terrorism or money laundering, there is no obvious remedy for any violation. As observed earlier, there is no constitutional expectation of privacy in records held by a third party. This means FinCEN and law

like. But neither can one assume that the statute reflects no concern about privacy. Section 314 is therefore just one example where the regulatory agency charged with developing rules about USAPA’s provisions could conceivably consider privacy and civil liberties concerns.

⁸⁰ See *Financial Crimes Enforcement Network; Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, 67 FED. REG. 9879, avail. at 2002 WL 331533(FR) (March 4, 2002) (hereinafter “Section 314 Notice of Proposed Rulemaking”).

⁸¹ *Id.*

⁸² See *id.* at 9884. Specifically, proposed Section 103.100 provides in relevant part as follows:

(b) Requests for information relating to money laundering or terrorist activities. On behalf of a federal law enforcement agency investigating money laundering or terrorist activity, FinCEN may require any financial institution to search its records to determine whether the financial institution maintains or has maintained accounts for, or has engaged in transactions with, any specified individual, entity, or organization.

(c) Certification requirement. Prior to FinCEN requesting information... the federal law enforcement agency shall provide FinCEN with a written certification... that each individual, entity, or organization about which the agency is seeking information is engaged in, or reasonably suspected based on credible evidence of engaging in, money laundering or terrorist activity.

No additional certification is required from federal law enforcement agencies, nor do the regulations establish any procedures to audit the extent to which law enforcement agencies have a basis for suspecting the individuals, entities, or organizations in question. Subsequent portions of the proposed Section 103.100 provide that the financial institution must provide FinCEN with, among other things, all identifying information used by the account holder to establish the account, and information involving transactions connected to the account. *Id.*

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enforcement agencies must police themselves when it comes to the limits of the justification for information requests. The absence of a remedy means no one else will have much of a chance to discipline anyone in government who abuses Section 103.100 by making unjustified requests for information.⁸³

Meanwhile, Part 103.110 of the draft regulation established the rule implementing Section 314(b). The regulations establish a legal safe harbor for many different types of financial institutions to share information among themselves relating to suspected money laundering or terrorist activity.⁸⁴ To avail themselves of the safe-harbor under the proposed regulation, financial institutions had to “certify” to FinCEN that they were going to engage in information sharing and that they would not use the information improperly.⁸⁵

iii. The resulting regulation

Then came the required comment period,⁸⁶ after which the final regulations were published in the Federal Register. The revised regulations looked a lot like the original ones. But they involved four major changes:

1. The regulations (especially 103.100) were reorganized for clarity. Specifically, financial institutions’ obligations to provide information under Section 314 are now grouped in a single paragraph.⁸⁷
2. The regulations added some default rules restricting the scope of what a financial institution would have to provide when receiving a request from the government, unless a request specifically provides otherwise.⁸⁸ There are two default rules. One default rule says a financial institution only needs to search its records for current accounts or accounts held during the last twelve months, or transactions taking place during the preceding

⁸³ See *supra* note 75 (discussing *Gonzaga*). Note that in *Gonzaga*, the presumption of a remedy would have been even stronger since the alleged violation of the Family Educational Rights and Privacy Act (FERPA) was committed by a state government, thereby making § 1983 applicable at least in principle. Since that would not be applicable here, then the only remaining route is a *Bivens* action.

⁸⁴ See Section 314 Notice of Proposed Rulemaking, at 9885. The Section 103.110 proposal states, in relevant part that:

...[a] financial institution or association of financial institutions that engages in the sharing of information pursuant to this section shall not be liable to any person under any law or regulation of the United States, under any constitution, law, or regulation of any State or political subdivision thereof, or under any contract or other legally enforceable agreement...

⁸⁵ *Id.*

⁸⁶ See APA § 553 *et seq.*

⁸⁷ See , Section 314 Final Rule Statement, *supra* note __, at 60580.

⁸⁸ *Id.*

six months. Another default rule says that financial institutions need not report a customer's future activity unless the information request from law enforcement (emanating through FinCEN) specifically asks for such future information.⁸⁹

3. The final regulations also expand the kinds of financial institutions that can share information and avoid liability for doing so.⁹⁰ The new regulation encompasses all financial institutions that are required to maintain an "anti-money laundering" program (which turns out to be a lot more than, for example, commercial banks), unless FinCEN specifically "determines that a particular category of financial institution should not be eligible to share information under this provision.
4. The final regulations streamline the certification process, through which financial institutions opt-in to the information-sharing program.⁹¹ Under the final regulation, the requirement is simply that financial institutions provide FinCEN with notice that they will be engaged in information sharing (and there is no way to revoke this), and that they make reasonable efforts to establish if a financial institution with which they are sharing information has also given FinCEN adequate notice.

One could argue that all of these changes seem like improvements over the initial rule, at least according to a defensible standard of administrability. Regrouping the financial institutions' obligations in a single paragraph may be a small thing but it probably makes the regulation easier to read. The use of default rules is a more meaningful step for financial institutions – and law enforcement authorities do not lose the ability to ask financial institutions to make longer-term searches or report on future activity. And if sharing information among institutions is supposed to improve security, then surely it is plausible to expand the scope of the "financial institutions" that can take advantage of the safe harbor. FinCEN's own explanations in the Federal Register discuss why these changes are justified, and credits particular comments for illuminating the need for the various changes.⁹² What is more, some of the comments were specifically seeking the sorts of changes that FinCEN made in the rule.⁹³

B. The Administrative Pluralism Model Should be Assessed in Light of the Case Study and Some Fundamental Questions

⁸⁹ *Id.* Note that this means the regulations imply that law enforcement may use FinCEN to make a request for future information, because a default nature by its own terms can be altered.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 60580-82.

⁹³ *Id.* at 60580.

Now let's return to some of the questions I posed above regarding administrative pluralism and the interest-group focused approach to public engagement that it supports. My assumption here is that administrative pluralism requires a qualitative evaluation. The answers to certain questions may shed light on the implicit claims of the administrative pluralism model – particularly the claim that it is the only reasonable approach to participatory democracy in the administrative state.

i. How pervasive is the role of technical and scientific decisionmaking in the administrative state?

Routine regulatory problems resolved through rulemaking involve complex judgments about risk and value that probably benefit from expertise, but they also involve policy judgments that often reflect ambiguous statutory commands. Sometimes judges explicitly recognize the importance of policy judgments but note that the agency should make them because it is rendered accountable through representative politics (in keeping with the administrative pluralism model).⁹⁴ But most of the time courts defer to agencies, invoking expertise and institutional competence as justification. Commentators have long raised questions about this claim, though lately some scholarly voices have sought to defend the idea of expertise by noting that laypeople have a tendency not to make sound judgments about risk.⁹⁵ Still, there is something unsatisfying about the narrow claim that the heavy lifting done by the administrative state when it regulates is predominantly about expertise. Let me illustrate this first with Section 314, and then with examples from other regulatory contexts.

Specifically, privacy and related concerns – like many other issues entrusted to regulators – turn out not to be pure technical matters under almost any defensible definition. Even if one assumed that the law enforcement interest at issue in the Section 314 regulations should be treated as the exclusive domain of experts (a questionable assumption), there is almost no way of describing privacy concerns as the exclusive domain for experts. It is true that the statute clearly emphasizes the goal of encouraging the sharing of information about suspected terrorists or money launderers, yet the statute also commands that sharing should be limited. Both the nature of that limit, the rest of the USAPA statute, and the underlying APA notice-and-comment process suggest that the agency is supposed to strike a balance between several different issues.⁹⁶ One

⁹⁴ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* 403 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (recognizing the impact of partisan changes on the administration of agency programs)(hereinafter “State Farm”).

⁹⁵ See Sunstein, *Risk and Reason*, *supra* note ____, at ____.

⁹⁶ Cf. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene)* 448 U.S. 607, 646-48 (1980) (plurality opinion) (OSHA statute, if interpreted appropriately to cure constitutional defects, creates a list of factors that the agency must consider in creating a

goal, obviously, is advancing national security and law enforcement objectives. Treating this as a matter for experts to resolve is certainly plausible, though not obviously right.⁹⁷ And whatever one thinks of the idea that national security and law enforcement can be treated as ripe for technical resolution by experts, the remaining concerns implicit in the statute are about privacy and accountability for the use of sensitive information.⁹⁸ Presumably, this is why there are some restrictions on the use of the financial information by the government and financial institutions.

Some might argue that any concern involved in regulatory policy reduces to a question of risks of particular states of the world. Seen in this light, the concern over privacy evinced by Section 314 is nothing more than an awareness of the risk that the government will abuse its access to financial information. This way of thinking again turns all of regulatory policy into the anodyne task for a technocratic expert. It is true that any policy question might in principle reduce to a matter of expected utility, but it is not clear how this cuts. Agency officials have to think about expected utility when they make decisions, and so does everyone else. But expected utility is about the value assigned to a state of

regulation that is not arbitrary and capricious). (emphasizing the importance of the agency balancing several competing concerns).

⁹⁷ The question is in part whether people likely to be called on as experts in the field (i.e., law enforcers) are in a position to provide accurate information about what legal changes are needed. This raises at least two different kinds of problems. One is the quality of information and analysis that experts on national security and law enforcement can provide. Another is an agency problem: given that law enforcers, like anyone else, have interests and respond to incentives, there may be distortions created when they serve both as experts and also beneficiaries of particular legal changes. See Cuéllar, *supra* note 27.

⁹⁸ For example, one commenter had the following to say:

I oppose all regulations of the Patriot Act proposed by the Treasury Department. This act will do nothing to prevent terrorism and will only result in further losses of freedom and privacy for honest, law-abiding Americans. The proposed Act is unconstitutional; the Administration and Congress will be violating their oaths to uphold the US Constitution if they agree to pass this or any similar legislation. I hope my government still listens to its citizens and I have not wasted my time in stringently and in all ways OPPOSING THIS PROPOSED LEGISLATION. Thank you for doing what is highest and best for all Americans.

Section 314 Comments, *supra* note ____, Comment # 124. Another said this:

Banks already ignore the Privacy Act and illegally discriminate against people who do not use a Slave Surveillance Number (SSN)[sic]. I am opposed to your so-called “Patriot Act” and any other police state tactics you dream up.

Id., Comment # 63. The Appendix, *supra*, lists excerpts from additional comments.

This is a far cry from a sophisticated argument to the effect that the agency should minimize the damage done by *Miller* by narrowing the scope of law enforcement authority. But the preceding commenters would probably agree with the existing statement if given an explanation (and if she did not believe that all was lost in any event).

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the world, not just its probability. If a citizen chose to be concerned about the Section 314 regulations and an agency official was *not* concerned, their difference of opinion may have nothing to do with their different estimates of the probability of abuse, but from a different guess about the cost they would bear if 100 people knew that the citizen was sending money to a drug treatment center. Moreover, even if the citizen and the agency official began with the same valuation of the scenario, the government official might be desensitized from repeatedly being exposed to private information.⁹⁹

The regulations at issue in *Rust v. Sullivan*¹⁰⁰ provide another example of how there is much more to the administrative state than scientific technocracy. The question was whether – and how – the federal Department of Health and Human Services could apply a gag rule limiting abortion-related counseling in federally-funded clinics. While the court made some moves in the direction of acknowledging ideological differences in how a Republican administration would treat the issue, the major thrust of the argument for deference to the agency was expertise and reference to “reasoned analysis”:

At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties’ attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing. When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency.¹⁰¹

Technical and scientific knowledge probably matters some to this decision. But only the most expansive definition of expert would let one just call the decision “science.”¹⁰²

⁹⁹ One could think of the existing administrative process and all its political checks as a way to address the regulatory issues that should not be left to the experts. But, as Section 314 also makes clear, not every commenter with a morsel of information about the regulation’s policy implications manages to provide sophisticated input. Not only does this lack of sophistication make it harder for a willing agency to assimilate contributions from many members of the public who do take the trouble to provide their comments. A teeming mass of unsophisticated comments is also likely to reinforce the idea that nothing will happen if the agency ignores the comments from laypeople.

¹⁰⁰ 500 U.S. 173 (1991).

¹⁰¹ 500 U.S. at 185-86.

¹⁰² And the bigger the concept of expertise, the more it makes sense to remember James Q. Wilson’s admonition about it. In discussing the politics of bureaucracy, Wilson wrote:

What the statute left vague “experts” were to imbue with meaning. But expert opinion changes and some experts in fact are politicians who bow to the influence of organized interests or ideologues who embrace the enthusiasms of zealous factions.

Even the rarefied domain of environmental regulation involves, at best, a mix of scientific and policy determinations. Consider the Environmental Protection Agency's recent rules governing the concentration of arsenic in drinking water promulgated under the Safe Drinking Water Act.¹⁰³ One study critiqued the final rule, alleging that the regulator was insufficiently attentive to technical economic and scientific concerns.¹⁰⁴ Another scholarly commentator defended the rule, suggesting it was not the product of shoddy analysis but instead the result of legitimate judgment calls.¹⁰⁵ According to this commentator, the agency issued a reasonable rule reflecting a legitimate interpretation of conflicting data from wage-premium studies¹⁰⁶ and attention to the need for an adequate margin of safety.¹⁰⁷ It is a separate question to ask whether the larger public would care or understand the debate between the two positions described above – a question I take up below – but the disagreement is obviously not just about science. It is about the type of inference to draw from an imperfect wage-premium study, and even more so about whether there is a need for an adequate margin of safety in a regulation designed to reduce a potentially dangerous concentration of arsenic.¹⁰⁸

I could go on, but the point should be clear. Of course agencies are expected to use rigorous analytical tools to weigh the risk of environmental, health-related, security, or occupational risks, depending on their mandate. What such analysis depends on are questions such as how to interpret an ambiguous

WILSON, *supra* note 43, at 330.

¹⁰³ Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (2000).

¹⁰⁴ See Jason K. Burnett & Robert W. Hahn, *EPA's Arsenic Rule: The Benefits of the Standard Do Not Justify the Costs* (2001), avail. at http://aei.brookings.org/admin/pdffiles/reg_analysis_01_02.pdf.

¹⁰⁵ See Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341 (2002).

¹⁰⁶ *Id.* at 2355. Professor McGarity writes:

[It is] certainly correct to emphasize that existing wage premium studies produce a very wide distribution of estimates and that they surely do not encompass every consideration that should go into monetizing the value of a statistical life. Whether these problems are cured [as the Burnett and Hahn study implies] by picking a number in the middle of the range of peer reviewed studies, multiplying that number by four because another law professor thought that was a sensible way to account for a few of the neglected considerations, and boosting that number by an additional twenty-three percent because rich people assign a higher monetary value to their lives than modest wage earners do is certainly an open question.

¹⁰⁷ *Id.* at 2375. The article notes:

How many of us want to drive over a bridge or ride in an airplane for which the last dollar spent on safety just equaled the projected monetized lives saved discounted to present value? A margin of safety provides a backup level of safety as a hedge against catastrophe when experts turn out to be wrong.

¹⁰⁸ I am not suggesting that one can dispense with expert decisionmaking in determining (a) exactly what amounts to a “dangerous concentration” of arsenic, (b)

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statute (not just ambiguous facts), or how to make judgment calls about the value of particular outcomes (not just their probability). Unless one defines technical expertise or science in a way that explicitly includes political judgments, it is not plausible to treat all regulatory policy issues as being primarily about expert or scientific decisionmaking. Obviously expert decisionmaking has a role sculpting regulations about domestic security and financial privacy. And sometimes statutes appear to call almost exclusively for scientific and technical determinations.¹⁰⁹ Regulatory policy aims to affect complicated problems that are often not easily understood or explained. But the administrative pluralism model seems to confuse two ideas. One is that regulatory decisions are primarily about expert judgment. The other is that view that most regulatory decisions involve contestable legal interpretations and policy judgments, both of which should be informed by technical and scientific expertise. There is a difference. In one approach the experts are assumed to be the ideal decisionmakers, and the rest of the regulatory process is meant only to assure they do not run amok with the public trust. In the other approach the experts are viewed as being in a secondary, albeit valuable, role.¹¹⁰ Amidst the administrative pluralism model of public engagement and the nondelegation doctrine's implicit focus on technical and scientific expertise, something gets lost in the shuffle. What gets lost is the idea that statutory interpretation in the course of writing regulations involves value choices as much as technical and scientific knowledge.

ii. *Do interested parties provide sophisticated comments covering the major issues in a rulemaking proceeding?*

The administrative pluralism strand would seem more satisfying if it turns out that clusters of interested parties gather round an agency during a difficult rulemaking proceeding to help it seriously consider a broad range of viewpoints when making regulatory policy decisions. The implication of this image is that interested parties who submit comments and play a role in shaping regulatory policy will represent an array of concerns, including those that would likely be important to various different constituencies subject to the regulation. But this was not the case with the Section 314 regulations. Not a single organized interest group concerned about privacy or civil liberties participated in the notice-and-comment process.¹¹¹

¹⁰⁹ See, e.g., *See Whitman v. American Trucking Associations*, 531 U.S. 457, 472-73 (2001) (hereinafter "American Trucking") (interpreting the Clean Air Act to require exclusively a technical determination of what constitutes an adequate air quality standard to protect "public health").

¹¹⁰ Thus, adherents to the second approach are not surprised to find that agency administrators are rarely apolitical technical experts.

¹¹¹ Neither is there any evidence to indicate that such groups participated through ex parte communications with the agency outside the context of the notice-and-comment process. The

It would be hard to argue that privacy was irrelevant to what the agency was doing with Section 314. Few people would be indifferent if unauthorized third parties had access to their private financial information. Thanks to Section 314 and the attendant regulations, what had been difficult for the government to obtain became relatively easy to get. Despite the fact that privacy is important both as a legal and a policy matter, there was no participation from any mass membership or advocacy organization with a sophisticated capacity for legal capacity and concerned specifically about privacy. Perhaps it is not surprising that such organizations may have too few resources to participate in rulemaking proceedings like this in times of crisis, when the pace of legal change quickens.¹¹² Whatever the cause, there were no sophisticated interest groups urging the agency to weigh the purported benefits of Section 314 against the perceived or actual privacy costs.

Of course it is true that we may not be able to generalize the Section 314 example to every situation. Interest groups and mass membership organizations representing a broad array of viewpoints often take part in regulatory proceedings through comments or ex parte contacts with regulatory agencies. Nonetheless, a substantial percentage of rules do not generate any comments at all,¹¹³ and many interest groups consider participation in rulemaking less important than litigation, or making political contributions.¹¹⁴ The experience with Section 314 shows that this process cannot guarantee that sophisticated advocates will articulate the full range of concerns that someone might defensibly consider important.¹¹⁵ The larger question is what it means for the

agency did not mention any such consultations in its discussion of the proposed or the final rule in the Federal Register, nor did it discuss the underlying (privacy and civil liberties) concerns that such groups would have presumably raised.

¹¹² If Section 314 regulations were being crafted at a time of meager legal changes affecting privacy or civil liberties, it is quite likely that the usual suspects – organizations like the American Civil Liberties Union or the Electronic Frontier Foundation – would have commented.

¹¹³ See Kerwin, *supra* note ___, at 185 (evaluating a sample of rules issued between January and June 1991, and finding that only about 60% of rules with prior notice generated any public comments).

¹¹⁴ *Id.* at 187 (62% of interest groups surveyed consider political contributions somewhat or far more important than participation in rulemaking, and 60% reach the same conclusion about litigation), and 194 (only 53% of groups surveyed “always” use written comments to influence the regulatory process). One might interpret this as a “market” response of interest groups choosing to allocate their resources elsewhere. Cf. John M. de Figueiredo and Rui J. P. de Figueiredo, Jr., *The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation*, unpublished paper on file with author (2002). But interest groups may have their own reasons to focus their resources away from influencing policy – and these may not match the interests of the members. See Moe, *supra* note ___, at ___ (“...interest group... policymaking processes can only be understood by taking into account the close interconnection of internal politics and the structural determinations of formation and maintenance.”).

¹¹⁵ The evidence here is not enough to establish whether the interest group process yields such systematic failures in other contexts. But neither can we reliably conclude that Section 314 is a complete aberration.

interests of leaders of advocacy groups to be aligned with those of their members, or even more broadly, with those of the various “publics” that they are taken to represent.

iii. Do laypeople participate in regulatory proceedings?

Although the administrative pluralism approach plays down the possibility that masses of individual laypeople would be rushing to write in comments about proposed rules, their participation might still be quite valuable under the model. In principle, individual citizens or members of informal associations could help cover any concerns not addressed by interest groups. But do such people participate?

It turns out that 172 comments about Section 314 were received, and over 70% of those came from laypeople or unofficial organizations. But before turning to the Section 314 rulemaking proceeding, consider the evidence from a number of different rulemaking proceedings. Figure 1 reports the number of comments received in six different rulemaking proceedings. Because the extent of participation across issues can be so dramatically disparate, I use a logarithmic scale to compare the total amount of participation. A two-fold increase along the chart’s horizontal axis represents a ten-fold increase in the number of comments. The first bar corresponds to the Section 314 rulemaking described above.¹¹⁶ The next bar reports on participation in the various regulations that the Federal Election Commission recently issued to implement the Bipartisan Campaign Finance Reform Act, popularly known as the “McCain-Feingold” law.¹¹⁷ The third bar reports on comments received by the September 11 Victim Compensation Fund at the Department of Justice in connection with its rulemaking proceeding.¹¹⁸ The fourth bar indicates the number of comments received by the Environmental Protection Agency in connection with the

¹¹⁶ See Appendix for a discussion of the source.

¹¹⁷ Bipartisan Campaign Finance Reform Act of 1998, H.R. 2183, 105th Cong. (1998). The total comments listed reflect all the comments received on regulations implementing the new campaign finance reform law, including (1) 1116 comments on public financing of presidential candidates and conventions, *see* 68 Fed. Reg. 47386; (2) 4 comments on consolidated reporting requirements, *see* 68 Fed. Reg. 404; (3) 51 comments on coordinated and independent expenditures, *see* 68 Fed. Reg. 421, (4) 13 comments on misuse of campaign funds and related issues, *see* 67 Fed. Reg. 76962; (5) 25 comments on contribution limits, *see* 67 Fed. Reg. 69928; (6) only 47 comments on regulations implementing the “electioneering communication” provisions that appear to have important free speech implications, *see* 67 Fed. Reg. 65190; (7) 5 comments on the administrative reorganization of regulations on “contribution” and “expenditure”, *see* <http://www.fec.gov/register.htm>; and (8) 2 comments on the extent of administrative fines, *see* 68 Fed. Reg. 12572.

¹¹⁸ These include 806 comments received in response to the initial notice of inquiry, 2687 comments specifically on the interim final rule, and 628 comments on the regulation received after the deadline. Jonathan D. Melber, *An Act of Discretion: Rebutting Cantor Fitzgerald’s Critique of the Victim Compensation Fund*, 78 N.Y.U. L. REV. 749, 750-55 (2003).

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National Ambient Air Quality Standards for Particulate Matter and Ozone in 1997.¹¹⁹ The fifth bar indicates the number of comments recently received by the Federal Communications Commission in the course of recent rulemaking proceedings changing local media ownership restrictions.¹²⁰ The final bar shows the number of comments received on the Food and Drug Administration's regulations on cigarette sale and distribution to minors.¹²¹

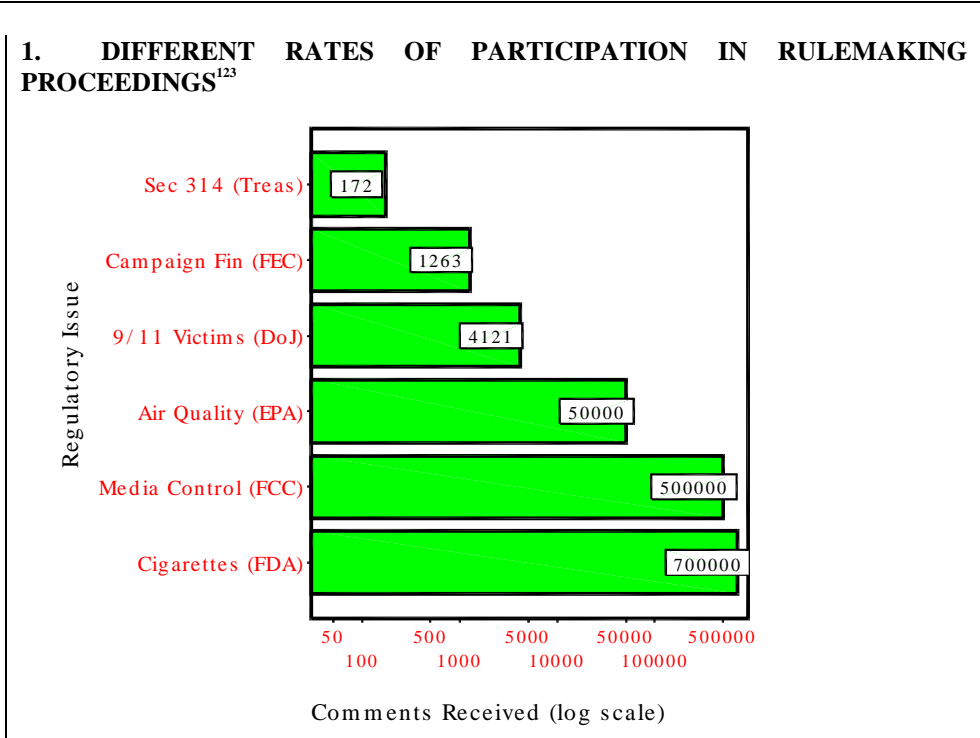
What the figure shows is that at least some rulemaking proceedings seem to attract mass participation. The specific rates of participation vary between 172 in the Section 314 rulemaking proceeding to approximately 700,000 for the FDA regulations involving the sale of cigarettes to minors. Admittedly, comment periods vary and many of these comments may reflect organized letter-writing efforts by interest groups. Nonetheless, the scale of participation in some rulemaking proceedings belies simple explanations suggesting that only parties with a narrow economic stake (or something like it) would participate. Witness the September 11 Victim Compensation Fund. Though only a small number of individuals would be eligible for benefits, the agency received 50 times as many comments as were received about Section 314 – a regulation affecting, in principle, everyone in the country.¹²² The scale of participation on the media control and cigarette sale regulations at least hints at the possibility that larger chunks of the public might become quite interested in regulatory policy. Even if many of these comments came from members of interest groups, those groups must still find ways of motivating a mass membership to send in comments. This suggests that given the right alignment of political circumstances, media attention, and institutional factors, hundreds of thousands of citizens might take the time to express their views about regulatory policy.

¹¹⁹ See 62 Fed. Reg. 38652; 62 Fed. Reg. 38856, 38858.

¹²⁰ See Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the 1996 Telecommunications Act, FCC 03-127, 5 (2003), avail. at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf.

¹²¹ See *Rules and Regulations: Department of Health and Human Services, Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44396, 44417.

¹²² It would be hard to argue that the rates of participation somehow reflect the “importance” of the regulation. Participation is probably driven by a host of factors, including media attention to the regulatory issue involved, the issue's inherent salience, and the organizational efforts of interest groups. This foreshadows an important theme to which I return later: members of the public may have one reaction if they consider an issue superficially and another if they reflect on it. This is true not only in the decision to allocate scarce resources to participate in one rulemaking (say, the Victim Compensation Fund regulation) as opposed to another (say, Section 314), but in what they think of on the merits. Just as it is important to understand how the political context might affect individuals' judgments on the merits (which I discuss below), we must learn more about what drives citizens' initial impressions of what issue is worth commenting on in the first place. See Part III.b.



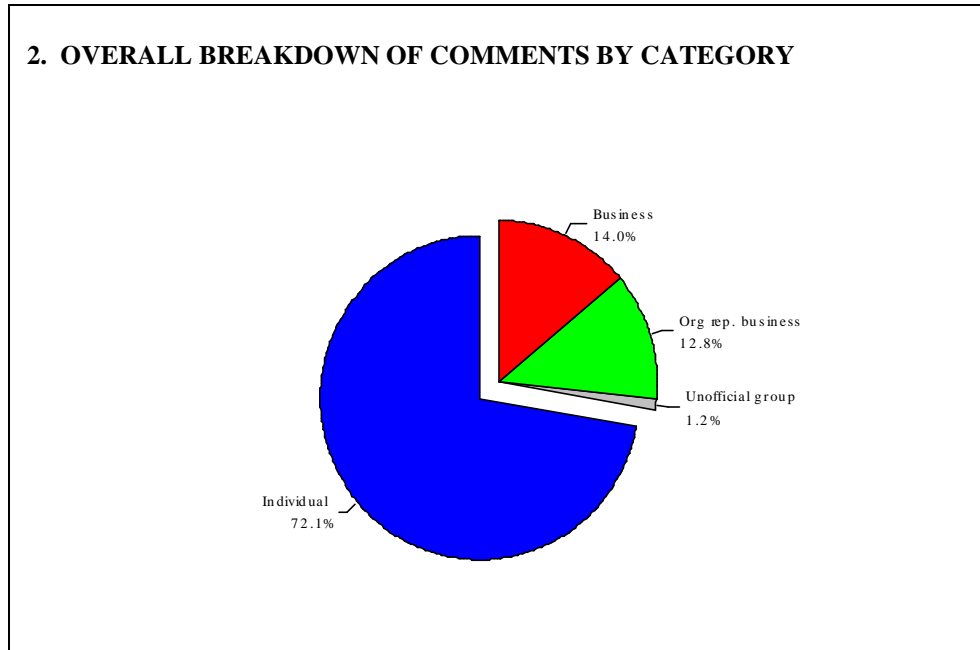
Given the tiny number of comments received about Section 314 compared to, say, the number of comments on the FDA cigarette sale regulations, one might imagine the commenters on Section 314 were probably just organized interests with an economic agenda. Not so. In fact the experience with Section 314 shows that laypeople participated in greater numbers than any other kind of participants. This is striking in some ways. The vast majority of commenters were not members of organized interest groups or businesses, but ordinary laypeople or representatives of unofficial local associations such as the self-styled “San Jacinto Constitutional Study Group.” Thus participation seems skewed towards individuals. Yet while most of these individuals raise a recurrent and clearly identifiable concern – privacy – they submit comments that are tremendously unsophisticated.

A substantial majority of comments – over 70% -- came from individuals with no stated organizational affiliation. None of these comments appeared to be form letters. This is not what would be expected from much of the literature on who is concerned about regulatory policy.¹²⁴ Conversely FinCEN did not receive a single comment from general membership not-for-profit organizations that

¹²³ Several sources provided these figures. See notes 63-68, *supra* for the sources. Rates of participation for the air quality, media control, and cigarette sale to minors regulations are approximate figures reported in the Federal Register.

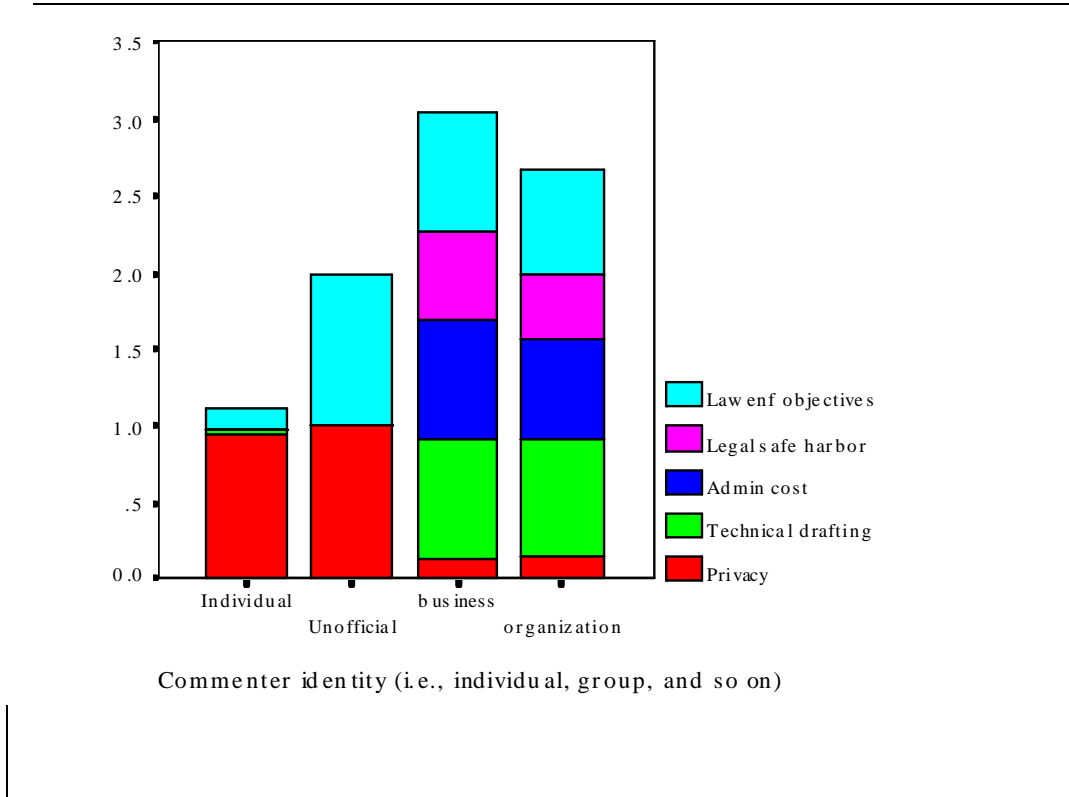
¹²⁴ See generally David Epstein and Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POLI. SCI. 697 (1994).

could have added a relevant perspective to the regulatory process here. Figure 1 shows the breakdown.



Different commenters showed radically different concerns about the regulation. As Figure 3 indicates below, individual commenters disproportionately mentioned privacy concerns. Businesses and organizations representing them tended to raise multiple concerns, but only rarely did they address privacy.

3. COMPARISON OF ISSUES MENTIONED BY COMMENT TYPE



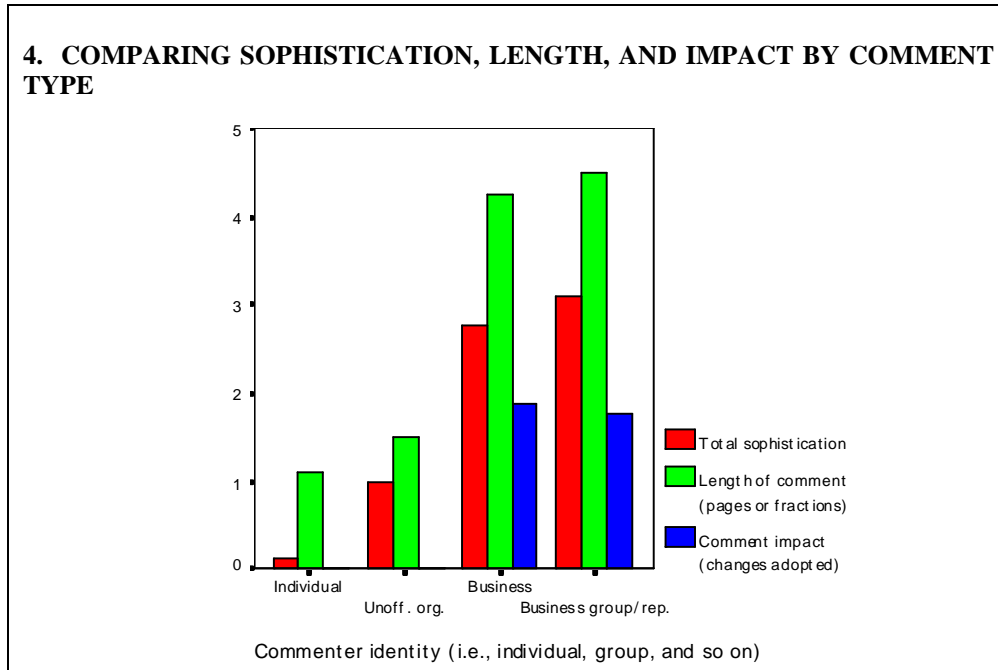
While the majority of the comments came from individuals, the vast majority of such comments focused on concerns about privacy- these comments proved to be tremendously unsophisticated. The appendix discusses how I evaluated the sophistication of the comments. Figure 3 shows a comparison of the sophistication of the different commenter types. Few of them recognized the distinction between the regulation and the statute, and only a meager number offered anything remotely resembling a concrete proposal. Instead, individual commenters came across as being angry and exasperated at what they viewed as unjustified ~~gbs~~ in government's access to private financial information. The following is a typical comment.

Privacy is a Constitutional right, why should we the people have any more rights removed. This act means the terrorist [sic] win. You have all the necessary instruments in place to follow the terrorist actions now.¹²⁵

¹²⁵ Section 314 Comments ~~supra~~note ____, comment # 45. The commenter continues:

This is still one nation under God. How about ~~his~~ how about we repent and get some super help from him. I guarantee you he knows exactly who's guilty and whose [sic] innocent and where they are.

So while the individual comments raised concerns about privacy and government accountability, there was no mention of providing sunsets for the regulation, building in reporting mechanisms to oversee the law enforcement agencies making the information requests, or providing remedies to people whose records turned out to be improperly obtained or used.



iv. What does an agency do with the comments it receives?

I have argued that it is hard to dismiss the privacy concerns as being irrelevant, either to the statutory scheme or in principle. The question then arises whether the disproportionately unsophisticated comments made by people concerned about privacy led to some kind of change in the regulation. They did not. In fact, the changes made in the regulation appeared to respond exclusively to comments that came in from the private sector.

On the one hand, since the bulk of comments raised a concern about privacy one might expect that this would affect the resulting regulations least the agency's response to the comments in the Federal Register. On the other hand, as Figure 4 also shows, the disproportionate concentration of sophistication among the comments from businesses and organizations representing them might suggest that these would be the comments that influence the agency's response. One might also think that financial institutions

and the organizations representing them would have a disproportionate impact because of their greater concentration of political power.¹²⁶

The fact is there were no changes in the regulation to address the privacy concerns brought up by the vast majority of commenters. The resulting regulations do not include, for example, a sunset provision, nor do they create a remedy for violations of the certification requirement, or any other mechanism to address the privacy concerns raised by the vast majority of commenters. Predictably enough, sophistication and status as a business or organization representing business yield a strong prediction of whether the agency implemented a requested change.¹²⁷ The striking relationship is obvious in Figure 5, which plots each comment's adjusted sophistication (defined as the product of the qualitative sophistication grade times the number of pages) against the comment's impact, as measured by the number of suggestions actually adopted made in any given comment.¹²⁸

The table that follows reports the results of an ordinary least squares regression predicting a comment's impact (measured by the number of issues raised in the comment that the agency addressed in its revised regulation) from its sophistication and whether or not the comment came from some private sector entity.¹²⁹ The first regression (reported in the left column) reports the result of a regression including all the comments. The second regression (reported in the right column) describes a regression on just the comments coming from business or its representatives. Sophistication and commenter status (as a business or its representative) both have coefficients with positive signs.¹³⁰ The second regression shows that – even among the comments from

¹²⁶ Cf. Olson, *supra* note ____, at ____. See also James Q. Wilson, *The Politics of Regulation* in THE POLITICS OF REGULATION 357 (J.Q. Wilson, ed. 1980)

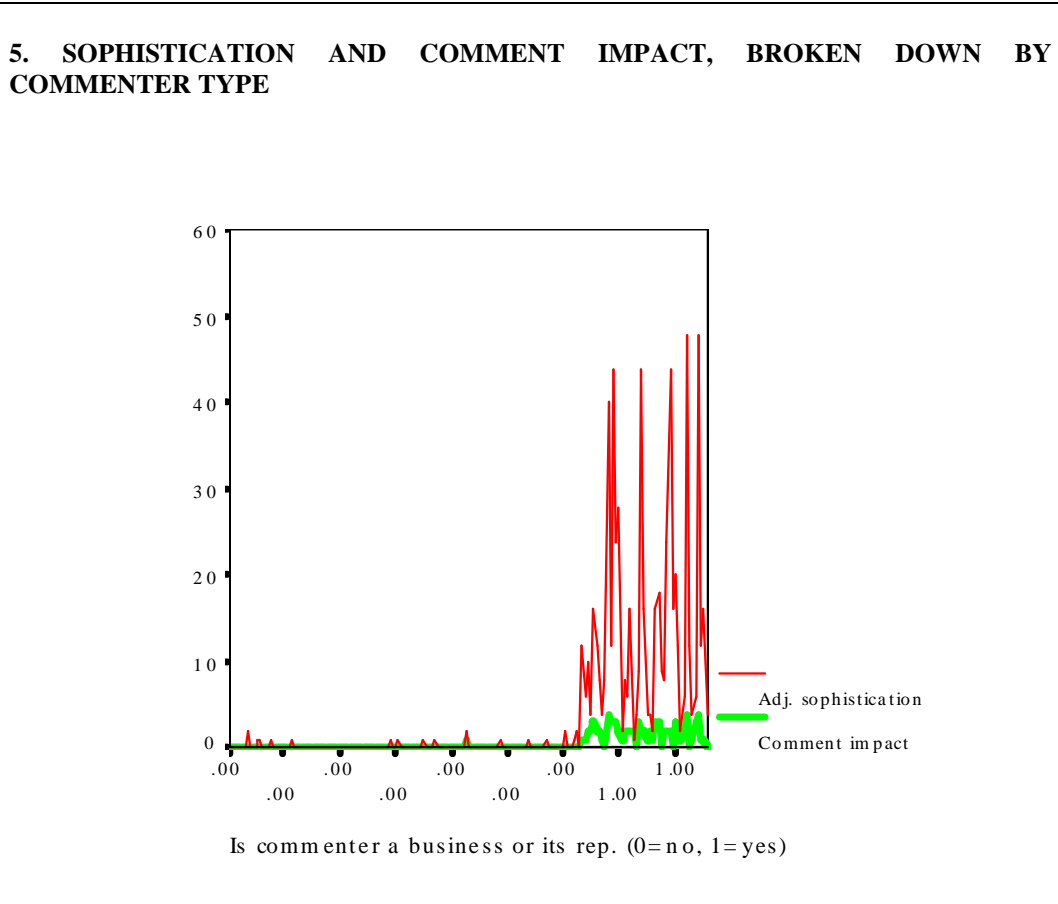
¹²⁷ There does not appear to be a significant multicollinearity problem. See D. Gujarati, *Basic Econometrics* 319 (1995). In the multivariate OLS regressions reported in Table 5, the ratios of the maximum and minimum eigenvalues are under 100. See *id.* at 338. Klein's rule of thumb suggests that multicollinearity may be a troublesome problem only if the R^2 obtained from auxiliary regressions of the independent variables in the equations are greater than the overall R^2 . See L.R. KLEIN, AN INTRODUCTION TO ECONOMETRICS 101(1962). That is not the case here (the R^2 for an auxiliary regression of adjusted sophistication and whether commenter is a business or its representative is .46).

¹²⁸ The Appendix describes the details of how I coded for length and qualitative sophistication. I checked for robustness by examining the effect of qualitative sophistication by itself. The results were not materially different.

¹²⁹ OLS regression is appropriate here because the dependent variable is continuous (i.e., number of issues raised in the comment that the agency actually addressed in its revised regulations). To check for robustness I also used a logistic regression (logit) model, where the dependent variable was whether the agency's final regulations had addressed *any* issue that the comment raised. The results were not materially different.

¹³⁰ Although statistical significance is not directly relevant because the figures reflect the result of a population, not a sample, regression function, the coefficients for the dependent variables would have been statistically significant if the data reflected a sample.

businesses and their representatives – sophistication still seems to affect the extent to which the agency addresses concerns raised in the comments.



6. PREDICTING “COMMENT IMPACT” BY COMMENT TYPE AND SOPHISTICATION

For All Comments	For Comments From Businesses or their Representatives
<i>Dependent Variable: Comment Impact</i>	<i>Dependent Variable: Comment Impact</i>

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<i>Constant</i> Unstandardized coefficient (Standard error)	.0001 (.043)	1.067
<i>Adjusted Sophistication</i> Unstandardized coefficient Standardized coefficient (Standard error)	.0493 .472 (.005)	.0492 .584 (.01)
<i>Commenter Type (i.e., Commenter is a Business or Its Representative)</i> Unstandardized coefficient Standardized coefficient (Standard error)	1.065 .481 (.113)	-- -- --
R-squared	.763	.341
Adjusted R-squared	.761	.326
F Statistic for the Regression	270.9	22.76

Table reports unstandardized OLS multiple regression coefficients, standardized coefficients, and standard errors in parentheses.

It makes sense to expect that the commenters' political and economic power drives the agency's differential response to the comments. There is a substantial literature on this in political science,¹³¹ and there are certainly substantial theory-related grounds to believe that agencies would be sensitive not only to litigation risk but also to interest groups' political responses to an undesired regulation. Yet the data provide at least some reasons to believe that agency responses here might be driven not only by differences in political power but also by differences in sophistication. If one examines only the comments from businesses and organizations representing them, there is still a strong relationship between adjusted sophistication and agency responsiveness to the comment.

¹³¹ See generally E.E. Schattschneider, *The Scope and Bias of the Pressure System*, in CLASSIC READINGS IN AMERICAN POLITICS (Pietro S. Nivola & David H. Rosenbloom, eds. 1990).

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Admittedly, these data do not include controls for the potential political or economic influence of businesses or organizations commenting.¹³² Neither can we tell how much back-channel lobbying businesses or their representatives conducted with the agency (though there are some legal limits on this).¹³³ Yet individuals and unofficial organizations tend to have far less political power than businesses and organizations representing them, so the fact that a comment comes from one of these entities can serve as a proxy for political power – and it is not altogether obvious that, once we screen out individuals and unofficial organizations, sophistication would correlate highly with political power.¹³⁴

Some people might argue that the inclusion of default rules limiting the scope of searches could be a partial reaction to concerns about privacy. Perhaps – but even the agency did not characterize this change in those terms, focusing instead on its administrative cost benefit to financial institutions.¹³⁵ Moreover, regardless of whether the default rules are a step in the right direction from the privacy perspective, no other aspect of the regulation even remotely addresses such concerns. The certification requirement seems to follow in a straightforward way from the language of the statute, not from some concern about privacy (and in any case, there is basically no remedy for a violation of it). And broadening the definition of financial institutions eligible for the safe harbor seems to cut against privacy concerns.

Regarding the agency's written response to the comments, what is still more striking is that the agency did not even bother to discuss privacy concerns (except perhaps in the most oblique way) in its Federal Register response including the final regulation. Under existing law agencies get some leeway in deciding how to group categories of comments for the purpose of responding to their arguments;¹³⁶ presumably what keeps them from using this flexibility to ignore whole categories of comments is the threat of litigation. If the agency largely ignored the mass of comments raising privacy concerns, the reason may

¹³² Nor does it necessarily make sense to use status as a single business versus status as an organization as a proxy for political influence. For example, a single business commenting (such as Wells Fargo Bank) might plausibly have more power than some organizations (such as the National Association of Credit Unions). In any case, status as an organization representing business is not statistically-significant in a regression predicting comment impact by adjusted sophistication and status as an organization (for status as organization, $t=-.938$, and $p=.353$).

¹³³ See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)(although blanket limitations on ex parte contacts only suitable for regulatory proceedings similar to adjudication or formal rulemaking, agency must place in rulemaking record an adequate summary of all post-comment conversations and meetings that were of “central relevance” to the rulemaking). Agencies also promulgate regulations limiting the scope of their ex parte contacts. See, e.g., 16 C.F.R. § 4.7 (FTC rules limiting ex parte contact in the course of informal rulemaking); 47 C.F.R. §§ 1.1201-13 (FCC rules).

¹³⁴ Indeed, the opposite hypothesis is also plausible: if sophisticated persuasive appeals and political influence are substitutes, then more power might make it less important to make a complex, lawyerly appeal for a chance in the regulations.

¹³⁵ See Section 314 Final Rule Statement, *supra* note ____, at 60583.

¹³⁶ See *Overton Park*, 401 U.S. at 409.

be both the relative lack of sophistication in the comments as well as the dim prospects that members of the San Jacinto Constitutional Study Group (or any one of the other commenters, for that matter) would litigate if they were ignored. The underlying statute may explicitly restrict the factors that an agency can consider in making regulations.¹³⁷ That's not the case here. If anything, the statute evinces some concern about privacy through its explicit concern with restricting the scope of increased sharing of information to situations where there is reasonable suspicion of money laundering or terrorism.¹³⁸

Notice that none of my observations here disparage the hard work of the regulatory staff in responding to comments and crafting the regulations. The staff of a regulatory agency, like anyone else, responds to the available legal tools and the incentives shaping their environment. Thus the agency tracked the comments submitted on Section 314 and responded to those it considered relevant and significant. It made changes in the regulation in response to some comments. And yet in the end, a substantial majority of the comments went largely excluded.

C. Administrative Pluralism's Empirical Presuppositions Are Questionable

In the end, the administrative pluralism model seems supported by certain realities of the administrative state, but not by others. Notice and comment rulemaking, subject to judicial review, probably serves as some sort of constraint on agencies. FinCEN responded to many of the categories of comments regarding Section 314, and so lived up to its responsibilities under existing law.¹³⁹ This is worth something. Moreover, legislative and presidential control does matter. Studies using various kinds of methodologies clearly show

¹³⁷ See *American Trucking*, 531 U.S. at 472.

¹³⁸ The agency obviously has some discretion in making sense of these requirements, but that's not a convincing reason for it to ignore the privacy-related comments. Let me elaborate. Even if the agency argued that Chevron deference entitled it to interpret the statute so that privacy concerns were excluded, such a move does not extinguish its responsibility to consider significant arguments about the regulation. Otherwise it would hardly make sense for the court to have decided in *Mead* that the agency could not automatically Chevron deference, and that the opportunity for public comment available through notice-and-comment rulemaking was a factor militating in favor of deference. See *Mead*, _____. The agency's choice of interpretation is, after all, an important decision – particularly if its implication is to exclude the importance of concerns raised by the bulk of commenters on the statute. To dismiss the significance of the privacy-related public comments on statutory grounds implies that *unless* the statute specifically commands the agency to consider privacy, the agency can choose not to do so. That does not follow from *American Trucking*, nor does it follow from the rest of the legal structure of administrative law. Sometimes the statute does not explicitly list the factors the agency should consider in issuing regulations, even if it does provide a bound on the scope of agency discretion that is sufficient to survive whatever remains of the nondelegation doctrine.

¹³⁹ See *Overton Park*, 401 U.S. at ____.

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that the political context matters.¹⁴⁰ The president's appointees shape the agency's work,¹⁴¹ and even after that the executive retains a measure of residual decisionmaking authority to influence the legislative process.¹⁴² One should be wary of idealizing representative politics. It is heavily influenced by organized interest group activity.¹⁴³ Still, voters can use heuristics to make decisions about candidates and parties that have at least an indirect impact on politicians, who in turn can affect regulation.¹⁴⁴

In short, the experience with Section 314 and other regulations shows how the reality of the existing approach to public engagement is consistent with much of the positive theory behind administrative pluralism. That same experience raises questions, though, about its prescriptive ideas. (1) On expertise, the administrative pluralism model confounds two ideas: one is the *importance* of expert judgment for *some* (perhaps even *many*) regulatory issues, and the other is the claim that expert judgment is the *core activity* of all regulatory policymaking. (2) Even leaving aside the problem that interest group strength is lopsided for a lot of issues, the experience with Section 314 makes it hard to believe the milder conjecture that, at least, different sorts of interest groups will participate in rulemaking proceedings, covering all the normatively important issues with sophisticated arguments for the agency to consider.¹⁴⁵ (3) The administrative pluralism model does not expect members of the public to participate, yet many did so here. It is true that they seemed disproportionately unsophisticated and concerned about a single issue – but this may be a reason to

¹⁴⁰ See generally Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POLI. SCI. 164 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (With Applications to the SEC)*, 44 PUB. CHOICE 147 (1984).

¹⁴¹ See, e.g., *Am. Iron and Steel Inst. v. OSHA*, 182 F.3d 1261, 1268 (11th Cir. 1999) (“Logic dictates that an agency must have some discretion in setting an agenda for rulemaking and excluding some matters categorically.”). See also Elena Kagan, *Presidential Administration* 114 HARV. L. REV. 2245, 2343 (2001).

¹⁴² See Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POLI. SCI. 197, 220-22 (1982).

¹⁴³ See Schattschneider, *supra* note 131, at [REDACTED].

¹⁴⁴ See, e.g., ARTHUR LUPA & MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998) (emphasizing the role of candidate reputation in voters' reasoned decisions about representative politics); SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991) (emphasizing the role of retrospective evaluations and candidate evaluations to argue that voters' choices in presidential elections are “rational”).

¹⁴⁵ To believe this, one would have to believe that the concerns raised by the sophisticated commentators were the only important ones. That's hard to accept. It may be this problem only arises in times of crisis – and perhaps then only for regulations involving national security and law enforcement. If so, it's still a serious problem. But it's not certain that for other regulatory matters, there will be sufficiently diverse interest group participation to make sure that various important aspects of an issue are discussed with sophistication.

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ask whether disparities in sophistication can be remedied. Others among the public may be both more sophisticated (at least when initially asked), and more willing to balance competing concerns – but they did not participate. This is hardly surprising, given the relatively low likely returns of taking the time to write a comment as an individual. (4) While the administrative pluralism model does not depend on or expect laypeople to participate, it does imply that the government should not ignore laypeople who do take the time to participate. The very fact of that participation is an indication of intensity of preference. Yet the comments of laypeople who participated were effectively ignored here. In contrast, the comments from private sector interests and their representatives were discussed in detail by the agency, and many were able to directly influence the resulting regulation. The more sophisticated commenters among businesses or their representatives tended to have even *more* of an impact.

There are those who will still cling onto administrative pluralism despite the lack of support for some of its empirical presuppositions. The less one believes the empirical presuppositions I have critiqued, however, the more one has to rely exclusively on representative politics to legitimate what happens in the administrative state. There's obviously something to this: representative politicians have a lot of control over the administrative state. As with any kind of theory of democracy, one might believe that our particular version of representative democracy leads to good (enough) decisions, or that it is fair enough to serve as a fount of procedural legitimacy. If one believes that strongly in representative democracy, then decisions that emanate from representative politicians will be imbued with sufficient legitimacy. The existing architecture for public engagement would then be rendered acceptable because it was built by representative politicians, and so too would it be just fine for legislators to simply decide not to interfere with the Section 314 regulations as they ended up.

This not an incoherent position, but it is not appealing. There is no denying that the current structure of the administrative state is politically efficient, but it is a different thing altogether to say this makes it legitimate. To equate the two is to buy into a pretty circular theory of legitimacy, unless one has a separate theory of how the interests of representative politicians are aligned with those of their constituents. The electoral mechanism plays a major role, but one might question whether it consistently succeeds in aligning the relevant interests. One can question this because of potential agency problems, and also because of limitations in how voters make decisions. Voters may be able to use simple mental short-cuts to make broad, reasonable overall judgments about candidates and parties¹⁴⁶ – but they can plainly make mistakes (when compared to what they would find important if they had more information and time to think about it) in deciding what are the most important issues on which they want to base their decisions. Paternalism may not be the answer to these shortcomings of voters in the arena of representative politics. Elected,

¹⁴⁶ See ARTHUR LUPA AND MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA* (1998).

representative politicians designed the legal procedures of the administrative state and have the power to undo regulatory decisions at any point. But the potential shortcomings of representative democracy should make one skeptical about the claim that public participation in regulatory decisions is irrelevant simply because of the power that politicians retain.

None of this would surprise advocates of participatory democracy, who have always been uneasy with the pluralist equation between descriptive theories of interest group control and normative ideas about what makes for good regulation. Regardless of whether they questioned administrative pluralism's empirical assumptions, people with an interest in participatory democracy seem to believe that pluralism takes an unnecessarily narrow approach to democracy – one that relies too heavily on interest-group and representative politician elites, and that misses the larger value of involving the public in decisions shaping its life. For believers in participatory democracy, there is something to be said for the view that people should have an effect on the regulatory process even if they do not mobilize to comment – particularly when the regulations (as with Section 314) involve complex trade-offs and no obvious competition between organized, opposing interest groups. Indeed, unless one has a theory of democracy where the failure to raise one's voice automatically means one's participation is unimportant, then one should be concerned about the interests of people who are affected in principle but do not participate in practice – either because they did not comment at all, or because they commented but their participation is not sophisticated enough for the agency to assimilate.¹⁴⁷ In the Parts that follow, I develop this perspective further and discuss the feasibility of legal mechanisms to carry it out.

III.

ADMINISTRATIVE PLURALISM TAKES A NARROW APPROACH TO PUBLIC ENGAGEMENT IN THE ADMINISTRATIVE STATE

Any convincing evaluation of public engagement in the administrative state must recognize an observation amply developed in the context of voting rights scholarship and positive political theory: the “public will” does not exist in some pure, unadulterated form. People's views must be aggregated somehow, and it is the scheme chosen – whether some kind of direct democracy, voting in geographic districts, or the notice-and-comment process – that determines the

¹⁴⁷ The data on participation in the Section 314 proceedings suggests that sophistication might have an effect on the agency's acceptance of commenter recommendations even if one is considering only comments from businesses and organizations representing them. Thus, even if one reason for the agency's skewed response is the disproportionate political power of private sector participants, there is room to be concerned about whether commenters possess adequate sophistication.

content of the public's will.¹⁴⁸ This underscores the need to look beyond legal formalisms (i.e., whether there is a right to vote or a chance to comment on a rule) to understand the impact of a preference aggregation mechanism.¹⁴⁹ At its

¹⁴⁸ The preference-aggregation mechanism (or “institutions”) can impact the derivation of the public’s “will” in at least two different ways: most directly (and obviously), institutions determine how preferences are counted up. *See, e.g.,* Sam Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981). *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (2d ed. 2001). But institutions can also shape how people develop preferences over time. *See, e.g.* Cass R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 17 (1997). Sunstein aptly describes why taking preferences “as a given” seems to ignore the fact that preferences are always constructed according to the context:

[T]he initial allocation creates the basic ‘reference state’ from which values and judgments of fairness are subsequently made, and those judgments affect preferences and private willingness to pay. Of course, a decision to make an entitlement alienable or inalienable (consider the right to vote or reproductive capacities) can have preference-shaping effects. Because of the preference-shaping effects of the rules of allocation, it is difficult to see how a government might even attempt to take preferences ‘as given’ or as the basis for decisions in any global sense.

¹⁴⁹ If there were simply an unadulterated “public will” existing in the abstract, it would be easy to evaluate a preference aggregation scheme by comparing the result of the scheme to the preexisting public will. But that is not possible. Moreover, to the extent that some mechanism appears to get closer to this ideal through direct democracy, this does not necessarily make the resulting system “better.” A recent case highlights some of the possible drawbacks of simply incorporating a referendum into the administrative process. In 1995, the Buckeye Community Hope Foundation purchased land zoned for apartments in the City of Cuyahoga Falls, Ohio and set out to build Pleasant Meadows, an affordable housing complex. *See City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, avail. at 2003 WL 1477301 (2003). Using low-income tax credits, the Buckeye Community Hope Foundation (Buckeye) obtained financing, bought some land zoned for apartments – and then ran into a problem. As the plan wound its way through the small city’s Planning Commission and City Council, a vocal group of city residents coalesced to oppose Pleasant Meadows. They complained to the Planning Commission, which imposed various conditions on the project, including that Buckeye build an earthen wall around the whole project. Buckeye agreed, and the Planning Commission unanimously approved the project, recommending it to the City Council.

The opponents of Pleasant Meadows were undaunted. The City Council meetings scheduled to discuss Pleasant Meadows were anything but pleasant. Cuyahoga Falls’ Mayor came to express his personal opposition to Pleasant Meadows. So did angry residents, who voiced a number of concerns about the low-cost apartments: that the development would bring an influx of families with children, that the families who lived there would cause crime and drug activity to escalate, and (indeed) that it would attract a population similar to the one on Prange Drive, which happened to be Cuyahoga Falls’ only predominantly African American neighborhood. None of this swayed the City Council, which approved the project in April 1996 over the objections of the Mayor and a growing group of angry residents. Twenty eight days after the Council approved Pleasant Meadows, its opponents filed a petition pursuant to local law requesting that the ordinance approving Pleasant Meadows be submitted to a popular vote, which the City allowed voters the “power to approve or reject at the polls any ordinance or resolution

core, the administrative pluralism approach to public engagement is a complicated mechanism for aggregating preferences. The most important question about it is therefore not whether it provides a formal mechanism for people's interests to be considered, but instead what particular vision of democracy is implicit in the administrative pluralism model when it comes time to decide what to do with those interests.

In this Part, I trace the argument that administrative pluralism's underlying vision of democracy is unnecessarily constricted. The narrowness comes from the fact that administrative pluralism – and the existing approach to public engagement that it bolsters -- takes both the public's interest in regulatory policy and its sophistication as fixed variables that cannot be changed. This in turn creates a sort of self-fulfilling prophesy: direct democracy seems like an implausible and problematic alternative for shaping regulatory mandates based on statutes like Section 314, and yet the existing legal framework does nothing to convey the impression to members of the mass public (either individuals or in the aggregate) that their cognitive or emotional investments in getting to know the issues will have a payoff. Which suggests that an intellectually honest version of administrative pluralism strand must now contend with the question that the participatory democracy strand has always faced: how much participation is enough, and what specific institutional mechanisms might accomplish this?

A. Collective Decisionmaking Constantly Poses the Question of Sufficiency of Participation

Unless we make unrealistic assumptions, any collective decisionmaking process will give some people more power than others.¹⁵⁰ Thus, depending on

passed by the Council" within 30 days of the ordinance's passage). Cuyahoga Falls City Charter, Art. 9, § 2, App. 14. The petition led to a referendum, in which voters decisively rejected the prospect of Pleasant Meadows.

The use of the referendum here raises some potential problems. A mass election did not appear to be the setting for participants to consider the long-term costs and benefits of building Pleasant Meadows. If anything, the opposite happened: the facts suggest that the referendum drive was fueled in part by racial animus against the black voters who would be the likely beneficiaries of Pleasant Meadows. Yet the nature of equal protection doctrine virtually eliminated Buckeye's ability to challenge the referendum as a means of race discrimination because of the difficulty of proving intent from the voters participating. The Ohio Supreme Court eventually found the referendum invalid on the ground that the Ohio State Constitution authorizes referendums only in relation to legislative acts, not administrative acts, such as the site-plan ordinance. As this article demonstrates, the rationale for such a distinction is not as strong as it seems. Nonetheless, the problems with referenda remain.

¹⁵⁰ The literature on this topic is vast. At its center is Arrow's famous impossibility theorem, and the substantial literature critiquing it. For an insightful introduction to the debates surrounding this result, see Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

the institutional details, collective decisions that supposedly depend on democratic procedures can still empower an oligarchy. Procedures that are supposed to be explicitly democratic – such as local elections, legislative voting, or presidential contests – reflect dramatic differences in participation. Not *everyone* legally entitled to be heard participates equally, and intensity of participation rarely matches the precise extent of the interests at stake. Members of an organization do not always have enough time to get to know the slates for boards of directors. Constituents of a local school district may not all vote in the local election. The electorate for presidential elections may not take the time to discern the differences in positions between two candidates or make the effort to vote in the primary. People face collective action problems. Even where laypeople with a certain interest are represented by organized groups, these groups form intermittently, and solve collective action problems only imperfectly. In short, differential rates of participation affect virtually all democratic decisionmaking procedures.

What is more, such a skew in participation need not be a disaster. We might still value collective decisionmaking procedures that make participation easier for some people than for others. If people participate at different rates and with different intensity, perhaps this shows differences in the intensity of their underlying preference – which is certainly valuable information under certain conditions. It would be costly, possibly unconstitutional, and perhaps unworkable to ensure that everyone participated to the same degree in a given collective decision. And despite such limits, differences in a speaker's articulateness or an audience's receptivity would skew the impact of participation in any case. Not only might we still value collective decisionmaking procedures that reflect or depend on differential rates of participation, but changing such differences in participation might entail various kinds of costs – ranging from administrative complexity to free speech restrictions.

Yet the distortions themselves are also costs, which emerge when we consider the most often-cited rationales for some kind of democratic decisionmaking. For some observers, democratic collective decisions are valuable because they allow people who will be impacted by the decision to participate in making it.¹⁵¹ For others, democracy is valuable because it allows a majority of the relevant community to choose the best course of action in a public-spirited way after some kind of deliberation.¹⁵² For still others, the potential chaos and unpredictability of democracy is valuable because at least it

¹⁵¹ See, e.g., Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 321 (1997)(describing “procedural” theories of democracy that highlight the “inherent fairness or justice of its system of substantial and equal participation in legislation by the governed.”).

¹⁵² See, e.g., Bohman, *supra* note ___, at ___ (discussing the inherent value of incorporating people who will be affected by a decision into the process of decisionmaking). See also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1995).

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provides information useful in policymaking that would not otherwise be available to government.¹⁵³ All of these rationales are reminiscent of the participatory democracy strand of thought regarding public engagement in the administrative state. They are undercut to some extent by distortions in participation. The distortions introduce the possibility that people with a stake in the collective decision will simply not participate. The distortions also make it harder to achieve any sort of majoritarian deliberation in the decision. For example, suppose that voting in the election for Insurance Commissioner costs the average citizen goes from about \$5 to about \$7 in time and effort (perhaps because polling places are closed). Suppose further that as a result of this change, 10% fewer citizens decide that it is worth their effort to take part in the election. Even if the loss of that 10% of voters does not render the election illegitimate, the loss weakens the claim that the democratic, collective decision is legitimate because people affected participated. The loss of voters also weakens the claim that the election reflects the result of some kind of desirable majoritarian deliberation. Finally, the loss of the 10% of voters deprives the new insurance commissioner of information about (and much of the incentive to care) how some chunk of the electorate reacted to her candidacy.

The formalistic answer to this quandary is to say something like this: “Look, whatever the electoral institutions require as a minimum rate of participation is enough! Not everyone *wants* to participate in making decisions about Section 314 or the rules for elections or whatever, and not everyone should be *made* to do so.”¹⁵⁴ This answer of course begs part of the question because the minimum degree of participation is determined by law, and the law itself is the product of the democratic process. Nonetheless, whatever one thinks of the formalistic answer in the legislative context, it seems like that answer is even less satisfactory for the rest of the administrative state. Consider some of the problems with delegation. The work of agencies is one step removed from the work of legislators.¹⁵⁵ Of course, legislators can also be swayed more directly by voters when the issue catches popular attention – but this again presupposes that there is some concordance between the issues that catch popular attention and those that are normatively important. One might plausibly conclude that

¹⁵³ See, e.g., Amartya Sen, *The Economics of Life and Death*, SCI. AM. 40 (May 1993) (describing democracies’ ability to avoid famines). See also Verba, Scholzman, and Brady, *supra* note ____, at 163 n.1 (“[W]e consider the representativeness of the participatory input from the perspective of a concern with its impact on the communication of citizens’ needs and preferences to political elites and thus a concern with equal protection of interests”).

¹⁵⁴ Cf. Rubin, *supra* note ____, at ____ (suggesting that the existing arrangements for participation and decisionmaking in the administrative state are legitimate, and that excessive idealized thinking about democracy is confusing in this arena).

¹⁵⁵ See, e.g., Theodore Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 296-312, 314-18, 321-22 (1987). Theodore Lowi, *The End of Liberalism*, in FOUNDATIONS OF ADMINISTRATIVE LAW 166, 169 (PETER H. SCHUCK ED., 1994) (“modern law has become a series of instructions to administrators rather than a series of commands to citizens”).

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delegations, on the margin, make it no easier and perhaps harder for the members of the public to understand and monitor the law's development -- particularly for those chunks of the public who have not yet decided if they care.¹⁵⁶

Notice also that the legal machinery of the administrative state opens up some possibilities for galvanizing participation that would be harder to achieve in a garden-variety collective decisionmaking process like a town meeting or a school board election. In contrast to other collective decisionmaking procedures, the administrative state does its regulatory work through institutions that are explicitly designed to integrate technical and legal decisionmaking with some kind of public input. This makes it a little easier to solve the administrability problems that might arise with alternative approaches to public engagement. All of this should make one question whether the administrative pluralism model takes too narrow a view of public participation in the administrative state.

For some observers, the meager participation in shaping regulatory policy would be less problematic if citizens lacked the cognitive ability or personal interest to understand regulatory policy. That would make it futile to involve the public. On the surface, it certainly seems as though such deficiencies in the public's interest and sophistication exist. Lay people rarely say that they care about specific regulatory policies, even if they more frequently note their concern over substantive matters affected by regulatory policy such as privacy or environmental protection. This generalized concern hardly seems like an appropriate basis to justify more public involvement in regulatory policy, since the lay public makes mistakes in understanding risk and glosses over important details of a regulatory issue. Nonetheless, not every member of the public is equally unsophisticated: some people have perfectly relevant expertise but do not comment. More provocatively, what if citizens' interest and sophistication when

¹⁵⁶ The argument is not that delegations are either undesirable or unconstitutional. On the legal question, Posner and Vermeule, *supra* note ____, advance persuasive arguments against judicial invalidations of legislative action on nondelegation grounds. Earlier, Mashaw argued in a similar vein in favor of delegating powers to the executive branch. See Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON & ORG. 81 (1985). My point here is that delegations might make participation particularly important because they make elections less of an effective proxy for what voters think about regulatory issues. There are, of course, exceptions that I have described earlier, where substantial chunks of the public acquire an intense interest in a regulatory decision. See *supra* note __ (discussing the extent of interest in the tobacco and telecommunications media ownership regulations). But leaving aside these exceptions, my conjecture is that high-profile legislative votes receive more attention than regulatory proceedings that become routine because they have been delegated. Some members of the public take cues from interest groups with which they identify in trying to make sense of legal developments, and those groups might often keep track of regulatory policy. But the literature on leadership dynamics within interest groups and the experience with Section 314 highlight limits in the role interest groups can be expected to play in informing the public about policy developments.

thinking about matters like the Section 314 regulations or local media ownership were fluid?

B. Citizens' Interest and Sophistication for Understanding Regulatory Policy Are Not Fixed

It turns out that neither interest nor sophistication is fixed. Both are a product of how the law structures the opportunity for people to participate in regulatory policymaking.¹⁵⁷ Just as juries change their perceptions during the course of a trial, so too can laypeople or even experts come to view issues differently after an opportunity to reflect. This makes it strange to dismiss questions about the extent of participation in regulatory by insisting that citizens lack cognitive sophistication and interest. Such an argument begs the question of whether the existing distribution of sophistication of interest is the “right” one, or whether the goal should be to engage the public by increasing their sophistication and interest in some way.

i. Sophistication is not fixed

What sort of ability does a member of the public have to deal with Section 314 and the issues it raises? An individual’s sophistication might be understood to mean her capacity to make insightful and coherent political decisions. In this context, “insightful” means that the decisions or observations that the layperson makes are not otherwise available in the regulatory rulemaking activities of the administrative state (i.e., through representative politicians, experts, or public opinion polls).¹⁵⁸ Coherence, meanwhile, refers to the idea that a participant’s views are not completely contradictory or incapable of assimilating relevant information to the decision.¹⁵⁹ One might think that laypeople’s very experiences as laypeople might give them insight into how to value the harm done if government inappropriately discloses financial information. On the other hand, voters’ apparently limited insight on other matters, and their apparent dearth of coherence might raise questions about how much a non-expert could really contribute to regulatory policy.¹⁶⁰

¹⁵⁷ See Luskin et al., *supra* note ____ (discussing deliberative polls to set utility prices in Texas); see also Robert C. Luskin, James S. Fishkin, & Roger Jowell, *Considered Opinions: Deliberative Polling in Britain*, 32 BRITISH J. POLI. SCI. 455 (2002) (noting that the opinion changes among participants in a “deliberative poll” in Britain on issues involving criminal justice do not seem to be driven by social-demographic factors such as income or education, but by a combination of factors including information gains).

¹⁵⁸ The “insightful” idea therefore overlaps a bit with the idea that there is distortion in the regulatory process that needs to be remedied.

¹⁵⁹ Cf. Luskin, Fishkin, & Jowell, *supra* note ____, at 485 (“...it was those who wound up knowing most, and presumably had learned most, who changed most.”).

¹⁶⁰ See, e.g., Patricia A. Hurley & Kim Q. Hill, *The prospects for Issue-Voting in Contemporary Congressional Elections: An Assessment of Citizen Awareness and Representation*, 8 AM. POL.

In fact the conventional wisdom is that most members of the public lack both the insight and coherence to play a useful role in informing regulatory policy.¹⁶¹ Laypeople tend to experience the world by using heuristics that simplify the complexity of their environment.¹⁶² Some of the problems people have in understanding risk are predictable, and so they can probably be corrected to some extent: in short, the mental short-cuts are not unchangeable.¹⁶³ Their use depends to some extent on the environment.¹⁶⁴ If people experience a change of setting or motivation, they can change the mental short-cuts they use to make sense of a problem.¹⁶⁵ People can probably display some additional sophistication and less reflexive reliance on a mental short-cuts if they think their opinion matters and they have access to more information.¹⁶⁶ In contrast, public opinion polls only provide a momentary snapshot of what people think; providing people with information, and allowing them to think about it or deliberate, can result in something more meaningful.¹⁶⁷

What all this implies is that individuals' sophistication could be catalyzed enough to understand complicated regulations. This observation is consistent with the preceding discussion of democratic accountability in the administrative

Q. 425 (1980). For a useful survey of some of the empirical studies raising questions about voters' insight and coherence, see Donald R. Kinder & David O. Sears, *Public Opinion and Political Action*, in 2 *Handbook of Social Psychology* 659 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).

¹⁶¹ See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993). See also Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *NW. U. L. REV.* 173 (1997).

¹⁶² See generally LUPIA & MCCUBBINS, *supra* note 144, at [REDACTED]. See also Sniderman, *supra* note 2.

¹⁶³ See, e.g., PAUL SLOVIC, *THE PERCEPTION OF RISK* 190 (2000). Slovic reviews experimental evidence on perceptions of risk and concludes that "an accident that takes many lives may produce relatively little social disturbance... if it occurs as part of a familiar and well-understood system (e.g., a train wreck). However, a small accident in an unfamiliar system..., such as a nuclear reactor or a recombinant DNA laboratory, may have immense social consequences if it is perceived as a harbinger of further and possibly catastrophic mishaps.").

¹⁶⁴ See, e.g., James P. Morris et al., *Activation of Political Attitudes: A Psychophysiological Examination of the Hot Cognition Hypothesis*, 24 *POL. PSYCH.* 727 (2003)(affectively charged political stimulus can affect evaluations of information).

¹⁶⁵ See Sunstein, *Risk and Reason*, *supra* note ___, at 265 (describing how risk communication studies successfully informed the redesign of EPA information).

¹⁶⁶ See *supra* note ___, at ___ (discussing research showing how changes in the setting can provoke people to use more sophisticated cognition to understand a complex problem).

¹⁶⁷ An entire research program in political science at one point seemed to indicate that public's views were suffused with attitudes that had little if any coherence. See Helmut Norpoth & Milton Lodge, *The Difference Between Attitudes and Nonattitudes in the Mass Public: Just Measurement?* 29 *AM. J. POLI. SCI.* 291 (1985) (noting that instability in responses to political attitude surveys is partly explained by "nonattitudes," where respondents provide an opinion indicating that they have a particular attitude about an issue when they may not).. See also Luskin, *supra* note ___, at [REDACTED]. This research program, coupled with the inconsistencies and shortcomings in responses revealed by regular public opinion polls, makes some people question whether the public can ever make a useful direct contribution to choices in policymaking.

pluralism model of public engagement. Even the seemingly ridiculous comments about Section 314 cannot be dismissed completely, because a different process might evoke more sophisticated responses from the commenters. This might be achieved for two different reasons: (1) a different process (i.e., explicitly putting risk profiles “on screen”) could inform the participants in some regulatory proceeding about what is at stake, and correct some of the limitations of the mental short-cuts they might be using; (2) signaling to someone that their opinion matters might give them incentives to become informed and analyze information on their own. The question then becomes whether members of the lay public would have an interest in doing any of this.

ii. Interest is not fixed

Does the public *care* about Section 314, or does the relative lack of attention it has received amount to some kind of normatively attractive equilibrium? Like sophistication, an individual’s perception of her interest in a particular issue is not static. The motivation to understand an issue – like the motivation to get involved in political activity – can respond to changes in a person’s environment. If forming an opinion on an issue seems costly and people believe there is little reason to do so, it is no mystery that people might not invest in being informed. Thus, a person planning to buy a car may not recognize that her vehicle’s purchase price might be driven in part by the safety record of the plant where the cars are manufactured, because lower safety might raise the wage that a company needs to offer workers, and (assuming competition does not constrain the manufacturer) the extra labor costs might be passed on to the consumer. The preceding discussion sheds some light on how individuals’ sophistication react to the environment, which can help break the cycle where limited information contributes to lack of interest. Regardless of whether the interest perceived is entirely self-regarding or not,¹⁶⁸ people who overcome their lack of time or attention¹⁶⁹ and participate are likely to be those who see specific value in such activity. There is no good reason to think that perception of value will be fixed rather than dynamic.

A contrary view would suggest that interests are more rigid, and in particular, that they are driven largely by financial and economic factors. This view would emphasize the idea that when people have financial stakes in the outcome of a regulation (as do the banks in the case of Section 314), they will

¹⁶⁸ See Verba, Schlozman, and Brady, *supra* note ____, at 529 (“In discussing the reasons they became active, participants make clear... that they think of themselves as acting for the common good.”).

¹⁶⁹ See *id.*, at 129 (surveying the public to assess the determinants of political activity, and finding those not active gave the following among the major reasons for not getting involved: lack of time, 39%; prioritizing family over the welfare of the polity, 34%; irrelevance of politics to “important things in... life,” 20%).

exhibit an interest in the outcome. Yet the reality is that people make decision on the basis of more than just their own material interests. They also care about how other people in the polity are doing.¹⁷⁰ And when they are concerned about their own situation, the concerns are not only about financial or economic status.¹⁷¹ This helps explain why dozens of individuals wrote to comment on the Section 314 regulations. Nonetheless, interest in politics is rarely enough to make someone participate in political activity – time, money, and skills have also have a large effect.¹⁷²

Now consider Section 314 in light of the preceding insights about the possibility of changing people’s perceptions of their interests. The law’s effect is quite broad. It can allow the financial transaction information of anyone in the country to be obtained by government agents as long as they fill out a certification. It effectively creates a substantial limitation on the Right to Financial Privacy Act, and also lets financial institutions share information about anyone, with few limits. Not all of this is apparent to the disaggregated mass of individuals who are going to be affected by this, not even those whose activities or positions might make them more liable to be affected by the new authority. It would seem wrong to ascribe the apparent lack of interest among more people to a deliberate conclusion that Section 314 did not matter all that much. Instead, it is entirely possible that they care but don’t think they will make a difference (i.e., the unsophisticated commenters on Section 314 did not make a difference, after all). But information and a belief in one’s efficacy can change individuals’ sophistication and interest.

C. Public Engagement Is Not Anathema to Rigorous Risk Analysis

A lot of regulatory policy depends on rigorous risk analysis, where someone competent considers the extent to which a regulation might achieve a particular benefit given a certain cost. Yet laypeople have in understanding

¹⁷⁰ See.e.g, Donald Kinder & D. Roderick Kiewit, *Sociotropic Politics*, 11 BRITISH J. POLI. SCI. 129 (1981) (political attitudes not driven by views of personal material gain but by, among other things, conceptions of what would advance overall economic well-being). Any framework that views political activity in terms of rational, goal-seeking behavior must still accept that it’s not just narrow material interest that makes people do things.

¹⁷¹ See generally Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

¹⁷² See, e.g., Henry E. Brady, Sidney Verba, & Kay Lehman Schlozman, *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 285 (1995) (developing and finding empirical support in cross-sectional studies of survey research for a model of political participation where interest in politics is not enough to explain political participation, and instead “[t]he resources of time, money, and skills are also powerful predictors of political participation in America”).

information about probabilities. Some commentators have argued for insulating administrative agencies from political and public interference on this basis.¹⁷³

Nonetheless, the fact that people use mental short-cuts does not necessarily imply that different approaches to public engagement are incompatible with reasoned decision-making about risk. Sometimes heuristics may represent a reasonable way for people to economize on decision costs.¹⁷⁴ Of course, heuristics sometimes lead people astray. For example, people often have trouble evaluating risk¹⁷⁵ – and much of regulatory policy involves heavy doses of risk analysis. But this observation merits a few answers. First, people do not always ignore probability information.¹⁷⁶ Second, regulation is not entirely about risk. Section 314, for example, also required the agency to make decisions about the extent of financial institutions’ administrative costs, and degree of financial privacy protections that should exist given the absence of a constitutional right to such privacy.¹⁷⁷ Third, experts also have some problems dealing with risk.¹⁷⁸ This means that disparaging heuristics does not necessarily imply that experts should replace laypeople. It is no surprise that experts are often better at understanding risk and other complex concepts that affect regulation, but that understanding is itself not impervious to the impact of cognitive short-cuts. Fourth, people’s failure to consider probabilities in a

¹⁷³ See Sunstein, *Risk & Reason*, *supra* note 3, at ___; CASS R. SUNSTEIN, THE COST-BENEFIT STATE 139 (2002)(defending default rules giving agencies wide latitude to conduct-cost benefit analysis even when the legislature has not explicitly allowed it, in order to “increase the rationality and sense of regulatory policy”).

¹⁷⁴ See, e.g., LUPIA & MCCUBBINS, *supra* note 144, at [REDACTED] (discussing how retrospective evaluations on key issues and other heuristics can help voters discipline politicians); Sniderman, *supra* note 2, at [REDACTED].

¹⁷⁵ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) at 3.

¹⁷⁶ See, e.g., Cass R. Sunstein, *Probability Neglect*, 112 YALE L.J. 61, 67-68 (2002). Sunstein writes:

By drawing attention to probability neglect, I do not mean to suggest that most people, most of the time, are indifferent to large variations in the probability that a risk will come to fruition. Large variations can, and often do, make a difference – but when emotions are engaged, the difference is far less than the standard theory predicts. Nor do I suggest that probability neglect is impervious to circumstances. If the costs of neglecting probability are placed “on screen,” then people will be more likely to attend to the question of probability.

¹⁷⁷ Moreover, there is a distinction between risk – involving situations where probabilities can be assigned – and uncertainty – where probabilities are not known. SEE JON ELSTER, EXPLAINING TECHNICAL CHANGE 185-207 (1983). While subjective probability estimates from experts are probably a great place to start in thinking about uncertainty, it may not be the only ingredient one would want to consider. Cf. McGarity, *supra* note ___, at ___.

¹⁷⁸ See, e.g., SCOTT SAGAN, THE LIMITS OF SAFETY 250-55 (1993).

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normatively defensible way can often be affected by the choice situation – which is just another application of the larger principle that sophistication is partly endogenous to the choice setting.¹⁷⁹ Fifth, some alternative approaches to public engagement could involve experts or other stakeholders who might be as sophisticated as the decisionmakers within the agency. Finally, there is at least an open question whether some of the public’s likely distortions in considering risk (i.e., the *dread* of dying one way versus another way) should affect the assessment of certain risks.¹⁸⁰

In some ways it seems the ambition of the administrative state has always been to provide a legal mechanism for harmonizing expert judgment and public input. That’s what many of the system’s advocates and proponents say.¹⁸¹ The upshot is that alternative mechanisms for public engagement need not give the public a monopoly on the content of a regulatory rule, any more than the existing system – so strongly identified with the administrative pluralism strand of thinking – gives commenters total control over the resulting rule. The challenge is to strike a balance. One goal is to entice the administrative process to take public input seriously. The other is to preserve the agency’s flexibility to act in accordance with executive branch policy prescriptions and the views of technical experts. Which means one can imagine alternative methods of public input coexisting with technocratic schemes to inform regulatory policy, such as cost-benefit analysis.¹⁸²

Of course, there would be no point in striking a balance if one clung to a version of public engagement that was, by definition, satisfied with extent of interest-group activity that the status quo accommodates.¹⁸³ This is not the only way to see things. One might believe instead in some version of “democracy” where the public makes informed and sophisticated contributions to the rulemaking process, where laypeople’s interest and sophistication are not taken as a given but rather as qualities that can be catalyzed, and where the agency is forced to take those insights seriously whether they come from bankers or bakers. This view can be criticized or rejected in favor of the simpler one

¹⁷⁹ See, e.g., HOWARD MARGOLIS, *DEALING WITH RISK* 91-92 (1996).

¹⁸⁰ Put differently, it may be very difficult in principle (and not just because of heuristics people use) to separate the evaluation of dreaded risks from the act of calculating its risk by itself. This is admittedly questionable – but it is not obvious that such “dread” should always be rejected.

¹⁸¹ See, e.g., Sunstein, Arsenic, *supra* note ____, at ____.

¹⁸² See, e.g., Matthew D. Adler and Eric A. Posner, *Introduction: Cost Benefit Analysis – Legal, Economic, and Philosophical Perspectives*, 29 J. LEGAL STUD. 837, 838 (2000). Adler and Posner note:

Even the proponents of cost-benefit analysis do not generally argue that it should be the sole decision procedure for administrative agencies and other governmental bodies.

There may well be scenarios where it is welfare maximizing for agencies to employ some other procedure, such as... (nonmonetized) multidimensional assessment.

¹⁸³ Cf. Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

implicit in the administrative pluralism model. But that rejection needs to be explained.¹⁸⁴

There may be a few reasons to look for alternative mechanisms to engage the public in regulatory policies like those involving Section 314. One is simply the chance to advance some workable version of participatory democracy by advantage of the legal structure of the administrative state, which is already set up to harmonize public participation and technical competence. Some people may care simply because they think administrative pluralism is just not a very convincing theory of the legitimacy of the administrative state. Still others might recognize practical reasons to look for new options for achieving public engagement: alternative arrangements could allow regulators to obtain different kinds of information about public reactions to regulatory policy. That information may later become politically or technically valuable, such as when an exogenous shock like a terrorist attack suddenly makes transportation security far more salient than the typical poll respondent might have thought before September 11. And regulators charged with crafting rules that depend on public compliance (e.g., speed limits) may benefit from alternative mechanisms that shed richer insight into public perceptions of regulatory issues. But how would these alternatives work in practice?

IV.

CORRECTIVE AND MAJORITARIAN DELIBERATION APPROACHES ARE REASONABLE ALTERNATIVES TO EXISTING MODES OF PUBLIC ENGAGEMENT

The existing approach to public engagement has a tenacious hold, but there is no reason why the administrative state should be imprisoned by it. Alternative arrangements are both possible and (I shall argue) desirable. For example, a *corrective* approach would try to sample people that should obviously have interest but are not adequately represented (with some appropriate metric for making this decision). The *majoritarian deliberation* approach would involve getting a stratified random sample of the population as a whole.¹⁸⁵ Either one of the alternative approaches could involve selecting a small group or groups through stratified random sampling of some population (i.e., the national population, or some subgroup especially likely to be affected). The difference in these approaches reflects two different conceptions of participatory democracy – one focused on the importance of including interests who will be particularly affected by the decision, and another on creating a space for people

¹⁸⁴ Some might take my criticisms and conclude outright that public engagement should not be so central to the legitimacy of the administrative state. I think that position is hard to sustain for reasons discussed earlier involving the value of democracy. See *supra* note ____.

¹⁸⁵ Obviously, at some level the entire population has some kind of “interest,” so the distinction between the two approaches is driven by how low one sets the “interest” threshold.

to engage in majoritarian deliberation about the regulatory matter in question.¹⁸⁶

In principle, individuals and groups consulted through these alternative approaches could offer both their raw initial opinions but also their reactions to information about the nature of the agency's mandate, the scientific and technical problems with different regulatory possibilities, and the views of different constituencies that would be affected by the regulation. The existence of these alternatives does not mean the existing approach is always wrong: letting participation be driven by self-designated interested parties might make sense, or it might not. Like everything in life, these alternatives have costs – but they should be judged alongside their potential benefits. That is exactly the point: choosing between all these approaches poses the question of when it is just fine to use the existing administrative pluralism approach, when we should be more interested in including people affected but not organized to participate, and when it is better to let regulatory decisions be informed by deliberation groups that are explicitly majoritarian in nature.

A. *The Core of the Corrective Approach is a Mechanism to Identify Stakeholders and to Integrate Their Views Into the Regulatory Process*

Practices like negotiated rulemaking occasionally involve agencies in figuring out *who* might be affected by a particular rulemaking proceeding.¹⁸⁷ Through negotiated rulemaking, the agency determines who might be interested in participating in the rulemaking proceeding in order to reach an early consensus on the proposed rule. But the point of negotiated rulemaking is not explicitly to identify people or constituencies who might have a particular interest and yet run the risk of being unrepresented. Instead, the major purpose of negotiated rulemaking is to enhance rules, reduce litigation, and shorten the rulemaking process by providing a mechanism for consensus rulemaking proposals.¹⁸⁸

¹⁸⁶ Verba, Schlozman, and Brady capture this distinction nicely. *See supra* note ____, at 528:

In one conception of democracy, politics is the arena for the working out of the self-interested claims of citizens. According to this view of the meaning of democracy, participatory inequalities matter because they jeopardize equal protection of interests.... There is another conception of democracy embedded in our discussion for which our findings are germane. According to this vision, a democracy in which self-interested citizens compete for benefits is inadequate. In a fully participatory democracy, political activity becomes a mechanism whereby citizens engage in enlightened discourse, some to understand the views of others, and become sensitized to the needs of the community and the nation.

¹⁸⁷ *See generally* Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens in Public Decisions*, 60 MONT. L. REV. 499 (1999).

¹⁸⁸ Note that negotiated rulemaking does not always seem to live up to its expectations. *See, e.g.,* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*, 9 N.Y.U. ENV'T L. REV. 386 (2001).

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Imagine extending just one aspect of the agency's mandate during a negotiated rulemaking procedure – identifying interests that are likely to be particularly affected by the regulation. The goal here would not be to speed up the regulatory process but instead to do something that might seem to go in precisely the opposite direction: including people who will clearly be impacted by the regulation but may lack the sophistication to gracefully articulate their concerns, and giving those people a chance to constructively voice their interests. The process would involve at least three components: (1) selecting a “corrective” sample of people, (2) providing a setting in which they could voice their concerns in a way that corrects for deficiencies in sophistication (i.e., through assistance from counsel or a facilitator), and (3) devising a process through which an agency would be nudged to take seriously the resulting opinions. A lawyer from the agency or an independent agency might then be charged with advocating for the deliberation group's ideas.¹⁸⁹

Imagine how this could work in the context of Section 314. The agency charged with issuing the regulations (i.e., Treasury), perhaps along with a separate specialized agency focused on public engagement (call it a *participation agency*),¹⁹⁰ make an initial determination about who is likely to be particularly affected by the regulations but unlikely to represent themselves – including, among others, smaller banks and credit unions, bank employees, or legitimate customers particularly likely to be concerned about privacy. No doubt that it would be difficult to design a defensible system for choosing “who will be especially affected yet unlikely to adequately represent themselves.”

Together, Treasury and the participation agency might break down the task into a few different pieces. One is to define the kinds of benefits and burdens that could be caused by the proposed regulation if it went into effect (i.e., privacy intrusions that could result in unauthorized disclosure, changes in the probability of being subjected to time-consuming, costly, or harrowing investigation, new tasks for financial institution employees). Another is to make

¹⁸⁹ The lawyer's role would be to represent overall tendency of the deliberative group's conclusion. In the absence of consensus, the lawyer would highlight the group's majority position, with perhaps some brief additional attention to the views of any significant minority. All of this raises the question of how the agenda for the group's discussion will be set, how the materials and moderator for the discussion will be selected, and how the lawyer's incentives will be structured to foster faithful representation of the group's views. These are not always easy questions, but they can be solved. Jury deliberations, mock jury and focus group arrangements, deliberative polls, and experimental studies all shed some light on how to resolve the issue of agenda-setting, moderators, and materials. The lawyers' behavior can be addressed in part through employee selection and performance audits. Which raises the question of how executive branch officials, legislators, and interest groups affect the process. I deal with this in Part V, *infra*.

¹⁹⁰ The separate agency can serve as an important repository of expertise – which is hardly irrelevant here and may shed important light on how to determine who is interested. A variation on this would make the centralized agency more specialized – focusing on the representation of people with particular kinds of interests, such as privacy concerns.

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some considered judgment about who among members of the general population may disproportionately bear the preceding benefits and costs. The methodology for making this determination could range from relying in part on a sub-sample of people who wrote in comments (admittedly an imperfect mechanism, but perhaps suitable for some issues) to computer simulations or good-faith estimates. In any case, the goal here would be to get a picture of how the regulation might operate in a world where the agency making use of it (in this case, an entity like the FBI) would be making discretionary decisions about its use. This phase of the process could result, for example, in a conclusion that recent immigrants from the Middle East who make small wire transfers would be especially likely to trigger scrutiny.¹⁹¹ Finally, once the agency has made this determination, it might consider whether the constituencies disproportionately affected are constructively represented in the process. This might include considering the sophistication (or even existence) of comments from some of the impacted constituencies. The agency would then select a small number of people in the “underrepresented” constituencies to take part in the rulemaking process.¹⁹²

How exactly would the selected participants take part in the regulatory process? A mass of comments that do not even distinguish between the Patriot Act (let alone Section 314) and the regulations themselves would not be as useful as comments that acknowledge that Section 314 is the law of the land while providing specific suggestions of how to write the desired regulations. At least two possibilities are worth considering here. One is to provide people with a sort of deliberative forum. Some group of people numbering between 7 and 15 might be chosen to deliberate.¹⁹³ They would all get balanced materials explaining the arguments for and against the proposed regulation.¹⁹⁴ Then they would get the chance to talk to each other and question experts from the agency about the possible alternatives. The agency would use the existing proposed regulations as a basis for discussion. The goal of the deliberation would not be

¹⁹¹ Cf. Cuéllar, *supra* note ____, at ____.

¹⁹² The resulting assemblage of participations could not be called representative of the interests of the larger population. While the notion of the government deciding who to include as affected parties may strike some as troubling, it is not without precedent: government agencies often have a legal obligation to consider the implication of a regulatory rule on some relatively unrepresented constituency, like small business. See, e.g., Exec. Order 13272 (requiring agencies to consider the implications of their regulations on small businesses). It is not obvious that allowing agencies to simply claim that they are considering the interests of a constituency results is better than actually getting people from that constituency to comment. During the Carter Administration, the Department of Agriculture sought to obtain more comments from groups that were affected by regulations establishing agricultural marketing orders for commodities. Among other things, the department investigated “public attitudes and views on a planned marketing order through a solicitation of comments mailed directly to affected groups.” Kerwin, *supra* note ____, at 171.

¹⁹³ See SIDNEY VERBA, SMALL GROUPS AND POLITICAL BEHAVIOR (1961).

¹⁹⁴ The agency would prepare these with oversight from the centralized agency.

to subject the regulations to an up-or-down vote but rather to elicit concerns, observations, and ideas about how the regulation should evolve.¹⁹⁵ Part of what the process would have to accomplish is to separate the factual issues best resolved through expert analysis from interpretation of an ambiguous statute and policy judgments. The deliberation group would be in a position to inform what to do about the latter but not necessarily the former.¹⁹⁶

Finally there is the question of giving legal effect to the corrective sample's deliberations. For the moment, imagine only that their deliberations inform the rulemaking process and become part of the record. Accordingly, the public can raise valid concerns given the statutory scheme, and these in turn can become a basis for litigation. Later I will consider other alternatives that give legal effect to the deliberations.¹⁹⁷ In the meantime, the most important point is that the corrective sample's deliberations would have some legal effect – for example, by creating a presumption in favor of a particular regulatory strategy, such as the issuance of Section 314 regulations with a remedy for unauthorized disclosure of sensitive financial information.

B. *The Majoritarian Deliberation Approach Calls For Obtaining a Sample of Citizens to Deliberate*

This leaves another alternative to the administrative pluralism model -- the majoritarian approach. By “majoritarian,” I mean the idea that decisions are best made by deliberative, electoral majorities or some sort of equivalent proxy. A popular referendum is not the only way to involve a wider slice of the public in regulatory decisions. Majoritarian deliberation implies a process where a majority makes a decision in accordance with its views about what would be best

¹⁹⁵ Cf. Luskin, Fishkin, & Jowell, *supra* note ____, at 463. Their description of a deliberative poll in the United Kingdom provides one example of how the deliberation groups could function:

On Friday evening, the participants spent 45 minutes in plenary session being welcomed, watching a brief documentary describing the issues they would be discussing, and being reminded of what lay before them. On Saturday, they spent three-and-a-half hours in small group discussions, then three hours in large group exchanges with panels of experts fielding questions, then another hour back in the small groups.

The difference here, of course, is that the subject matter is not as general as what participants in the deliberative poll had to discuss. Instead of fairly open-ended questions about criminal justice policy (for example), the basis for discussion among the deliberation groups would be the agency's proposed rule.

¹⁹⁶ See Part IV.a

¹⁹⁷ See *id.* for additional technical details involving the presentation of information to the deliberation group.

for the polity.¹⁹⁸ Regardless of whether this is practically feasible (it may not be), it represents a particular view of what regulatory policymaking should be.

To some people the legislature (and perhaps even the rulemaking process) is already providing a mechanism to represent majority views. All this talk about a “majoritarian” deliberation alternative may therefore seem confusing since the regulatory rulemaking process is often analogized to the legislative process, which is often assumed to be majoritarian.¹⁹⁹ But neither the rulemaking process nor legislation necessarily live up to this idea. For one, electoral majorities can differ in their views about regulatory policy when compared to mobilized, economically and politically powerful interest groups.²⁰⁰ The preceding sections highlight how different the reality of the regulatory rulemaking process is from some kind of ideal version of majoritarian deliberation. To be sure, elected politicians can intervene on behalf of electoral majorities to affect regulatory policy when the issues in question have mass political appeal. But once again, this sort of argument assumes a view about democracy that has to be defended. The administrative pluralism view leaves it to interest groups and voters to figure out what matters in regulatory policy, and in politics more generally. Anything that is not already important enough to voters when it comes time to vote or make a donation to an interest group is assumed not to matter.

In contrast, the majoritarian deliberation alternative is grounded in the premise that perhaps democracy should consider individuals’ informed opinions, not just their superficial reactions. As with the corrective approach, the idea is that informing people and giving them a chance to deliberate could shed light on what satisfies their own interests. In addition, the chance to learn and deliberate might signal to participants that there is some value in thinking beyond their self-interest when they consider the regulatory decision.²⁰¹

¹⁹⁸ It is the sort of process reminiscent of Rousseau’s discussion of the “general will.” See JEAN-JAQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* 5 (WORDSWORTH CLASSICS 1998) (1762).

¹⁹⁹ See generally ERIC SCHICKLER, *DISJOINTED PLURALISM* (2001)

²⁰⁰ By “electoral majorities,” I mean majorities of voters in a particular jurisdiction. What constitutes a majority obviously depends on the boundaries of the jurisdiction and the process through which preferences are aggregated. See ISSACHAROFF, KARLAN, & PILDES, *supra* note 148, at 1 (“At the heart of a democratic political order lies a process of collective decisionmaking that must operate through pre-existing laws, rules, and institutions. The kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures.”).

²⁰¹ This is not meant to suggest that individual participants could ever (or should) put aside their own interests. Such interests are important and the existing model does not represent these. Moreover, personal interests may serve as a heuristic through which voters can form views about a complicated policy. Nonetheless, the deliberative process might expand the scope of that inquiry and get people to think about how others might be affected. Whether this happens because people are genuinely capable of altruism or because people simply further expand the scope of their own evaluations of their self-interest does not really matter that much. The point is

Implementing the majoritarian deliberation approach is a lot like implementing the corrective approach: there needs to be a way of selecting the sample of people, a space to deliberate and learn about the issue, and a means of giving their input at least some legal effect. The major difference is in the selection of the sample. Here the participation agency would not need to figure out a way to discern who might be especially affected. Instead the animating vision of democracy here is to provide a group of laypeople (as a proxy for a majority) with the chance to shape the regulatory process. If the goal is something other than a referendum, then the group would have to be small enough to make it feasible to educate its members and to give them a chance to deliberate among themselves.²⁰² In short, the process would involve selecting a stratified random sample of people from throughout the country, helping them understand Section 314, and asking them what they think. As before, a lot of the choices about the structure of the deliberative process are really about how to create the relevance condition. To the extent that such a relevance condition could be met, the majoritarian deliberation approach would focus on eliciting the views of people regarding what regulation would be in the putative interests of the polity, rather than on considering whether people with strong interests support or oppose the policy in question.

C. *Some of the Technical Challenges Posed by Either Approach Could be Resolved by Creating an Independent Agency*

Both the corrective and the majoritarian deliberation alternatives share the same three major technical problems: selecting the sample, creating the opportunity for the sample of people to learn and deliberate (i.e., in a way that fulfills the third condition), and deciding what legal impact will be given to the public's input. The participation agency to which I have already alluded could help solve all these problems and protect the integrity of the public engagement process.

In some rare cases agencies may be able to implement the alternatives with their existing resources and legal authorities. But the real promise of the alternatives might best be realized through the creation of a separate agency. The new "participation agency" could handle several functions that would all support government decisionmaking about regulatory policy, and in particular public participation in the regulatory process. A separate agency would have a specific mandate to enhance decisionmaking across agencies, without having to concern itself with competing tasks involving civil servants and political appointees who get invested with a specific point of view. Its leadership might consist of a board of appointees with fixed, staggered terms. Their job would be

that they might view an issue differently when they have a chance to talk to people about it and learn about it. Cf. Luskin, Fishkin, & Jowell, *supra* note ____, at ____.

²⁰² See Hackman, *supra* note ____, at ____.

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to supervise the staff in discharging a few interrelated functions. First, the agency would promulgate rules²⁰³ for how members of the public would be selected to participate in deliberation groups. Second, the agency would prepare risk and cost-benefit analysis materials that would be presented to either corrective or majoritarian deliberation groups. These analyses would be designed to complement those of the agency with direct responsibility for the regulatory program. Deliberation groups would therefore get more than one point of view about the risks, costs, and benefits associated with any given proposal. Third, the participation agency would provide trained moderators to facilitate the discussion among either the corrective or the majoritarian deliberation groups. Finally, the agency would provide the lawyers to take the contributions of participants and turn these into more sophisticated comments that would become part of the administrative record.

The agency would also have the responsibility of promoting the participation of people selected to be part of the deliberation group associated with the majoritarian deliberation approach. This would require legislation giving people some incentive to participate (or forcing them to bear some cost if they did not). Potential participants could be enticed with a financial reward, a mild penalty for non-participation, or a combination of both. Otherwise valuable people would be excluded and there would be overrepresentation of people for whom the opportunity cost of participation is lower. This is probably what happens when laypeople participate in the notice and comment process. While the participants in the Section 314 rulemaking proceeding made intelligible contributions and raised concerns about an important issue, neither their degree of unsophistication, nor their substantive views, are likely to be representative of the larger public. Members of the public with more sophistication are likely to be the kinds of people who face a higher opportunity cost from participating in rulemaking instead of spending time with their kids, their friends, their garden, or advancing their careers. If the alternatives are to enrich the administrative state with perspectives that are largely ignored today, then there must be participation from among these higher-opportunity cost folk. In any case, the defining features of the alternatives would be to get participants as close to the actual decision as possible, instead of keeping their input general. The more specific the feedback, transmitted through a moderator or legal representative, the more possible it would be for the implementing agency to grapple directly with public input about specific proposals.²⁰⁴

²⁰³ The first set of rules could be promulgated subject to the traditional notice-and-comment process to avoid an infinite regress problem.

²⁰⁴ Otherwise the implementing agency has to do all the work of translating vague opinions into regulations, which may be no different from agency responses to a vague delegation and therefore no different from the status quo. Obviously, there is a limit to the public's potential sophistication (even after all the institutional reforms I have described). My point is that sophistication is not fixed in the "low" position. The people participating in the corrective mechanism will have less of a challenge, because (by definition) they will be motivated by their

There is also the question of how much all this would cost. Between 1981 and 2000, the number of regulations considered important enough to be reviewed by the Office of Management and Budget totaled 34,386.²⁰⁵ While this averages to about 3,800 a year, the number of rules reviewed in some years is considerably less (about 500 per year in the late 1990s).²⁰⁶ Depending on the details of how they are structured, the alternatives might cost as little as a focus group. The higher the projected cost, the more it would make sense to try the proposals through a pilot project. Regardless of whether the alternatives are implemented through pilot projects, I do not expect the agency would to solve all the problems associated with the alternatives. But it could help address them and in the process it would create opportunities to protect the public engagement process from naked manipulation by the agencies or their political superiors.

D. The Alternatives to Pluralism Force A Choice Between Different Kinds of Administrative Democracy

By making it possible to supplement or replace the administrative pluralism model, the alternatives would force a choice between different conceptions of administrative democracy. Different issues may call for dissimilar versions of democracy. If it is possible to solve the technical problems associated with the alternative approaches to public involvement in the administrative state, then how is one to choose among them? That depends on the version – or vision – of democracy that seems appropriate for particular kinds of problems. The question is difficult because there is no one right answer. Prosperous countries mix and match different kinds of democratic procedures successfully.²⁰⁷ This implies that economic and political prosperity do not depend completely on adoption of a vision of democracy.²⁰⁸ Neither does the U.S. Constitution hardwire a single version of democracy for the administrative state, even if it does proscribe many features of representative

stake in the outcome (they may even be experts with a “professional” stake in the regulatory policy). The majoritarian mechanism could take advantage of techniques like panels of competing experts, contingent valuation, and pedagogically sound uses of analogical reasoning, the public participating

²⁰⁵ See Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 846 (2003). The Office of Management and Budget Reviews only “economically major” and otherwise “significant” rules, and only 1,693 were economically significant during the relevant time-period.

²⁰⁶ *Id.*

²⁰⁷ See, e.g., DAVID M. FARRELL, *COMPARING ELECTORAL SYSTEMS* (1997).

²⁰⁸ This is not to say that visions of democracy are inconsequential. As I have argued in this paper, visions of democracy matter because they allow for different kinds of participation and different sorts of information to reach decisionmakers. Differing visions of democracy do more than just create expectations about law and government. They reward some interests and disadvantage others. The point is that practical constraints involving economic development and politics do not rule out all but one particular version of democracy in the administrative state.

political institutions.²⁰⁹ Indeed, while the federal constitution’s architecture obviously relies heavily on representative politics,²¹⁰ legislatures can delegate power. That opens up the question of how democracy should work its way into the regulatory process, and what kind of democracy one prefers. Here I provide some notes about how one might think through these questions.

The most important point here is that participation has costs as well as benefits.²¹¹ I have argued elsewhere that rethinking public engagement can result in regulations that might be more widely accepted and appreciated if the public learned their details. The alternatives could also provide agencies and representative politicians with useful information about how to communicate risk to the public, and would help make the regulatory system more consistent with its alleged aspiration of taking seriously the concerns raised by the public.²¹²

At the same time, the alternatives will have some financial costs. Hiring moderators, lawyers, and analysts takes money, as does the compensation of people selected to be part of the deliberation groups. Moreover, participation can slow down regulation. Deliberation groups would need to be chosen, constituted, and dismissed. Agency lawyers would need to take more time to think about the concerns raised in the deliberation groups. Delay is not always a problem, as poorly thought-out regulation may be worse than no regulation at all. But it may be a problem in the sense that statutes passed by Congress reflect an interest in getting regulations implemented. All of this means that the benefits of the alternatives may not always exceed the costs.²¹³

Even if one does not accept that the alternative approaches rest on a uniformly “better” or more defensible approach to democracy, one might accept

²⁰⁹ But note that the Constitution leaves open many of the most important rules of electoral competition. The Voting Rights Act, the recent electoral reform legislation and associated appropriations, and the requirement that the House of Representatives have only 435 members are just a few examples of how some of the rules of the political game are not set directly by the constitutional text.

²¹⁰ The “Republican guarantee” clause has been held not to mean much of anything as a practical matter. *New York v. United States*, 505 U.S. 144, 184 (1992) (finding no violation and stating “[T]he Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the “political question” doctrine.); *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001) (“challenge based on the Guarantee Clause, however, is a nonjusticiable political question”); *Padavan v. United States*, 82 F.3d 23, 27 (2d Cir 1996) (noting traditionally “claims brought under the Guarantee Clause are nonjusticiable political questions” and to the extent that this is not always the case, exceptions are rare). Direct democracy is not considered per se a violation of any federal constitutional guarantee against arbitrary decisions, *see Cuhyoga Falls*, xx U.S. at ___ (2003), or any other kind of constitutional guarantee for that matter.

²¹¹ *See*, e.g., Rossi, *supra* note 161, at [redacted].

²¹² *See supra* Part II.b ____.

²¹³ The question of regulatory agency *inaction* is worth thinking about separately. One might think that *Heckler v. Chaney*, 470 U.S. 821 (1985), is wrong, but as it stands today it limits the public’s ability (or that of any interest group) to compel regulatory action.

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that choosing the right kind of approach to public engagement depends a little on the circumstances. For example, one might imagine a few relevant criteria.

1. First is the question of how much the regulation has a direct, disproportionate impact on particular groups and individuals.²¹⁴ In the context of Section 314, this might mean (in addition to financial institutions) people who are especially likely to arouse suspicion or who might have particularly strong (but perfectly legal) reasons to seek privacy in their financial records. One might think that some policies just violate “rights,” but the language of rights is not necessary to conclude that some issues are best suited to the corrective approach because of their disproportionate impact on a limited number of people not adequately served by the administrative pluralism model of public engagement.
2. Just as the concentration of costs matters, so might the dispersal or concentration of benefits. Section 314 might be an example: the alleged benefits of added national security are not concentrated among a few people (although in reality law enforcement authorities might benefit disproportionately). This sort of pattern might highlight the value of something like the majoritarian deliberation approach.
3. Quite apart from whether the statutory requirements primarily call for an explicitly technical or scientific determination, there is the question of just how much an individual layperson can understand. I have argued that the capacity (or “sophistication”) is more malleable than has been recognized. Nonetheless, it is possible to imagine a situation where the legislature passes an ambiguous statute that still depends primarily on scientific knowledge. One could argue if there is any such thing as pure “scientific knowledge,” but some issues are more opaque than others to laypeople.²¹⁵

Is it possible for the administrative state to avoid all these questions? Of course it is. The machinery of regulation would then grind on relying only on the administrative pluralism model, spinning out its regulatory rules, working

²¹⁴ Some people might insist that impact should be understood in the aggregate, so that a less direct impact affecting a large number of people should be given some weight. Obviously, a major feature of the majoritarian deliberation alternative is its capacity to pierce through the public’s initial impression that an issue simply does not concern them. But there should be some separate discussion about people who may be said to bear a particularly heavy and direct cost of a regulation, such as individuals living close to a proposed Superfund site, or workers who have been shown through some defensible analysis to be at particularly high risk of losing their job if the regulation is implemented.

²¹⁵ See, e.g., Sunstein, *Probability Neglect*, *supra* note ____, at ____.

through its legal powers, and balancing its deceptively simple scale of costs and benefits. That path implies blindness – both to alternative conceptions of democracy and to the concerns that might otherwise inform the administrative state. It makes little sense to regulate by pretending that some important costs or benefits are just not there, and neither does it make sense to ignore questions about the appropriate kind of administrative democracy. The problem is politics makes it easy to choose blindness.

V.

**THE MAJOR DIFFICULTY WITH THE ALTERNATIVE APPROACHES IS THEIR
POLITICAL VIABILITY**

As a theory of legitimacy, administrative pluralism does a lot of work for the administrative state. It helps put the existing approach in the best possible light, solving a cluster of questions about how the public should be involved in regulatory decisionmaking. Here I discuss some of the political economy behind the tenacious hold of the existing approach and the conceptual theory that supports it. I also sketch three political scenarios that might give life to the alternative approaches that I have described. Since these scenarios depend on certain preconditions, some of which are unlikely, no one is likely to topple the administrative pluralism model anytime soon.

A. The Major Players in Regulatory Policy Find the Existing Approach Attractive

Beyond all the conceptual appeal of administrative pluralism, there is also a straightforward political reality bolstering the existing, interest-group centered approach to public engagement: what the legislature delegates and the president oversees can affect interest groups endowed with economic and political power, who can themselves affect representative politicians.²¹⁶ Later I explain how this makes the administrative pluralism model difficult to change.²¹⁷ For now it is enough to observe that legislatures shaping the developing administrative system probably harbored a substantial interest in contributing to the development of an administrative state that could be subject to their oversight, and (just as important) could generate information about the impact of regulatory policy on important constituencies. Viewed in this light, the APA and its notice-and-comment procedures become part of a fire-alarm approach to overseeing the bureaucracy. As one article describes it:

²¹⁶ By this I mean specifically interest groups that command sufficient economic and political resources to materially impact (though not necessarily to determine) the success of representative politicians in their electoral pursuit of office or in the realization of related political objectives.

²¹⁷ See *infra* Part IV.c, at ____.

When something goes awry, constituents pull the fire alarm, bringing the attention of political officials down on agency proceedings. To the extent that sustained congressional attention is costly to an agency, it will seek to avoid attention by serving congressional constituents so that alarms do not get pulled. Nevertheless, if agencies can keep their actions secret, especially if they can conspire with particular interests against others, congressional interests might not know about agency proceedings until it is too late... The APA helps mitigate this problem by requiring a substantial degree of transparency... Affected constituents must be notified in advance of proceedings and given opportunities to participate and provide their views.²¹⁸

If politicians care about fire alarms and interest group opposition, then they would *want* a system that responds to political power as well as interest. The resulting model of public engagement would predictably have a focus on generating information about the views of people and groups who would most be willing to expend resources to shape the regulations in question – or to punish politicians and bureaucrats for an unwelcome one.

The Final Report of the Attorney General's Committee on Administrative Procedure (issued in 1941) suggests that even before passage of the APA, agencies already understood the value of avoiding confrontation with interest groups that might undermine the agency in Congress:

Early in the present century a number of agencies appear to have adopted regularized consultation in connection with their rule-making processes.... The practice of holding conferences of interested parties in connection with rule-making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule-making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented conferences have evident advantages over hearings in the development of knowledge and understanding.²¹⁹

The report implies that the goal of administrative procedures to involve the public should be to involve interested parties. None of this implies that powerful interest groups would exclusively rely on administrative procedures like the notice-and-comment process to signal their displeasure to politicians. Interested parties could also rely on having their allies serve as political appointees or deploying congressional staffers to gather information. Nor is it

²¹⁸ McNollgast, *supra* note 17, at 199.

²¹⁹ ATTORNEY GENERAL'S REPORT, *supra* note ____, at 103-04.

necessary to argue that the sole or primary purpose of administrative procedures was to benefit politicians' favored interest groups.²²⁰ Instead the contention is that, on balance, the APA and associated procedures probably helped (and continues to help) politicians track the reactions of outside interest groups, a development that in turn could advance their electoral and policy agendas.

Thus there is more than just a conceptual attraction to the administrative pluralism model. There is a political and economic logic behind its brawn. The result is a system that does not necessarily benefit everyone, nor does it live up to all the ideals participatory democracy. But the administrative pluralism model certainly makes it easier for interest groups and representative politicians to work with the administrative state to achieve their goals.

B. The Status Quo Can Be Upset Under Certain Conditions

All of the preceding makes any substantive change in the direction of the alternatives quite difficult. But change is not necessarily impossible, so in closing let me provide a sketch of three scenarios that could bolster the alternatives. The three scenarios reflect the premise that ambiguous statutes do not represent legislators' genuine desire to defer to experts, but instead a political compromise.²²¹ That compromise may, in turn, be affected by politicians' guesses about what sorts of policies are politically palatable.²²² Figuring out what precisely is politically acceptable (by congressional district, by state, or by national electorate) is difficult, perhaps even for politicians who survive a competitive process weeding out the ones who cannot do the figuring very well. Nonetheless, some guesses about the political popularity of legislation are probably easier to make than others, and sometimes politicians just get it wrong.²²³

Here is one scenario. Politicians often use opinion polls as an important tool for shedding light on what voters want. The information they provide can supplement politicians' own sense of how voters stand on the issues most likely to matter in elections (such as crime and the economy). Meanwhile, with few exceptions regulatory issues are likely to seem uninteresting and relatively unimportant by comparison, unless of course there is a some incident or shock, making a previously unimportant issue very relevant. For example, the September 11 attacks could transform terrorist financing counter-measures from something marginally important into a centrally important issue. The same

²²⁰ *Contra* Balla, *supra* note ____, at ____.

²²¹ See, e.g., Joseph A. Grundfest and A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN L. REV. 627 (2002); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

²²² See Epstein & O'Halloran, *supra* note ____, at ____.

²²³ See, e.g., John Hardin, *An In-Depth Look at Congressional Committee Jurisdiction Surrounding Health Issues*, 23 J. HEALTH POL. POL'Y & L. 517 (1998)(describing legislators' travails involving catastrophic health insurance amendments to Medicare-Medicaid).

could be said for transportation security policy. In such situations, voters' pre-crisis responses in opinion polls would not provide an accurate perspective about the electorate's take on things *after* the crisis. This means that politicians would have to be guessing how a crisis could affect the public's judgment, and therefore the politicians' prospects in future elections.

To some extent, experts and agencies working under the aegis of the executive branch serve as proxies for public engagement. They can also help solve controversial matters for which politicians occasionally want to avoid responsibility. But the alternative approaches could perform useful functions, helping provide additional insulation from responsibility when politicians have to deal with a hot potato. One useful function would be to help provide an additional line of insulation from responsibility when politicians have to prospectively deal with a scalding hot potato – a means of dropping a cool dollop of sour cream on the potato by saying “we didn't make a decision, and it was so important we didn't even want the experts to do it by themselves. We had real people help us make the decision.” The logic of this scenario would make the viability of the alternatives depend on politicians' beliefs about the state of the world. The alternatives would be most attractive in the following situation: (a) there is a high enough probability that a low-importance issue might skyrocket in importance later on; and (b) they cannot guess what a voter would think once circumstances forced her to reflect more about it. This means that at least sometimes, a deliberation group could help politicians go about their business of supervising the work of the administrative state.²²⁴ If the alternatives were politically valuable to legislators but faced bureaucratic resistance, outside interest groups might fund corrective or majoritarian deliberation proceedings and then funnel the results to agencies through the existing notice-and-comment process (perhaps with a quick “cc:” – the equivalent of a knowing glance – to interested legislators). The corrective or deliberative proceedings themselves might be conducted by companies or not-for-profit organizations with a reputational interest in the integrity of the results.

Now imagine a different scenario. The alternatives are promoted by political entrepreneurs and become popular among the public. They are not diluted because they are used to resolve statutory ambiguities in areas where the interest group context is not strong enough to predetermine the result. So imagine that for some issues, interested parties lack the power or interest to achieve objectives through the existing approach. Think, for example, of

²²⁴ If legislators decide that there is a high probability of an exogenous shock dramatically increasing the salience of a particular issue, they may find the alternatives as desirable as the existing procedural mechanisms to oversee the bureaucracy. In both cases, the goal is to ensure that the output of the regulatory process redounds to the legislators' benefit. Cf. Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995)(developing a formal model highlighting legislators' interest in designing procedures forcing agencies to make technically sound decisions that balance competing interests as legislators intended).

regulations governing the use of money provided to state governments for the development of drug offender diversion programs (i.e., “drug courts”). If no group is strong enough to sway the policy, legislations might see a political payoff in telling the electorate that the public will be more involved in these decisions.²²⁵

There is still a third scenario. Suppose public-spirited legislators and bureaucrats promote the alternatives as a means of allocating political responsibility – even when there is some short-term (or even longer-term) personal political gain for them from maintaining the status quo. This is unlikely but not impossible. It is unlikely because political constraints give legislators a reason to support the existing arrangement instead of some more elaborate approach to participatory democracy in the administrative state.²²⁶ But change under this scenario is possible because those political constraints do not always overwhelm (at least in principle) countervailing impulses to pursue the alternatives. I have argued above that some of those impulses could arise from the possibility that the alternatives are politically popular. What is also possible is that policymakers would just be curious to know what the alternatives can reveal. “What would a group of unaffiliated outside expert think of this?” might wonder a legislator asking an agency to use the corrective approach. An agency official might wonder if deliberating citizens share her intuition about the need for an adequate margin of safety in drinking water regulations governing the permissible concentration of arsenic.

None of the above scenarios guarantee success in reforming public engagement in the administrative state. In the meantime, some things resembling the corrective approach are already in use, such as negotiated rulemaking, blue-ribbon commissions, and the selection of political appointees from constituencies that are impacted by an agency’s regulations. On occasion politicians can use these tactics to supplement the political mechanisms of the APA. What is unsatisfying about these approaches is that, unlike the corrective approach I have described, there is no *explicit* discussion of what interests are likely to have a big stake in the regulation but lack the sophistication, interest, or ability to overcome collective action problems. Which means, by and large, that these approaches fail to address the endogeneity of sophistication and interest.

²²⁵ Cf. Hugo Hopenhayn and Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J. LAW, ECON. & ORG. 196, 109 (1996)(using a formal model to demonstrate the implication that interest-group “information providers may have incentives to deceive the political recipient of their signals in order to manipulate her decisions”). Indeed, politicians may seldom be in a position to ascertain whether interest groups are providing accurate information about agencies. Sometimes politicians will be able to learn what they need just by *knowing* that certain interest groups are opposed to a regulatory policy, because the interest group opposition makes enough of a difference to an electorate outcome. But where interest groups are *not* powerful enough to offset the electoral benefits of a particular policy, then politicians may prefer to have some independent mechanism to inform them about what the larger public thinks of specific regulatory policies.

²²⁶ See *infra* Part V.a.

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Some people might think that the alternatives I have suggested will be costly to society, at least in the beginning. To pursue the alternatives, government would need to find and train moderators and lawyers, experiment with the format for the deliberation groups, and defend the approach from the slings of opposing interest groups who either reject the premise or wonder about the political impact of the alternative approaches on their agendas. Even if sometimes the alternative approaches were close to being politically viable, they would create legal friction. This is because the administrative pluralism model is so closely identified with the larger legal foundations of the administrative state. Delegation problems seem easier when everyone insisted that agencies were just scientists necessary to figure out the problem. I have tried to show that connection between delegation and expertise to be more apparent than real, but the legacy of that insistence on linking expertise and the administrative state is the entrenchment of the administrative pluralism model. Lawyers, judges, regulators, and executive branch officials who try to undermine this model create friction, because the alternative approaches are premised on very different assumptions. Those assumptions challenge the dominance of expertise and the adequacy of our existing reservoir of regulatory democracy. Which means the political viability of the alternative approaches depends on changing ideas as well as interest group politics.

CONCLUSION

Some are in darkness
And others are in light
We see those in [the] light
Those in darkness, we do not see.²²⁷

--Bertolt Brecht

Threepenny Opera

Since the modern administrative state was born, it has been characterized by a widely accepted approach to the question of how to involve the public in shaping regulatory policy. That approach begins by limning the basic process of regulation -- from interpreting the statute to analyzing the plots of air-quality graphs -- as one that primarily involves the application of technical and scientific expertise. This exercise of authority is then rendered democratically accountable through the machinery of representative politics and through mild “notice-and-comment” public participation from people interested in the regulation. And the entire process is policed against arbitrariness and lawlessness by courts. While

²²⁷ BERTOLT BRECHT, *THREEPENY OPERA* (Stefan S. Brecht trans. 1979)(quoted in Verba, Schlozman, and Brady, *supra* note ____, at xxi).

the existing approach has been the subject of some attacks over its history, most judges, policymakers, and commentators have considered it unrealistic to expect any major change in it. Laypeople seem to lack the time and intellectual ability to think about effluent standards, alternative energy sources, or financial information disclosure requirements. Regulation by referendum seems ludicrous, even in times of crisis where traditional interest group advocates are overwhelmed by the rapid pace of legal changes. Yet it also seems unrealistic to force legislators to make all the major regulatory decisions themselves. So legislators continue making broad delegations of legal authority. These delegations, and the administrative state as a whole, seem most legitimate to people who believe in what I have called administrative pluralism: a descriptive theory emphasizing that organized interests have the power to influence regulatory policy, and a normative theory that such influence results in reasonably coherent, legitimate, and desirable regulatory policy.

The problem is the assumptions of administrative pluralism do not fit reality very well. The public's ability to understand regulatory policy is not fixed. Neither is the public's degree of interest in a regulatory matter that, on the surface, seems little more than an opportunity for experts to engage in hair-splitting discussions. As Section 314 and other matters demonstrate, many regulatory issues are not scientific issues, or even matters primarily involving technical assessments of probability and risk. Technical expertise can shed light on the problem, but cannot really solve the problem of striking a balance between competing values. Even beyond the national security context, interest groups directly affected by regulations vigorously contest expert judgments and compete to shape policy.²²⁸ Interest groups and the public can and do participate in the rulemaking process. But interest group leaders may not have the same view of the good that their members do, or the incentives to pursue it. And in times of crisis, interest groups lacking exceptional funding and organization can be overwhelmed by the pace of legal change. Even in ordinary times, members of the public (whether representing interest groups or just themselves) may try to participate in the notice and comment portion of the regulatory process, but that participation is skewed in its sophistication, and so is the agency response to it. All of this should lead one to question the existing approach to involving the public in regulatory policy, and to consider feasible alternatives like the corrective and majoritarian deliberation approaches I have proposed. Not only do those alternatives provide regulators with valuable information that can improve the substance of regulation, but they also force a legitimacy-enhancing choice among different kinds of "democracy," some of which may be better suited for certain regulatory issues.

Advocates for the administrative state have always implied that regulatory policy should be informed by some kind of public engagement. This insight embodies the view that no one in the administrative state can possibly

²²⁸ See *supra* Part IV.c.

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have all the answers: not the legislators who passed the law but left the details to someone else, not the voters in whose name the law was passed, not the regulators who write the proposed rule or the experts they consult, and not the interest groups whose fortunes and futures may turn on the regulation. What gets done in the administrative state therefore depends a lot on whose questions are taken seriously. The experience with Section 314 shows that the questions getting answered by the machinery of the administrative state are not the only ones that matter.

APPENDIX: METHODS AND DATA

A. *Methods and Source of Data*

The Financial Crimes Enforcement Network (FinCEN) was the Treasury Department bureau entrusted to write the regulations implementing Section 314. FinCEN provided me with all the comments submitted by individual, business, and organizational members of the public.²²⁹ FinCEN received and archived the comments in accordance with the requirements of the APA.²³⁰ A number of electronic mail comments sent to FinCEN regarding Section 314 included no text, so these were excluded.²³¹ Duplicate comments originating from the same source were counted as a single comment from that source. The resulting number of comments (172) was coded in accordance with the following criteria.²³²

1. **Commenter type:** Comments were divided into four major categories: business, organization representing business, other official not-for-profit organization, unofficial organization, and individual. If the organization was a business or an organization representing business, then it was further classified into four categories: bank, non-bank financial institution (as traditionally defined to include the provision of financial services to customers), or other business.
2. **Comment sophistication:** Comment sophistication was coded in two ways. First, as to substance: (a) Did the commenter distinguish the regulation from the statute?²³³ (b) Did the commenter indicate an understanding of the statutory requirement?²³⁴ (c) Did the commenter ask for specific changes in the regulation provided in the notice of proposed rulemaking?²³⁵ (d) Did the commenter provide at least one example or

²²⁹ See Section 314 Comments, *supra* note ____.

²³⁰ APA § 553, *supra* note ____.

²³¹ Several of these comments included computer viruses. See Section 314 Comments, *supra* note ____.

²³² Coding was performed by two coders. Intercoder reliability was assessed by randomly selected about 20% (34) of the comments and recoding them without examining the first coder's work. Intercoder reliability was approximately .9.

²³³ This category is meant to distinguish between comments that primarily address the scope of the underlying statute from comments that recognize in some way that the agency cannot legally abrogate its responsibility under the statute and must therefore issue regulations of some kind.

²³⁴ Whether or not the commenter distinguishes the regulation from the statute in a comment, there is the question of whether the commenter understands the scope of the statutory requirement. For example, a commenter might simply use the comment to complain about a statutory requirement that allows further flexibility for the sharing of financial information among banks and with government in the absence of much individualized suspicion.

²³⁵ The notice-and-comment rulemaking process seems to have as a major premise that people can provide feedback that could result in changes in a given regulation. It seems logical to think that the chances of achieving such an impact are heightened when the commenter provides a specific recommendation for a change in (or for maintaining a particular aspect of) the proposed rule. In any case, the capacity to ask for such a specific change plausibly reflects a commenter's degree of sophistication about the rule and the underlying statute.

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separate argument for why the commenter’s concern should be addressed?²³⁶ These categories were meant to shed light on the extent of the commenter’s information about, and understanding of, the problem faced by the agency. Comment length was the second measure. Comments of any length were coded as being at least one page long. Any fraction of a page over a full page counted as an additional page. A comment’s overall sophistication was defined by the product of its length and the number of applicable qualitative sophistication categories.

- 3. **Comment concerns:** Although comments varied substantially in their sophistication, all of the comments coded identified at least one (and often more than one) concern. The comments were coded according to the following categories: (a) privacy; (b) suggestions that allegedly involved merely “technical” changes; (c) administrative burdens on entities subject to the rule; (d) scope of, and eligibility for, the safe harbor included in the statute; The categories were derived from a qualitative analysis of the comments, with the objective of providing a category for virtually all of the concerns raised by any comment.
- 4. **Comment impact:** Finally, comments were coded in accordance with whether they raised issues that the regulatory agency actually addressed in the changes it made to its proposed regulations. I use the term “comment impact” to describe this quality: this implies that the comment was among one that collectively appeared to have an effect on the agency rule. It does not imply information about whether an individual comment had an effect on the regulations. I coded for impact by asking whether a comment mentioned one or more of the recommendations that the agency *actually* implemented. These included the following recommendations: (a) making it easier to glean the obligations of covered financial institutions from the regulation; (b) reducing the administrative burden on covered financial institutions by restricting the scope of the time periods that they would have to search in order to comply with a request; (c) expanding or clarifying the scope of “financial institutions” that would be eligible to share information with each other subject to the statutory safe harbor from liability; and (d) streamlining the “certification” process for financial institutions who choose to take part in sharing information with each other under the regulation.

B. Excerpts From Selected Comments

Commenter Type	Concern Raised	Excerpt of Comment
Individual (# 9)	Privacy	“I am opposed to any additional expansion of power on the part of

²³⁶ This is meant to assess whether the commenter provided some measure of justification for the concerns raised, rather than simply stating the concern without indicating why such a concern was important. No distinction was made between self-regarding arguments (i.e., this is a problem because it affects *my* business in a particular way) and public-regarding arguments (i.e., this is a problem because it will make *Americans* feel like they are constantly under surveillance, which will chill free expression).

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		<p>the federal government. The issues are ill defined and allow the U.S. Treasury the opportunity for further misconduct.... I am willing to live with the threat of terror rather than the creeping exetension [sic] of a malignant and paternalistic state.”</p>
Individual (#126)	Privacy	<p>“As you have requested comments, your gonna get ‘em. I am greatly opposed to section 314 of the USA Patriot Act. After reading it, I am left with one hugh and necessary question. How will any of these ‘rules’ or provisions have any effect in stopping terrorism?.... We already have statutes in effect dealing with money laundring [sic]. This is sufficient. Section 314 must not be implemented [sic]. The time has come for real police work that deters... not reports it after the fact.”</p>
Individual (# 121)	Privacy	<p>“This moronic P.O.D.S. (piece of dog s_ _t) legislation should never have left the table of whatever bumbling fool pit it in print... The Supreme Court has many times ruled that any legislation passed by congress that is repugnant to the Constitution, and/or indecipherable to the common man is NULL and VOID!... Are the bureaucrats and politicians going to give up their liberty and freedom with ease when someone comes knocking on their door to arrest them...? What about monitoring their money transactions...? What about keeping a perpetual eye on them 24/7/365? Are we all adolescents or convicts needing</p>

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		the eye of 'BIG BROTHER'.
Individual (#82)	Privacy	“This Act offends the heck out of me. The government has no legitimate right to involve itself in the financial transactions of others absent some true indicia of criminal activity other than it looks suspicious; that is, a particularly large deposit, it involves people the government already has its eyes on, and the like. This should not have been passed in the first place; it having been passed, it should be read as narrowly as possible.”
Individual (#57)	Privacy	“I am opposed to this portion of the Patriot Act of 2001. As a matter of fact, the entire act is a travesty. The events of September 11 th occurred because the FBI, CIA, and INS did not do their jobs. That event could have been prevented under the laws in effect before September 11 th but for poor performance on the part of those agencies. I consider the banking provisions of this act to be an invasion of personal privacy, just right for another J. Edgar Hoover to spy on innocent people.”
Business (# 143)	Scope of Safe Harbor	“The proposed rule contains various problems for the bank and its affiliated companies. Many of our affiliated companies meet the definition of a financial institution as that term is defined for purposes of 314(a). A much smaller group meets the definition of a financial

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		institution for purposes of 314(b). We believe the notice of proposed rulemaking is unworkable for our organization.”
Business Representative (#151)	Scope of Safe Harbor	“Inclusion of life insurers would not only allow the information sharing necessary for good faith compliance with the USA PATRIOT Act of 2001 (Public Law 107-56)...but also would allow insurers the protections necessary to execute such information sharing activities. As entities subject to privacy regulations on information sharing under such laws as, for example, the Gramm-Leach-Bliley Act (Public Law 106-102), life insurers would need the safe harbor protections embodied in the Proposed Rule in sec. 113.110(d).”
Business Representative (#161)	Administrability	“The proposed rule requires firms to respond to requests for information from FinCEN, but does not specify how much time a firm has to conduct the search. The rule states, ‘[u]pon receiving a request from FinCEN, a financial institution shall search its records to determine whether it maintains or has maintained an account for, or has engaged in any transaction with’ the subject of FinCEN’s request. 66 Fed. Reg. At 9,884. The rule also states that if a financial institution identifies an account or transaction, the report to FinCEN must be made ‘as soon as possible.’ The rule should

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		make clear that financial institutions will be provided a reasonable amount of time to search their records and to respond. The burden and disruption to financial institutions would be great if responses were required within an unreasonably short time frame.”
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