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Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis

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INTRODUCTION

How should democratic societies regulate their rulemakers? As administrative agencies grapple with novel challenges—from the environment,[1] to public health,[2] and now, to terrorism[3]—perennial questions reemerge. Chief among them are the appropriate limits of bureaucratic discretion amidst competing demands for expertise and public participation. Indeed, modern risks are increasingly complex.[4] We need experts for sober insights into the consequences of our regulatory choices. Only then will administrative decision-making be informed. Yet, these same risks also breed greater uncertainties and, thus, harder political decisions. Even more urgent, then, becomes the need to ensure those decisions are transparent and accountable. Only then will administrative decision-making be legitimate.

These twin goals—technocratic and democratic—often seem at loggerheads, but they need not be. Reconciling them, however, is not always an easy task.[5] Early theories of administrative law assumed that agencies simply served as "transmission belts" for detailed legislative pronouncements.[6] Voters held regulators accountable through the legislature, which was charged with prom-

1. *See, e.g.*, Richard J. Lazarus, *Environmental Law After Katrina: Reforming Environmental Law by Reforming Environmental Lawmaking*, 81 TUL. L. REV. 1019, 1019 (2007) (calling for a "fundamental reformation" of environmental law after Hurricane Katrina); Yuhong Zhao, *Trade and Environment: Challenges After China's WTO Accession*, 32 COLUM. J. ENVTL. L. 41 (2007) (exploring environmental effects of China's economic growth).

2. *See, e.g.*, Kim Elliott, *Public Health Preparedness in the 21st Century*, 58 ADMIN. L. REV. 595 (2006) (describing pandemic threats and risks to American public health system); Michael A. Stoto, *Public Health Surveillance in the Twenty-First Century: Achieving Population Health Goals While Protecting Individuals' Privacy and Confidentiality*, 96 GEO. L.J. 703 (2008) (discussing privacy implications of new approaches to public health data collection).

3. *See, e.g.*, Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005) (proposing administrative law principles for reviewing presidential authorizations of military force); Lee Wolosky & Stephen Heifetz, *Regulating Terrorism*, 34 L. & POL'Y INT'L BUS. 1 (2002) (criticizing anti-money laundering regulations).

4. *See* ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY 19-24 (1992).

5. *See, e.g.*, GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 9 (1987) ("The theory and practice of administrative government must satisfy the competing expectation of discretion, on the one hand, and political accountability and the rule of law on the other."). *See generally* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003) (discussing various theories of democratic legitimacy in the administrative state).

6. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675, 1684 (1975).

ulgating precise statutory instructions. The New Deal Era, however, saw broad delegations of authority and growth in the regulatory state; legitimacy thus adhered in the superior expertise of agency officials who could be entrusted to act in the public interest.[7] Still, decades later, growing skepticism about expertise and the specter of industry capture grounded administrative legitimacy in its ability to replicate the pluralistic electoral process.[8] In this view, the function of congressional and judicial oversight was to ensure sufficient interest group access to rulemaking institutions.[9]

Given the narrow scope and short time horizons of interest groups, however, reformers gradually began to search for tools that would ameliorate poor priority-setting and provide a more global view of a regulation's costs and benefits.[10] Many of those reformers seized upon the analytical tool of cost-benefit analysis (CBA) as their rallying cry. President George W. Bush's Executive Order 13,422, for example, represents the most recent advance.[11] Most notably, the order calls for federal agencies to produce measures of total annual costs and benefits for every proposed regulation, to install political appointees as regulatory policy officers, and to identify in writing specific "market failures" to justify government intervention before promulgating a rule.

Broadly defined, CBA entails the systematic identification of all future monetized costs and benefits associated with a proposed regulation or policy decision.[12] At root, CBA attempts to mimic a basic function of markets by rely-

7. *Id.* at 1678-80 (characterizing expertise as "the knowledge that comes from specialized experience"); *see also* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2036 (2005).

8. Vandenbergh, *supra* note 7, at 2036.

9. *Id.* at 2035. Underlying this shift was the notion that the "public interest" was nothing more than the aggregate preferences of individuals. Analogously, legislation was simply the culmination of compromises struck between competing groups. By mimicking the legislative process, then, legitimacy adhered in agency decisions that adequately considered affected interests. *See* Stewart, *supra* note 6, at 1712.

10. *See* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 19-21 (1993) (arguing that regulatory agendas were set unsystematically and overly beholden to public perceptions of risk); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 6 (2002) (arguing that the "most attractive parts of the movement for cost-benefit analysis (CBA) have been rooted . . . in a more mundane search for pragmatic instruments designed to reduce the three central problems: poor priority setting, excessively costly tools, and inattention to the unfortunate side effects of regulation").

11. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007), *available at* http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-293.pdf.

12. While it is true that the term, "cost-benefit analysis" has a host of meanings and uses, *see, e.g.*, Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153 (2000), my defini-

ing upon an economic criterion—net-benefit maximization—as a metric of evaluation.[13] Markets are used as a touchstone on the theory that an important rationale for government intervention is market failure. Therefore, when aspects of well-functioning markets—such as perfect information, competition, robust price signals—are absent, the government has a role to play in inducing such conditions. Regulations must thus be able to show how they will achieve an important public objective that the marketplace, on its own, could not provide.

Even as the movement for CBA grew,[14] however, bureaucrats were also increasingly seen as "out of touch" with society, leading to concurrent calls for greater citizen participation and deliberation in the rulemaking process.[15] Allowing lay citizens to participate directly in the formation of administrative rules, proponents argued, had the potential to increase trust in the rulemaking process and to educate administrators and citizens alike.[16] Their arguments arose from a particular view of democracy, one in which legitimate government authority stems from the collective discussion and reflection of citizens.[17] At its

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tion refers to a "method of pure evaluation" and input into administrative decision-making, *id.* at 1154; *see also infra* note 13 and accompanying text.

13. *See* Robert B. Reich, *Public Administration and Public Deliberation*, 94 YALE L.J. 1617, 1621 (1985). Some argue that CBA is not a decision-rule based on net-benefit maximization, but merely a heuristic for generating information about the possible scale and scope of some proposal's consequences, along with underlying assumptions. *See, e.g.*, SUNSTEIN, *supra* note 10, at 10 ("[Cost-benefit analysis] can be seen . . . not as an endorsement of the economic approach to valuation, but as a real-world instrument, designed to ensure that the consequences of regulation are placed before relevant officials and the public as a whole."). Importantly, this understanding does not require any kind of net-benefit calculation or cost-benefit ratio, but rather simply aims to be a system for presenting information.

14. *See infra* Part I.B.

15. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-making*, 92 NW. U. L. REV. 173, 174-75 (1997) ("Over the last thirty years or so, courts, Congress, and scholars have elevated participation to a sacrosanct status . . . . Greater participation is generally viewed as contributing to the democracy, and also to the quality, of decisions by otherwise out-of-touch bureaucrats." (citations omitted)).

16. *See* Richard H. Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 89-95 (1995) (describing initial agency efforts to engage in deliberative procedures).

17. *See* JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 1-2 (2000) (surveying accounts of deliberative democracy and concluding that the "only condition for authentic *deliberation* is . . . the requirement that communication induce reflection upon preferences in noncoercive fashion"). It is important to distinguish this conception of deliberation from competing notions found in the literature, namely, civic republican theories which promote insulated, expert bureaucrats deliberating over decisions in a

core, it takes reason—as opposed to bargaining or compromise—as its guiding political procedure.[18] Deliberation, then, could be understood as "debate and discussion aimed at producing reasonable, well-informed opinions in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants."[19] Informed and reasoned reflection,[20] mutual respect between parties when problem-solving,[21] and public debate are the new hallmarks of agency legitimacy.[22]

"public-regarding" way. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (arguing that civic republicanism provides strong justification for broad delegations to agencies, which are best situated to deliberate in the public's interest). In this view, bureaucrats are obligated to defend their choices by appealing to some conception of civic virtue; as a result, insulating decision-makers from private pressure is crucial to enabling that process to function appropriately. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541-42 (1988). In contrast, the conception of deliberation defended here posits that legitimate administrative decision-making must carve out a role for lay citizens external to agencies, not only as a locus of accountability but also as a source for information and public values. As such, bureaucrats insulated from the public threaten rather than encourage democratic desiderata such as transparency and the potential for citizen education.

18. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67, 72 (James Bohman & William Rehg eds., 1997) ("The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and *reasoning* among equal citizens." (emphasis added)); John Rawls, *The Idea of Public Reason*, *in* DELIBERATIVE DEMOCRACY, *supra*, at 93, 95 (arguing that "public reason" should govern political discourse).

19. *See* Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 309 (2003). Some criticize these deliberative aspirations as overly "utopian." *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 164 (2003) (describing deliberative concepts of democracy as "utopian" and "utterly unworkable under modern conditions"). It is important, however, to distinguish between the first principles of deliberative democracy and its more pragmatic aspirations. That is, one can disagree with the epistemic or foundational assumptions of deliberative democrats, yet still think deliberation yields empirically testable hypotheses related to fostering informed agreement, mutual respect, and greater levels of citizen education.

20. *See* Rawls, *supra* note 18, at 95.

21. For examples of collaborative problem-solving in negotiated rulemaking, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33-55 (1997). *See also* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 9 (1996) ("[A] deliberative perspective can help resolve some moral disagreements in democratic politics, but . . . its greater contribution can be to help citizens treat one another with mutual respect . . . ."). *See generally* DELIBERATIVE POLICY ANALYSIS: UNDERSTANDING GOVERNANCE IN THE NETWORK SO-

And so things stand, with powerful advocates for the virtues of deliberation and CBA marking out their respective territories. Indeed, much of the literature currently pits CBA and deliberation against one another as mutually exclusive substitutes: where CBA injects much needed rationality to the cognitive confusion of the masses, deliberation empowers citizens to hold their representatives accountable. Some like Henry Richardson, for example, bemoan the "stupidity of the cost-benefit standard" and offer instead a "superior mode" of decision-making involving deliberative procedures.[23] Writers like Cass Sunstein push back, proclaiming that the "effect of cost-benefit analysis is to subject a public demand for regulation to a kind of technocratic scrutiny, to ensure that the demand is not rooted in myth, and to ensure as well that government is regulating risks even when the public demand (because insufficiently informed) is low."[24] In other words, because public demand is often uninformed and subject to "cognitive errors," CBA should be lauded for injecting cool-headed reason into any policy debate.[25]

This Note rejects both views, and the notion that the two modes of decision-making are bitter adversaries. Rather, by proposing the idea of *deliberative cost-benefit analysis*, it argues that they can—and should—be allies whose shortcomings can be mitigated by the other's strengths. The debate must thus be reframed. Simply stated, deliberative cost-benefit analysis entails the use of deliberative forums when measuring the costs and benefits of a proposed regulatory rule. Deliberative forums constitute gatherings of lay citizens that engage in informed and structured discussion. The forums' goals are not only to educate, but also to provide opportunities for citizens to reflect on and revise their preferences. The insights gained from such forums would then inform regulatory rulemaking.

As it stands, the contemporary practice of CBA not only fails to achieve its own objectives, but can also no longer withstand scrutiny as a democratically legitimate means of regulatory analysis. Given that CBA relies on the aggregation of individuals' private willingness-to-pay, it undermines many fundamental tenets of American administrative law. These private judgments of value are often ill-informed and analyzed using a host of assumptions with little public scrutiny. Unlike those who criticize CBA without more, however, this Note proposes an alternative.

CIETY (Maarten A. Hajer & H. Wagenaar eds., 2003) (exploring examples of deliberative network-based policy-making).

22. *See* Cohen, *supra* note 18, at 72.

23. Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971 (2000); *see also* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 119-29 (2002).

24. Cass Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1067 (2000).

25. *Id.* at 1073.

The discussion proceeds in four parts. Part I argues that contemporary rulemaking is dominated by two models of bureaucratic restraint with an, as yet, under-theorized relationship. The first model features what I call the "deliberative impulse" embodied in both notice-and-comment rulemaking and the Administrative Procedure Act (APA) more broadly.[26] This procedure requires agencies to give notice and to allow parties potentially affected by an agency rule to present objections or suggestions.[27] In turn, agencies must provide reasons for their actions along with evidence in support of their final decisions, subject to judicial review.[28] Parties engage in a back-and-forth exchange of reason-giving and reflection—a nascent process of deliberation.

Against this backdrop, however, such procedures are actually dwarfed on the ground by de facto requirements to deploy CBA.[29] While attempts to formally codify cost-benefit requirements in the APA have failed, a mix of executive orders, guidance documents, and best-practice manuals nonetheless mandate the procedure as a matter of practice.[30] In this manner, the second model of administrative restraint arises from this enlarging "cost-benefit regime" whereby the Legislative, Executive, and Judicial Branches have all imposed strong norms in favor of the technique.

Given these two trends, Part II introduces the idea of deliberative cost-benefit analysis, an extension of the deliberative impulse into the realm of CBA. Deliberative cost-benefit analysis envisions forums for lay citizens to deliberate about the genuine monetary value of public goods. Such forums would not only improve CBA analytically, but also help educate citizens about the regulatory rules that govern their everyday lives. Many have heard of the Food and Drug Administration[31] and the Clean Air Act,[32] but few have any sense of the enormous role they play in regulating everyday life. Drawing upon efforts to imple-

26. Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (2000). The statutory description of notice-and-comment rulemaking can be found at 5 U.S.C. § 553(b) (2000).

27. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 6-7 (1982).

28. *Id.* at 7.

29. *See, e.g.*, President Bush Amends Federal Regulatory Process, OMB WATCH, Jan. 23, 2007, http://www.ombwatch.org/article/articleview/3688/1/368?TopicID=1 ("Though the Administrative Procedure Act outlines the formal rulemaking process, in practice, formal rulemaking procedures are rarely used; E.O. 12866 [mandating the use of cost-benefit analysis] has been the basis for the regulatory process since [President] Clinton used it to replace two Reagan administration executive orders.").

30. *Id.*

31. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (1938) (establishing the Food and Drug Administration).

32. Clean Air Act, 42 U.S.C. §§ 7401-61 (2000).

ment deliberative democracy in other contexts, this Part also addresses logistical concerns including how to recruit citizens and moderate discussion.

Part III then turns to assess the proposal in more detail by exploring its normative foundations and various arguments for why deliberative cost-benefit analysis is a necessary feature of democratic society. In doing so, it draws upon the political science and economics literature to show how deliberation can mitigate social choice and other related problems. Finally, Part IV confronts inevitable objections to the proposal, including the prudence of involving lay citizens in the seemingly expert nature of rulemaking, as well as the potential costs of the procedure itself.

I. Two Models of Constraint

While a number of important devices historically have been adopted to check bureaucratic discretion—ranging from changes in standard agency operating procedures to increasing external oversight[33]—two models of regulatory constraint currently dominate: the "deliberative impulse" and cost-benefit analysis (CBA).

A. The Deliberative Impulse

The first model is reflected in the process of notice-and-comment rulemaking under the Administrative Procedure Act (APA).[34] Enacted in 1946, the Act provided agencies with wide latitude to promulgate rules, limited only by fairly minimal procedural requirements.[35] While trial-type formal rulemaking procedures are triggered when Congress requires a decision on-the-record after an opportunity for a hearing,[36] the bulk of rules are promulgated through informal notice-and-comment.[37] Notice-and-comment rulemaking, as its name suggests, is a procedure in which agencies give notice of a proposed rule in the Federal

33. Breyer, *supra* note 27, at 3.

34. Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (2000).

35. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1559 (1996).

36. *See* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 Harv. L. Rev. 543, 586 (2007) (citing 5 U.S.C. §§ 556-57).

37. *See, e.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749, 1761 (2007) ("[A]gencies began to implement these statutes primarily through notice-and-comment rulemaking rather than through formal adjudication."); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1390-93 (2004) (comparing different agency procedures); Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 Fordham L. Rev. 1877, 1885 (2006) (describing formal rulemaking, relative to "notice-and-comment rulemaking," as "a less often used but available option under the APA").

Registrar and provide parties with the opportunity to submit comments.[38] The agency must base the rulemaking on a consideration of the record and include a statement of basis and purpose in the final rule adopted.[39] If the agency follows this procedure, then the result is a "legislative" rule with the full force of law.[40]

At root, notice-and-comment—and the APA more generally—espouses a set of powerful background norms designed to vindicate what I call a "deliberative impulse," reasoned deliberation between citizens and administrators policed through judicial review. More concretely, the deliberative impulse can be understood along three axes that lie at the heart of notice-and comment: information, participation, and publicity. These three elements—overlapping, yet analytically distinct—respectively call for preferences that are informed, the participation of citizens, and a public process of reasoning oriented to the common good.[41] Along the first axis, the APA specifies both the information an agency must collect, as well as the information it must provide to the public before, during, and after rulemaking. The most basic requirement is the notice provided in the Federal Register when a rule is being developed until it becomes final and binding.[42]

Courts have expanded this information-forcing requirement by duly scrutinizing whether rules are promulgated only after full consideration of an adequate record.[43] Agencies must collect the necessary data and information to sur-

38. *See* 5 U.S.C. § 553(b)-(c) (2000).

39. *Id.* § 553(c).

40. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

41. I refer to this phenomenon as a deliberative "impulse" because despite the extent to which notice-and-comment helps to foster deliberation, it also falls short of the ideal in many ways. For example, notice-and-comment often fails to make the best use of available data since the process begins only after the notice of proposed rulemaking, instead of beforehand when the information would be more valuable to the agency. As a result, an agency may frame regulatory problems at the early stages of a rulemaking in a way that "limits rethinking at later junctures." Freeman, *supra* note 21, at 13. Moreover, parties forego opportunities to engage constructively with each other, instead staking out extreme positions in anticipation of litigation. *Id.* at 12 ("Notice and comment . . . undermines the implementation of rules by failing to encourage dialogue and deliberation among the parties most affected by them."). At the same time, as this Section suggests, the Administrative Procedure Act set in motion a series of statutory and judiciary reforms such as negotiated rulemaking that continue to promote the continuing "impulse" of deliberative administrative decision-making.

42. *See* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 62-63 (2003).

43. *See* United States v. N.S. Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977) (requiring notice of studies, an adequate statement of reasons, and agency responses to reasonable objections).

vive "arbitrary or capricious review."[44] Consequently, the preambles of final rules have become "veritable legal briefs explaining and justifying agency's choices in great detail."[45] Though the APA's drafters did not contemplate their current scope,[46] notices of proposed rulemaking now routinely contain the full text of the rule as well as lengthy preambles, including the information, data, and analyses upon which the agency relied. Congress has also since enacted various "information statutes" that apply generally to all rulemaking agencies, adding yet another layer of publicly available information.[47]

Furthering the deliberative impulse, greater avenues for participation allow members of the public to directly participate in the formation of rules. Interested parties submit comments, which are collected in the docket; administrators must then be able to justify the ultimate rule by responding to the major criticisms and suggestions received. Indeed, in *National Labor Relations Board v. Wyman-Gordon Co.*, the Supreme Court declared that public participation in rulemaking is meant to ensure that the regulation is responsive to the general interests of those regulated.[48] Extending these insights, Congress passed the Ne-

44. *Id.* at 251.

45. John C. Reitz, *E-Government*, 54 AM. J. COMP. L. 733, 743 (2006).

46. A manual prepared by the Attorney General shortly after the passage of the Act went so far as to advise agencies against publication of the actual text of the rules for fear that such text would simply "confuse the public." KERWIN, *supra* note 42, at 63 (citing JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 183 (1998)).

47. For example, the National Environmental Policy Act requires agencies to consider the effects of rules on the environment. 42 U.S.C. §§ 4321-47 (2000). In doing so, it calls for various stages of information collection and analysis: first, an environmental assessment to determine whether the contemplated rule will significantly impact the environment. This assessment requires the agency to solicit information from experts and other external parties. If the first stage finds there will be significant impacts on the environment, the agency must then prepare an environmental impact statement, a report on the likely effects of the rule, alternatives to the rule, and the steps the agency will take to mitigate damage. Similarly, Congress also passed the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (2000), which was designed to protect small businesses by requiring agencies to gather information on the effects of rules on such entities. *See* KERWIN, *supra* note 42, at 60. As such, agencies are required to consult individuals and interest groups in an attempt to gather the relevant data. In this manner, the basic premises of the APA along with subsequent statutes highlighted the importance of consulting the public in order to ensure that decisions were made with the appropriate information and statistics. *See* Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969) (holding that participation by parties with an interest in the regulatory rulemaking process ensures that agencies' decisions are based upon relevant information).

48. 394 U.S. 759, 764 (1969) ("The rulemaking provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application." (citations omitted)).

gotiated Rulemaking Act of 1990,[49] authorizing regulatory negotiation as an approved means for developing rules. In amending the APA, Congress implicitly endorsed negotiated-rulemaking, a "process by which representatives of the interests that would be substantially affected by a rule . . . negotiate [along with the agency] in good faith to reach consensus on a proposed rule."[50] Agency officials and stakeholders explore their shared interests and differences of opinion, collaborate in gathering and analyzing technical information, and evaluate their options according to their respective priorities.[51] In this manner, the APA provides the means through which parties and citizens external to the agency can participate in the rulemaking process.

Finally, the APA also mandates public justification, most obviously in a rule's statement of "basis": an explanation of the data the agency considered when developing the final regulation.[52] Judicial interpretation has been integral in enforcing and expanding this requirement.[53] For the agency rule to avoid being termed "arbitrary [or] capricious,"[54] for example, the agency must develop at least a minimal record, subject to public scrutiny.[55] Under the courts' "hard look doctrine," the reviewing court must take a "hard look" at the agency decision if it believes that the agency "has not genuinely engaged in reasoned decision-making."[56] Moreover, if the agency eventually decides to promulgate a rule that is not the "logical outgrowth" of the proposed rule, the final rule may be deemed invalid.[57] In this manner, judges now have a detailed record before them, including the interactions between various parties to the rulemaking process. As a result, agencies are judicially required to give reasons for their de-

49. 5 U.S.C. §§ 561-70 (2000).

50. Phillip Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33 (2000).

51. *Id.* at 33-36.

52. KERWIN, *supra* note 42, at 63.

53. *See* United States v. N.S. Food Prods. Corp., 568 F.2d 240, 249 (2d Cir. 1977) (holding that, even under arbitrary and capricious review, decisions must be based on full consideration of an adequate record).

54. 5 U.S.C. § 706(2)(A) (2000).

55. *See* Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 419-20 (1971).

56. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); *see also* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (refusing to uphold a rule rescission absent a reasoned explanation for the action); Ethyl Corp. v. EPA, 541 F.2d 1, 35 (D.C. Cir. 1976) (en banc) (noting that a reviewing court "must engage" in a "substantial inquiry" into the facts, one that is "searching and careful"); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (arguing for a "hard look" approach to judicial review of deregulatory policies).

57. *See* Weyerhauser v. Costle, 590 F.2d 1011, 1031 (D.C. Cir 1978).

cisions in ways that are responsive to public input[58]—a process of deliberation and reflection supervised by the courts.

B. The Cost-Benefit Regime

Critics of notice-and-comment, however, have charged that the APA allows for the disproportionate influence of well-organized stakeholders at the expense of the public interest.[59] In this view, "[a] participant must be aware that a rule is being developed . . . [and] possess the resources and technical expertise needed to respond, and, when necessary, have the ability to mobilize others in the effort to influence agency decision makers."[60] By and large, very few other than professional lobbyists or lawyers employed by interest groups send in comments, read the Federal Register, or pursue litigation challenging administrative rules in federal court.[61] While notice-and-comment rulemaking can involve non-agency members, in practice it only elicits deliberation among a select number of interested elites.

This ability—real or perceived—of certain parties to influence rulemaking disproportionately has led many to advocate for CBA "as a way of diminishing interest-group pressures on regulation and also as a method for ensuring that the consequences of regulation are not shrouded in mystery but are instead made available for public inspection and review."[62] Such sentiments may help explain the enlarging cost-benefit regime and the increasing endorsement of CBA from all three branches of government, suggesting a growing institutional

58. *See* Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 181 (describing the "giving reasons requirement" in administrative law as a mandate not only to "giv[e] reasons to judges," but also to "giv[e] reasons to the public").

59. *See, e.g.*, John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 959 (2001) (criticizing the "special interest domination of the notice and comment process"); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 636 (2003) (describing notice-and-comment as "practically speaking, likely to engage primarily well-organized interest groups—those versed in the intricacies of administrative procedure").

60. KERWIN, *supra* note 42, at 178.

61. Revealingly, litigants in leading cases reviewing rules are generally entities such as the Natural Resources Defense Council, the Sierra Club, and the Motor Vehicle Manufacturers Association. Adjudications involve individuals, of course, but even then, sustained challenges to general agency practices under the APA's judicial review provisions are often mounted by large organizations. *See* Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 102 (2003).

62. Cass Sunstein, *The Cost-Benefit State* 4 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 39, 1996), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=10083.

convergence. Though the Executive Branch's pursuit of CBA has been long-standing,[63] a watershed moment came with President Reagan's Executive Order 12,291, which also created the Office of Information and Regulatory Affairs.[64] The order declared (1) "to the extent permitted by law," a commitment to CBA; as well as (2) a requirement that a regulatory impact analysis, including a CBA, accompany all "major" rules.[65] While President George H. W. Bush continued Office of Management and Budget (OMB) review under Reagan's executive order, the election of Bill Clinton raised a number of questions as to the future of CBA.[66] To the surprise of many, Clinton's Executive Order 12,866 affirmed the Reagan-Bush orders as bipartisan fixtures of American government.[67] Crucially, it accepted the basic commitments to assess costs and benefits, while also offering several revisions mandating that CBA take into account factors like "equity" and "distributive impacts."[68] As a result, the Environmental Protection Agency (EPA) alone has spent tens of millions of dollars on CBA in recent decades.[69] Other agencies are likewise committed to using and improving the techniques of CBA.[70]

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63. SUNSTEIN, *supra* note 10, at 10.

64. Exec. Order No. 12,291, 3 C.F.R. 127 (1982). In practice, the office's traditional role is intermittent, with little effort to ensure that the Executive branch engages in priority-setting; however, there are now mechanisms in place that would allow OMB to reject initiatives with substantial costs, and little perceived benefits. *See* SUNSTEIN, *supra* note 10, at 11; *see also* SHELLEY LYNNE TOMKIN, INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET OFFICE 4 (1998) ("Although the OMB's influence to affect presidential, agency, and congressional actions has ebbed and flowed over the years, its presence in the center of policy making has remained a constant."); Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257 (2006).

65. According to Exec. Order No. 12,291, 3 C.F.R. 127 (1982):

> "Major rule" means any regulation that is likely to result in:
>
> (1) An annual effect on the economy of $100 million or more;
>
> (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
>
> (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

66. SUNSTEIN, *supra* note 10, at 11.

67. Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

68. *Id.*

69. *See* Matthew Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999).

70. *Id.*

Similar efforts to extend the reach of CBA have also come from Congress. During the "Republican Revolution"[71] of the mid-1990s, for example, the House Governmental Affairs Committee scheduled a series of hearings addressing various issues of regulatory reform, one of which focused exclusively on CBA.[72] Consequently, the House passed the Risk Assessment and Cost-Benefit Act of 1995,[73] which covered a broad range of risk-related proposals, including CBA for all major rules. Similarly, the Senate considered the Comprehensive Regulatory Reform Act of 1995,[74] which would have required that agencies conduct CBA before imposing any new regulation. Once an agency demonstrated that the benefits of a regulation outweighed the costs, it also would have had to show that it was the least costly means of achieving the desired result. The Senate bill failed to pass by just one vote.[75]

Although none of these more sweeping legislative proposals succeeded, congressional enactment of both the 1996 Safe Drinking Water Act Amendments[76] and the 1996 Small Business Regulatory Enforcement Fairness Act[77] can "be read as clear signs of congressional concerns about the absence of economic considerations" in the environment.[78] The Safe Drinking Water Act Amendments constituted "the first substantive law to include such explicit use of economic analysis" and mandated the use of cost benefit-analysis for all major drinking water rules.[79] Importantly, they required the consideration of impacts

71. *See generally* JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2005).

72. *See* Alexander Nathan Hecht, *Administrative Process in an Information Age: The Transformation of Agency Action Under the Data Quality* Act, 31 J. LEGIS. 233, 247 (2005) (citing Press Release, House Governmental Affairs Comm., Continuation of Regulatory Reform Hearings (Feb. 13, 1995)).

73. H.R. 1022, 104th Cong. (1995).

74. S. 343, 104th Cong. (1995).

75. Moreover, that same year, the Senate considered the Regulatory Procedures Reform Act, S. 1001, 104th Cong. (1995). This Act would have required that federal agencies conduct a CBA before publishing a "major rule," defined as one which was likely to have an annual economic effect of over a hundred million dollars. *Id.* § 621(4)(A) ("The Regulatory Procedures Reform Act defines a 'major rule' as 'a rule or a group of closely related rules that the agency proposing the rule . . . reasonably determines is likely to have a gross annual effect on the economy of $100,000,000 or more in reasonably quantifiable direct and indirect costs.'").

76. 42 U.S.C. § 300g-1(b)(3) (2000).

77. Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in scattered sections of Titles 5, 15, 28 of the U.S.C.).

78. Richard D. Morgenstern, *The Legal and Institutional Setting for Economic Analysis at EPA*, *in* ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT 5, 19 (Richard D. Morgenstern ed., 1997).

79. *Id.* at 20.

on the broader population, instead of only those who were "maximally exposed."[80] The Small Business Regulatory Act, in turn, strengthened provisions in the Regulatory Flexibility Act,[81] requiring agencies to assess the effects of significant proposed rulemakings on small businesses.[82] In this manner, Congress has sought to require more explicit consideration of costs and benefits and reviewed rules accordingly.

Finally, the courts have also independently designated CBA an important element of legitimate rulemaking, though recent decisions have arguably mitigated this trend.[83] In *Michigan v. EPA* (2000)[84] and *National Resources Defense Council v. EPA* (1987),[85] for example, the courts interpreted provisions of the Clean Air Act that made no mention of costs in such a way that nevertheless allowed the EPA to take costs into account. Such decisions could be interpreted as signaling the courts' willingness to recognize a default cost-benefit principle.[86] Similarly, *National Resources Defense Council v. EPA* (1991)[87] and *International Union, UAW v. OSHA* (1991)[88] both upheld the agency use of CBA in the face of ambiguous statutory mandates. In perhaps the most aggressive endorsement, in *Corrosion Proof Fittings v. EPA* (1991),[89] the Fifth Circuit struck down an EPA regulation on the grounds that the cost-benefit justification was inadequately conducted.[90]

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80. *Id.* at 19.

81. 5 U.S.C. §§ 601-12.

82. *See* LUBBERS, *supra* note 46, at 151-52.

83. Some have read *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), for example, to imply the Court's rejection of a cost-benefit default principle. In *Whitman*, the Court interpreted the Clean Air Act to hold that, absent a clear statutory directive, the EPA is not authorized to consider costs in establishing National Ambient Air Quality Standards (NAAQS). *See* Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 237 (2004). However, others like Cass Sunstein read the Court's holding as narrowly tied to the statutory language, which Sunstein argues is particularly clear in disallowing consideration of costs by the EPA. Thus, the decision can be narrowly read as such—not as a wholesale rejection of the cost-benefit logic. *See* SUNSTEIN, *supra* note 10, at 46-47.

84. 213 F.3d 663 (D.C. Cir. 2000).

85. 824 F.2d 1146 (D.C. Cir. 1987).

86. *See, e.g.*, SUNSTEIN, *supra* note 10, at 64.

87. 937 F.2d 641 (D.C. Cir. 1991).

88. 938 F.2d 1310 (D.C. Cir. 1991).

89. 947 F.2d 1201 (5th Cir. 1991).

90. *Id.* at 1229-30. According to the court, the EPA committed a multitude of cost-benefit sins: discounting costs but not benefits, *id.* at 1218, using inconsistent valuations for statistical lives, refusing to quantify certain benefits, and refusing to repeat the analysis with better data supplied by industry, *id.* at 1227. The court remanded for a more adequate analysis. *Id.* at 1230.

In this manner, all three branches of government, from the legislature to the executive to the judiciary, have increasingly demanded cost-benefit analyses as a central aspect of informal rulemaking. Importantly, these measures have been proposed as distinct but necessary extensions to the underlying deliberative impulse of the APA: where notice-and-comment allows only for deliberation among elites, CBA represents diffuse interests by estimating the dollar costs and benefits imposed upon them. Administrative legitimacy, then, rests on both deliberative principles as well as a broad consideration of the consequences on the public at large.

II. THE PROPOSAL

To extend these insights to their logical conclusion, deliberative cost-benefit analysis capitalizes on the deliberative impulse of the Administrative Procedure Act (APA) and advances it into the current cost-benefit regime. Deliberative cost-benefit analysis basically entails the use of deliberative forums when measuring the costs and benefits of a proposed regulatory rule. Deliberative forums constitute gatherings of lay citizens that engage in informed and structured discussion. The goals of the forums are not only to educate, but also to provide opportunities for citizens to reflect on and revise their preferences. In turn, the insights gained from such forums would be used to establish, *inter alia*, appropriate discount rates and citizens' willingness-to-pay for regulatory outcomes.[91] When employed in conjunction with—indeed, as an integral part of—cost-benefit analysis (CBA), the resulting procedure constitutes a more legitimate means of evaluating an administrative rule.

91. There is debate in the literature on the differences between individuals' willingness to pay and their willingness to accept compensation for particular outcomes—a distinction that can best be illustrated by example. In calculating the damages caused by an oil spill, analysts could either measure how much people are willing to pay to avoid or prevent the oil spill or the minimum compensation they would demand before being willing to accept the consequences of the oil spill. Put differently, the decision to clean up the spill could depend either on how much people are willing to pay to have it done or on the compensation necessary for them to agree to forego the task. *See* Jack L. Knetsch, *Biased Valuations, Damage Assessments, and Policy Choices: The Choice of Measure Matters*, 63 ECOLOGICAL ECON. 684, 684 (2007). As a practical matter, however, "economists expect that the difference between [these two measures] will be small in most cases." U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES 60 (2000), http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/Guidelines.html/$file/Guidelines.pdf; *see also* Peter A. Diamond et al., *Does Contingent Valuation Measure Preferences? Experimental Evidence*, *in* CONTINGENT VALUATION: A CRITICAL ASSESSMENT 42, 66 (Jerry A. Hausman ed., 1993) ("[T]here is no basis consistent with economic assumptions and empirical income effects for WTP and WTA to exhibit sizable differences.").

Facilitating implementation, the drafters of the APA were clear that its minimal procedural requirements were not a ceiling but a floor. On this point, the Senate and House Reports agreed:

> This subsection states, in its first sentence, the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings," and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.[92]

As such, the drafters of the APA left ample room for innovative procedures designed to vindicate considerations of necessity and public interest. Deliberative cost-benefit analysis can take advantage of this statutory flexibility in creating more robust valuations of the issues at stake in rulemaking and, in doing so, improve agency decision-making.

A. Deliberative Forums

Just as there are multiple normative foundations for the idea,[93] there are also numerous ways to instantiate the concept of deliberative cost-benefit analysis in practice. Drawing upon the already rich efforts to establish deliberative forums in other contexts, I will discuss only a few possibilities here; but it is important to underscore that the perfect (or what is perceived as such) should not be the enemy of the good. That is, deliberative cost-benefit analysis can only be refined through experience and thoughtful experimentation.[94] Ex ante objections along any one dimension should not result in wholesale dismissal, but rather renewed debate. Accordingly, among current efforts to increase delibera-

92. S. REP. No. 79-752, pt. IV, sec. 4(b) (1945), *reprinted in* S. COMM. ON THE JUDICIARY, LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-46, at 185, 200-01, 259 (1946).

93. *See infra* Part III.

94. For an overview of this literature, see generally JAMES CREIGHTON, THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT 5 (2005) (exploring the "mechanics of public participation"); THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine eds., 2005) (describing practical issues in increasing citizen deliberation); ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 45-174 (2003) (discussing case studies in deliberative democracy); Chambers, *supra* note 19, at 315-18 (surveying efforts to implement deliberative democracy).

tion—including consensus conferences[95] and participatory budgeting[96]—citizens juries and deliberative polls have perhaps been the most successful in generating empirical insights, at least in the United States.

In a citizens jury,[97] a randomly selected and demographically representative panel of citizens, meets for four or five days to examine an issue of public significance. Usually consisting of eighteen to twenty-four individuals, the group is designed to emulate the trial jury and serve as a microcosm of the public.[98] Jurors are paid a stipend for their time and then hear from and deliberate with a variety of expert witnesses. On the final day of moderated hearings, the members of the citizens jury present their recommendations to decision-makers and the public.[99]

Similarly, deliberative polls start with standard public opinion surveys sent to a scientific random sample of the population.[100] Each respondent is asked a series of closed-ended questions after which the participant is invited to spend a weekend of face-to-face discussions at a central site, all expenses paid.[101] During this weekend, briefing materials are sent to the participants and also made pub-

95. *See* Johs Grundahl, *The Danish Consensus Conference Model*, *in* PUBLIC PARTICIPATION IN SCIENCE: THE ROLE OF CONSENSUS CONFERENCES IN EUROPE 31 (Simon Joss & John Durant eds., 1995); Carolyn M. Hendricks, *Consensus Conferences and Planning Cells: Lay Citizen Deliberations*, *in* THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 94, at 80.

96. *See, e.g.*, FUNG & WRIGHT, *supra* note 94, at 11-12; Boaventura de Sousa Santos, *Participatory Budgeting in Porto Allegre: Toward a Redistributive Democracy*, 26 POL. & SOC. 461 (1998).

97. *See* Ned Crosby & Doug Nethercut, *Citizens Juries: Creating a Trustworthy Voice of the People*, *in* THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 94, at 111, 111-19; Graham Smith & Corinne Wales, *Citizens' Juries and Deliberative Democracy*, 48 POL. STUD. 51 (2001); Jefferson Center, Citizens Jury Process, http://www.jefferson-center.org/ (follow "Citizens Jury Process" hyperlink) (last visited Feb. 12, 2008).

98. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 527 (1975) ("[I]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." (citing Smith v. Texas, 311 U.S. 128, 130 (1940))); Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 210 (2007) ("[T]he jury is supposed to be representative of the public; and if it is indeed representative, it should be taken as a more knowledgeable microcosm.").

99. *See generally* Smith & Wales, *supra* note 97.

100. *See* BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 69-71 (2004); Christian List, Robert Luskin, James S. Fishkin & Iain Mclean, Deliberation, Single-Peakedness, and the Possibility of Meaningful Democracy: Evidence from Deliberative Polls (Jan. 4, 2007) (unpublished manuscript, on file with the Yale Law & Policy Review), *available at* http://cdd.stanford.edu/research/papers/2006/meaningful-democracy.pdf.

101. *See* ACKERMAN & FISHKIN, *supra* note 100, at 47.

lic. The participants then engage in dialogue with competing experts based on questions they develop in small group discussions with trained moderators. After deliberations, the sample is again asked the original questions. Any resulting statistically significant changes in opinion can presumably be explained by the deliberation. In theory, at least, the result would represent the conclusions the public would have reached had it the opportunity to become more informed and engaged by the issues.[102]

Building upon these models, administrative agencies implementing deliberative cost-benefit analysis would structure analogous sessions in order to measure the legitimate costs and benefits of proposed regulation. These valuations would be determined by citizens once they were fully informed and had the chance to reflect upon their preferences. But first things first: How would these lay citizens be recruited? Jury-list sampling and list-assisted random-digit-dialing are two of the most promising possibilities, especially as both rely on already existing infrastructures. First, as its name suggests, jury-list sampling would follow the lead of the Jury Selection and Service Act of 1968,[103] which encourages the use of voter registration lists as the foundation for "source lists."[104] Some have also advocated supplementing this list with names from a national database of driver registration lists in an attempt to garner a wider population.[105]

Since deliberative forums should be representative of the larger population, organizers would call members of this list and administer questionnaires requesting information about various demographic characteristics, including gender, race, educational background, and age. These questionnaires could also be mailed, though evidence suggests that relative response rates would depend on the subject matter at hand.[106] Based on the collected data, administrators would then select a sample that reflected the demographic characteristics of the target population at large. When selecting jurors, organizers should strive for diversity not only across demographic variables, but within them as well. For

102. *See* James S. Fishkin, Deliberative Polling: Toward a Better-Informed Democracy (2004) (unpublished manuscript, on file with the Yale Law & Policy Review), *available at* http://cdd.stanford.edu/polls/docs/2003/executivesummary.pdf.

103. 28 U.S.C. §§ 1861-69, 1871 (2000).

104. This method is also suggested in David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 92 (2005). For a discussion of how my proposal differs from that of Fontana's, see *infra* Part II.B.

105. Fontana, *supra* note 104, at 92.

106. *See* FLOYD J. FOWLER, SURVEY RESEARCH METHODS 44 (2002) ("It seems reasonable, and is consistent with existing evidence, that respondent interest in the subject may play a bigger role in response to mail surveys than when an interviewer enlists cooperation.").

example, educational levels should vary for men and women, while each racial group should also feature a mix of gender as well as age.[107]

In light of well-documented factors tending to skew the demographics of jury pools[108] and driver registration lists,[109] however, an alternative approach would seek to increase representativeness through list-assisted random-digit-dialing. This technique uses information about which one-hundred blocks would be most likely to contain residential numbers, since residential (as opposed to business or non-functioning) numbers are more likely to be clustered within groups.[110] From this list, one can then generate a subset of telephone numbers to call by randomly selecting a working one-hundred block and then adding a value from zero to ninety-nine. This process is repeated as many times as necessary to produce the desired sample size, with an allowance for non-

107. *See* JEFFERSON CTR., CITIZENS JURY HANDBOOK 32 (2004), http://www.jefferson-center.org (follow "Citizens Jury Handbook" hyperlink).

108. *See, e.g.*, Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL'Y & L. 445, 446 (1994) ("[R]acial and ethnic minorities, as well as the young, old, and poor, are consistently underrepresented in most federal and state court jury pools and wheels"); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 244 (1994) ("Because of differential registration rates by economic and racial groups . . . the use of [voter registration] lists alone does not lead to a representative cross-section of the community.").

109. Brown, *supra* note 108, at 454 ("Yet driver lists, while they document low-income citizens and racial minorities in numbers closer to their actual proportions in the population, still somewhat under-represent those groups . . . [as well as] the elderly and women, both of whom drive less than their younger, male counterparts." (citations omitted)).

110. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., RANDOM-DIGIT DIALING SURVEYS 6 (2000), http://www.huduser.org/Publications/pdf/rddlarge98.pdf (describing concepts and procedures used to conduct a random digit dialing). Lists of working 100-blocks used by survey firms are sold by a handful of firms that specialize in providing such information. These lists of working 100-blocks are often culled from the Master Exchange Data Base, which consists of a computerized listing of individual telephone numbers, along with the relevant state, county, and zip codes. This information, in turn, is used to determine whether there are at least five working telephone numbers in each exchange and two in each 100-block, and the resulting list can then used as the basis for developing a survey sample. *Id.* In this manner, the technique differs from traditional random-digit dialing, in which selection of telephone numbers is purely random. *Id.* The Jefferson Center has estimated that the purchase of random telephone numbers should be budgeted for about $1,500. *See* JEFFERSON CTR., *supra* note 107, at 19-20.

responses.[111] The larger the sample, and the response rate, the greater the confidence one can have that the random sample is a microcosm of the public.[112]

Those selected through either procedure would then be recruited heavily to attend the deliberative gathering and would be offered a stipend for their work. If initial tests of deliberative cost-benefit analysis yielded low response rates, reformers could also consider legislation that would make service on such deliberative panels mandatory, modeled again after jury service.[113] More research, of course, would need to be conducted into this possibility.[114]

Once individuals are selected and agree to participate, they would then be sent a briefing book regarding the rule under consideration as well as its underlying rationale. To facilitate a balanced view, opponents of the rule would be invited to submit rebuttal evidence and contrasting considerations. Citizens would be encouraged to cross-examine expert witnesses and to avoid taking expert testimony at face value. During the resulting deliberations, discussion would be led in small-groups by moderators who would be trained to facilitate the debate. Each participant would be encouraged to share his or views on the public goods in question, including personal testimony or objections to the empirical evidence. After a sufficient amount of deliberation, perhaps signaled by an anonymous motion and majority vote to close debate, participants would then be given surveys asking them how much they would be willing to pay for the various goods subject to regulation. Just as in deliberative polls, the resulting aggregate values should represent preferences that are better informed and take into account the public nature of the goods in question.

Due to cost considerations, these forums need not be used for all rules, but they would be especially necessary for those rules that attempt to value goods for which no ready market exists. Such forums might not, for example, be used for rules promulgated by the Securities and Exchange Commission in which the costs and benefits are largely measured in terms of the impacts on robust private securities markets.[115] In addition, citizen deliberation is particularly important when valuing goods that are politically salient or that resonate with social meaning, lest the decision be—or be perceived to be—left to unelected techno-

111. *Id.* at 6-7.

112. *See* Robert C. Luskin, James S. Fishkin, Dennis L. Plane, Deliberative Polling and Policy Outcomes: Electric Utility Issues in Texas 5 (Nov. 1999) (unpublished manuscript), *available at* http://cdd.stanford.edu/research/papers/2000/utility_paper.pdf.

113. *See, e.g.*, Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69, 1871 (2000).

114. David Fontana's deliberative notice-and-comment model suggests the use of summons procedures to require participation. Fontana, *supra* note 104, at 93. In contrast, however, Fishkin's deliberative polls rely solely on voluntary participation. Fishkin, *supra* note 102, at 2.

115. *See, e.g.*, Press Release, Securities and Exchange Commission, SEC Begins Small Business Costs and Benefits Study of Sarbanes-Oxley Act Section 404 (Feb. 1, 2008), http://www.sec.gov/news/press/2008/2008-8.htm.

crats.[116] Thus, for example, one would expect to see such rules deployed when calculating the monetary value of human life[117] and the potential impacts of climate change on the environment.[118] To prevent manipulation of the decision of when to use or not to use deliberative cost-benefit analysis, specific agencies that are regularly forced to make decisions about public goods—like the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS)—would use deliberative cost-benefit analysis as a default in place of traditional methods, particularly for "major" rules expected to have impacts of over $100 million.[119]

Another way to instantiate deliberative cost-benefit analysis is by providing opportunities for citizens to determine contested aspects of cost-benefit analyses such as the appropriate population, variables, or discount rates to employ in a study—issues which will be discussed in more depth later.[120] Discounting is the calculation of the present value of a future cost or benefit, based on the premise that a dollar today is worth more than a dollar tomorrow: while waiting for a future dollar to arrive, a current dollar could be earning interest in the bank or elsewhere.[121] Parents, who might be expected to value future generations more heavily, may present vivid reasons drawn from personal experience for using a higher discount rate and convince others accordingly. At the same

116. Some like Cass Sunstein would argue that such politically sensitive situations are precisely when deliberation should not be used since the danger of emotion and irrationality is at a zenith. *See* Sunstein, *supra* note 24, at 1065-73. However, such worries can be mitigated by preserving the role of experts, *see infra* Part IV.B, and helping to ensure that individuals involved in the deliberations are informed of the actual magnitude of risks and the ways in which such risks can be exaggerated.

117. *See* Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941 (1999) (discussing issues in valuation of human life); Katharine Q. Seelye & John Tierney, *E.P.A. Drops Age-Based Cost Studies*, N.Y. TIMES, May 8, 2003, at A34 (reporting public controversy over age-based valuations of human life and so-called "senior death discount").

118. *See, e.g.*, Danny Hakim, *Battle Lines Set as New York Acts to Cut Emissions*, N.Y. TIMES, Nov. 26, 2005, at A1 (describing a clash between politicians, environmentalists, and manufacturers over a regulation to cut automotive emissions of greenhouse gases); Stephen Power, *EPA Chief Makes Political Target*, WALL. ST. J., Feb. 19, 2008, at A7 (describing the EPA Administrator as a "political target" for Bush administration climate change policies).

119. This requirement would align with past Executive Orders that, in effect, require CBAs for "significant regulatory action" or "major" rules projected to have an annual economic effect of $100 million or more. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (President Reagan) and Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (President Clinton); *see also supra* note 65 and accompanying text (discussing definition of "major" rules).

120. *See infra* Part III.D.

121. *See* Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 2043 (1998).

time, experts might present diverging arguments for lowering or raising the rate based on economic growth[122] or risk and uncertainty.[123] Given that such decisions are inevitably discretionary at the margins, they must not only be open to informed debate, but also placed in the hands of those most affected by them.[124] Thus, a deliberative panel could be charged with reaching consensus on the appropriate discount rate to use.[125]

Experts would still play a central role.[126] Citizens would not be given *carte blanche* in making decisions—about the discount rate or otherwise—but rather, here, would be charged with choosing a rate within the existing range of expert disagreement.[127] Regulatory agencies, for example, generally use discount rates of either three or seven percent, and the Office of Management and Budget's most recent guidance recommends that agencies should report costs and benefits using both rates.[128] Given these expert disparities, citizen input would therefore be valuable in choosing between these two rates and evaluating the competing explanations proffered for both. In this manner, there is ample room for

122. *See, e.g.*, Geoffrey Heal, *Discounting: A Review of the Basic Economics*, 74 U. CHI. L. REV. 59, 71-77 (2007) (discussing various factors that inform the choice of discount rate, including economic growth); Ari Rabl, *Discounting of Long-Term Costs: What Would Future Generations Prefer Us To Do?*, 17 ECOLOGICAL ECON. 137, 139 (1996) (explaining that conventional discount rate analysis considers the creation of wealth rather than only intergenerational redistribution); Dexter Samida & David A. Weisbach, *Paretian Intergenerational Discounting*, 74 U. CHI. L. REV. 145, 169 (2007) ("[L]ong-run discount rates should instead be limited to expected long-run economic growth because this is the true opportunity cost.").

123. *See* W. Kip Viscusi, *Rational Discounting for Regulatory Analysis*, 74 U. CHI. L. REV. 209, 221 (2007) (arguing for a "riskless rate of return"); *cf.* Louis Kaplow, *Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U. CHI. L. REV. 79, 106-07 (2007) (demonstrating different considerations in factoring in uncertainty and risk assessments for intergenerational comparisons).

124. *See infra* Part III.D.

125. *See* MICHAEL SAWARD, DEMOCRATIC INNOVATION: DELIBERATION, REPRESENTATION AND ASSOCIATION 36-38 (2000) (discussing advantages and disadvantages of consensus-based versus majoritarian decision rules).

126. *See infra* Part IV.

127. *See* Edward R. Morrison, Comment, *Judicial Review of Discount Rates Used in Regulatory Cost-Benefit Analysis*, 65 U. CHI. L. REV. 1333, 1336 (1998) ("Agencies exhibit striking inconsistencies in their use of discount rates.").

128. *See* Viscusi, *supra* note 123, at 224 (after surveying all regulations reported to Congress by OMB in 2005, reporting that "the OMB guidance of 3 percent and 7 percent discount rates seems to have taken hold"); OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 34 (2003), *available at* http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf ("For regulatory analysis, you should provide estimates of net benefits using both 3 percent and 7 percent.").

bureaucratic discretion that reflects value choices that should, in turn, be constrained by the thoughtful and informed discussion of citizens.

B. Role in the Rulemaking Process

Institutionalizing deliberative cost-benefit analysis as a more formal part of the administrative process would not require radical changes in either judicial review or implementing legislation. Certainly, legislation could mandate or simply create incentives for agency adoption—and such efforts should be vigorously advocated. Part I, however, has already described various reform movements underway that would likely support the proposal. Moreover, increased interest group pressure from parties seeking to legitimize the rulemaking process has resulted in norms favoring increased citizen participation. Agencies, for example, already voluntarily engage in limited forms of stakeholder consultations, focus group meetings, and town hall style meetings for open discussion.[129]

To illustrate, the EPA recently worked with the Jefferson Center, the "originator" of the citizens jury process,[130] to conduct a citizens jury on global climate change.[131] Eighteen citizens from a thirty-five-mile radius of Baltimore, Maryland, were chosen from a randomly identified jury pool to serve as a representative microcosm of the public. Over five days, the jury heard expert witness presentations on a range of issues related to global climate change.[132] The citizens jury focused on which potential impacts of climate change were of most concern, and what, if anything, should be done to address the problems. Jurors deliberated and developed recommendations for policy makers to consider, while also reporting changes in their own perspectives.[133] While this example illustrates how agencies could either directly organize forums, or contract out the task to research or non-profit bodies, it also suggests that the institutional momentum for reform already exists.

To further see how deliberative cost-benefit analysis would fit into current administrative practices, it is helpful to distinguish it from David Fontana's re-

129. *See, e.g.*, Press Release, Am. Health Care Ass'n, Long Term Care Profession, At HHS/OMB Town Hall Meeting, Outlines Its Concerns Regarding Economic Impact of Health Care Regulations (Nov. 4, 2005), http://www.ahca.org/news/nr051104.htm (describing a town-hall meeting on economic consequences of health care regulation sponsored by HHS and OMB).

130. *See* Jefferson Center—Welcome to the Jefferson Center, http://www.jefferson-center.org (last visited Apr. 7, 2008) (describing the Jefferson Center as the "Originator of the Citizens Jury Process").

131. *See* JEFFERSON CTR., CITIZENS JURY: GLOBAL CLIMATE CHANGE 1 (2002), http://www.jefferson-center.org (follow "Past Projects" hyperlink; then follow "Citizens Jury on Global Climate Change—2002" hyperlink).

132. *Id.* at 1.

133. *See id.* at 20 (reporting juror comments).

cent proposal for "deliberative notice-and-comment" (DNC).[134] Essentially, Fontana proposes a two-step process whereby stakeholders and lay citizens would be summoned to participate in "randomly organized juries" with the goal of providing an evaluative report to the agency about a proposed rule.[135] In place of regular notice-and-comment, individuals would be asked to deliberate about the merits and drawbacks of a rule, the results of which the agency would have to take seriously before deciding to eventually accept or reject them.[136] Agencies would have an incentive to employ DNC since the resulting rule would receive more deference if the rule was challenged in court.[137]

Fontana's proposal—though a step in the right direction—wholly ignores, however, the de facto centrality of CBA in formulating the rule itself. Consequently, he fails to extend the insights of the APA into the actual—and often dispositive—practices employed by administrative officials who draft the rules, inviting citizen input only after the rule has been proposed. In this sense, his proposal and that of deliberative cost-benefit analysis part ways entirely. Simply asking citizens to evaluate a rule ex post heightens the possibility for underlying cost-benefit studies to be seen as expert, technical and thus worthy of deference. Indeed, ample evidence suggests that numbers tend to have an "anchoring" effect on group judgments,[138] while unquantifiable benefits are often ignored in favor of quantifiable costs, thus biasing against new regulation.[139] Deliberation, as it were, must occur from the ground up.

At the same time, the two proposals are not mutually exclusive: one could imagine a deliberative cost-benefit analysis followed by DNC. In this sense, both procedures highlight different functions for deliberation. Fontana views deliberation as a means for adopting or rejecting a rule. Deliberative cost-benefit analysis, by contrast, views it as a necessary feature of the rule's expert evaluations and perceived consequences. In other words, citizens must play an important role in measuring the rule's effects on society. Not surprisingly, then, the two proposals also diverge in their strategies for agency adoption. Fontana

134. Fontana, *supra* note 104, at 82.

135. *Id.* at 91-96 (describing DNC).

136. *Id.* at 95.

137. *Id.* at 110.

138. *See* Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 526 (1996) (reporting that plaintiffs' requested amounts as an anchor that had a linear effect on compensation awards); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 494-95 (1989) (finding an essentially linear relationship between the amount requested and the amount awarded).

139. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1579 (2002) (arguing that unquantifiable benefits and readily quantifiable costs tend to skew decision-making against increased environmental protection).

argues for "deliberative deference,"[140] a "form of judicial review, created to entice agencies to use participatory schemes of rulemaking [that] would make it quite difficult to obtain pre-enforcement review of a legislative rule," and an "extremely deferential standard of review once that rule made it into court."[141] Here, agencies presumably would be motivated to use DNC since more deliberation would necessarily imply greater deference from the courts.

While deliberative cost-benefit analysis would certainly benefit from such shifts in existing doctrine and the likely necessary amendments to the APA, existing features of the policy-making toolkit already make deliberative cost-benefit analysis potentially attractive to agencies. Unlike DNC which calls for deliberation over the proposed rule, deliberative cost-benefit analysis would still be only one factor—albeit an important, presumptive one[142]—in choosing which rule to propose in the first place. Because agencies would be interpreting executive orders requiring CBA,[143] they would likely use "guidance documents" to promulgate the procedure, thus allowing for experimentation and evaluation, subject only to limited judicial review.[144]

Moreover, the same policy motivations underlying the rise of negotiated rulemaking would also support deliberative cost-benefit analysis. To recall, members of negotiated rulemaking committees determine what factual information and data are necessary to make a reasoned decision, analyze that information, and examine the relevant legal and policy issues.[145] Its proponents argued that the technique would decrease the threat of legal challenge, since rules developed by the consensus of affected parties would be less likely to generate subsequent conflict and disagreement.[146] As a result, the agency would save both time and resources during the rulemaking process by addressing objections and incorporating information, thus securing buy-in from interested parties more

140. Fontana, *supra* note 104, at 89.

141. *Id.*

142. Just as Cass Sunstein argues for regular CBA, deliberative CBA "should command such a consensus, at least as a presumption," and the presumption in favor of CBA should operate regardless of political commitments. SUNSTEIN, *supra* note 10, at 20.

143. *See supra* note 65.

144. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1391 (2004). Even if a court considers the document to be a "final agency action," it may not be "ripe" for review. Util. Air Regulatory Group v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003) (holding that a challenge to EPA manual provisions requiring greater monitoring in permits was unripe); *see also* Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 14 (D.C. Cir. 2005) (refusing to review a survey protocol because the document was non-binding).

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

146. *See* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 59 (1982).

effectively ex ante.[147] The same efficiency concerns would make deliberative cost-benefit analysis appealing as well.

A growing body of evidence, however, suggests that negotiated-rulemaking has fallen short of these expectations, with such rules taking just as long to promulgate as before, with little decrease in the likelihood of litigation.[148] Though more data are necessary before reaching a firmer conclusion, there are multiple reasons to think that parties would be less likely to challenge a rule after deliberative cost-benefit analysis relative to negotiated rulemaking. Most importantly, the former involves lay citizens who are more likely to be disinterested relative to stakeholders in negotiating committees. As a result, interest groups may be more hesitant to challenge a rule based on the considered judgment of the general public, especially if such rules are perceived as more legitimate and less likely the product of captured agencies or rent-seeking parties.[149] If deliberative forums are well-publicized, particularly contentious proposed regulations may gain broader public support, which would in turn place pressure on overly-litigious parties not to bring suit.[150] Finally, administrators may simply believe that the technique is a more analytically sound tool for measur-

147. *Id.* (arguing that regulatory negotiation can head off the "wrangling and disputes" that make "regulations take an enormously long time to become effective").

148. *See, e.g.*, Steven J. Balla & John R. Wright, *Consensual Rule Making and the Time It Takes To Develop Rules*, *in* POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY 187, 203-04 (George A. Krause & Kenneth J. Meier eds., 2003) ("Our research demonstrates . . . that rules to which regulatory negotiation was applied took longer to issue than those developed through conventional proceedings, despite the fact that agencies were more likely to conduct regulatory negotiations in situations that were amenable to relatively rapid resolution. In general, we find no evidence that consensual rule making reduces the time it takes to develop rules."); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1335 (1997) ("Negotiated rulemaking does not appear any more capable of limiting regulatory time or avoiding litigation than do the rulemaking procedures ordinarily used by agencies . . . . The litigation rate for negotiated rules issued by the EPA has actually been higher than that for other significant EPA rules."). *But see* Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 625 (2000) (finding that participants in selected negotiated rulemakings had higher levels of satisfaction with the process).

149. *See* Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1209-10 (1994) (characterizing negotiating rulemaking as "similar to a contract negotiation in which all parties expect to gain from an agreement but where the gains can be divided up in different ways").

150. At the same time, it is also possible that deliberative polls could increase public awareness and thus motivate even more individuals to challenge the rule; the ultimate outcome is an empirical question.

ing public costs and benefits,[151] and thus make a professional judgment to adopt the practice.

Previous empirical efforts suggest that deliberative cost-benefit analysis would be successful in the regulatory context. For example, between 1996 and 1998, eight Texas electric utilities used deliberative polls to determine what energy options citizens preferred to meet future electricity requirements.[152] As regulated monopolies, all electric utility companies in Texas had to periodically submit an Integrated Resource Plan for meeting the service territory's electricity needs. As part of this process, they were required by the Public Utility Commission to take customer preferences into account.[153] But meaningful and informed preferences had been hard to uncover, which helped motivate the utility companies' decision to use deliberative polls.[154]

The polls combined telephone surveys with town meetings where customers learned more about energy choices and discussed the issues with each other and panels of experts. Regulatory staff of the Texas Public Utility Commission participated as Advisory Group members, small group moderators, while the Commissioners served as expert panelists.[155] After deliberating, they responded to the initial survey again, this time on the basis of their informed opinions.[156] Across the eight polls, the percentage of those willing to pay more for alternative and renewable energy sources rose dramatically.[157] One of the companies, West Texas Utilities, for example, discovered that informed customers were almost twice as likely to support energy research even if such research raised rates. The percentage of deliberative poll participants agreeing to this proposition soared from seventeen percent to thirty-one percent after they were educated on the benefits of research expenditures.[158] Citizens became committed to paying more in order to encourage public goods like research and development.

Another Texas public utility, Central Power and Light, drew upon similar results from its deliberative poll when deciding to charge each of their customers an additional twenty-five to fifty cents per month to build a new wind farm.[159] After the regulatory plan was challenged, the utility referred to a par-

151. *See infra* Part III.

152. Luskin, Fishkin & Plane, *supra* note 112, at 4.

153. *Id.* at 3.

154. *See, e.g.*, Larry Jones, *Educated Opinions*, ELECTRIC PERSP., Jan./Feb. 1997, at 10-11.

155. *See* R.L. LEHR ET AL., LISTENING TO CUSTOMERS: HOW DELIBERATIVE POLLING HELPED BUILD 1,000 MW OF NEW RENEWABLE ENERGY PROJECTS IN TEXAS 9 (2003) (unpublished technical report), http://cdd.stanford.edu/polls/energy/2003/renewable_energy.pdf.

156. *Id.*

157. *Id.* at 6.

158. *Id.* at 12.

159. *Id.* at 8.

ticipants' survey conducted more than a year after the original deliberative poll. Central Power and Light provided the participants with information on the wind project, explaining the higher cost and asking whether the amount was too much or too little. The participants responded that the company's plan was acceptable and that the company might consider expanding clean energy options even more.[160] More than a year after the initial deliberative poll, participants' opinions held firm on their willingness-to-pay more for renewable sources.

What these examples demonstrate in addition to the real potential of deliberative forums to change individual preferences are the incentives that agencies already possess to engage in the practice. In Texas, Central and South West Corporation had turned to deliberative polls in a genuine attempt to determine what values its customers placed on various energy options early enough to incorporate the feedback into their Public Utility Commission plan. As regulatory case manager Ron Ford explains: "We considered the more traditional approaches to customer involvement, such as telephone surveys, focus groups, town meetings, or advisory groups," but "none of the methods gave the level of involvement that we were seeking."[161] Because power plants could cost as much as $100 million to build, they felt that "customers' input needed to be more than a top-of-the-head opinion."[162]

As such, agencies already have a host of reasons to pursue deliberative cost-benefit analysis, and radical changes in judicial doctrine or large-scale statutory reforms are not necessary to encourage its adoption. According to one senior vice president at the Texas utility, "[i]t may have been a risk to take this type of approach in the old world, but those days are gone .... As we move into a new era, utilities are going to have to find new ways of identifying what their customers want, as well as ways of responding to those expectations."[163] Deliberative cost-benefit analysis—just like normal cost-benefit analysis—should not place agencies in an "arithmetic straightjacket," but rather present a strong presumption that would constitute an important legal and policy advancement for the rulemaking process as a whole.[164]

III. Evaluating Deliberative Cost-Benefit Analysis

Deliberative cost-benefit analysis encourages the reconciliation of principles underlying deliberative democracy and the cost-benefit regime, and encourages agencies to explore ways to manifest this ideal. At bottom, both deliberation and cost-benefit analysis (CBA) mitigate the democratic deficit created

160. *Id.*

161. Jones, *supra* note 154, at 10.

162. *Id.* (quoting James Fishkin who helped to organize the polls).

163. *Id.*

164. Sunstein, *supra* note 10, at 22.

by administrative delegation in different, but complementary, ways. On the one hand, the Administrative Procedure Act (APA) creates an avenue for judicially supervised participation and information-sharing with external parties through notice-and-comment and negotiated rulemaking. Such parties, however, are self-selecting and thus non-representative of the citizenry at large. On the other hand, CBA presents a method for taking into account the interests of all affected citizens. These methods, however, often neglect distributional concerns and meaningful avenues for participation.

Accordingly, the underlying foundation for deliberative cost-benefit analysis is deceptively simple: democratically legitimate rulemaking must assess costs and benefits only after opportunities for deliberation with and among non-elite citizens. To demonstrate this proposal's normative force, this Part considers four major criticisms of the current cost-benefit regime and explores how deliberation mitigates each of them.

A. The Aggregation Problem

The first set of critiques centers on the claim that any aggregation device for producing collective choices is arbitrary, and therefore fails to reflect anything meaningful about the preferences or will of the people. This criticism is particularly salient since one of the strongest democratic arguments for CBA rests on the idea that it measures social preferences, and thus reflects the public's desires writ large.

To understand this argument, it is helpful to look at how the technique is applied in practice. Consider a typical CBA conducted by the Environmental Protection Agency (EPA).[165] Federal law currently requires the agency to regulate lead contamination of drinking water.[166] In 1991, the EPA decided to revise its previously issued regulations by conducting a CBA of several proposed rules. Using a three-percent discount rate, the EPA estimated the cost of treating contaminated water that enters a particular distribution system; the cost of maintaining water quality; the cost of replacing lead pipes; the cost of warning the public of high lead levels and informing it of precautions; and the cost of monitoring water quality.[167] For each rule, the EPA then calculated the total cost by aggregating the projected costs for each of the water distribution systems across the country.

In contrast, only some of the benefits of the regulations were monetized. The EPA estimated, for example, that the cost of medical treatment for children with elevated lead levels would be between about $300 and $3,200 per child, the

165. *See generally* ECONOMICS ANALYSES AT EPA: ASSESSING REGULATORY IMPACT (Richard D. Morgenstern ed., 1997) (describing the use of economics at the EPA). This particular example is drawn from Adler & Posner, *supra* note 70, at 172-73.

166. *See* Safe Drinking Water Act, 42 U.S.C. § 300g-1 (2000).

167. *See* Ronnie Levin, *Lead in Drinking Water*, *in* ECONOMIC ANALYSES AT EPA, *supra* note 165, at 205, 216-22.

cost of compensatory education for children with "cognitive damage" would be about $5,800, and the cost of lost future earnings would be about $4,600 per lost point of intelligence quotient.[168] For adults, the EPA estimated individuals' willingness-to-pay at $1 million to avoid nonfatal heart attacks and strokes, $628 per case of hypertension for medical costs and lost productivity, and $2.5 million per death.[169] Total benefits (in terms of costs avoided) were then calculated by multiplying these amounts by the estimated number of cases avoided. As a result, the EPA concluded that total health benefits from corrosion control alone would exceed the total cost by a factor of more than ten to one.[170]

This brief glance at a representative CBA illustrates several practical assumptions underlying the technique. First, the EPA, like other government agencies, uses individuals' "willingness-to-pay" as a measure of regulatory benefits through revealed preference or contingent valuation studies.[171] At its core, revealed preference theory rests on the assumption that when an individual is observed buying a collection of goods, *X*, when she could have bought another collection of goods, *Y*, within her budget, she must have preferred *X* over *Y*, and thus chosen it.[172] As a corollary, the value assigned to the preferred good can be observed through market transactions that presumably reflect the maximum amount of money the buyer was willing to relinquish in exchange for obtaining that good: the buyer's "willingness-to-pay."[173] In this manner, cost-benefit analysts assume that individual market behavior can provide data about individual preferences, and the best way to discover somebody's preferences is to observe her market choices with real consequences that she will have to bear.[174]

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168. *Id.* at 224.

169. *Id.* at 224-25.

170. *Id.* at 223.

171. *See generally* W. Michael Hanemann, *Valuing the Environment Through Contingent Valuation*, 8 J. ECON. PERSP. 19 (1994) (describing the use of contingent valuation methods to value environmental resources); Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 ECONOMICA 243, 243 (1948) (describing revealed preference theory in terms of the "individual guinea-pig, [who] by his market behaviour, reveals his preference pattern"); U.S. ENVTL. PROT. AGENCY, *supra* note 91, at 60-62 (presenting EPA guidance on using willingness-to-pay measures).

172. *See* Amartya Sen, *Behaviour and the Concept of Preference*, 40 ECONOMICA 241, 241 (1973).

173. Similarly, a seller of some good, who receives money in exchange for relinquishing the good, relinquishes it because the amount she can get is large enough for her to be willing to part with the object. Underlying this logic is the notion that there is a minimum amount of money needed to make a seller willing to relinquish the good: the amount referred to as her *willingness to accept*. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 91, at 60-62.

174. An example may help. The hedonic-property-value method, for instance, is often used to isolate the value placed on a non-market good like "clean air." This

Alternatively, some analysts employ what is known as contingent valuation to measure individuals' willingness-to-pay though their stated preferences. Such techniques are often used when it is especially difficult to establish shadow prices through revealed preferences, or when markets are missing due to the non-rivalry or non-excludability of the good.[175] Generally, this method ascertains individual preferences by directly asking people in a survey how much they would be willing to pay for successive additional quantities of the non-market asset.[176] Once the individual values are aggregated, the result should correspond to a market demand curve for the public good.[177] The method is "contingent" because people are asked to state their willingness-to-pay, contingent on a specific scenario or description of the environmental quality.[178]

As these techniques make clear, CBA attempts to aggregate individual preferences in terms of monetary units. Both revealed and stated preference techniques profess to operate under the "neutral" assumption that a dollar is equally valuable to everyone, since "[o]ur only objective general indication is [one's]

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method assumes that individuals place value on some "bundle" of desirable characteristics provided by a unit of chosen property. By controlling for the effects of all other characteristics (e.g., crime rate, quality of schools), analysts then attribute the remaining differences in property value to differences in the value of clean air. Similarly, the travel-cost approach to valuing recreation uses an individual's cost of travel to some recreation site as a measure of that individual's willingness to pay for that recreation site. In turn, the method then uses this information along with the demanded quantity of recreation (perhaps the number of people who visited the site) to estimate society's willingness to pay for the recreation activity. For other examples, see Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 237-47 (1991).

175. *See* Hanemann, *supra* note 171, at 19-21.

176. In some cases, people are asked for the amount of compensation they would be willing to accept to give up these assets. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 91, at 60-61.

177. *Id.* at 61.

178. For example, consider the case of the 1989 *Exxon Valdez* oil tanker that spilled eleven million gallons of oil across Alaska's Prince William Sound. Scientists estimated that between 75,000 and 150,000 birds and more than 600 otters and seals were killed. To estimate the monetary value of the damage, a team of economists used contingent valuation: first, they set up focus groups across the country to give researchers a sense of what people knew about the *Exxon* spill and how they felt. Based on the gathered information, researchers drafted the final questionnaire, which asked how much people would be willing to pay to prevent the damage to the Sound. Eventually, the researchers determined that Americans were willing to pay $31 per household to have prevented the spill. That amount, multiplied by the number of households in America, equaled $2.8 billion—the putative contingent value of the damage caused by the oil spill. *See* Natalie Phillips, *In Public Eye: Spill Toll Higher—State Backed Survey Puts Tab at $2.8 Billion*, ANCHORAGE DAILY NEWS, Jan. 10, 1993, at A1.

money income."[179] In this view, money can serve as a proxy for how much one would gain from the outcome itself. Though many analysts admit that they are measuring "a surrogate [for welfare], of course, and an imperfect surrogate at that," they nonetheless maintain that using money as a measure of welfare is the best of what are inevitably flawed indicators.[180]

Given that CBA uses money as a proxy for aggregating individual preferences, however, it is vulnerable to a host of social choice critiques. Though CBA differs from ordinal voting procedures—the traditional target of social choice—the argument here is not that both yield the same problems in the same way. Rather, their affinities are emblematic of a deeper and analogous class of issues that vex all preference-based theories. Indeed, Kenneth Arrow famously argued that it is impossible for any aggregation mechanism of individual preferences to satisfy five seemingly innocuous and undemanding criteria; as a result, such mechanisms are arbitrary and subject to undemocratic manipulation.[181] Arrow's findings—known as the impossibility theorem—suggested that if any decision-making body has at least two members and at least three options to decide between, then it is impossible to design a social choice function which is not vulnerable to dictatorship or to the strategic manipulation of rules by shrewd political actors, thus questioning the relationship between attempts to aggregate preferences with the democratic project itself.[182]

In a related vein, William Riker attacked the notion of collective choice as a manifestation of some popular will by arguing that there is no such popular will that exists independently of the particular mechanism used to measure it; that is, identical distributions of preferences will yield different social choices for different decision rules.[183] This insight led many to the conclusion that social choice theory had effectively exposed the basic limits of aggregating preferences

179. ABBA P. LERNER, THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS 24 (1944).

180. EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 278 (1978).

181. The first condition is unanimity, whereby any unopposed individual choice should be incorporated in the collective choice. Second is non-dictatorship: the social choice function should not depend only upon the preferences of one individual. The third criterion, transitivity, states that if the collective group prefers A to B and B to C, then A should be preferred to C. The fourth condition is unrestricted domain; there is no restriction on the preferences one can have across available alternatives. Finally, the independence of irrelevant alternatives condition requires that the group's preference between A and B not be affected by non-nominated alternatives, those outside the original subset of options. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 1-6 (1963).

182. *See* Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 971, 984 (1998).

183. *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 239 (1982).

as the basis for democratic interaction.[184] In this manner, CBA's underlying assumptions call into question its democratic resonance, if any. Namely, CBA's reliance on the aggregation of preferences measured by monetary units threatens its ability to produce results not susceptible to political manipulation.[185]

Some theorists have responded, however, by suggesting avenues through which deliberation can help mitigate the social choice critique, and by analogy, CBA's tenuous foundations. David Miller[186] and John Dryzek,[187] for example, argue that deliberation can help relax Arrow's unrestricted domain restriction,[188] thus obviating the notion that collective choice will necessarily be marred by individual, strategic dictators. According to this argument, there are features of deliberation that can help promote preferences that are "single-peaked" in the sense that when all "available options are arrayed on a continuum, the individual's preference must fall continuously on either side of the most preferred position."[189] In other words, single-peakedness implies that

184. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 284 (1988) (noting that Arrow's thesis implies that "results achieved under 'democratic' voting rules are arbitrary"); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1822 (1992) (challenging those who argue for judicial review of legislative judgments on the grounds that democratic rule is "inherently desirable").

185. One might argue that CBA is immune to this set of critiques because it does not depend on an ordinal theory of preferences. This objection would be mistaken. At root, CBA rests on a principle of potential Pareto efficiency, otherwise known as the Kaldor-Hicks criterion. *See, e.g.*, Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2121 (2007) (reviewing BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006)) (discussing the "Kaldor-Hicks criterion, including its many refinements in the discipline of cost-benefit analysis"). On this view, a policy would be justified if enough benefits were generated to potentially compensate those who would be made worse off by the policy, though these compensations need not be made in practice. As a result, the underlying rationale remains that of ordinal Pareto efficiency, on the theory that individual utility need not be compared, as long as a common unit of individual gains and losses (money) were available. *See* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 636-37 (1993) ("Because the Kaldor-Hicks standard, like the Paretian ones, grew out of attempts to avoid interpersonal utility comparisons, the norm is strictly and properly an ordinal one.").

186. David Miller, *Deliberative Democracy and Social Choice*, 40 POL. STUD. 54, 60-65 (1992).

187. DRYZEK, *supra* note 17, at 42-47.

188. This assumption presumes that every logically possible set of individual orderings is included in the domain of the collective choice rule. *See* Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 153 (1970).

189. DRYZEK, *supra* note 17, at 43.

when options are laid out on a spectrum, each individual has some choice they prefer the most, while moving away from this choice in either direction is less preferred. The implication is that voters will understand the choice facing them in the same way, even if they have different optimal points along the continuum; there is only one dimension of choice.[190]

Insofar as single-peakedness allays the social choice critique, deliberation can help citizens form such single-peaked preferences by separating out different dimensions of choice.[191] That is, by requiring that participants give reasons for the alternatives they favor, deliberation will likely uncover whether there are just one or multiple dimensions of disagreement underlying the original set of alternatives subject to CBA. If more than one dimension exists, then discussion can help tease each of them out. Analysts can then split the factors underlying the original decision into their various components such that all preferences are as single-peaked as possible. Resulting cost-benefit studies will reflect a more coherent and well-specified set of policy preferences.

To illustrate, say a city is faced with the choice of whether to meet its energy needs through the construction of a nuclear, coal or gas-fired power plant.[192] It decides to conduct a CBA of each option. There are many dimensions that may underlie the choice: relative costs, environmental sustainability, number of jobs created, and so on. If coal-fired stations were favored on cost grounds, then the issue of environmental sustainability could be detached by conducting a separate CBA on whether the plants should be fitted with carbon scrubbers or other filters at the cost of some loss in output. So two sets of cost-benefit analyses could be carried out: one concerning the ratio of costs to output and another in terms of the costs of environmental technology.

In this manner, by disaggregating the various issues through reason-giving, deliberation can help ensure that information about collective preferences is more consistent and less prone to manipulation. It can also stimulate novel policy options and creative ways of thinking about the problem at hand. Delibera-

190. *See* Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948). More formally, the individual's utility decreases monotonically as the policy moves away from the optimal choice. To illustrate, say voters were faced with a choice between various amounts of public spending (and corresponding taxation) on the local school. Suppose some voter decided that she would only send her child to the school if public spending were high. If public spending were low, she would rather send her child to a private school, thus not receiving any benefits from the local school. Thus, she would least prefer to have a medium amount spent on the local school since not only would she have to pay more in taxes, but her child would not receive any of the benefits of the local school. This voter's preferences—(1) high spending, (2) low spending, and (3) medium spending—would not be single-peaked, since when they were arrayed on an increasing array (low-medium-high) of spending from left to right, her utility would have two local maxima on both ends.

191. Miller, *supra* note 186, at 64.

192. *See id.*

tive cost-benefit analysis thus seeks to rebut social choice critics skeptical about robust notions of democracy and the place of citizens in helping to formulating the rules that govern them.

B. Raw Preferences

The second major justification for deliberative cost-benefit analysis stems from CBA's presumption that administrative accountability is largely a matter of serving citizens' predetermined wants. In this view, individual preferences are assumed to exist wholly independently from attempts to discover and respond to them. This premise, however, is both descriptively and normatively problematic insofar as preferences do not arise outside and apart from their social context, but rather are influenced by both the process and substance of policy-making itself.[193] In other words, preferences are endogenous and can be shaped by those who purport to objectively measure them. Taking such preferences as given not only results in meaningless data, but also misses the opportunity to educate and correct mistaken or distorted beliefs.

Therefore, deliberative forums that provide information and allow for debate have the potential to generate valuations that reflect informed and thus more valid preferences. Full information is important because CBA assumes that measured preferences—whether revealed or stated—represent individuals' decisions made in their real interest. They should reflect what citizens would genuinely want as a matter of policy. Deliberative CBA can help create avenues for greater information-sharing and mutual learning.

For example, say a group of citizens is faced with the question of whether to build a nuclear power plant to meet its energy needs. Consider one individual in this group, Smith, who is well aware that the plant could pose threats to public health and so has gathered all the available information on health risks. Deciding they were not significant enough, she has stated a high willingness-to-pay for the nuclear plant. During deliberations, however, another citizen—Jones—argues vigorously against the plant on environmental grounds, an issue Smith did not even think to consider. As a result, because she cares about the environment, Smith would now try to gather as much information as possible on the plant's environmental risks through available resources and experts. She would then revise her willingness-to-pay for the nuclear plant, thus helping to ensure the contingent valuation was as robust as possible.

Amy Gutmann and Dennis Thompson also point out that being informed of one's risks or told of the probability of their occurrence is a far cry from fully appreciating their dangers.[194] For instance, seeing a co-worker die from lung cancer after constantly breathing workplace fumes is different from being told

193. Reich, *supra* note 13, at 1625-31 (describing "social leaning" arising from "both the process and the substance of policy decisions [that] necessarily generate profound social learning about public values").

194. GUTMANN & THOMPSON, *supra* note 21, at 185.

that one has a one-in-one-hundred chance of contracting cancer from one's assembly-line job. Often, however, one must make choices on, say, which job to take based only on the latter information; these choices are in turn often used to infer the value placed on the job.[195] Thus, deliberative forums can present opportunities in which individual testimonies can render more vivid the nature of the risks at stake.[196] Listening to stories from a first-person perspective would allow people to fully appreciate the nature of the risks at stake. As such, deliberation can help mitigate CBA's reliance on uninformed or misguided preferences, namely, by presenting opportunities for the exchange of information and the fuller appreciation of its implications.

C. Underestimating the Public

Another crucial assumption underlying the traditional economic analysis of public goods—and revealed preference theory in particular—is that people value these goods only in their roles as consumers and producers. If people have concerns about the environment that cannot adequately be expressed through commodity consumption, willingness-to-pay statistics will not capture them. This observation suggests an important role for deliberation not only to help individuals form a collective understanding of the public interest, but also to allow them to revise their market behavior (or, in the case of continent valuation, their stated preferences) accordingly.

Ample research suggests that individuals do not always act out of pure self-interest, but rather develop a greater sense of empathy and the common good through interaction with others.[197] This opportunity to transform and express self-regarding preferences into public-regarding preferences is important in

195. Indeed, the hedonic wage method for calculating the value of a statistical life is premised on just such logic. *See generally* Richard Thaler & Sherwin Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, *in* HOUSEHOLD PRODUCTION AND CONSUMPTION 265 (N. Terlekyj ed., 1976) (describing the hedonic wage method).

196. Again, I anticipate that some like Cass Sunstein would argue that allowing for personal testimony would only exacerbate the infusion of emotion and irrationality that plagues risk analyses. *See* Sunstein, *supra* note 24, at 1065-73. However, such worries can be mitigated by preserving the role of experts who would provide information on the actual magnitude of risks and the ways in which such risks can be exaggerated. Allowing citizens opportunities to appreciate the *nature* of the dangers involved is not the same thing as amplifying them needlessly.

197. *See, e.g.*, JOHN GASTIL, DEMOCRACY IN SMALL GROUPS: PARTICIPATION, DECISION MAKING & COMMUNICATION 103-42 (1993) (describing successful examples of "small group democracy"); Robert Boyd & Peter J. Richerson, *Culture and Cooperation*, *in* BEYOND SELF-INTEREST 111-32 (Jane J. Mansbridge ed., 1990); *see also infra* note 200. *See generally* Tali Mendelberg, *The Deliberative Citizen: Theory and Evidence*, 6 POL. DECISION MAKING, DELIBERATION & PARTICIPATION 151 (2002) (surveying studies).

contexts where people may be especially willing to pay more to prevent greater risks to others, either out of targeted altruism or a broader sense of the common good.[198] Indeed, empirical evidence indicates that deliberation can help develop other-regarding preferences and feelings of trust, cooperation and empathy.[199] Small-group experiments have shown that when verbal interaction leads individuals to perceive a consensus to cooperate, such discussion can become a powerful predictor of actual cooperation.[200]

Another interesting finding from the perspective of deliberative cost-benefit analysis is that no circumstance increases cooperation in social dilemma experiments more dramatically than face-to-face communication.[201] A review of over one-hundred experiments found that face-to-face communication in social dilemma games raised cooperation by forty to forty-five percentage points.[202] Similarly, other experimental studies have shown that discussion can create a norm of group-interest in which individuals identify their own self-interest with the self-interest of every other member of the group.[203] This norm in turn encourages individuals to act with the goal of maximizing the group's interests as a whole, thus reflecting the public rather than private good.[204] By organizing explicit opportunities for robust discussion, deliberative cost-benefit analysis provides insights into how individuals would value social goods when considering the broader public interest.

D. Lack of Democratic Scrutiny

The final class of problems deliberative cost-benefit analysis confronts is the array of administrative decisions routinely made without proper democratic oversight. Such decisions specify a number of variables that can differ from study to study. Each of these variables, in turn, implicates deep value judgments

198. *See supra* Part II.B (discussing changed preferences after deliberation about Texas utilities provision).

199. *See supra* note 197.

200. *See* Norbert L. Kerr & Cynthia M. Kaufman-Gilliland, *Communication, Commitment, and Cooperation in Social Dilemmas*, 66 J. PERSONALITY & SOC. PSYCHOL. 513, 522-24 (1994); *see also* Kelly S. Bouas & S.S. Komorita, *Group Discussion and Cooperation in Social Dilemmas*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1144 (1996).

201. *See* Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, 92 AM. POL. SCI. REV. 1, 12 (1998).

202. *See* David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC. 58 (1995).

203. *See* Robyn M. Dawes, Alphons J.C. van de Kragt & John M. Orbell, *Cooperation for the Benefit of Us: Not Me, or My Conscience*, *in* BEYOND SELF-INTEREST, *supra* note 197, at 97, 108-10.

204. *Id.*

wholly independent from the expertise that administrators profess to possess. As such, any democratically legitimate CBA must be subject to public scrutiny, both in terms of transparency and, more substantively, reflective discussion oriented toward the public interest.

First, any CBA must grapple with what has sometimes been referred to as the problem of "standing."[205] That is, bureaucrats must make decisions about which preferences should matter, or have standing, in the study. In theory, the analyst should measure all of the benefits and costs of a potential rule, regardless of who bears them. In practice, however, CBA routinely rejects many preferences as illegitimate, including those of convicted criminals, illegal immigrants and foreigners, even when the policies may directly impact them.[206] While there may be sound reasons to deny some preferences standing in a CBA, such political decisions on who does and does not count as worthy of inclusion must be in the hands of a democratically accountable body. By posing such questions to a microcosm of the public, deliberative cost-benefit analysis provides this opportunity.

Another major decision that bureaucrats currently control revolves around the issue of how much to discount future benefits and costs. As previously discussed,[207] analysts regularly discount future benefits and costs on the theory that resources in hand today are more valuable than resources available later, because one could invest the resources today and receive some positive return.[208] Such discount rates have the potential to change completely the results of a CBA. When the EPA conducted a study for setting arsenic standards in drinking water, for example, it included benefits stemming from the number of lives saved, valued at $6.1 million.[209] A rival study conducted by a think tank, however, criticized the agency study for not using a discount rate to conclude that the present value of a life-saved was, in fact, $1.1 million—a difference between the two studies of $5 million for each life saved.[210] Though discount rates are often presented as an objective and technical issue, in reality, the decision fundamentally implicates questions about the relative value of present and future members of the political community.

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205. *See* Dale Whittington & Duncan McRae, Jr., *The Issue of Standing in Cost-Benefit Analysis*, 5 J. POL'Y. ANALYSIS & MGMT. 665, 666 (1986).

206. *Id.* at 665, 667-68 (1986). Debates over how to count a policy's benefits and costs to fetuses, non-humans, and the environment also exemplify this issue. *See* William N. Trumbull, *Who Has Standing in Cost-Benefit Analysis*, 9 J. POL'Y ANALYSIS & MGMT. 201, 201 (1990); Richard O. Zerbe Jr., *Comment: Does Benefit Cost Analysis Stand Alone? Rights and Standing*, 10 J. POL'Y ANALYSIS & MGMT. 96 (1991).

207. *See supra* notes 122-128 and accompanying text.

208. *See* Heinzerling, *supra* note 121, at 2043.

209. For a full discussion of this case study, see LISA HEINZERLING & FRANK ACKERMAN, PRICING THE PRICELESS: COST-BENEFIT ANALYSIS OF ENVIRONMENTAL PROTECTION 17-20 (2001).

210. *Id.*

Along similar lines, bureaucrats also implicitly make decisions about the relative worth of past generations when choosing certain variables for analysis. For example, though many agencies base benefit estimates on what is called the "value of a statistical life," others use the "value of statistical life-years," which looks at the number of *years* saved as opposed to the number of statistical *lives*.[211] In effect, such reliance on life-years as opposed to the lives themselves rations regulatory protections or public funding based on age, thus elevating life-saving measures aimed at the young over those that primarily protect the elderly. Yet there is little evidence showing that the elderly value their lives any less than the young, nor are any less willing to pay for regulatory benefits—no matter how many life-years they have remaining.[212] In this manner, the practice of using life-years skews against protections that primarily benefit the elderly.

Furthermore, analysts must also confront the question of what constitutes value for society, manifested in the choice between measuring use-value or non-use value.[213] Use-value is the value that people purportedly receive in the direct, physical use of certain goods or services.[214] In contrast, non-use value consists of the value people receive from appreciating certain goods such as the Grand Canyon from afar, or simply knowing that such goods exist.[215] Thus, while revealed-preference studies may reveal the former, only contingent valuation surveys can capture the latter. More fundamentally, the choice between whether to measure use-value or non-use value represents the abstract but no less significant question of how to conceive of the good life—broadly understood as the kinds of things that people esteem.

The point of underscoring the nature of these decisions is not to say they should not be made, for in any scarce society, they must. However, each decision implicates values that a group of citizens deliberating together—not administrators and experts acting alone—must identify in a transparent and reflective manner. Deliberative cost-benefit analysis advocates a firm policy presumption to create such opportunities for open debate. These commitments not only respect and build upon the deliberative impulse of the APA, but more

211. *See* Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189, 205-06 (2000); Cass Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 413 (2004) ("Along the same lines, many analysts suggest that regulatory policy should focus not on the value of statistical lives but on the value of statistical life-years . . . .").

212. Based on protests from senior citizen groups complaining that the approach wrongly devalued their lives, the EPA recently decided to end its practice of the "death discount," where it considered life-years rather than lives saved. *See* John J. Fialka, *EPA To Stop "Death Discount" To Value New Regulations*, WALL ST. J., May 8, 2003, at D3.

213. *See* Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. REV. 1875, 1906 (2006).

214. *Id.*

215. *Id.*

importantly, render more democratically legitimate the procedures through which coercive regulations are promulgated.

IV. Objections and Answers

Deliberative cost-benefit analysis will likely have its detractors, either at the level of theory or implementation. The next section will anticipate two of the strongest objections: the first more theoretical, the second more pragmatic.

A. Lay Citizens Versus Experts

The first objection will come from those who believe that administrators possess the unique training and expertise to make them *solely* suited to promulgate rules, especially when the rule involves highly complex or scientific judgments. The "civil service system, with its emphasis on merit appointments, expertise and professionalism, rests on the idea of discretion: the idea that administrative officials should be free to employ their expertise and training in pursuit of the policy responsibilities delegated to them."[216] In this view, involving lay citizens in what is inherently an expert enterprise would not only be disruptive, but would also result in greater public harm. Better to entrust agency officials with deploying the various analytic tools and knowledge available to them.

It is important to distinguish, however, between different kinds of expertise, and at what junctures such expertise would influence the rulemaking process. Expertise will no doubt be important in certain information-gathering stages. In particular, it will be critical when such information consists of data on particular immutable facts such as the chemical make-up and health effects of a new proposed drug, or the impact of a chemical on the ozone. Expertise is important here since basic research and risk predictions require techniques culled after years of experience and training.[217]

However, such expertise is inapposite in at least two situations: the first, when the information gathering is aimed at *registering social preferences* and, second, in *circumstances of indeterminacy*, when expertise is successful only in narrowing a range of probabilities. During the former, expertise by itself cannot answer questions that will necessarily require political value judgments such as the appropriate discount rate or questions of standing. Reasonable people can disagree. Moreover, policy analysts currently attempt to register social preferences that are uninformed, self-interested, and wholly private; in light of the Administrative Procedure Act (APA), these premises ring hollow. Therefore,

216. Bryner, *supra* note 5, at 5.

217. Richard A. Posner, Catastrophe: Risk and Response 213-15 (2004) (proposing a center for catastrophic-risk assessment and response, members of which would serve as expert witnesses or advisors).

there is ample room for citizen deliberation over the assumptions underlying preference measurement.

Second, expertise will also be necessary in narrowing ranges of probabilities, whether they include risk profiles or the likelihood of a catastrophic disaster.[218] Within these bounds, there is room for discretion that cannot be constrained by scientific dictates alone. As such, deliberative forums offer citizens the opportunity to offer informed input on how to choose within these reasonable probability bands. Indeed, there is little basis for assuming that lay citizens will be unable to appreciate or comprehend technical information.[219] Doing so underestimates the ability of lay citizens to understand well-presented analyses, and also gives short shrift to the ability of policy analysts to explain and educate. Experts within administrative agencies are continually called upon to translate their judgments and the reasoning behind them for public consumption. Civil servants must regularly present their evaluations to regulatory heads, who are often political appointees and thus not always conversant in the technical details of each rule. In this manner, policy analysts could serve a democratic, educative function in deliberative cost-benefit analysis.

One might also argue that involving lay citizens in the regulatory process only increases opportunities for capture, as business and interest groups will attempt to influence or buy off citizens. Here, more public participation only exacerbates the number of access points for special interests to sway regulatory outcomes. There are a number of responses, however, to this charge. First, compared to the status quo, lay citizens have fewer incentives than career civil servants to be bought off by businesses interests. Unlike civil servants who serve longer tenures and may benefit from the notorious "revolving door" between industry and the government, lay citizens will not possess the same incentives.

Just as criminal jury research suggests that lay citizens take their task very seriously,[220] administrative agencies could also take great care to impress upon participants the important civic function they will be serving. During deliberations, participants would be instructed not to discuss the rule with outside parties. More pragmatically, citizens called to serve on regulatory juries will be randomly selected beforehand, making it difficult for special interest organizations to target those individuals in time. Any lingering bribery attempts could be policed through mandatory disclosure statements.

In short, there are many reasons why insulated expertise should not have a monopoly on the grounds for decision-making. The authors of the APA "hoped for a system in which citizens and representatives, operating through responsive

218. *Id.* at 139-98 (discussing issues in evaluating catastrophic risk).

219. *See* STUART HILL, DEMOCRATIC VALUES AND TECHNOLOGICAL CHOICES 55-89 (1992) (providing an optimistic account of lay citizens' abilities to assess risks).

220. *See, e.g.*, Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1148 (2001) ("[S]tudies indicate that, at least from juror reports, there is little evidence that juries take their task lightly. All of the reports strongly suggested that jurors were motivated to take the task seriously.").

but expert organs, would make deliberative decisions about the basis system of public law."[221] In this spirit, deliberative cost-benefit analysis seeks to be complementary to, not mutually exclusive with, the important function of experts in a modern democracy.

B. Costs

The second main objection will likely center on the costs of implementing deliberative costs-benefit: ironically, critics will ask, do the benefits outweigh the costs of deliberative cost-benefit analysis? The easiest response, unlikely to convince detractors, will be that the normative requirements of the APA cannot be subjected to blind considerations of efficiency; thus, expenses should not be a dispositive concern. For those remaining unconvinced, however, administrative agencies already engage in a number of efforts to increase public participation and lay citizen involvement. Therefore, it is reasonable to predict that deliberative cost-benefit analysis would not create burdens that depart radically from the status quo.

To illustrate, the expenses of negotiated rulemaking already include those of hiring experts, soliciting testimony, and providing rooms and staff. The only added costs of deliberative cost-benefit analysis, then, would be the expense of transporting, say, fifteen or twenty citizens and providing stipends and lodging.[222] These costs, while not trivial, are arguably worth the trade-off in increasing rulemaking legitimacy, and would also likely confer positive externalities on citizen education.

To put some harder numbers on the analysis, according to the Jefferson Center, the cost for a classic citizens jury can range anywhere from $35,000 to $90,000 depending on the issue's scope.[223] Factors that most affect cost are geographic breadth, the number of jurors and how much staff time is needed to manage the project. The more complex or contentious the issue under consideration, the more staff time will be required in setting up a credible advisory committee and finding appropriate witnesses. Given these variable dimensions, deliberative cost-benefit analysis should be subject to the same cost-minimization efforts that administrative agencies already undertake for notice-and-comment, stakeholder meetings, and consultations.

One could imagine several cost-cutting measures. For example, agencies may attempt to recruit representative samples of participants not from the entire national population, but more localized areas that correspond to their regional offices, yet still reflect diverse socio-economic or cultural perspectives. Alternatively, one nationally representative deliberative jury could be asked to

221. CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 325 (1997).

222. For one attempt to calculate the cost and explore the logistics of deliberative forums, see ACKERMAN & FISHKIN, *supra* note 100, at 221-28.

223. Jefferson Center—Frequently Asked Questions, http://www.jefferson-center.org (follow "FAQ" hyperlink) (last visited Feb. 8, 2008).

consider a number of questions that would then inform a host of studies. Furthermore, it is also important to keep in mind that the direct costs of carrying out deliberative cost analysis have the potential to be dwarfed by the actual costs saved. It would not take much in the way of increased benefits or decreased costs of a rule—whether in time-saved or litigation avoided[224]—to enable the procedure to pay for itself, given that the annual costs imposed by regulatory rules currently range from $40 to $46 billion.[225] In this manner, while the net monetary burdens of deliberative cost-benefit analysis will ultimately be an empirical question, there are a number of reasons to think the marginal costs would be well worth it.

Conclusion

The Administrative Procedure Act celebrates the deliberative impulse in regulatory rulemaking. Notice-and-comment procedures invite administrators to deliberate with external parties under the watchful eye of the courts. Because these parties are often unrepresentative, however, a growing chorus of reformers touts cost-benefit analysis as a ready substitute that properly considers the preferences of all citizens. By aggregating individuals' willingness-to-pay, cost-benefit analysis appears both expert and objective. At face value, then, deliberation and cost-benefit analysis seem at cross-purposes. Where one empowers lay citizens to shape the rules that govern them, the other injects much needed rationality and expands the circle of interests considered.

These apparent disagreements frequently bleed into political rhetoric. Traditionally, free-market conservatives are styled as the champions of cost-benefit analysis in their attempt, say liberals, to foster deregulation in favor of big-business. At the same time, liberals—comfortably ensconced at EPA, say conservatives—simply allow their indeterminate beliefs about equity and fairness to dictate their decisions.

Deliberative cost-benefit analysis explodes these false dichotomies. Gathering people to discuss their priorities before asking how much they would be willing to pay for different outcomes ensures that measured costs and benefits represent something meaningful: preferences that are informed and that weigh the public interest. Deliberative cost-benefit analysis thus offers something for both sides of the ideological spectrum. It also offers a powerful way to resolve the administrative state's ongoing struggle for expertise and public participation. Experts would serve a central role in informing and empowering citizens. Citizens, in turn, would provide the critical data necessary to expertly evaluate the social consequences of a regulatory rule. This reflexive relationship magnifies both the normative pull and the pragmatic importance of this proposal.

The time for deliberative cost-benefit analysis is ripe.

224. *See supra* notes 146-150 and accompanying text.

225. *See* Office of Mgmt. & Budget, Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations 2 (2007).