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# PARTICIPATION RUN AMOK: THE COSTS OF MASS PARTICIPATION FOR DELIBERATIVE AGENCY DECISIONMAKING

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[T]he notion of direct participation in administrative governance responds to deep strains of individualism and political egalitarianism in the American character. It rekindles the nostalgic image of the town meeting.<sup>1</sup>

America has a paradoxical bureaucracy unlike that found in almost any other advanced nation. The paradox is the existence in one set of institutions of two qualities ordinarily quite separate: the multiplication of rules and the opportunity for access.<sup>2</sup>

The new participation may actually be creating a new influence structure which selective interests, already administratively active, have exploited in hope of greater success; one might well expect the agency-group relations to stabilize within the structure over time without necessarily producing any strong pressures for greater heterogeneity of representation.<sup>3</sup>

## I. INTRODUCTION

Administrative law has somewhat of a fetish for public participation in agency decisionmaking. Over the last thirty years or so, courts,<sup>4</sup> Congress,<sup>5</sup>

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<sup>1</sup> JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 23 (1985).

<sup>2</sup> JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENTS DO AND WHY THEY DO IT* 377 (1989).

<sup>3</sup> Walter A. Rosenbaum, *The Paradoxes of Public Participation*, 8 *ADMIN. & SOC.* 355, 374 (1976).

<sup>4</sup> *Cf. Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (noting that the public interest includes consideration of aesthetic, conservation, and recreational needs, and that the Federal Power Commission alone could not protect these interests).

<sup>5</sup> The earliest modern experiments with mass participation in administrative decisionmaking took place in the antipoverty programs of President Lyndon Johnson's Great Society. *See, e.g.*, *Demonstration Cities and Metropolitan Development Act of 1966*, Pub. L. No. 89-754, 80 Stat. 1255 (1966); *Economic Opportunity Act*, Pub. L. No. 88-452, 78 Stat. 508 (1964). Many environmental statutes passed during the 1970s and 1980s also contained significant enhanced opportunities for participation in agency decisionmaking. *See, e.g.*, *National Environmental Policy Act of 1969*, 42 U.S.C. §§ 4321-4370d (1994) (allowing public participation in preparation of Environmental Impact Statements); *Occupational Safety and Health Act*, 2 U.S.C. § 1341 (1994) (allowing for oral legislative-type hearings); *Safe Drinking Water Act*, 42 U.S.C. § 300f (1994). Although the use of mass participation in agency decisionmaking is a fairly recent phenomenon, bureaucracy has always provided for some degree of public participation. The Attorney General's Committee on Administrative Procedure, conducting a case study of rulemaking over fifty years ago, concluded that five basic forms of participation in rulemaking were in widespread use by the close of the 1930s: oral or written communication and consultation, investiga-

and scholars<sup>6</sup> have elevated participation to a sacrosanct status. For example, recent reform efforts are consistently geared to enhance broad-based participation in the agency decisionmaking process.<sup>7</sup> Greater participation is generally viewed as contributing to the democracy, and also to the quality, of decisions by otherwise out-of-touch bureaucrats.<sup>8</sup> Yet participation,

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tions, specially summoned conferences, advisory committees, and informal and formal hearings. ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 103 (1941). See also *infra* notes 21-22, 131 and accompanying text (discussing participation during the Jacksonian era).

<sup>6</sup> See Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 426-33 (1996); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361-62 (1972).

<sup>7</sup> Federal reform proposals have consistently contained enhanced opportunities for broad-based participation. See, e.g., Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 202, 110 Stat. 847 (1996) (adopting reforms designed "to make agencies more responsive to small business"); see also S. 343, 104th Cong. § 625 (1995) (sponsored by Senator Dole) (proposing additional public participation in regulatory analysis by allowing persons subject to major rules to petition the relevant agency or President for cost-benefit analysis and subjecting denial of such petitions to renewed judicial review). But see S. 981, 105th Cong. § 623 (1997) (sponsored by Senators Thompson and Levin) (proposing substantially less onerous cost-benefit assessment requirements than the Dole bill). In addition, many states have experimented with proparticipatory reforms. In Florida, for example, the state legislature adopted a major APA reform bill in 1996 designed to facilitate increased participation in agency decisionmaking, including negotiated rulemaking and more opportunities for the public to challenge rules before they are final. See 1996 FLA. LAWS ch. 96-159 (codified at FLA. STAT. ANN. § 120 (West Supp. 1997)). For discussion of Florida's recent Administrative Procedure Act (APA) reforms, see Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?*, 49 ADMIN. L. REV. 345 (1997). North Carolina has also recently adopted many pro-participatory reforms, including a Rules Review Commission, consisting of eight citizens, which has veto power over proposed agency rules. See N.C. GEN. STAT. § 150B-21.12(d) (1995).

<sup>8</sup> This literature is far too vast to reproduce in full here. See, e.g., Administrative Conference of the United States (ACUS) Recommendation No. 76-1, Public Participation in Administrative Hearings, 1 C.F.R. § 305.71-6 ("persons whose interests or views are relevant and are not otherwise represented should be allowed to participate in agency proceedings whether or not they have a direct economic or personal interest"); ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 7 (1972) (noting that "mass participation may be one of the major innovative forces in developing new issues and refining old issues that have remained on the formal agenda for some time"); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972) (stating that lack of public participation is a major factor in agencies' failure to develop regulatory policy responses to public needs); Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 POL'Y SCI. 165, 181-82 (1993) (noting that participatory policy analysis by bureaucrats is "more than a utopian concept" and holds promise for solving problems of expert decisionmaking); Gellhorn, *supra* note 6 (advocating increased participation in bureaucratic decisionmaking); Stuart Langton, *Citizen Participation in America: Current Reflections on the State of the Art*, in CITIZEN PARTICIPATION IN AMERICA: ESSAYS ON THE STATE OF THE ART 1, 7 (Stuart Langton ed., 1978) (noting that citizen participation serves a "watchdog" function, helping to improve agency decisionmaking); see also CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 105-11 (1970) (noting that evidence of political unawareness and lack of interest in issues are indicative of deficiencies in institutions, not of limitations inherent in individuals).

like citizenship and many other untouchables of modern democracy, has rarely been defined, explored, or criticized.<sup>9</sup>

Interestingly, in other important activities of life, participation does not enjoy this sacred status, nor is participation itself indicative of the quality of the practice. Consider, for example, participation in art. Performance artists enact a ceremony that affirms shared values with an audience. Energetic and enthusiastic spectators, some conversant with the rules of performance and its underlying meaning, might be said to participate as observers.<sup>10</sup> In most instances, though, the demarcation between performer and audience is clear.

In recent years, however, advocates of community theater and amateur music have urged mass participation as a way to smash the elitist distinction between performer and spectator.<sup>11</sup> But while participation in the creation of art may be personally and socially satisfying, no one would suggest that it tells us much about the quality of art. Likewise, *it just does not make sense* to evaluate the quality of a sports event, such as a baseball game, by the sheer number of spectators in attendance or viewers tuned to the television channel. Nor is the number of players or performers indicative of the quality of a game or a show: "We might just as well assess the future of American music by counting the number of amateur musicians."<sup>12</sup>

<sup>9</sup> *But see* THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 86-87 (1969) (criticizing participatory programs for "cut[ting] out that part of the mass that is not specifically organized around values strongly salient to the goals of the program"); GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 362-63 (1966) (observing that the participatory politics facilitated by interest groups must be mediated by government); DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* 159-61 (1969) (explaining problems with "maximum feasible participation" in welfare programs); SIDNEY VERBA & NORMAN H. NIE, *PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY* 341-42 (1972) (suggesting that nonelectoral participation skews policy in favor of particular participants and away from the "public interest").

<sup>10</sup> *Cf.* Edward L. Schieffelin, *Performance and the Cultural Construction of Reality*, 12 *AM. ETHNOLOGIST* 707 (1985).

<sup>11</sup> One author notes that 15% of students in U.S. schools engage in regular musical performance activities, even though a very small number of these students will pursue music professionally. Bennett Reimer, *Is Musical Performance Worth Saving?*, 95 *ARTS EDUC. POL'Y REV.*, Jan.-Feb. 1994, at 2-5. According to Christopher Lasch, who analogizes political participation to participation in competitive sports,

[T]he critics of "passive" spectatorship wish to enlist sport in the service of healthy physical exercise, subduing or eliminating the element of fantasy, make-believe, and play acting that has always been associated with games. The demand for greater participation, like the distrust of competition, seems to originate in a fear that unconscious impulses and fantasies will overwhelm us if we allow them expression.

CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 108 (1979).

<sup>12</sup> *Id.* at 108, n.\*.

While it would be sophomoric to suggest that democracy, like serious music or baseball,<sup>13</sup> ought to be left to the professionals, political theorists have often suggested that mass participation is not always a positive good for democracy. Plato suggested that some elite—not the masses—should govern because of its monopoly on certain skills conducive to collective judgment.<sup>14</sup> And, in the twentieth century, political commentators ranging in ideology from José Ortega y Gasset<sup>15</sup> to Walter Lippman<sup>16</sup> to Hannah Arendt<sup>17</sup> have expressed ambivalence about unfettered participation of the masses in democratic decisionmaking. These theorists perceive mass participation as a threat to democracy, because the masses—the People—may be under- or mis-informed, lost, bewildered, overly self-interested, or simply apathetic.<sup>18</sup> Indeed, recent public attitudes about Congress reaffirm this perception: Congress, the most public and directly participatory institution in our government, is also one of the most disliked institutions of government.<sup>19</sup>

If participation raises problems for democracy, it is certain to raise problems for contemporary democracy's veritable "fourth branch"—administrative agencies. For example, as public participation in agency decisions has increased over the past thirty years, citizens have expressed less, not more, confidence in government. Bureaucrats are perceived today in popular culture as out-of-touch, staid, and lackluster.<sup>20</sup> Perhaps, as oppor-

<sup>13</sup> Democracy is a distinctive practice insofar as it is concerned not only with the enjoyment, inspiration, and education of a state's citizens, but also with producing results which are coercive to non-participants and mediating conflict that is predefined, external to the rules of the game. The connection between sports, music, and democracy has been made before in the legal literature. See, e.g., Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1 (noting that modern electoral democracy is descriptively like a classic American spectator sport, baseball, but should strive to be more like another distinctively American activity, jazz music). Modern efforts to analogize legal institutions to music are not new. See Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

<sup>14</sup> PLATO, *THE REPUBLIC* 233-34 (Richard W. Sterling & William C. Scott trans., W.W. Norton Co., Inc., 1985).

<sup>15</sup> JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 116 (W.W. Norton Co., Inc., 1964) ("When the mass acts on its own, it does so in only one way, for it has no other: it lynches. It is not altogether by chance that lynch law comes from America, for America is, in a fashion, the paradise of the masses.")

<sup>16</sup> WALTER LIPPMAN, *THE PHANTOM PUBLIC* 143-45 (1925) (suggesting that mass participatory democracy fosters a timid conformity to prevailing public opinion).

<sup>17</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 460-79 (1951) (discussing how mass participation, by fostering isolation and loneliness, creates preconditions for totalitarian domination).

<sup>18</sup> See, e.g., JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 166 (Thomas Burger trans., MIT Press 1989) ("Serious involvement with culture produces facility, while the consumption of mass culture leaves no lasting trace; it affords a kind of experience which is not cumulative but regressive.") (footnote omitted).

<sup>19</sup> See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARDS AMERICAN POLITICAL INSTITUTIONS* 148-49 (1995).

<sup>20</sup> See, e.g., PHILIP HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

tunities for access have increased, citizens over the years have had more direct experience with what has always been there—ineffective bureaucracy.<sup>21</sup>

On the other hand, the increase in mass participation *itself* may have adversely affected the quality of bureaucratic decisionmaking.<sup>22</sup> In this Article, I explore the mechanisms by which participation reveals itself in modern bureaucratic democracy. After introducing participation's values and its contribution to various political-theoretic models of agency decisionmaking, this Article examines a particular cost of mass participation<sup>23</sup>—its negative spillover effects on another political ideal, deliberation—and explores this cost in the context of administrative law. I argue that mass participation, while sometimes beneficial to agency legitimacy, may in certain circumstances impair deliberation, which many contemporary administrative theorists perceive as an equally important function of administrative law. A threshold amount of participation is necessary to deliberative decisions, but at some point participation creates significant institutional costs for deliberative administrative process. As a result, the ideals of democratic governance may suffer.

Part I of the Article briefly explores traditional rationales for increasing participation in agency decisionmaking. Participation helps to avoid domination of the political process by factions; it also minimizes many information problems inherent to agency decisionmaking. In addition, participation is often embraced as a political ideal because it treats citizens fairly by allowing opportunities for input, it educates citizens, and it reaffirms citizenship. Administrative agencies provide for both passive and active forms of participation, in a variety of direct and representative ways. In addition to the classic agency mechanism for facilitating citizen participation, namely notice and comment rulemaking,<sup>24</sup> other mechanisms for facilitating mass

<sup>21</sup> In fact, it should come as no surprise that, prior to the growth of mass participation in bureaucracy in the 1960s, efforts to increase participation in agency decisionmaking corresponded with a deterioration in the perceived status of agencies. See LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861*, at 329-32 (1954) (discussing the decline in the perceived status of agencies that accompanied rotation during the Jacksonian era).

<sup>22</sup> Cf. MASHAW, *supra* note 1, at 29 ("Participation has costs as well as benefits."). This too is not inconsistent with experiences in previous eras. See WHITE, *supra* note 21, at 327-29, 332-43 (discussing the effects of increased participation facilitated by rotation on efficiency and accountability during the Jacksonian era).

<sup>23</sup> "Mass" participation is used to describe unregulated, indiscriminate participation before agency decisionmakers that treats all persons, entities, or organizations with claims to interest equally. It contrasts with regulated participation, which discriminates among different claims to interest and does not allow all claims to interest equal standing to participate before an agency. I also use the term to contrast participation facilitated by nonbureaucratic political institutions, such as the legislative or executive branches, discussed *infra* note 46. Mass participation includes both "direct" and "representative" (or "crypto-mass") forms of participation, discussed *infra* notes 109-28 and accompanying text, although it contrasts with regulated or mediated representation.

<sup>24</sup> See 5 U.S.C. § 553 (1994) (agencies must "give interested parties an opportunity to participate in rulemaking through the submission of written data, views, or arguments"); see also CORNELIUS M.

participation in administrative procedure include initiatives, public surveys, open meetings and public records, negotiated rulemaking, site-specific dispute mediation, citizens' review panels, and advisory commissions.<sup>25</sup>

In Part II of the Article, I briefly present various political-theoretic models that have been used to describe agency decisionmaking. I then explore the purposes of participation in the context of each model. Expertocratic models view the decision process primarily as an exercise in scientific validation by virtue of the method and culture of the agency experts' profession. A second model, pluralism, views decisions as residual conflict resolution akin to market exchange. A third model, deliberative democracy, has arisen in recent years as an alternative to these expertise and pluralist models. In contrast to the older models, deliberative democracy views agency decisions as providing both for participation and for deliberation as primary, irreducible values.

Part III of this Article explores a tension between participation and deliberation, brought to the fore of administrative law by deliberative democracy. When things work well, the ideals of participation and deliberation converge; the optimal mix of participation and deliberation will ensure breadth as well as depth and focus in agency decisions. Like many ideals in law, however, participation and deliberation often clash. When the ideals produce conflicting demands on decisionmakers or participants, there is a trade-off between participation and deliberation: increased participation comes only at the cost of diminished deliberation. After discussing the existence of the tension and presenting an initial framework for its examination, I explore mass participation in three contexts: citizen suits to enforce federal environmental laws, the preparation of Environmental Impact Statements (EIS) pursuant to the National Environmental Policy Act (NEPA), and the operation of the Government in the Sunshine Act (Sunshine Act).<sup>26</sup>

While threshold levels of participation often improve the quality of agency decisions, participation can—and often does—adversely affect “ordinary” agency decisionmaking in three ways.<sup>27</sup> First, it may, and often does in the context of citizen suits, impair agency agenda setting at the cost

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KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (1994). A recent study of interest group participation in agency rulemaking concluded that “[m]any interest groups surveyed characterized participation in rule making as important as participation in legislation.” Scott R. Furlong, *Interest Group Influence on Rulemaking*, 29 ADMIN. & SOC. 325, 341 (1997).

<sup>25</sup> For an excellent survey of many of these mechanisms, see Daniel J. Fiorino, *Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms*, 15 SCI. TECH. & HUM. VALUES 226 (1990).

<sup>26</sup> While each of these examples illustrates how participation, if not appropriately structured, can have deleterious effects on agency governance, my purpose in exploring these examples is not to suggest that one or more of them is inherently flawed.

<sup>27</sup> “Ordinary” decisionmaking, as I describe it below, refers to the day-to-day, instrumental operation of agency decisionmaking within a given structural model and its specified goals. See *infra* notes 220-23 and accompanying text.



of neutral analysis and accountability to democratic political processes. Second, it may, and sometimes has in the context of the EIS process, create information problems for decisionmakers and participants, encouraging use of strategic tactics, such as delay, that thwart the development of agency programs and the achievement of regulatory goals. And third, as has often been observed in the context of open meeting laws, it may impair collegiality and chill deliberation in multimember agencies. Moreover, I suggest, increased participation creates incentives for an agency to make a fundamental shift in its decisionmaking culture, away from deliberative democratic decisionmaking and towards expertocratic or pluralist models. To the extent that deliberative democratic ideals are important to agency decisionmaking, mass participation may make their pursuit impractical.

Part IV analogizes the tension between participation and deliberation in administrative law to a problem that has been recognized in other areas of the law. Recent civil procedure and First Amendment scholars have recognized a similar tension and have proposed a move away from participation and towards selective and limited representation in the judicial or political process. Similarly, I conclude that the tension between participation and deliberation in administrative law is not likely to subside until the issue of representation in the administrative process has been addressed.

The administrative process is ensconced in participation. Yet paradoxically, idealizing, embracing, and expanding broad-based participation may make institutions less, not more, democratic.<sup>28</sup> The purpose of this Article, though, is not to suggest that participation in administrative process is an unnecessary luxury and that experts should have a monopoly over agency governance. Nor is it to suggest that those individuals and groups that currently lack access to administrative process be shut out. Rather, I conclude that a study of participation's institutional effects on agency governance offers a clear choice for administrative law: mass participation must be balanced with deliberative values, or theories of deliberative democracy in bureaucratic decisionmaking must be reassessed.

## II. PARTICIPATION AND ITS VALUE TO AGENCY DECISIONMAKING

Participation is sacrosanct to modern democracy. Many evaluate the quality of democratic processes, including agency decisionmaking, with respect to the degree of participation provided.<sup>29</sup> Like citizenship, participa-

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<sup>28</sup> This Article thus complements Philip Pettit's cogent effort to develop a republican conception of freedom as non-domination, one that contrasts with his views of negative (non-interference) and positive (pro-participatory) liberty. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 7-11 (1997). Pettit sees participation as "essential" to his vision of republicanism (what I refer to in this Article as "deliberative democracy"), but not as a right or its independent attractions. Instead, for Pettit, participation is valued "because it is necessary for promoting enjoyment of freedom as non-domination." *Id.* at 8.

<sup>29</sup> See *supra* notes 6, 8.

tion is considered tantamount to democracy and democratic processes. Rarely has it been questioned, criticized, or explored.<sup>30</sup>

But the history of administration is replete with examples of failed reforms adopted with the noble intention of increasing access to administrative agencies. Consider the Consumer Product Safety Commission's (CPSC) experience with rulemaking in the 1970s. The original Consumer Product Safety Act (CPSA),<sup>31</sup> passed in 1972, contained a number of provisions designed to "maximize public participation"<sup>32</sup>—increasing the CPSC's responsiveness to concerns and information from external sources. Two provisions of the original CPSA were of particular significance for participation.

Under section 10 of the original CPSA,<sup>33</sup> any person could petition the CPSC for a rule setting product safety standards. Following receipt of a petition, the CPSC was required to respond within 120 days.<sup>34</sup> If the CPSC granted a petition, it was required to initiate a rulemaking process with an oral hearing.<sup>35</sup> If the CPSC decided to deny a petition for a rule, it was required to publish its reasons for doing so in the *Federal Register*, and this decision would be subject to review by a trial de novo in a district court.<sup>36</sup>

Once the rulemaking process was under way, an additional opportunity for external influence—known as the "offeror process"—was provided by section 7 of the original CPSA.<sup>37</sup> Whenever the CPSC proposed to initiate a rulemaking proceeding to establish product safety standards, it was required to invite persons or groups outside the agency, including consumer and industry groups, to develop the product standard.<sup>38</sup> If an offeror presented a standard, the CPSC was required to give the offeror the assignment, provided that the agency determined it was competent to develop the

<sup>30</sup> See the works cited *supra* note 9; see also MASHAW, *supra* note 1; LESTER W. MILBRATH, *POLITICAL PARTICIPATION: HOW AND WHY DO PEOPLE GET INVOLVED IN POLITICS* (1965); Rosenbaum, *supra* note 3.

<sup>31</sup> 15 U.S.C. §§ 2051-2084 (1994).

<sup>32</sup> H.R. REP. NO. 92-1153, at 14 (1972).

<sup>33</sup> Law of Oct. 27, 1972, § 10, 86 Stat. 1217 (repealed 1981).

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* The participatory rights afforded by section 10 were much broader than those allowed interested persons under the APA. Under the APA, interested persons can petition an agency for the issuance, repeal, or amendment of rules, but are only entitled to "prompt notice" of the petition's denial and "a brief statement of the grounds for denial"; judicial review under the APA is not de novo, but subject to an arbitrary and capricious standard of review. See 5 U.S.C. §§ 555(e), 706(2) (1994).

<sup>37</sup> For a detailed description of the original CPSA offeror process, see Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899 (1973); Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982); Carl Tobias, *Early Alternative Dispute Resolution in a Federal Administrative Agency Context: Experimentation with the Offeror Process at the Consumer Product Safety Commission*, 44 WASH. & LEE L. REV. 409 (1987).

<sup>38</sup> See 15 U.S.C. § 2056 (amended 1981).

standard.<sup>39</sup> The standards developed by designated offerors could not be modified by the agency except through a full rulemaking process, which included another offeror process.<sup>40</sup>

As Jerry Mashaw describes the CPSC experience with rulemaking in the 1970s, “[t]he progressive logic of participation” became “the progressive logic of disaster.”<sup>41</sup> The effect of the participatory processes provided by sections 7 and 10 was to bury the CPSC in an “unproductive investigation of useless subjects and [to] destroy[] its capacity to set a reasonable agenda for regulation.”<sup>42</sup> The offeror process, designed to allow direct participation by regulated interests, produced debilitating delay and made the CPSC virtually captive to the very industries it was designed to regulate.<sup>43</sup> In response to this disaster, in 1981 Congress repealed sections 7 and 10 of the CPSA.<sup>44</sup> As the CPSA example illustrates, participation’s value to agency decisionmaking must be understood with respect to other activities that contribute to democratic legitimacy, not as a sacred, paramount value.

### A. Rationales for Mass Participation in Agency Decisions

Standard justifications for broad-based involvement in agency decisions regard participation as serving purposes of accountability and oversight, minimizing the potential for capture of the process, and counteracting myopia by improving information available to agency decisionmakers and citizens. Citizen involvement in agency decisions also reinforces proceduralist goals and helps to create and affirm citizenship.

1. *Increased Accountability and Oversight.*—Administrative agency decisions are subject to formal institutional oversight by Congress and courts—for the latter, though, not until an agency has taken “final” action.<sup>45</sup> However, immediate participation in the decisionmaking process *before* an agency takes action also serves as a type of *informal* oversight, ensuring that the agency is accountable to the public at large for its decisions.

The oversight and accountability rationale is paramount to the legitimacy of agency decisions. Agencies occupy an odd place in our constitutional structure, somewhere between the legislative and executive branches.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* See also Scalia & Goodman, *supra* note 37, at 908.

<sup>41</sup> MASHAW, *supra* note 1, at 262.

<sup>42</sup> *Id.* at 262-63; see also *Federal Regulation and Regulatory Reform: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce*, Vol. 4, 94th Cong. 170 (1976) [hereinafter *Regulatory Reform Hearings*]; GENERAL ACCOUNTING OFFICE REPORT B-139319: THE CPSC NEEDS TO ISSUE SAFETY STANDARDS FASTER (Dec. 12, 1977).

<sup>43</sup> See generally Schwartz, *supra* note 37, at 62-68; R. David Pittle, *The Restricted Regulator*, 12 TRIAL 24-30 (May 1976); see also *Regulatory Reform Hearings*, *supra* note 42, at 35.

<sup>44</sup> See Consumer Product Safety Act Amendments of 1981, Pub. L. No. 97-35, § 1210, 95 Stat. 703.

<sup>45</sup> 5 U.S.C. § 704 (1994).

However, at least in the federal system, agencies are not directly accountable to the political processes that are responsive to participation in electoral politics. In other words, agencies lack any direct link to majoritarian political processes.

While administrative agencies are subject to institutional oversight by majoritarian branches, such as the executive branch and Congress,<sup>46</sup> and nonmajoritarian branches, such as courts, such *formal* oversight is imperfect to the extent that these institutions have scarce resources and are generally reactive rather than proactive with respect to agency action.<sup>47</sup> In addition, nonagency political institutions may be subject to coordination problems of their own.<sup>48</sup>

Participation in the immediate administrative process reduces the necessity of and occasion for nonbureaucratic institutional oversight. According to one author, “[p]ublic participation has deterred the agencies from straying too far from their assigned missions.”<sup>49</sup> Judge Jerome Frank of the United States Court of Appeals for the Second Circuit acknowledged Congress’s interest in designating “private attorneys general” to assist in enforcing laws by participating before an agency or obtaining judicial review of agency action.<sup>50</sup> In the past, the Supreme Court has recognized the importance of this function in its liberal agency standing jurisprudence.<sup>51</sup>

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<sup>46</sup> Nonbureaucratic political institutions, such as the legislative or executive branches, may also foster increased participation in bureaucratic decisionmaking. For instance, one rationale for separation of powers is that it broadens participation beyond traditional direct participants in a single branch’s governance and makes accountability to citizens not solely dependent upon electoral year politics. *See, e.g.,* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988). For example, the rotation system, introduced during the reign of President Andrew Jackson, discussed *infra* note 131, had the effect of increasing participation through the channel of the executive branch.

Many recent administrative law reforms also have had the effect of increasing participation by involving the legislature, which would be directly responsive to participatory pressure outside of an agency’s decisionmaking process. For example, the Contract with America Advancement Act of 1996 delays the effective date of agency rules and shifts the decisionmaking process to Congress, which may then pass a joint resolution declaring that it “disapproves the rule . . . and such rule shall have no force or effect.” Pub. L. No. 104-121, § 802, 110 Stat. 847 (Mar. 29, 1996). For discussion of this process, see Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997). Discussion of the nonbureaucratic participation facilitated by separation of powers is beyond the scope of my analysis.

<sup>47</sup> Cf. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433 (1989).

<sup>48</sup> *See* Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994) (arguing that increased political oversight over the last twelve years, resulting from infighting between the legislative and executive branches, has reduced the discretion of administrative agencies without more democracy or better regulatory policy).

<sup>49</sup> Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 263 (1986).

<sup>50</sup> *See* *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

<sup>51</sup> *See* *Sierra Club v. Morton*, 405 U.S. 727, 740 n.15 (1972) (“Once this standing is established, the party may assert the interests of the general public in support of his claim for equitable relief.”).

The “private attorneys general” rationale encourages individuals who are injured by agency action to assert the interests common to members of a larger class.<sup>52</sup> Since agencies are subject to immediate participation on such grounds in many cases, agencies will face stronger incentives to comply with congressional and judicial requirements, resulting in “enhanced agency compliance with mandates and prohibitions Congress included in statutes to protect the interests of groups that seek judicial review of agency actions infrequently because of collective action problems.”<sup>53</sup> The result is better accountability and oversight of agency decisions.<sup>54</sup>

2. *Minimizing Excessive Concentration of Power.*—Participation may also help to reduce the likelihood of the administrative process yielding monopoly rents for interest groups. In *Federalist No. 10*, James Madison decried the potential of factions—special interest groups who are not necessarily majorities—to dominate government decisions.<sup>55</sup> The potential for factional domination of a decision is particularly large when each member of a small group has a large stake in the decision’s outcome, while each member of a larger group has a relatively small stake in the decision’s outcome.<sup>56</sup> Factional domination, or “capture,” of bureaucratic decisionmaking has been well documented.<sup>57</sup>

In the past two-and-a-half decades, through standing jurisprudence, courts have attempted to mitigate factional domination by infusing the decisionmaking process with a greater degree of participation. Under previous Supreme Court standing jurisprudence, regulated firms themselves were

<sup>52</sup> As an illustration, imagine that an agency action, such as approval of a proposal to build a high-voltage electricity transmission line, has the actual or perceived potential to cause injury to a large group of people, such as members of a minority group or all people who use a park for recreation or enjoyment. Members of the minority group or individual users of the park are unlikely to participate in opposing this decision unless their preferences in opposition are relatively strong. The fact that there are multiple individuals with similar interests creates incentives for free-riding because as each individual perceives that others may be similarly affected by the agency action, the likelihood that any member of the class will devote resources to asserting the class’s interest is greatly reduced. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53-65 (1965).

<sup>53</sup> 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 68 (1994).

<sup>54</sup> However, private attorneys general alone will rarely suffice to completely overcome the free-rider problem. Ultimately, what would be needed is a system that taxes all regulatory program beneficiaries to pay individuals who bring actions. To the extent that private attorneys general can recover fees from a company or other entity which, then, could pass these on to other customers or similarly situated individuals, a system that taxes a regulatory program’s beneficiaries may work to internalize some of these costs.

<sup>55</sup> See *THE FEDERALIST NO. 10*, at 51-52 (James Madison) (Henry Cabot Lodge ed., 1889).

<sup>56</sup> See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11-12 (1971).

<sup>57</sup> See, e.g., Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975).

often the only parties with standing.<sup>58</sup> Other affected persons, such as consumers, were rarely allowed to participate in agency decisions.<sup>59</sup> Even when beneficiaries could participate before an agency, often beneficiaries did not have a group on the agency's staff who viewed them as constituents, nor did the agency have much other incentive to react to the beneficiaries' perspective, since beneficiaries typically could not challenge an agency's decision on appeal. This disparity in procedure and status created the potential for factional domination of agency decisionmaking processes by interest groups who could use the political process to extract monopoly rents. The Supreme Court's liberalization of administrative law standing doctrine beginning in 1970<sup>60</sup> allowed participation by interests in conflict with those of regulated firms, forcing agencies to become aware of and consider a broader range of perspectives.<sup>61</sup> Although it is unclear whether this doctrinal revolution has sufficiently controlled private capture of decisionmaking, it has helped to disperse the power of the strongest, most vocal interest groups, historically dominant in the decisionmaking process.

*3. Better Quality Information for Decisionmakers and Citizen Participants.*—Because information often exhibits many of the qualities of a public good,<sup>62</sup> the private market frequently fails to provide adequate amounts of information.<sup>63</sup> The positive effects of more information on the quality of agency decisions are threefold: first, as information makes its way inside the bureaucratic process to the actual decisionmakers, it contributes to the rationality of the final decision by improving the information base utilized in setting agendas, developing alternatives, and making final policy decisions; second, additional information about agency proposals fosters public understanding of and support for agency proposals; third, as participants

<sup>58</sup> See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (holding only those who have suffered a "legal injury" have standing to sue); *Hohn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) (tenants not entitled to obtain individual review of Federal Housing Administrative decisions to grant rent increases).

<sup>59</sup> Former Federal Trade Commissioner Mary Gardner Jones, for instance, once stated:

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

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

<sup>60</sup> See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); see also *United States v. SCRAP*, 412 U.S. 669 (1973).

<sup>61</sup> See Gellhorn, *supra* note 6, at 362 (participation "can serve as a safety valve allowing interested persons and groups to express their views before policies are announced and implemented").

<sup>62</sup> A public good is an item that is freely available to the public without the possibility of exclusion.

<sup>63</sup> See Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980).

exchange information among themselves they are more likely to become aware of others' perspectives, helping to forge understanding and consensus.

Through participation, agencies learn of the preferences of affected citizens, as well as about policy alternatives and the actual and anticipated effects of their actions.<sup>64</sup> Participation begets better information for the agency decisionmaking process, and at the same time, encourages the decisionmaker to "really listen" to what the participant believes is important and not accept conflicting evidence or arguments without close scrutiny.<sup>65</sup> While agency decisionmaking is regarded by many as more than mere preference aggregation,<sup>66</sup> participation provides decisionmakers with information as affected citizens reveal their preferences.

Participation provides other, less preference-dependent, information as well. Most would expect government decisionmakers, when pondering difficult issues, to gather as much information as they can before reaching a decision. Indeed, often government is criticized for acting too soon or for not having enough information.<sup>67</sup> By facilitating consideration of more interests and viewpoints to be heard, participation broadens the range of issues before an agency.<sup>68</sup> Similarly, by increasing the number of points of access, participation makes it more probable that information will be heard and considered by decisionmakers.<sup>69</sup> To the extent that rational decisionmaking will yield a single "correct" result, as in determining whether an individual is entitled to a welfare benefit under predetermined guidelines,

<sup>64</sup> Cf. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 132-33 (1930) ("[T]he people must educate their rulers. At least they must see to it that their rulers are educated for the tasks of government.").

<sup>65</sup> JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 140 (1983).

<sup>66</sup> See *infra* notes 130-36 and accompanying text (discussing the expertocratic model); *infra* notes 163-85 and accompanying text (discussing deliberative democracy).

<sup>67</sup> For example, it has been argued that the management of renewable resources, such as forests, focuses on a narrow range of economic values, excluding information regarding noncommodity values, such as protection of biodiversity, watershed functions, and carbon sequestration. See ROBERT REPETTO ET AL., *WASTING ASSETS: NATURAL RESOURCES IN THE NATIONAL INCOME ACCOUNTS* (1989).

<sup>68</sup> See Robert G. Healy & William Ascher, *Knowledge in the Policy Process: Incorporating New Environmental Information in Natural Resources Policy Making*, 28 POL'Y SCI. 1, 2 (1995) (noting that "better understanding of the multiple functions of ecosystems will lead to more attention to balanced conservation as a concern of public policy and to more support among policymakers for conservation"); see also Peter Isaacson, *Pollutant Regulation and Public Sensibility*, 6 ENVTL. IMPACT ASSESSMENT REV. 229-32 (1986) (observing that the public sees problems, issues, and solutions that the experts miss).

<sup>69</sup> As Professor Kerwin notes:

Agencies rely on the public for much of the information they need to formulate rules. Therefore, if participation is hampered by hostility, intransigence, secrecy, or incompetence on the part of the agency, the rule will be deprived of information that is crucial to establishing its authority with the affected community.

KERWIN, *supra* note 24, at 162.

participation enhances the likelihood that the agency will reach a correct decision and minimizes the probability of decisionmaking errors.<sup>70</sup> But, even in contexts where a single correct result is unlikely, participation may give decisionmakers valuable information. Lay judgment of risks, for example, may be as sound as or more so than experts', who may be loath to recognize certain harms or to question the fundamental assumptions of their models.<sup>71</sup> Members of the public, rather than experts, may be in a better position for "institutionalizing regret"<sup>72</sup>—for mediating uncertainty through a reasoning process and correcting errors over time.<sup>73</sup>

Participation does not only educate agency decisionmakers; it also educates citizens with respect to policy issues. Through participation, citizens learn about agency proposals before an agency has made its final decision.<sup>74</sup> This helps the agency in rationalizing its decision and in facilitating the exercise of "reflexive" preferences by citizens, who may be influenced by the availability of new information. Thus, in addition to ensuring more agency responsiveness to citizen preferences and objective evidence, participation also allows decisionmakers to persuade—to affect and mold the preferences of the public.<sup>75</sup> Participation may also facilitate the exchange of information between participants, contributing to their understanding of different viewpoints and the possible formation of consensus.

4. *Proceduralist Values.*—Persons and entities subject to agency regulations are more likely to view agency decisions as legitimate if the procedures leading to their formulation provide for fair consideration of their views.<sup>76</sup> According to Mashaw, for example, participation by claim-

<sup>70</sup> See MASHAW, *supra* note 1, at 102-03.

<sup>71</sup> See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 88 (1995) (arguing that risk managers should not only be attentive to the number of lives saved, but also "to public judgements about the contexts in which risks are incurred, and hence to the full range of factors that make risks tolerable or intolerable").

<sup>72</sup> BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 258-59 (1984).

<sup>73</sup> For example, had decisionmakers relied solely on diagnostic and preventive experts, risks such as DES and Agent Orange would have been missed. See Peter Brown, *Popular Epidemiology: Community Response to Waste-Induced Disease in Woburn, Massachusetts*, 12 SCI. TECH. & HUM. VALUES 78-85 (1987).

<sup>74</sup> See Gellhorn, *supra* note 6, at 361 (participation "can ease the enforcement of administrative programs relying upon public cooperation"). But see Toni Makkai & John Braithwaite, *Procedural Justice and Regulatory Compliance*, 20 LAW & HUM. BEHAV. 83 (1996) (observing that, although control over decisions is correlated with compliance with a regulatory program, subjective procedural justice measures do not significantly predict compliance).

<sup>75</sup> See CHARLES E. LINDBLOM, *INQUIRY & CHANGE: THE TROUBLED ATTEMPT TO UNDERSTAND & SHAPE SOCIETY* (1990). As a matter of political theory, this role of participation is controversial but underexplored.

<sup>76</sup> See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: AS A PSYCHOLOGICAL ANALYSIS* 121 (1975) (greater consideration of individualized arguments enhances perceptions of procedural fairness); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL*



ants in Social Security Agency decisions serves the cognitive purpose of producing "an understanding on the claimant's part of the substantive adjudicatory norms and of the decision process."<sup>77</sup> Participation "inspires confidence that sufficient efforts have been made to inform the decisionmaker about the claimant's case."<sup>78</sup> It has been observed that, especially under conditions of scarcity, where participating in private economic markets is unlikely to provide ample satisfactions and opportunities, participation in political processes offers the only hope for protecting substantive rights and for stabilizing democratic values and institutions.<sup>79</sup> Thus, participation may serve to reaffirm the procedural values that lie at the core of democratic institutions.<sup>80</sup>

5. *Breeding Citizenship*.—Finally, participation in agency decision-making may help to produce better citizens by inspiring a sense of civic responsibility. Participation not only makes for better informed citizens, it also helps develop citizenship, a precondition to some contemporary theories of agency decisionmaking.<sup>81</sup> Participation is important, Judith Shklar has argued, because it is an "affirmation of belonging."<sup>82</sup> It makes citizens feel as if they are a part of, and thus helps to encourage membership in, a political community. Participation "educates individuals how to think publicly as citizens,"<sup>83</sup> inducing "us to listen to other people's positions and to justify our own."<sup>84</sup> Citizenship presupposes that one is able to participate in the decisions that affect oneself and one's community.<sup>85</sup>

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JUSTICE 208 (1988) ("Procedures are viewed as fairer when they vest process control or voice in those affected by a decision.").

<sup>77</sup> MASHAW, *supra* note 65, at 140.

<sup>78</sup> *See id.*; *see also* Gellhorn, *supra* note 6, at 361 ("If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced.").

<sup>79</sup> In contexts where it makes sense to discuss substantive rights, participation is often valued? because the exercise of positive liberty is seen as a way of protecting negative liberties. *See* PETIT, *supra* note 28, at 30; *see also* Aryeh Botwinick & Peter Bachrach, *Democracy and Scarcity: Toward a Theory of Participatory Democracy*, 4 INT'L POL. SCI. REV. 361 (1983).

<sup>80</sup> At the same time, it has been noted that participation may numb the public's faith in democratic processes, or lead the public to perceive such processes as failures. *See* HIBBING & THEISS-MORSE, *supra* note 19, at 17-20, 60-61; *see also* Robert B. Reich, *Public Administration and Public Deliberation*, 94 YALE L.J. 1617, 1634 (1985) (observing that the residents of the Tacoma, Washington, area expressed hostility when Environmental Protection Agency (EPA) Administrator William Ruckelshaus attempted to involve them directly in the decisionmaking process regarding arsenic content controls on a copper smelter).

<sup>81</sup> *See infra* notes 170-72 and accompanying text (discussing civic virtue).

<sup>82</sup> JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 25-26 (1991).

<sup>83</sup> BARBER, *supra* note 72, at 152.

<sup>84</sup> Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1624 (1988); *see also* Hannah Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 347-49 (1981).

<sup>85</sup> *See* PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* 26 (1967).

### B. Participation in Agency Decisionmaking

Given the diversity and cumulative persuasiveness of the above rationales in favor of participation and the emphasis modern political theory places on enhancing positive liberty,<sup>86</sup> it should not be surprising that contemporary administrative agencies provide for massive amounts of participation. Calls for greater public participation in agency decisions are likely to continue as we confront a variety of new technologies promising easier access to participation in and information about governance, such as Internet access to public documents,<sup>87</sup> electronic town meetings,<sup>88</sup> and electronic rulemakings.<sup>89</sup> In this section I briefly introduce some forms and types of participation in the context of three examples, which will be the subject of more extended discussion later in the Article.

1. *Passive and Active Forms of Participation.*—Agency participation occurs at two levels: by decisionmakers (those on the “inside” of the process with formal government positions pursuant to legal authority or an agency’s internal structure), and by lay persons (those on the “outside” of a political decisionmaking process, fenced out by a lack of legal authority to make collective policy decisions).<sup>90</sup> Internal agency decisionmakers may participate as either career or politically accountable bureaucrats.<sup>91</sup> Laypersons participate in agency decisionmaking in both passive and active forms, sometimes as individual parties, but more often as members of interest groups, corporations, and other firms.

<sup>86</sup> See PETTIT, *supra* note 28, at 17-21 (urging a reformation of the distinction between negative liberty, or non-interference, and positive or pro-participatory liberty, made famous in the twentieth century by Isaiah Berlin).

<sup>87</sup> See Thomas: *Legislative Information on the Internet* (visited Nov. 29, 1997) <<http://thomas.loc.gov/>> (online access to bills, committee documents, and proceedings of the U.S. House and Senate); *U.S. Government Printing Office Web Site* (visited Nov. 29, 1997) <[http://www.access.gpo.gov/su\\_docs/](http://www.access.gpo.gov/su_docs/)> (online access to General Printing Office (GPO) documents, including the *Federal Register*).

<sup>88</sup> See, e.g., JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995) (discussing deliberative polling techniques facilitated through the usage of television). With videoconferencing, state governments are also allowing for increased participation in agency meetings. See *Does the Sun Shine in Cyberspace? Electronic Access and State Open Meeting Laws*, 27 *STATE & LOCAL GOV'T REV.* 235 (1995).

<sup>89</sup> The Nuclear Regulatory Commission (NRC), for example, has undertaken a pilot project, called “RuleNet,” that allows Internet participants in an NRC fire safety rulemaking proceeding “to communicate both with the NRC and among themselves, with a view towards defining issues, eliminating misunderstanding, and finding areas of common ground.” See *RuleNet Extended Vision Statement* (visited Nov. 29, 1997) <<http://nssc.llnl.gov/RuleNet/Vision/Visioncnts.html#Concept>> (the main index for the RuleNet project is at <<http://nssc.llnl.gov/RuleNet/>> (visited Nov. 29, 1997)).

<sup>90</sup> See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 48 (1984).

<sup>91</sup> An important distinction, crucial to my analysis, is between politically insulated decisionmakers, such as career bureaucrats or experts accountable exclusively to the norms of their agencies and professions, and politically appointed decisionmakers, accountable to formal political institutions.

In bureaucracies, many forms of participation are passive, allowing the public to participate by observing—but not directly influencing—agency decisionmaking. Consider, for example, the Sunshine Act,<sup>92</sup> a post-Watergate law founded on the principle that the “government should conduct the public’s business in public.”<sup>93</sup> The Sunshine Act’s primary purposes are to provide the public with information regarding the decisionmaking processes of federal agencies and to improve these processes by increased public oversight, “while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.”<sup>94</sup>

Most forms of bureaucratic decisionmaking, however, also allow the public active participation in the agency decisions.<sup>95</sup> For example, citizens, either on their own or through interest groups, are allowed to petition agencies to initiate rulemaking or participate directly in the rulemaking process,<sup>96</sup> as the CPSC example illustrates. Many agencies have broad intervention guidelines, allowing the public to participate in adversarial adjudicative disputes as well.<sup>97</sup> Citizens also participate actively in agency decisions through mediated decisionmaking, such as dispute resolution<sup>98</sup> or negotiated rulemaking.<sup>99</sup>

Another example of an agency process allowing for active citizen participation is the Environmental Impact Statement (EIS) process under the

<sup>92</sup> The Sunshine Act is codified in pertinent part at 5 U.S.C. § 552b (1994).

<sup>93</sup> S. REP. NO. 94-354, at 1 (1975). The Sunshine Act complemented previously enacted legislation designed to open the government’s decisionmaking process to public participation, such as the APA, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994) (enacted in 1946), the Freedom of Information Act, 5 U.S.C. § 552 (1994) (enacted in 1966), and the Federal Advisory Committee Act, 5 U.S.C. app. at 1371 (1994) (enacted in 1972).

<sup>94</sup> Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976).

<sup>95</sup> The distinction between active and passive forms of participation is employed elsewhere in the political participation literature. See MILBRATH, *supra* note 30, at 9.

<sup>96</sup> See 5 U.S.C. §§ 553(e) (1994) (requiring agencies to “give an interested person the right to petition for the issuance, amendment, or repeal of a rule”), 553(c) (agencies must “give interested parties an opportunity to participate in rulemaking through the submission of written data, views, or arguments”); see also *National Resources Defense Council v. SEC*, 606 F.2d 1031, 1046 n.18 (D.C. Cir. 1979) (“Public participation in agency decisionmaking is increasingly recognized as a desirable objective.”).

<sup>97</sup> See, e.g., 10 C.F.R. § 2.714 (1996) (NRC); 14 C.F.R. § 302.15(b) (1996) (Department of Transportation) (criteria for intervention “will be liberally interpreted”); 18 C.F.R. § 385.214(b)(2)(ii) (1996) (Federal Energy Regulatory Commission) (identifying classes of interested persons, including competitors).

<sup>98</sup> See, e.g., Administrative Dispute Resolution Act, 5 U.S.C. § 571 (1994); see also Civil Justice Reform, Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996) (directing agencies to utilize alternative dispute resolution in lieu of traditional adjudication, where appropriate).

<sup>99</sup> See, e.g., Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570 (1994); see also Clare M. Ryan, *Regulatory Negotiation: Learning from Experiences at the U.S. Environmental Protection Agency*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 203 (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

National Environmental Policy Act (NEPA),<sup>100</sup> which has spawned massive citizen input. NEPA declares a congressional purpose to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”<sup>101</sup> NEPA’s procedural requirements are contained in a single statutory section;<sup>102</sup> under section 102, all federal agencies, proposing actions that will significantly affect the environment must prepare an EIS and make copies available to the public.<sup>103</sup> Draft EISs are distributed to the public for written comments,<sup>104</sup> which generally must be made within forty-five days.<sup>105</sup> An agency must hold a hearing or meeting when (1) there is “substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing,” (2) another agency with jurisdiction over the action requests a hearing, or (3) another statute so requires.<sup>106</sup> Once it has received comments from the public and other agencies, the agency then revises its draft EIS and prepares a final EIS. The final EIS must contain and respond to all “responsible” opposing viewpoints.<sup>107</sup> Within thirty days after distribution of the final EIS, an agency may make its decision, which is memorialized in its record of decision.<sup>108</sup>

<sup>100</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

<sup>101</sup> 42 U.S.C. § 4321 (1994). Unlike other detailed and highly complex environmental statutes, such as the Clean Air Act, NEPA is surprisingly brief.

<sup>102</sup> While early lower court cases were split on whether NEPA imposed any substantive standards on agencies, *see, e.g.*, *Environmental Defense Fund, Inc. v. Corps of Eng’rs*, 492 F.2d 1123, 1139 (5th Cir. 1974) (noting split in the circuits), the Supreme Court has held that NEPA’s requirements are “essentially procedural.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 445 U.S. 519, 558 (1978).

<sup>103</sup> *See* 42 U.S.C. § 4332(2)(C) (1994). Other than this general requirement of public disclosure, NEPA provides no guidance as to what procedures should govern public participation in the preparation of an EIS. Under the language of NEPA, the views of “Federal, State, and local agencies” should accompany an EIS, but comments from ordinary citizens are not expressly contemplated. *Id.* NEPA did, however, contain another provision that created the Council on Environmental Quality (CEQ) as a part of the Executive Office of the President. 42 U.S.C. §§ 4341-4347 (1994). CEQ, nudged occasionally by the judiciary, has established NEPA procedures. *See, e.g.*, *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971). The current framework for participation under NEPA is contained in revised regulations, published in 1978. 43 Fed. Reg. 55,978 (1978) (codified at 40 C.F.R. pts. 1500-1517 (1996)).

<sup>104</sup> *See* 40 C.F.R. § 1502.19 (1996). Notice of the draft’s availability is published in the Federal Register, *id.* § 1506.10(a), and the agency must then send a copy of the draft EIS to any member of the public who requests it. *Id.* § 1502.19(c).

<sup>105</sup> *See id.* § 1506.10(c). The EPA may “for compelling reasons of national policy” provide for a shorter comment period. *Id.* § 1506.10(d).

<sup>106</sup> *Id.* § 1506.6(c).

<sup>107</sup> *Id.* § 1502.9(b). This requirement was established in early case law. *See Seaborg*, 463 F.2d at 787.

<sup>108</sup> 40 C.F.R. §§ 1505.2, 1506.10(b)(2) (1996). The record of decision is designed “to see that the decisionmaker considers and pays attention to what the NEPA process has shown to be an environmentally sensitive way of doing things.” 43 Fed. Reg. 55,978, 55,985 (1978). It is required to state the

2. *Direct and Representative Participation in Agency Decisions.*—Participation in agency decisions is provided primarily by agencies allowing “points of access” to their decisionmaking processes, expanding opportunities for the public to provide information to agency decisionmakers, and allowing access to information about agency decisionmaking. Virtually every citizen participates to some degree in agency decisions, whether through formal political institutions that oversee agencies (for example, voting), indirectly as a member of an organization which directly comments on agency proposals (for example, a corporation or public interest group), or as an individual who is immediately affected by agency action (for example, a social security claimant).

Yet, ever since James Madison, in *Federalist No. 10*, distinguished between a “republic”—by which he meant “a government in which the scheme of representation takes place”—and a “pure democracy”—by which he meant a group of citizens who “assemble and administer the government in person”<sup>109</sup>—Americans have debated whether, when, and how much to directly participate in political institutions.<sup>110</sup> As Madison recognized, democratic political institutions provide for two main forms of participation. The first form—direct participation (pure democracy)—allows individuals themselves to directly voice their opinions and concerns. Voting mechanisms such as referenda, in which citizens directly register their opinions on social issues, and mass opinion polls are the closest modern-day variants of direct democracy. However, as some have noted, participation can perhaps never really be direct, because individuals’ opinions are always filtered through voting ballots, which reflect a preselected range of choices, congressional staff, majoritarian processes, or polling questionnaires.<sup>111</sup>

The second form identified by Madison—representative participation (a republic)—allows individuals to participate in political decisions indirectly by their membership in organizations and institutions. Self-selected groups or persons often stand for citizens in the political process. What Bruce Ackerman has dubbed a “synecdoche”—one who “stands for” an

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agency’s decision, identify the alternatives the agency considered, specify environmentally preferable alternatives, discuss the factors that the agency balanced in making its decision, and indicate whether all practical means of avoiding or minimizing environmental impacts were considered. 40 C.F.R. § 1505.2(a)-(c) (1996).

<sup>109</sup> THE FEDERALIST NO. 10, at 56-57 (James Madison) (Henry Cabot Lodge ed., 1889).

<sup>110</sup> As the historian Edmund Morgan has recognized, notions of “representation” and “popular sovereignty” are inherently fictitious. And, as with fiction, a willing suspension of disbelief may help us to understand how they both sustain and limit government’s authority. See EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 13 (1988) (“Government requires make-believe. . . . Make believe that the people *have* a voice or make believe that the representatives of the people *are* the people.”).

<sup>111</sup> See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 59 (1989).

other—is a form of representation that occurs regularly in politics.<sup>112</sup> Indeed, some might argue that politics itself is a process that facilitates decisions by a part that are to be taken to stand for, or represent, the whole. Such is our status as members of churches, unions, public interest groups, and citizens in congressional districts and states. Representative democracy is widespread before administrative agencies to the extent that individuals themselves do not appear before agencies, but instead participate by virtue of their voluntary membership in interest groups, such as unions, environmental organizations, corporations, or public interest groups.<sup>113</sup>

As Madison recognized, however, participation is not without its costs.<sup>114</sup> While one cost of participation is interference with the agency decisionmaking process,<sup>115</sup> another cost, the cost to the individual, has been observed to give rise to interest group participation. Participation has obvious costs for individuals, who may forgo participation in a political process where it is perceived that individual action will not make a difference. Frustrated by the costs that increased participation in institutions may create for them, individuals, out of rational ignorance or apathy, may choose not to participate in the political process.<sup>116</sup> Individuals are more likely to participate in political processes, including agency decisionmaking, where the expected benefits of participation exceed the costs.<sup>117</sup> Typically the costs of direct individual participation in agency decisionmaking are very high, especially when generic issues of policy (for example, environmental protection, economic policy) are addressed.<sup>118</sup> Unless particular individuals are

<sup>112</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 181 (1991).

<sup>113</sup> See Stewart, *supra* note 57, at 1667.

<sup>114</sup> Cf. THE FEDERALIST NO. 10, at 51 (James Madison) (Henry Cabot Lodge ed., 1889) (“The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declarations.”).

<sup>115</sup> See *infra* Part IV.

<sup>116</sup> See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260 (1956) (“[E]very rational man decides whether to vote just as he makes all other decisions: if the returns outweigh the costs, he votes; if not, he abstains.”). For a recent attempt to address Downs’ voting paradox using social norm theory, see Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996). For further discussion of Downs’ contributions, see the collection INFORMATION, PARTICIPATION & CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE (Bernard Grofman ed., 1995).

<sup>117</sup> One of the factors influencing an individual’s decision to participate in a process is the extent to which she believes that her participation will have some beneficial impact upon the outcome. Recent research suggests that one’s decision to participate in political processes is often a product of one’s socioeconomic status or one’s resources. See Henry E. Brady et al., *Beyond SES: A Resource Model of Political Participation*, 89(2) AM. POL. SCI. REV. 271 (1995) (suggesting that time, money, and civic skills are strong predictors of political participation).

<sup>118</sup> It has been observed that

the more closely the matter touches on the personal life of an individual, the more likely the individual is to take the effort to participate in the hearing process; conversely, the more general and abstract the policy content, the less likely one is to find individual public participation.

singled out as direct beneficiaries of a governmental decision, it is highly unlikely that they will participate actively in agency decisionmaking.<sup>119</sup>

Because the costs of individualized participation in policy decision-making are often excessive, informal representatives are prevalent as a form of participation in agency decisions. Individuals are most likely to participate in agency decisions by virtue of their membership in interest groups, whether "public interest" groups, unions, trade associations, corporations, or firms.<sup>120</sup> Hence, when we refer to participation before administrative agencies, we often speak of interest group representation.<sup>121</sup>

Interest groups can also be understood as arising from an asymmetry of information between more diffuse groups and more concentrated groups. Narrowly focused and more concentrated groups have information and transaction cost advantages in pursuing their political interests because they suffer from fewer and less intense collective action problems.<sup>122</sup> The solution to a variety of market failures and policy problems is based in promoting the development and dissemination of information among participants, as well as channeling that information to decisionmakers.<sup>123</sup> Informal representation through interest groups allows for more, not less, participation in agency decisions to the extent that interest groups provide a mechanism for filtering information and pooling resources.<sup>124</sup>

Michael D. Reagan & Victoria Lynn Fedor-Thurman, *Public Participation: Reflection on the California Energy Policy Experience*, in CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING 89, 95 (Jack DeSario & Stuart Langton eds., 1987).

<sup>119</sup> My discussion, which focuses on agency policy decisions, recognizes that individualized participation has an important role to play in the decisionmaking process, but it must be accorded different weights in different contexts. Where decisionmakers have singled out a particular individual, as in *Goldberg v. Kelly*, 397 U.S. 254 (1970), a case in which an individual's welfare payments were in jeopardy, the value of individualized participation remains paramount.

<sup>120</sup> See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1530 (1992) (defending interest groups "because they consolidate people with common private interests and backgrounds" and "streamline the input that the government receives but ensure that the interests of diverse parties are represented."). John Kingdon observes that, in practice, an interest groups' resource base does not necessarily ensure that group domination on the issues relevant to its interests:

The American Medical Association, once enjoying the reputation of standing astride health policy, saw the enactment, over their [sic] vigorous objections, of Medicare and then of a series of regulatory programs. The vaunted highway lobby, powerful as it was and still is, saw portions of the interstate system stopped by environmentalists and freeway opponents.

KINGDON, *supra* note 90, at 56.

<sup>121</sup> "Generally, . . . the lower the partisanship, ideological cast, and campaign visibility of the issues in a policy domain, the greater the importance of interest groups." *Id.* at 49.

<sup>122</sup> See OLSON, *supra* note 52; Michael A. Fitts, *Can Ignorance be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990).

<sup>123</sup> See HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* 92-105 (1983).

<sup>124</sup> See Seidenfeld, *supra* note 120, at 1530. It has been noted, for example, that political parties reduce the transaction costs associated with, and thus encourage, political participation. Peter W. Weisbauer & Brad Lockerbie, *Party Contacting and Political Participation 1952-90*, 38 AM. J. POL. SCI. 211 (1994).

Consider, for example, interest group representation pursuant to "citizen suit" provisions, which allow "any citizen" or "any person" to sue private parties or agencies for noncompliance with a statute.<sup>125</sup> Agencies, such as the EPA, face limited enforcement budgets and may not have accurate and complete information about violations of environmental statutes and regulations. Although the term "citizen suit" may invoke the image of a concerned individual citizen who seeks to redress some local or neighborhood environmental problem, this is rarely the case in the environmental enforcement context: citizen suits are almost always brought by professional advocacy groups with national or regional organizational structures, such as the Sierra Club Legal Defense Fund, the National Resources Defense Council (NRDC), or the Atlantic States Legal Foundation.<sup>126</sup> Few individual citizens have the expertise, resources, or incentive to monitor how the EPA administers environmental statutes; environmental interest groups, by contrast, are better positioned to do so. A portion of settlement awards and attorney fee awards from citizen suits are typically returned to environmental interest groups, which then use these resources to fund additional litigation, scientific and policy research, lobbying, and education of their members and the public.<sup>127</sup> Citizen suits seem desirable because they allow the public to bring violations of environmental laws to the attention of the EPA and allow the public an opportunity to participate in environmental enforcement.<sup>128</sup>

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<sup>125</sup> In the environmental law context virtually every federal statute provides for citizen suits against private polluters, the government, or both. See Toxic Substances Control Act, 15 U.S.C. § 2619 (1996); Endangered Species Act of 1973, 16 U.S.C. § 1540 (1996); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1996); Clean Water Act, 33 U.S.C. § 1365 (1994); Act to Prevent Pollution of Ships, 33 U.S.C. § 1910 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Noise Control Act of 1972, 42 U.S.C. § 4911 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9659 (1994); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046 (1994); Public Lands Act, 43 U.S.C. § 1349(a) (1996); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994). A major federal environmental statute that does not contain a citizen suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1996).

<sup>126</sup> For example, claims filed by six national environmental groups accounted for 162 of the 214 notices of intent to sue filed under the Clean Water Act between January 1978 and April 1984. Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitled Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 107-08 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

<sup>127</sup> *Id.*

<sup>128</sup> Consider the observations of Barry Boyer and Errol Meidinger:

[T]o the extent that regulation serves "the people" rather than "the industry" or "the bureaucrats," it gains legitimacy. Conversely, it forfeits that legitimacy when it becomes captive to the will of the industries or bureaucrats. From this perspective, private enforcement may be viewed as the ultimate legitimizing device, since it gives the effective power to initiate regulation back to the people themselves.

Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 843 (1985).



### III. PARTICIPATION IN THE CONTEXT OF POLITICAL-THEORETIC MODELS OF AGENCY DECISIONMAKING

Participation in administrative decisions does not occur in a vacuum. Rather, it occurs in the context of an agency culture, which, in large part, is influenced by the model embraced by those who have structured an agency's internal decisionmaking mechanisms. Selection of a decision-making model can influence how an agency structures and allocates its resources, including staff, and how it channels expertise. Moreover, as I suggest in this Part, the choice of a model will influence how an agency values and treats participation by the public.

#### A. Models of Agency Decisionmaking

In the past fifty years, there have been several accounts of agency decisionmaking.<sup>129</sup> Expertocratic models define the quality of decisions with respect to the method and culture of the agency's experts' profession, but do not provide much explanation for how lay participation and expertise-based decisionmaking are to coexist in bureaucratic democracy. Pluralist models, which reduce decisions to conflict resolution, are based in a preference exchange theory of bureaucratic democracy: participation in bureaucratic decisions is viewed as akin to participation in the market. More recent models, borrowing from the civic republican revival in constitutional history, have attempted to synthesize deliberation and participation into a deliberative democratic process, which revives some of the virtues of expertocratic models without denying completely the importance of lay participation.

1. *Expertocratic Decisionmaking.*—Expertocratic models of administrative law view deliberation by decisionmakers as dependent upon specialized technical training, skill, and judgment.<sup>130</sup> Early models focused

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<sup>129</sup> While the decisionmaking models I identify, in some respects, mimic models of delegation identified by others, suffice it to say that a complete analysis of the merit, scope, and importance of delegation is beyond the scope of this Article. For two spirited, but diametrically opposed, discussions, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (arguing for a revival of the nondelegation doctrine) and Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 99 (1985) ("Delegation to experts becomes a form of consensus building that, far from taking decisions out of politics, seeks to give political choice a forum in which potential collective action can be discovered and its benefits realized."). A fatal flaw in the nondelegation argument is that the judiciary is "institutionally incapable of creating and applying a delegation doctrine." Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 393 (1987).

<sup>130</sup> Mashaw writes:

By virtue of constant exposure to a single type of problem, as well as by selection of personnel with specialized training, the administrative agency could bring to bear an expertise that generalist courts and generalist legislatures could rarely hope to match. Although the agency may not have the requisite scientific knowledge or technical expertise to effect final solutions at the inception of

almost exclusively on skill and expertise alone as justifying bureaucracy's claim to power,<sup>131</sup> while more recent expertocratic models focus on "comprehensive rationality," a set of conditions conducive to a synoptic, thorough decisionmaking process.

Modern expertocratic decisionmaking has been called synoptic or comprehensive because of the high degree of synthesis or comprehension required by the decisionmaker.<sup>132</sup> Under this approach, expert decisionmakers define a rational choice as (1) defining a policy problem, (2) clarifying goals, values, and objectives (ends) and prioritizing them, (3) listing practical means, that is, policies, for achieving these ends, (4) investigating the important consequences that would flow from each of the alternatives,

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its operations, the expertise model of administration imagines that over time experience and research will produce increasingly sound administrative judgments.

MASHAW, *supra* note 1, at 19; see also MAX WEBER, *ECONOMY AND SOCIETY* 973-80 (Guenther Roth & Claus Wittich eds., 1978).

<sup>131</sup> Traces of the expertise model appear in some of the early writings of Felix Frankfurter preceding the New Deal, the era in which modern American bureaucracy was born. Frankfurter distinguished between an "early democratic faith," which prevailed in the nineteenth century—in which "[p]opular rule was expected to work miracles"—and more modern forms of democracy—in which democracy "is dependent upon knowledge and wisdom beyond all other forms of government." FRANKFURTER, *supra* note 64, at 126-27. For Frankfurter, writing in an era of rising Italian fascism, the answer to defects with modern democracy was not the abandonment of the democratic ideal. Rather, Frankfurter embraced Great Britain's Civil Service, created in the mid-nineteenth century, as a model of democracy from which the United States could learn: "[A] highly trained and disinterested permanent service, charged with the task of administering the broad policies formulated by Parliament and of putting at the disposal of government that ascertainable body of knowledge on which the choice of policies must be based." *Id.* at 145. Frankfurter rejected the political rotation system embraced by Andrew Jackson during his presidency. He believed that Jackson "practiced rotation in office because he thought permanence makes for 'corruption in some and in others a perversion of correct feelings and principles.'" *Id.* at 148 (citing Richardson, *Messages and Papers of the Presidents*, II, 449). Because of this, Frankfurter urged governance by bureaucrats with "training and a sophisticated judgment": "[G]overnment must have at its disposal the resources of training and capacity equipped to understand and deal with the complicated issues to which . . . technological forces give rise." *Id.* at 150-51.

Frankfurter's model of trained, rational bureaucrats has won out over a competing model—Jackson's model of rotating political officers—as the predominant contemporary rationale for delegation to administrative agencies in the United States. See WHITE, *supra* note 21, at 4-5 (noting that Jackson did not introduce the spoils system but continued a system of rotation which existed hand-in-hand with executive-branch-led participatory democracy). Since the New Deal, administrative agencies have been established because experts housed in agencies, more than legislators and their staffs, are able to evaluate technical evidence, engage in scientific analysis, and make rational policy decisions. Recent efforts to expand participation in bureaucratic decisionmaking have been compared with "previous surges of democratic values during the Jacksonian and Progressive eras." Nelson M. Rosenbaum, *Citizen Participation and Democratic Theory*, in *CITIZEN PARTICIPATION IN AMERICA: ESSAYS ON THE STATE OF THE ART* 43, 48 (Stuart Langton ed., 1978).

<sup>132</sup> See CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 137-38 (1965) ("To adopt the term [synoptic decisionmaking] is to assume that a problem is solved by understanding it. Understanding requires a comprehensiveness of information and analysis."); see also THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 10 (1991); Colin J. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 414 (1981).

(5) comparing these alternatives, and (6) choosing the policy with consequences most compatible with the chosen ends.<sup>133</sup>

Although expertocratic decisionmaking provides for scientific rationality, its major shortcoming is that many agency decisions are not purely matters of scientific judgment that can be reduced to a concrete problem-solving calculus, but are inherently infused with value judgments.<sup>134</sup> Issues of risk assessment, for instance, are not simply a matter of discerning scientific risks, but a matter of determining who should bear the risks or costs of a policy choice. Consider, for example, an electric utility's proposal to build a high-voltage electricity transmission line through a park adjacent to a residential area. Neighboring residents whose children play in the park may object in part on the grounds that the children may be exposed to electro-magnetic fields (EMFs) increasing their risk of cancer and other adverse long-range health effects.<sup>135</sup> The electric utility, by contrast, will likely assert that there is no sound scientific evidence to support such claims.<sup>136</sup> Yet, although neighboring residents raise the EMF issue, attempting to clothe the issue in science, there are also other grounds—less technical—for their objection: a loss in a clear view of the sky, a loss in trees which must be removed to accommodate the transmission lines, a decline in their property value, and concern that the neighborhood will become a future brown field. To the extent that agency decisions involve competing values, decisionmaking is political and must provide for and value some degree of nonexpert participation if it is to make claims to legitimate governance.

2. *Pluralism.*—An alternative model focuses not on expertise but on the ability of decisionmakers to solve residual conflict among the constituency they regulate. Pluralism<sup>137</sup>—a theory dominant throughout the 1960s

<sup>133</sup> The model is described in CHARLES E. LINDBLOM, *THE POLICY-MAKING PROCESS* 13 (1968).

<sup>134</sup> See CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* 47, 81 (1979); see also DONALD McCLOSKEY, *KNOWLEDGE AND PERSUASION IN ECONOMICS* (1994).

<sup>135</sup> According to a government report, as of January 1994, fourteen studies had analyzed the association between proximity to power lines and various types of childhood cancers. Of these, eight showed positive associations between proximity to power lines and some form(s) of cancer(s). Four of the studies showed a statistically significant association with leukemia. See NATIONAL INST. OF ENVL. HEALTH SCIENCES AND U.S. DEP'T. OF ENERGY, *QUESTIONS AND ANSWERS ABOUT EMF: ELECTRIC AND MAGNETIC FIELDS ASSOCIATED WITH THE USE OF ELECTRIC POWER* 12 (1995); see also *San Diego Gas & Elec. Co. v. Superior Court of Orange County*, 940 P.2d 669 (Cal. 1996) (discussing evidence of the impact of EMFs). For a conflicting account of the evidence, see NATIONAL RESEARCH COUNCIL, *POSSIBLE HEALTH EFFECTS OF EXPOSURE TO RESIDENTIAL ELECTRIC AND MAGNETIC FIELDS* (1996) (finding no conclusive evidence that EMFs cause cancer).

<sup>136</sup> See, e.g., D.A. Savitz & D.P. Loomis, *Magnetic Field Exposure in Relation to Leukemia and Brain Cancer Mortality Among Electric Utility Workers*, 14 *AMER. J. EPIDEMIOLOGY* 123 (1995) (suggesting that study subjects, exposed to EMFs, had a lower risk of dying from leukemia and brain cancer than the general population).

<sup>137</sup> Some refer to pluralist theories as "exchange perspectives." See JAMES G. MARCH & JOHAN P. OLSEN, *DEMOCRATIC GOVERNANCE* 7 (1995) ("Politics can be seen as aggregating individual prefer-

and 1970s and, in many circles, still dominant today<sup>138</sup>—provides an alternative model of decisionmaking.

For pluralists, “[t]he common good amounts to an aggregation of individual preferences.”<sup>139</sup> Likened to markets, in its most prevalent form, pluralism uses the political process to distribute the benefits of regulation according to the preexisting<sup>140</sup> preferences of its constituents.<sup>141</sup> An alternative form of pluralism views competition among interest groups not as mere preference aggregation, approximating the result of free markets, but as the best means of approximating the public interest.<sup>142</sup> Pluralists see political participation much as market participation, primarily as providing a forum for exchange and bargaining, with the goal of satisfying pre-existing, exogenous preferences.<sup>143</sup>

Consider the legislative process as a forum for addressing an environmental problem, such as air pollution. Now a classic description of the failures of pluralist democracy is the 1977 amendment to the Clean Air Act’s definition of the control technology that must be installed at new sources of air pollution.<sup>144</sup> This amendment to the Clean Air Act requires major new sources of air pollution to install control technology reflecting “the best

ences into collective actions by some procedures of rational bargaining, negotiation, coalition formation, and exchange.”).

<sup>138</sup> This can be confirmed by browsing virtually any issue of the *Journal of Law & Economics*, the *Journal of Legal Studies*, *Public Choice*, or the *Journal of Law, Economics & Organization*.

<sup>139</sup> Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32-33 (1985).

<sup>140</sup> Some use the term “nonreflexive” to describe pluralist preference revelation. See Robert E. Goodin, *Democracy, Preferences, and Paternalism*, 26 POL’Y SCI. 229 (1993); see also Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129, 1140 (1986) (distinguishing second-order preferences, which are preferences about preferences, from first-order preferences, which are direct and often short-term desires for particular objects).

<sup>141</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 288-89 (1965); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 13 (1991); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 45-46 (1984); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975).

<sup>142</sup> ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY V. CONTROL* (1982); ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 23-24 (1967); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* 512-16 (1951). The distinction between the public choice or economic understanding of pluralism and this public interest or civic variant is made in MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?* 112 (1988).

<sup>143</sup> It is important to note that pluralism, unlike expert-based models, implies value skepticism. In other words, all claims to knowledge are treated equally in the preference exchange process. See ARYEH BOTWINICK, *SKEPTICISM AND POLITICAL PARTICIPATION* (1990). For example, a recent attempt to reach consensus in a pluralist regulatory process associated the success of the process with participants’ satisfaction with the outcome and concluded “the most that federal agencies may be able to achieve is an open airing and full consideration of all views within the constraints imposed by external factors.” GOVERNMENT ACCOUNTING OFFICE, *RESTORING THE EVERGLADES: PUBLIC PARTICIPATION IN FEDERAL EFFORTS 2* (Letter Report, Oct. 24, 1995) (GAO/RCED-96-5).

<sup>144</sup> See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

system of emission reduction which . . . has been adequately demonstrated."<sup>145</sup> However, it has been observed, the pluralist legislative process that led to this language was fraught with democratic failures.<sup>146</sup>

For pluralist democracy, whatever its form, participation in legislative processes is an unwieldy and imprecise mechanism for the distribution of regulatory benefits. Although Congress may be able to reach broad agreement on its type of regulatory approach, its size and committee structure may render a detailed congressional approach to the problem difficult or impossible. Interest groups may find administrative agencies more effective institutions for aggregating their preferences.<sup>147</sup> The details of air pollution regulation, along with many of its difficult policy questions, can be addressed by an agency, such as the EPA, which operates under a broad grant of delegated authority from Congress. Agencies may be comparatively more effective than legislators in meeting pluralist political objectives.<sup>148</sup> Thus, many pluralists favor broad legislative delegation to administrative agencies.

So conceived, however, pluralism raises two related problems. First, as Thomas McGarity has observed,<sup>149</sup> pluralism in bureaucracy may occur

<sup>145</sup> 42 U.S.C. 74 § 111(a)(1) (1994). In addition, the 1977 amendments created the "Prevention of Significant Deterioration" program that aims to prevent the deterioration of air quality in those parts of the country that already comply with the National Ambient Air Quality Standards. 42 U.S.C. § 7471-7479 (1994).

<sup>146</sup> First, the new statutory language, by requiring the control technology that would result in a certain "percentage reduction" in emissions, forced scrubbing only indirectly, rather than addressing head-on the means of pollution prevention. ACKERMAN & HASSLER, *supra* note 144, at 40, 47-48. Second, the opaque language adopted by Congress prevented public debate on the issues raised by forced scrubbing. *See id.* at 55-56. Third, even the limited debate that a pluralist clash of opposing interests may normally inspire was thwarted by a bizarre coalition of environmentalists and the eastern high-sulfur coal industry. *See id.* at 27, 31, 37, 126. The failure of the political process, it has been observed, also led to a failure in substance. Although the basic purpose of the Clean Air Act is (obviously) to "clean the air," *id.* at 109, the 1977 amendments may have made the air dirtier by increasing the cost of new power plants so much that utilities had an incentive to keep their older, dirtier facilities in operation longer than they might have with a scrubber requirement. *See id.* at 78.

<sup>147</sup> *See* Pierce, *supra* note 129, at 404-05. Pierce notes that "large numbers of issues, large numbers of participants in as a group decisionmaking process, inadequate information, and inadequate foresight" all impair the ability of the legislative process to aggregate preferences. In addition, relying on the work of Kenneth Arrow and Amartya Sen, Pierce suggests that, even if Congress addressed only one issue each session, there would be analytic problems with majoritarian preference aggregation by Congress. *Id.*; *see also* Amartya Sen, *Social Choice Theory: A Re-Examination*, 45 *ECONOMETRICA* 53 (1977); KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). *But see* Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 *IOWA L. REV.* 949, 955 (1990) (noting "cardinality and interpersonal comparability of individual welfare functions are all but inherent in the process of representative decisionmaking").

<sup>148</sup> *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 56-58 (1982).

<sup>149</sup> Thomas McGarity critically describes agency rulemaking under the pluralist approach. Solutions to problems, according to McGarity, "depend heavily upon professional judgment." MCGARITY, *supra* note 132, at 7. But, in practice, much expertocratic thinking "is really grounded in a kind of in-

within a system of masked rationality. Decisionmakers are often forced to “muddle through” complex problems, making the best decisions they can given political constraints.<sup>150</sup> In addition to their specialized training and experience, agency decisionmakers regularly use cognitive tools to assist them in making their decisions. They “satisfice” instead of maximize: instead of trying too hard to maximize some value, such as social utility, agency decisionmakers instead adopt some acceptable goal short of their ideal.<sup>151</sup> They act incrementally, which allows for concentration on familiar, better known problems, reduces the number of policy choices to be explored, and sharply reduces the number and complexity of factors a decisionmaker has to analyze.<sup>152</sup> They rely on feedback: by making policy choices that yield information, this improves the ability of decisionmakers to make quality choices in the future.<sup>153</sup> Where they face high levels of uncertainty,<sup>154</sup> they are often aided by simplifying devices and heuristic shortcuts.<sup>155</sup> Because of these shortcuts, often embraced for political reasons,

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tuition that is informed by technical training and experience”; that is, decisionmakers “do not analyze the problem and derive a solution so much as they ‘feel’ their way through to an answer, accommodating as many affected interests as possible along the way to reduce the external resistance to their ultimate resolution of the problem.” *Id.*

Under the pluralist approach, the agency’s “primary institutional goal is to produce rules that have a reasonable chance of surviving the inevitable political and legal attacks and that are capable to a tolerable degree of effective implementation in the real world.” *Id.* As McGarity describes the agency rule-making process, the program office, housing the experts, typically drafts a “decision memorandum” for upper-level, politically accountable agency decisionmakers:

The memo lists three options, discusses the first and last options in a cursory fashion, discusses the second option in great detail, and recommends that the agency adopt number two. Unless the upper level decisionmakers are willing to devote substantial time to studying the problem and the program office’s proposed solution, they will usually agree to number two or some minor variation thereof.

*Id.* at 8. The agency’s proposal is then published in the *Federal Register* for public comment. In response to the public’s comments, as with internal suggestions, however, “drastic overhauls, although not unheard of, are rare.” *Id.*

<sup>150</sup> Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959).

<sup>151</sup> Cf. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

<sup>152</sup> See DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS 114-19 (1963).

<sup>153</sup> See *id.* at 120-24.

<sup>154</sup> Rational decisionmaking in situations of uncertainty has been discussed extensively in the literature. See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67 (Robin M. Hogarth & Melvin W. Reder eds., 1987).

<sup>155</sup> A heuristic simplifies a complex network of information into a simple shorthand, analytic framework. When trying to assess the validity of a position, for example, decisionmakers may compare the numbers of reasons they can think of that favor the position with the number of reasons against it. See Eldar Shafir et al., *Reason Based Choice*, 49 COGNITION, Oct.-Nov. 1993, at 11. Following this heuristic, decisionmakers will favor an initiative if there are three reasons in favor of it while only one reason against. This heuristic, however, is hardly precise or accurate. Contrary to the heuristic, precise

some have suggested that, in practice, expertocratic decisionmaking will rarely be able to avoid the pressures of pluralism.<sup>156</sup> However, to the extent that pluralist decisionmaking operates under the guise of science, it raises serious problems for democratic legitimacy.

Second, pluralism in administrative decisionmaking runs the risk of powerful factions securing deals in legislation or regulations at the expense of smaller, more isolated (and perhaps more vulnerable) groups.<sup>157</sup> In the context of air pollution regulation, for example, once legislators delegated the discretion to make policy regarding technology-based environmental regulation to the EPA, the ability of special interests to derail the regulatory objective of clean air increased. The EPA, after much internal rift, concluded that a standard that relied on scrubbers was not worth the cost it would impose on the industry and might even have adverse environmental consequences in contrast to its alternative—burning much cleaner, low-sulfur coal primarily from western states.<sup>158</sup> Yet, despite this conclusion, the EPA adopted a regulation that mandated the scrubber option,<sup>159</sup> because the Administrator believed that it would further one of the purposes of the 1977 amendments—to promote the use of high-sulfur coal produced primarily by eastern and Midwestern states.<sup>160</sup> Likewise, powerful interest groups may cause regulators to misperceive risks, allocating scarce regulatory resources to activities that do not cause the most environmental

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and accurate decisionmaking should lead decisionmakers to oppose a position even if there are *three weak* reasons in favor of it while only *a single decisive* reason for opposing it.

Despite their inaccuracy and imprecision, heuristics have been recognized to serve two important functions. First, they work to reduce the costs of transmitting information, or the costs of engaging in dialogue. Second, in order to facilitate analytical examination of the information transmitted, they actually exclude some information. See Fitts, *supra* note 122, at 940. Perhaps more importantly, though, heuristics may make otherwise intractable problems solvable—at least at a non-prohibitive cost.

<sup>156</sup> See MCGARITY, *supra* note 132, at 8.

<sup>157</sup> Now a classic along this line of critique in constitutional jurisprudence is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Ely, building on the famous footnote four of *United States v. Carolene Products Co.*, juxtaposes “participation enhancing” theories of judicial review against “fundamental values” theories. The former, Ely argues, are preferable over the latter

insofar as political officials had chosen to provide or protect X for some people (generally people like themselves), they had better make sure that everyone was being similarly accommodated or be prepared to explain pretty convincingly why not. . . . [I]t seems to be coming into focus that pursuit of these participational goals of broadened access to the processes and bounty of representative government, as opposed to the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental, was what marked the work of the Warren Court.

*Id.* at 74-75.

<sup>158</sup> See Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 *YALE L.J.* 1466, 1547-50 (1980).

<sup>159</sup> See *id.* at 1553-55.

<sup>160</sup> See *id.* at 1503.

harms.<sup>161</sup> Thus, pluralism—by creating a “faction-ridden maze of fragmented and often irresponsible micro-politics within the government”<sup>162</sup>—may be antithetical to democratic conceptions of equality and fairness.

3. *Deliberative Democracy.*—A fairly recent account of agency decisionmaking, loosely referred to as “deliberative democracy,” has attempted to redefine our understanding of administrative agencies as pockets of democracy.<sup>163</sup> It provides an alternative to expertocratic, pluralist, and transmission belt models of agency governance,<sup>164</sup> and it also provides for an understanding of progressive regulation.<sup>165</sup> Furthermore, deliberative democracy can justify bureaucracy as an element of “sound governance”<sup>166</sup> and suggests that, in certain contexts, agencies have a comparative advan-

<sup>161</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11-21 (1993).

<sup>162</sup> Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 342 (1990).

<sup>163</sup> For a recent description, see AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT* (1996) (containing an eloquent discussion of the promises of deliberative democracy). Of course, deliberative democracy is much broader in its application than administrative law. It is often associated with civic republicanism, which in recent years has inspired a reassessment of constitutional law. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). In addition to administrative law, the impact of deliberative democracy has also extended to areas such as civil procedure, family law, corporate law, and torts. For critical reviews of deliberative democracy, see Richard H. Fallon, *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994); Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993); Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463 (1996).

<sup>164</sup> See Seidenfeld, *supra* note 120. The transmission belt model understands delegation to agencies as “necessary to fulfill explicit congressional policy.” Expertise models understand delegation to agencies as facilitating “technical expertise . . . outside an environment influenced by interest groups and the political process,” while pluralist democracy likens the political process to markets, understanding agencies as directly aggregating the preferences of their regulated constituents. *Id.* at 1513. See also Stewart, *supra* note 57, at 1711-12 (discussing transmission belt, expertise, and pluralist models).

<sup>165</sup> See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 107-10 (1990) [hereinafter *RIGHTS REVOLUTION*]; Sunstein, *supra* note 139, at 59-64.

<sup>166</sup> CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990). Although Edley does not expressly label himself a deliberative democrat or civic republican, Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 592, others, including myself, have been more inclined to include him in this group. See Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763; Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401 (1994).



tage over Congress and the President in making collective policy decisions.<sup>167</sup>

Over the past ten years, deliberative democracy has afforded a systematic challenge to pluralism as a theory of agency legitimacy.<sup>168</sup> Deliberative democracy in administrative law, as with other areas of the law,<sup>169</sup> eludes a simple definition. However, central to all accounts of deliberative democracy is "civic virtue."<sup>170</sup> While civic virtue may be relevant to some pluralist accounts of democracy, for deliberative democrats it is more than the mere result of a political process: "In the republican vision, a primary function of government is to order values and define virtue, and thereby educate its citizenry to be virtuous."<sup>171</sup>

Civic virtue is *necessary* to the deliberative democratic decisionmaking process, not just a fortunate byproduct of it.<sup>172</sup> Despite the centrality of civic virtue, deliberative democrats have failed to define it specifically. It is fair to say, though, that among those who embrace deliberative democracy

<sup>167</sup> See Seidenfeld, *supra* note 120, at 1515 ("[O]n the whole, civic republicanism is consistent with broad delegations of political decisionmaking authority to officials with greater expertise and fewer immediate political pressures than either elected officials or legislators.").

<sup>168</sup> Lindblom, noting the shortcomings of the pluralist approach to deliberation, distinguishes between residual conflict resolution, akin to pluralism, and probing, akin to deliberative democracy, as a means of solving conflict:

As a method of conflict resolution, the vast scope of probing consequently contrasts with an only residual (which is not unimportant) process of conflict resolution through power in the hands of government and other institutions. Inquiry continues without end, always a source of new agreements. The Dutch came to their distinctive social welfare program largely because they probed or talked their way to agreement, not because the government imposed a program to resolve earlier discordance. And it may turn out that such deep conflict as separates Protestant from Catholic in Northern Ireland will be resolved, if ever at all, by discourse, so futile appear the attempts of the British government to impose or coerce a resolution.

LINDBLOM, *supra* note 75, at 48.

<sup>169</sup> See Gey, *supra* note 163, at 805 ("[E]ven if consideration of civic republicanism is limited to the theory's modern variations, it is difficult to define the doctrine. Modern civic republicans disagree among themselves about basic issues, such as the identity of their historical predecessors, and the relationship of civic republicanism to traditional liberalism.").

<sup>170</sup> Jon Elster views the "civilizing force of hypocrisy" as requiring people to speak in public regarding terms, even though they may be self interested. See Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236 (Kenneth Arrow et al. eds., 1995). Sunstein concurs: "If 'hypocrisy is the tribute that vice pays to virtue,' at least we can say that in a system of public deliberation, everyone must speak as if he were virtuous even though he is not in fact." CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 244 (1993) (quoting LA ROCHEFOUCAULD, *MAXIMS* 65 (L. Tancock trans., New York 1959)). Although Gutmann and Thompson are skeptical about the inherent tendency of open debate to "transform self-interested claims into public-spirited ones," for them publicity, one of their basic principles of deliberation, "helps to rule out arguments that one would not accept if others made them." GUTMANN & THOMPSON, *supra* note 163, at 126.

<sup>171</sup> Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 552 (1986).

<sup>172</sup> See Gey, *supra* note 163, at 806 ("The concept of civic virtue is the leitmotif of all civic republican theory."); Sunstein, *supra* note 139, at 31 (noting "animating principle" of republican conception of the Constitution was civic virtue).

as an account of bureaucratic legitimacy there is strong agreement as to at least two features that civic virtue, also referred to as deliberation, entails.

*a. Dialogue based in reason.*—To begin with, deliberation must occur through a process of dialogue,<sup>173</sup> or discourse,<sup>174</sup> based in communicative reason.<sup>175</sup> The dialogue provided by deliberative democratic decisionmaking processes goes beyond the rationality provided by expertocratic models to the extent that it relies upon communicative action within the regulated community.<sup>176</sup> At the same time, participants, whether agency referees or the public, are not enjoined merely to respect the viewpoints of others: they are required to engage these viewpoints, to take them as a starting point in shaping dialogue and moving towards consensus.<sup>177</sup> A deliberative democratic process strives to operate in an engaged mode, somewhere between mere respect and confrontation.<sup>178</sup> When the decisionmaking process deviates from this mode, it becomes disengaged.

Deliberative democratic dialogue generally occurs at two levels: at the level of lay (private citizen) participants—often participating through interest groups—and at the level of institutional decisionmakers. The reasoning process engaged in by both lay and agency decisionmakers is not solely instrumental or strategic—that is, offered for purposes of justifying a pre-rationalized decision.<sup>179</sup> Instead, it is expected to be communicative and

<sup>173</sup> See Sunstein, *supra* note 139, at 31 (noting that “[d]ialogue and discussion among the citizenry” are “critical features” of the republican vision).

<sup>174</sup> See Seidenfeld, *supra* note 120, at 1529-30 (arguing that before the government acts, “it must engage in public discourse about whether the action will further the common good” and “explain how its decisions further the common good”).

<sup>175</sup> The parallels to Jürgen Habermas’ theory of communicative action, and Bruce Ackerman’s extension to social justice, are obvious. See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 353 (1980) (envisioning a discussion about liberal justice in which “the legitimacy of *each and every* intuition is vindicated through dialogue”); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 25 (William Rehg trans., 1996) (1992) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*]; JÜRGEN HABERMAS, *1 THE THEORY OF COMMUNICATIVE ACTION* 101 (Thomas McCarthy trans., 1984) (describing communicative process by which political actors attempt to reach an understanding and orient themselves to future common actions); see also *infra* notes 212-15 and accompanying text (discussing the ideal speech situation).

<sup>176</sup> Political philosophers have recognized the distinction between rationality and reasonableness. See JOHN RAWLS, *POLITICAL LIBERALISM* 48-54 (1993). For a recent discussion of the distinction in the context of tort law, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311 (1996).

<sup>177</sup> “A deliberative process will not result in unanimity or even consensus.” SUNSTEIN, *supra* note 170, at 247.

<sup>178</sup> Hence, Gutmann and Thompson place reciprocity, their first principle of deliberation, somewhere between impartiality, motivated by disinterested altruism, and prudence, motivated by self-interest. See GUTMANN & THOMPSON, *supra* note 163, at 53.

<sup>179</sup> The distinction between communicative and strategic actions is discussed in HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 175, at 25. As Pettit suggests, a key contrast between pluralism and deliberative decisionmaking is that while the former backgrounds reason, the latter places reason in the foreground of the decisionmaking process. PETTIT, *supra* note 28, at 202-05.

dynamic, and to have a direct effect on the final decision. Communicative reasoning presupposes the application of dialogic structures, such as scientific or economic models, and semiotic tools, such as heuristics and satisficing, for purposes of furthering dialogue.<sup>180</sup>

*b. Decisionmakers and citizens do not act solely on preferences exogenous to the decisionmaking process.*—Second, unlike pluralist accounts, deliberative democratic decisionmaking does not take individual preferences as exogenous to the political process. Rather, private citizens in the political process must transcend their own conceptions of self interest: “[I]n their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general.”<sup>181</sup> Government outcomes are reflective of “citizens devoted to a public good separate from the struggle of private interests.”<sup>182</sup> This is not to say that citizens may not express private preferences in the political process; however, to the extent that they do rely on their personal experiences and values, rather than the public good, the decisionmaking process ensures that these preferences are reflexive and not simply accepted as reasons for action without critical examination.<sup>183</sup> “The republican belief in deliberation counsels political actors to achieve a measure of critical distance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review.”<sup>184</sup> The deliberative

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<sup>180</sup> On dialogic structures and semiosis within Habermas’ theory of communicative action, see Benjamin Lee, *Textuality, Mediation, and Public Discourse*, in HABERMAS AND THE PUBLIC SPHERE 402, 409-12 (Craig Calhoun ed., 1992).

<sup>181</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550 (1988) (noting that political actors should look “to the public good”) (citing J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975)); see also Seidenfeld, *supra* note 120, at 1537-38.

<sup>182</sup> Sunstein, *supra* note 139, at 36.

<sup>183</sup> Hence, Gutmann and Thompson value accountability as their third principle of deliberation. See GUTMANN & THOMPSON, *supra* note 163, at 128-64. Evidence suggests that the natural inclination of citizens may tend towards uncritical revelation of preferences. It has been noted that people “tend . . . to see their own behavioral choices and judgments as relatively common and appropriate to existing circumstances, while viewing alternative responses as uncommon.” Lee Ross et al., *The “False Consensus” Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279, 280 (1977). However, there is also evidence that deliberation has a transformative effect on one’s beliefs. See, e.g., NORMAN FROHLICH & JOSEPH OPPENHEIMER, *CHOOSING JUSTICE* (1992); John Orbell et al., *Explaining Discussion-Induced Cooperation*, 54 J. PERSONALITY & SOC. PSYCHOL. 811 (1988). Public dialogue itself may cause public and private preferences to diverge. See TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995) (exploring the causes and consequences of holding one set of opinions privately while expressing another in public). This suggests the difficulty of defining a pluralist criterion for preference aggregation when individual preferences are highly malleable. See Robert H. Frank, *The Political Economy of Preference Falsification, Timur Kuran’s Private Truths, Public Lies*, 34 J. ECON. LIT. 115, 119 (1996) (book review).

<sup>184</sup> Sunstein, *supra* note 181, at 1548-49.

democratic decisionmaking process is not only reactive to preferences, but it also seeks affirmatively to mold and shape them.<sup>185</sup>

### *B. Participation in the Models of Agency Decisionmaking*

Regardless of the decisionmaking model,<sup>186</sup> participation lends legitimacy to agency decisions. The rationales for participation, however, vary from model to model. The expertocratic model values participation primarily for providing information, although the model recognizes some other values from participation as well. Pluralist models depend upon participation to make the process of preference exchange fairer. Deliberative democratic models see participation as valuable for these reasons, but also for purposes of forging greater understanding and consensus about the common good among participants.

At first blush, the need for participation seems least acute within the expertocratic model. However, as a justification for collective social action, the expertocratic model relies upon participation in several respects. First, even for strident advocates of expertise, participation continues to play an important role in ensuring oversight and accountability; to the extent the expertocratic models do not completely eschew oversight and accountability, participation will be valued for these purposes. Lay participation behooves agencies to formulate reasons for their decisions in language that is understandable to the public at large.<sup>187</sup> Second, participation may be important to counteract the effects of faction in the expert decisionmaking process—to preclude the expertocratic model from transforming itself into strategic-rationalized pluralism. Third, and most important to expertocratic models, is the information provision function: to the extent that participa-

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<sup>185</sup> See JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 26-42 (1983).

<sup>186</sup> While some express a clear preference for one of the models in all agency decisionmaking contexts, I am less inclined to suggest that one model, invariably, is preferable. The expertocratic model may become more appropriate with the intellectual difficulty of the task at hand, fitting the regulatory tasks of, say, the Patent Office or the Internal Revenue Service; the pluralist model may become more appropriate if the number of people directly affected by the process comprises a significant portion of the community and is likely to be heard in the process, as with a local zoning board; the deliberative democratic model may best fit big and highly controversial issues, such as social security or health care reform at the state or national level.

<sup>187</sup> For example, for Justice Stephen Breyer, who envisions a centralized bureaucratic group of experts, this oversight rationale is paramount:

[T]he existence of a single, rationalizing group of administrators can . . . facilitate democratic control, for it would reduce a mass of individual decisions to a smaller number of policy choices, publicize the criteria used to make those choices, . . . and thereby make it easier for Congress, or the public, to understand what the Executive Branch is doing and why. . . . [T]o create clear lines of authority, to facilitate the assignment of responsibility is to empower the public.

BREYER, *supra* note 161, at 74.

tion provides agency decisionmakers with information, more participation can provide better data and ensure more comprehension.<sup>188</sup>

Lay participation is also important to pluralist models of decisionmaking, but primarily to encourage the formation of interest groups in order to make the playing field of exchange politics fairer. Further, pluralism is compatible with skepticism about the scientific claims of rationality. Pluralists prefer that all preferences, whether scientific or lay, be treated equally in the political process without evaluating the merit of any individual preference. Thus, to the extent that pluralism embraces skepticism, it makes participation the only mechanism that can achieve truly democratic solutions.<sup>189</sup>

Although some deliberative democrats have claimed that pluralism provides for and justifies narrow participation in the political process,<sup>190</sup> today most pluralist theories of democracy make broad calls for openness in government and participatory democracy.<sup>191</sup> For pluralists, a more public and participatory process greases the wheels of preference exchange. For example, Robert Dahl, a pluralist, makes "effective participation" one of the five criteria for any democratic process:

Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.<sup>192</sup>

Democracy, for modern pluralists, lives hand-in-hand with participatory democracy.<sup>193</sup>

Participation is also viewed as necessary to contemporary deliberative democratic accounts of agencies,<sup>194</sup> but for a broader range of reasons.<sup>195</sup>

<sup>188</sup> See Mary Gisez Kweit & Robert W. Kweit, *The Politics of Policy Analysis: The Role of Citizen Participation in Analytic Decisionmaking*, in *CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING* 19, 25-30 (Jack DeSario & Stuart Langton eds., 1987).

<sup>189</sup> See BOTWINICK, *supra* note 143.

<sup>190</sup> Sunstein asserts that "[p]luralist approaches place no premium on political participation." Sunstein, *supra* note 181, at 1546. For some pluralists, the absence of participation in open government process is taken to suggest contentment with the status quo. See BERNARD R. BERELSON ET AL., *VOTING: A STUDY OF OPINION FORMATION IN PRESIDENTIAL CAMPAIGNS* (1954); MILBRATH, *supra* note 30. However, this version of pluralism—one that allows participation to only the most powerful interest groups—is relatively weak.

<sup>191</sup> See Stewart, *supra* note 57.

<sup>192</sup> ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 109 (1989).

<sup>193</sup> See ELY, *supra* note 157; Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>194</sup> Pettit argues against the populist tendency of modern civic republican or deliberative democratic theories. See PETTIT, *supra* note 28, at 8-9.

Cass Sunstein, for example, argues that deliberative democracy is based on several principles, foremost among them deliberation and participation:<sup>196</sup> political actors “generate institutions that will produce deliberation among those differently situated, not to mimic decisions . . . made by the unsituated.”<sup>197</sup> For Mark Seidenfeld as well, participation is central to deliberative democratic legitimacy: “[P]articipation by all facets of society, deliberation prior to agency decisionmaking, and justification of the decision in terms of the public interest (including explanations of deviations from past conceptions) encourage regulators to think hard about their own conceptions of the public interest.”<sup>198</sup> Moreover, James Fishkin specifies four simple conditions for an ideal democratic process, central among them deliberation and participation.<sup>199</sup>

For these deliberative democrats, participation—opening up political processes to interests and providing additional access points—works “to monitor the behavior of representatives in order to limit the risks of factionalism and self-interested representation.”<sup>200</sup> According to Sunstein:

Impartiality within republican theories . . . require[s] [a] public regarding [of] justifications after multiple points of view have been consulted and (to the extent possible) genuinely understood. . . .

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<sup>195</sup> Despite its pejorative connotation, elitist deliberation, or deliberation independent of direct political participation, is not rejected by deliberative democrats. Democratic elitism—the incorporation of elitist principles within democratic theory—finds support in the writings of Peter Bachrach and William McDougal. See BACHRACH, *supra* note 85; WILLIAM MCDUGAL, *IS AMERICA SAFE FOR DEMOCRACY?* (1921). On elitist deliberation, see FISHKIN, *supra* note 88, at 32 (“In spite of two centuries of attempts to defend elite deliberation, it is arguable that the Congress we have finally developed is close enough to being an instructed body, at least on many issues, that there is no longer any irony in the choice of terms.”).

The issue, however, is not reducible to labels. Rather, it harks back to an old debate often associated with Edmund Burke’s distinction between a congress and a parliament. By a congress, Burke meant a meeting of ambassadors, as in a treaty negotiation. Ambassadors in such a setting are bound by instructions from their respective states. A parliament, by contrast, is a more deliberative body, in which representatives exercise independent judgment. See Edmund Burke, *Speech to the Electors of Bristol on Being Elected* (Nov. 1774), in *THE POLITICAL PHILOSOPHY OF EDMUND BURKE* 110 (Jain Hampsher-Monk ed., 1987). The contemporary debate raises the question whether decisionmakers, as representatives, “ought to be viewed as autonomous or automatons.” See Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996) (raising the issue in the context of the “Contract with America”).

<sup>196</sup> Sunstein’s version of civic republicanism is characterized by four distinctive principles: (1) deliberation in politics, or what he calls “civic virtue,” (2) equality of political actors, (3) universalism, or a common good made possible by “practical reason,” and (4) citizenship, “manifesting itself in broadly guaranteed rights of participation.” Sunstein, *supra* note 181, at 1541.

<sup>197</sup> *Id.* at 1571.

<sup>198</sup> Seidenfeld, *supra* note 120, at 1571.

<sup>199</sup> FISHKIN, *supra* note 88, at 34. Fishkin’s conditions include: (1) political equality, (2) deliberation, (3) participation, and (4) nontyranny. *Id.*

<sup>200</sup> Sunstein, *supra* note 181, at 1556.

. . . [T]he basic constitutional institutions of federalism, bicameralism, and checks and balances share some of the appeal of proportional representation, . . . proliferat[ing] the points of access to government, increasing the ability of diverse groups to influence policy, multiplying perspectives in government, and improving deliberative capacities.<sup>201</sup>

Civic republican decisionmaking, writes Sunstein, “produce[s] high levels of participation and genuine deliberation.”<sup>202</sup> Thus, deliberative democrats, like pluralists, view participation as important because it diffuses the influence of the most powerful special interests by ensuring that everyone else has access to the political process as well, exposing participants and agency decisionmakers to a broad and diverse range of perspectives.

For most deliberative democrats, though, participation is of much broader significance than it is for pluralists. Participation is not only instrumental, but it is also celebrated as a way of inculcating characteristics such as empathy, virtue, and feelings of community.<sup>203</sup> “Once the participatory system is established . . . it becomes self-sustaining because the very qualities that are required by individual citizens if the system is to work successfully are those that the process of participation itself develops and fosters.”<sup>204</sup> These characteristics, of course, feed back into the deliberative process.<sup>205</sup> Moreover, large scale participation may help to make citizens aware of new proposals and alternatives to their existing preferences, and give them access to otherwise unavailable information. This increases the propensity of regulators to shape and mold not only civic virtue itself, but also individuals’ preferences on substantive policy and political issues.<sup>206</sup>

Whether, and when, deliberation and participation converge in the deliberative democratic model depends upon our conception of the common good, toward which a deliberative democratic decisionmaking process aspires. Procedural and substantive definitions of the common good yield

<sup>201</sup> *Id.* at 1575, 1586 (footnotes omitted). Seidenfeld concurs:

The civic republican goal that government policy reflect political consensus requires open access to the policymaking process. Representatives of all interests potentially affected by a government action must have meaningful opportunities to engage in discussion about the action. . . . Broad rights of access . . . allow champions of particular values to communicate their perspectives to government decisionmakers, and they facilitate the decisionmakers’ communication of the reasons for their decision—how their decision takes account of various perspectives—to the citizenry.

Seidenfeld, *supra* note 120, at 1530 (footnotes omitted).

<sup>202</sup> SUNSTEIN, *supra* note 170, at 244.

<sup>203</sup> See Brest, *supra* note 84, at 1624; Seidenfeld, *supra* note 120, at 1536; Sunstein, *supra* note 181, at 1556.

<sup>204</sup> CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 25 (1970).

<sup>205</sup> For Ely, too, participation is not only instrumental. See ELY, *supra* note 157, at 75 n. \*.

<sup>206</sup> See Seidenfeld, *supra* note 120, at 1537 (“By informing citizens about others’ conceptions of the public interest and by revealing to them how their own conceptions might harm others, the deliberative process can help educate citizens and unmask self-delusions.”). See also ELSTER, *supra* note 185, at 36-37; LINDBLOM, *supra* note 75.

slightly different relationships, and hence balances, between participation and deliberation.<sup>207</sup>

If the common good is entirely a matter of an agency's decisionmaking procedure, participation and deliberation will often, but not always, be complementary, and citizens who participate in agency decisions will be afforded all of the advantages of a deliberative process.<sup>208</sup> Likewise, deliberation depends upon participation because for the common good to prevail throughout the process, members of the affected community must be allowed to participate directly in its deliberations. As I discuss in Part IV, however, too much participation may impair the deliberative quality of this process. Encouraging deliberation, then, becomes a matter of managing participation to ensure that the process remains sufficiently deliberative.

To the extent, the common good has a significant substantive component, deliberative democracy need only allow a minimal level of participation. Although deliberative democratic decisionmakers do not make claims to discovery of a single right answer, they do engage in a scientific and rationalist dialogue that demands some critical distance from the immediate political process. To the extent that this model prevails, less broadly based participation will be acceptable to deliberative democrats, although even here participation may still be valued to the extent this type of exercise of positive liberty works to protect negative liberties.

#### IV. THE TENSION BETWEEN PARTICIPATION AND DELIBERATION

Unlike expertocratic and pluralist decisionmaking models, deliberative democracy, as it has found expression in the administrative law literature, challenges its supporters to examine the relationship between two democratic ideals, namely participation and deliberation. On their face, the ideals seem to be complements—perhaps even inextricably so. Participation complements deliberation by helping to limit monopoly rents from interest group politics, by providing better information, and by fostering democratic process and citizenship. Deliberation ensures that participation in agency decisions will be meaningful and not perfunctory.

However, deliberative democracy harbors a tension that demands further analytical exploration. In order to be deliberative *and* democratic, institutions must provide for meaningful participation by individuals and groups from a broad and diverse range of perspectives. Yet, as I will argue in this Part, if institutions allow too much of certain types of participation they are no longer deliberative. Participation, while necessary to the deliberative democratic conceptions of legitimacy, also threatens the ability of deliberative democracy alone to provide an account of political legitimacy.

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<sup>207</sup> On the tension between substantive and procedural conceptions of the common good in civic republicanism, see Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 138-42 (1995); see also Gey, *supra* note 163, at 854-94.

<sup>208</sup> See Note, *supra* note 166.



The tension between participation and deliberation, this Part suggests, casts doubt upon the claims of deliberative democracy to realize its ideals through the American administrative process.

### *A. Exploring the Relationship Between Participation and Deliberation*

As a conceptual matter, deliberation is quite separable from participation.<sup>209</sup> Participation helps to ensure that agency decisions are responsive to the will of the public, transparent, and open. Deliberation, by contrast, removes decision events from the immediate influence of the public, slowing down the political process and giving it a deeper legitimacy; it ensures that collective decisions are something more than the consensus of “mere majorities.” While participation encourages breadth in the agency decision-making process, deliberation is more concerned with depth.

It is theoretically possible for political institutions to allow for mass participation without much deliberation. In ancient Sparta, for example, representatives were elected by a method called “the Shout”: impartial observers simply assessed the volume of the cheering each candidate received when he walked in front of the mass assembly throng, and the candidate with the loudest vocal endorsement was deemed the winner.<sup>210</sup> Likewise, it is theoretically possible for political institutions to provide deliberation without participation. One can imagine, for instance, a set of politically insulated experts appointed to assess health and environmental risks.<sup>211</sup> In practice, however, political institutions, including administrative agencies, attempt to provide for both.

As a point of departure, it is useful to consider what Jürgen Habermas posits as the ultimate deliberative state—the ideal speech situation.<sup>212</sup> In such a conversation, all arguments posed by participants are answered in a context of free and equal discussion.<sup>213</sup> If such a conversation continues for

<sup>209</sup> My analysis in this section is intended to make some general claims about the relationship between participation and deliberation, and explore their implications for a well-functioning system of agency governance. I do not intend to make predictive claims about what happens invariably in the agency decisionmaking context.

<sup>210</sup> The term “the Shout” has been used by modern scholars. See JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITS OF RATIONALITY 85-86 (1989). The Spartan system is described in Plutarch’s *Lycurgus*. See PLUTARCH ON SPARTA 38-39 (Richard J.A. Talbert trans., Penguin Books 1988).

<sup>211</sup> Justice Stephen Breyer, before his appointment to the Supreme Court, proposed the establishment of a small, centralized administrative group of career civil servants to rationalize health and environmental risk assessment. BREYER, *supra* note 161, at 59-61.

<sup>212</sup> See JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., Beacon Press 1975).

<sup>213</sup> The ideal speech situation, according to Habermas, assumes a background consensus emerging from mutual recognition of four different validity claims (so-called *Geltungsansprüche*) involved in the exchange of speech acts (1) claims that each individual’s utterances are understandable, (2) claims that their propositional content is true, (3) claims that each speaker is sincere in uttering them, and (4)

a sufficient length of time, it is quite possible that, ultimately, the only reason a question might be resolved is because the force of the better argument is able to persuade those who hold differing perspectives.<sup>214</sup> Such is the ideal deliberative state in any communicative political process. In practice, however, the ability of institutions to provide for this ideal state is seriously constrained. Institutions must make due with scarce resources. Agencies, for example, work with limited staff. In addition, agencies may not always have the time to wait for the force of the better argument to prevail. Conversations must come to an end in order to solve practical problems and avoid their exacerbation.<sup>215</sup>

Participation and deliberation in the administrative process often complement each other. As a general matter, as the number of participants (access points) in an administrative process is expanded at the various levels of decisionmaking, the amount of monopoly rents powerful interest groups may be able to extract will decrease. This works to reinforce the norms of political equality that are central to democratic deliberation. The amount of information before decisionmakers will also increase: a greater number of issues will be raised, the proposed set of solutions for decisionmaking will increase, and the amount of data with respect to issues and solutions will increase. "Public deliberation may reveal the truth or falsity of factual claims about the state of the world or about the likely effects of policy proposals."<sup>216</sup> Participants and decisionmakers will have more information to analyze, evaluate, and act upon. Increased participation enhances deliberation by broadening the number of proposed solutions for each agenda item and giving agencies more information on which they can base their final decisions. Thus, initially an increase in access points will work to create positive information effects by facilitating greater participation while also minimizing the monopoly rents that powerful interest groups may seek to gain from the regulatory process. Threshold levels of participation will not impair but enhance deliberative agency decisions.

At some point, however, the benefits of information provided by increased participation will begin to diminish at the margin and, eventually, will level off. Eventually, as participation expands, deliberation will peak and will reach its maximum level. At some point, the proliferation of access points will begin to create adverse effects for agency decisionmakers and for participants: deliberation will begin to decrease as participation ex-

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claims that it is right or appropriate for the speaker to be performing the speech act. *See id.* at xiii-iv (translator's introduction).

<sup>214</sup> *See* Jürgen Habermas, *A Reply to my Critics*, in HABERMAS: CRITICAL DEBATES 219, 269 (John B. Thompson & David Held eds., 1982).

<sup>215</sup> "One can discuss for only so long, and then one has to make a decision, even if strong differences of opinion should remain." ELSTER, *supra* note 185, at 38.

<sup>216</sup> SUNSTEIN, *supra* note 170, at 243.

pands, leading to sub-optimal deliberation.<sup>217</sup> Fishkin recognizes this phenomenon to the extent that he concedes “[a]s we open up opportunities for participation and political equality for the entire citizenry . . . we create incentives for rational ignorance that destroy deliberation.”<sup>218</sup> A goal of administrative law should be to encourage decisionmakers to monitor their levels and degrees of participation and balance these against the depth of deliberation.<sup>219</sup>

However, participation’s adverse effects for deliberation are broader than the rational ignorance of the participants that Fishkin suggests. Participation also has costs for the *decisionmaking process*. For example, large numbers of participants may present too much information to decisionmakers, overwhelming the ability of decisionmakers to focus in depth on specific problems. This, in turn, may create opportunities for strategic uses of information by participants. While strategic behavior alone is not suspect, it raises problems for deliberative decisions to the extent that it encourages the obfuscation of issues or delay with little or no countervailing benefits.

To understand the effects of increases in participation on agency decisions, it is helpful to recognize the dualist nature of agency decisionmaking. Bureaucratic decisionmaking dualism employs a distinction between “ordinary” and “constitutive” decisions.<sup>220</sup> *Ordinary* decisions take place within the structure or context of a specific political-theoretic decisionmaking model, which describes the day-to-day operation of a decisionmaking culture given the goals of a pre-selected decisionmaking model.<sup>221</sup> By contrast, *constitutive* decisions refer to an agency’s selection of a political-

<sup>217</sup> Cf. David W. Orr, *U.S. Energy Policy and the Political Economy of Participation*, 41 J. POLITICS 1027, 1040-44 (1979) (explaining effects of large-scale participation on focus, deliberation, and efficiency in policy formation).

<sup>218</sup> FISHKIN, *supra* note 88, at 54; see also *supra* note 116 and accompanying text (discussing Downs’ voting paradox).

<sup>219</sup> As the D.C. Circuit has noted:

[T]he [Federal Communications] Commission need [not] allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate [intervention] regulations by statutory rulemaking. . . . *Appellants were responsible spokesmen for representative groups having significant roots in the listening community.* These criteria can afford as a basis for developing formalized standards to regulate and limit public participation to spokesmen who can be helpful.

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (emphasis added).

<sup>220</sup> Harold Lasswell, one of the founders of modern policy science, makes this distinction in HAROLD D. LASSWELL, A PRE-VIEW OF POLICY SCIENCES 77 (1971). A similar distinction is made in BRIAN J. COOK, BUREAUCRACY AND SELF-GOVERNMENT: RECONCEIVING THE ROLE OF PUBLIC ADMINISTRATION IN AMERICAN LIFE 4-7 (1996) (distinguishing between instrumental and constitutive views of administration for purposes of evaluating decisionmaker and public conceptions of bureaucracy).

<sup>221</sup> “Ordinary policy planning adapts structures and functions to the modest changes compatible with established doctrines, formulas, and miranda.” LASSWELL, *supra* note 220, at 77. Cook’s analogue to ordinary decisionmaking, “instrumental” administration, is defined by him in an epistemic manner, as a means-ends rationality, COOK, *supra* note 220, at 4.

theoretic model—expertocratic, pluralist, or deliberative democratic—which, in turn, influences an agency's decisionmaking culture.<sup>222</sup> Selection of such a model is important because it will affect an agency's mind set, its allocation of staff resources and expertise, and its institutional relationship with and reaction to participation by the public.<sup>223</sup> Expertocratic decisionmaking cultures, for example, are likely to allocate their staff resources in a manner very different from pluralist cultures, and this allocation of resources will affect how expertocratic cultures respond to lay participants.

Regardless of the decisionmaking culture, increased participation may affect *ordinary* agency decisions in several ways. First, participation of a broad range of interests before an agency may affect the ability of agency decisionmakers to control their own agendas and set priorities. As agency supervision over regulatory agendas diminishes, agency decisionmaking processes lose their potential for neutral analysis. Moreover, agency accountability to politically responsive oversight institutions, such as the President and Congress, is reduced; direct participation before any agency may crowd out participation through formal political institutions.<sup>224</sup> These adverse effects on neutral analysis and accountability are problematic for expertocratic decisionmaking. Moreover, as the ability to supervise agendas and set priorities decreases, so will the deliberative quality of the process, raising problems for deliberative democratic decisionmaking processes.<sup>225</sup>

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<sup>222</sup> See LASSWELL, *supra* note 220, at 77, 98-111. A dualist distinction similar to Lasswell's and Cook's is employed by Bruce Ackerman, in a different context, in his discussion of American constitutional governance. See ACKERMAN, *supra* note 112 (distinguishing between ordinary and constitutional modes of decisionmaking). Constitutional dualism is now widely discussed, if not well-accepted, in the constitutional law and legal theory literature. See RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); *Symposium on Bruce Ackerman's "We the People,"* 104 ETHICS 446 (1994). However, my analysis, unlike Ackerman's, views the distinction as one initially made by institutions, including administrative agencies, not by individual citizens (although individuals citizens, eventually, may perceive and react to the distinction). Further, the distinction as I employ it, does not depend upon citizens' motivations in the decisionmaking process (although their motivations may be influenced by the mode of decisionmaking).

<sup>223</sup> Rousseau's discussion of the Lawgiver in *The Social Contract* relies on the work of the eighteenth-century French philosopher and jurist Montesquieu: "[A]t the birth of political societies, it is the leaders of the republic who shape the institutions but afterwards it is the institutions which shape the leaders of the republic." JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 84 (M. Cranston trans., 1968) (1762).

<sup>224</sup> As Mashaw has recognized, "the micropolitics of a participatory administrative structure may undermine rather than support what remains of the attachment to legislative control or to rational decisionmaking." MASHAW, *supra* note 1, at 23. As David Cohen and Peter Strauss have suggested, enhanced legislative participation may also crowd out participation in rulemaking by leading agencies to shift decisionmaking resources to adjudication. Cohen & Strauss, *supra* note 46, at 109-10.

<sup>225</sup> Even advocates of broadened participation in agency decisionmaking acknowledge the importance of agencies retaining control over their agendas. See Cramton, *supra* note 8, at 536 ("an agency and its presiding officer must be able to maintain control of each proceeding in order to bring it to an expeditious conclusion").

Second, increases in information facilitated by more participation may lead to information overload, encouraging poor analysis, superficial examination of alternatives, and a widening of the gap between complete, precise, and accurate, as opposed to vague and sloppy, heuristic analysis. Expansion of the interests before decisionmakers will eventually have the effect of duplicating preexisting agenda items or, perhaps, the number of choices before an agency for any single agenda item. Some information may be ignored, the task of sifting bad from good information may be burdensome, or, far worse, bad information may drive out the good. Moreover, the availability of additional information may affect participants by enticing them to act strategically. This behavior has the unwelcome effect of polarizing existing participants' preferences. Information overload and increased incentives for strategic action can have adverse effects for both expertocratic and deliberative democratic decisionmaking models. To a lesser extent, overload may also impair the achievement of pluralist goals.

Third, as more lay participants learn about the agency decisionmaking process, the ability of agency decisionmakers to deliberate collegially may be impaired. Decisionmakers may lose the ability to meet and discuss items critically without backlash from the public, forcing superficial, cooled, or disingenuous discussion. While closing agency discussion altogether from public participation is not desirable, open meeting laws may have gone too far towards debilitating the democratic decisionmaking process within administrative agencies, thus thwarting the attainment of deliberative democratic goals.

At the *constitutive* level, increased participation may also create incentives for decisionmakers to shift agency resources away from efforts at deliberative decisionmaking, required by the deliberative democratic model, and towards expertocratic or pluralist decisionmaking. For example, agency decisionmakers, frustrated by their inability to satisfy all participants in the process, may choose to delegate tough political choices to experts, who can attempt to legitimate their choices by appealing to rational, scientific jargon. In this way, increases in participation may lead agency decisionmakers to perceive the expertocratic model as more attractive than its alternatives. Alternatively, as degrees of participation increase, decisionmakers risk even greater interference of pluralist politics with an agency's task of devoting depth and focus to its decisions. For example, it has been observed that much interest group activity in the agenda-setting context consists not of proposing new agenda items or advocating certain proposals, but of blocking them.<sup>226</sup> Less seldom, interest groups that press

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<sup>226</sup> As John Kingdon notes:

[I]nterest groups often seek to preserve prerogatives and benefits they are currently enjoying, blocking initiatives that they believe would reduce those benefits. Thus regulated truckers in combination with the Teamsters put up a strong fight against trucking deregulation. Hints of increased landing fees for general aviation (not-for-hire aircraft) and of imposing landing restrictions or requiring new equipment for them brought floods of outcry from pilots all over the country. The op-

issues persistently and squawk loudly may be able to influence the content of an agency's agenda.<sup>227</sup> While the increase in information that is brought on by more participants may make expertise decisionmaking a preferred format, it also provides greater opportunities for strategic behavior on behalf of participants—facilitating a shift away from communicative and towards instrumental speech acts. To the extent that decisionmakers perceive participants as acting strategically based on their pre-existing preferences, they are likely to find the pluralist model of decisionmaking-as-conflict-resolution more attractive than the deliberative democratic model.

Participation's effects on ordinary and constitutive decisions can be understood in the context of several well-accepted mechanisms designed to enhance participation in administrative governance which have already been introduced: citizen suits to enforce environmental laws, the NEPA's EIS process, and sunshine laws. My purpose in exploring these mechanisms is not to suggest that one or more of these are inherently flawed, but to examine how, if not appropriately structured, the type of participation provided by each may have deleterious effects on agency governance.

### *B. Participation's Effects for Ordinary Agency Decisions*

Excessive participation interferes with ordinary decisions in at least three respects: by interfering with agenda setting by politically accountable agency decisionmakers, by causing information problems for decisionmakers and participants, and by impairing collegiality among decisionmakers. In this section, I provide examples of how the proliferation of access points, facilitating increased participation, can create each of these adverse effects, assuming for the present that the degree and level of participation has not affected the agency's constitutive decision about which model it wishes to employ.

*1. Interference with Agency Agenda Setting.*—One of the more significant costs of mass participation for agency decisionmaking is its potential interference with agency-supervised agenda setting. In practice, this is a particular problem for broad-based participation in expertocratic and deliberative democratic decisionmaking cultures. If agency decisionmakers are to maintain neutrality in public dialogue over issues, politically accountable decisionmakers must maintain some degree of supervision over their agendas. Moreover, participation before agency decisionmakers may work to crowd out accountability by virtue of oversight by nonagency political in-

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position of medical care providers to health insurance and other new health programs that they believe run counter to their interests is by now legendary.

KINGDON, *supra* note 90, at 52.

<sup>227</sup> One government official described how an issue rises through his department due to interest group pressure: "Generally speaking, the louder they squawk, the higher it gets." *Id.* at 52.

stitutions, such as Congress or the executive branch. Citizen suits under federal environmental laws are illustrative of this problem.<sup>228</sup>

Citizen suits were designed with the laudable intention of discouraging unaccountable or irrational decisionmaking by agency experts alone, instead empowering private interests to seek enforcement of environmental laws.<sup>229</sup> Some deliberative democrats, such as Sunstein, have embraced citizen suits and urged Congress to find ways to grant citizen standing<sup>230</sup> that comport with the Supreme Court's decision in *Lujan v. Defenders of Wildlife*,<sup>231</sup> in which the Court invalidated a congressional grant of universal standing to citizens under the Endangered Species Act. Although the number of citizen suits may comprise a very small portion of participation in agency decisions, citizen suit provisions under federal environmental statutes provide a clear example of how indiscriminate participation in the agency decisionmaking process potentially interferes with agency agenda setting and threatens the deliberative propensity of the process. Consider citizen suits under the Clean Water Act,<sup>232</sup> which constitute a disproportionately large percentage of citizen enforcement actions against private polluters in that context.<sup>233</sup> The Clean Water Act establishes an ideal of zero discharge to eliminate *all* pollution, not just *harmful* pollution.<sup>234</sup> Despite this absolutist goal, the water pollution regulatory system, which operates under limited resources, has had to make hard choices: the EPA has exhausted most of its resources in regulation of and enforcement against point

<sup>228</sup> Citizen suits are described in the text accompanying *supra* notes 125-28.

<sup>229</sup> See *supra* note 128 and accompanying text. Citizen suits were also meant to prevent the executive from undermining Congress's programs by selective enforcement or by its complete failure to enforce programs due to direct political pressure by polluters. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311 (1991) (observing that Congress established citizen suit provisions in each of the environmental statutes to prevent agency capture).

<sup>230</sup> See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 168 (1992) (suggesting that *Lujan* provides Congress with the flexibility to, properly understood, create a system of bounties for citizen enforcement or to create property rights in the benefits provided by regulatory statute).

<sup>231</sup> 504 U.S. 555 (1992).

<sup>232</sup> 33 U.S.C. § 1365 (1994).

<sup>233</sup> See BUREAU OF NAT'L AFFAIRS, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION 10-11 (1988) (describing citizen enforcement actions); Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 35-53 (1985).

<sup>234</sup> 33 U.S.C. § 1251(a)(1) (1994) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated"); see also Greve, *supra* note 126, at 115. Measured by this goal, under-enforcement is not difficult to show: any increase in enforcement is better enforcement. Congress's absolutist standard, perhaps designed to make regulatory choices easier, makes the issues the EPA must address more difficult by ignoring the issue of the relationship between discharges and water quality. Under the Clean Water Act, it is quite easy for anyone with minimum training, whether a private citizen or EPA staff, to discover discharge permit violations and establish liability. Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 46-47 (1995).

sources, such as municipal sewage plants and private industrial facilities.<sup>235</sup> While relatively easy to regulate, however, point sources account for a far smaller portion of water pollution than non-point sources, such as runoff from construction sites, roads, and agricultural fields.<sup>236</sup>

Michael Greve has criticized citizen suits under the Clean Water Act as “an off-budget entitlement program for the environmental movement.”<sup>237</sup> Interest groups participating in decisions under citizen suits are often guided by the immediate costs and benefits of litigation to themselves, not by the public benefit of their action.<sup>238</sup> Environmental groups tend to target firms whose discharge records show recent multiple violations, because such cases are of low cost to such groups and are the easiest to plead in a complaint.<sup>239</sup> This may appear rational, from a public benefit perspective, to the extent that frequent recent violations may be grounds for suspecting more substantial, prolonged violations and significant damages. But, as Greve observes, such suspicions are not based on scientific cost-benefit analysis, but often on the strategic assessments of privately motivated groups.<sup>240</sup> A group called the Atlantic States Legal Foundation, for example, brought multiple actions against private parties over violations of the voluminous paperwork requirements of the Clean Water Act, not over any violations of substantive environmental standards.<sup>241</sup> The actions generated tens of thousands of dollars in attorney’s fees, but produced no discernible environmental benefits.<sup>242</sup>

<sup>235</sup> See Greve, *supra* note 126, at 115.

<sup>236</sup> As of 1986, industrial point sources accounted for 9% of stream pollution and municipal sources for another 17%. See EPA, ENVIRONMENTAL PROGRESS AND CHALLENGES: EPA’S UPDATE 46 (1988).

<sup>237</sup> Greve, *supra* note 126, at 107.

<sup>238</sup> Greve notes:

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

*Id.* at 110 (footnotes omitted).

<sup>239</sup> See *id.* at 112-13; see also Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Dependent Values*, 22 GA. L. REV. 337, 402 (1988) (observing that because the Clean Water Act holds violators strictly liable and accrues penalties based on the number of permit violations per day, environmental groups have an incentive to sue defendants with the highest number of violations, regardless of the seriousness of the violation).

<sup>240</sup> See Greve, *supra* note 126, at 110.

<sup>241</sup> See *id.* at 111.

<sup>242</sup> See *id.* at 111-12. Greve notes that it is a peculiarity of the Clean Water Act citizen suit provision that it allows citizens to sue not only for an injunction but also for civil penalties up to \$25,000, creating strong incentives for alleged violators to settle. *Id.* at 109.



Greve decries citizen suits as a subsidy to private interest groups. Indeed, for pluralist models, which view the primary role of agency decisionmakers as facilitating deals between private interest groups, the broad right to bring citizen suits is desirable. Citizen suits make regulation more responsive by requiring agencies to respond to interest groups' preferences. Although agencies have limited resources and may not be able to respond fully to all interest group requests, citizen suits facilitate broader access to agency enforcement agendas. If such suits were subsidized through attorney's fees when effective—in order to overcome the problem of less wealthy interest groups or groups that cannot overcome collective action and coordination problems—they might work to facilitate the pluralist process of preference exchange.

Although the types of participation facilitated by citizen suits may be desirable within the framework of a pluralist model, citizen suits raise some particular operational problems for expertocratic and deliberative democratic decisionmaking models. The fact that some interest groups may benefit from citizen suits does not preclude their ability to achieve deliberative democratic or expertocratic goals.<sup>243</sup> Interest groups may present alternative perspectives regarding the scientific evidence agency experts rely on. In addition, while interest groups may not always facilitate face-to-face discussions by individual citizens, they often have a positive impact on the decisionmaking process by allowing those who may be excluded from direct participation an opportunity for representation.<sup>244</sup>

However, citizen suits may work to undermine accountability and to impair neutrality—important goals of the expertocratic and deliberative democracy models. In contrast to the pluralist understanding of agencies, which “threatens to . . . reflect[] private whim,”<sup>245</sup> expertocratic and deliberative democracy decisionmaking models foresee a more independent role for agency administrators and staff.<sup>246</sup> For deliberative democrats, for example, although the requirement of deliberation “does not exclude compromises among those with different conceptions of appropriate government ends,” it does “demand that representatives engage in some form of discussion about those ends.”<sup>247</sup> In order to do so, politically ac-

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<sup>243</sup> However, the risk of self-interested strategic behavior by private parties in bringing suit may raise problems for deliberative democracy. See *infra* notes 344-49 and accompanying text.

<sup>244</sup> Even strong advocates of face-to-face deliberation, such as J. Jane Mansbridge, observe that some distance is appropriate in situations of high conflict. J. JANE MANSBRIDGE, *BEYOND ADVERSARIAL DEMOCRACY* 272-77 (1980); see also JOHN GASTIL, *DEMOCRACY IN SMALL GROUPS: PARTICIPATION, DECISION MAKING & COMMUNICATION* 131-33 (1993) (discussing deliberation in geographically dispersed groups).

<sup>245</sup> Sunstein, *supra* note 139, at 63.

<sup>246</sup> See *id.*

<sup>247</sup> *Id.* at 84 (footnote omitted).

countable decisionmakers must retain supervision over agency agendas.<sup>248</sup> Agency-supervised agenda setting is important for two reasons: first, it provides accountability; second, it ensures a decisionmaking setting that is conducive to neutral analysis.

To begin with, citizen suits dilute the direct accountability of agencies to formal political institutions. Unlike Congress and the executive branch, agencies are not directly accountable to the political process. The supervision of agenda setting by politically accountable agency decisionmakers provides a linkage between agency policy choices and the political process. As nonaccountable private enforcers sue under citizen suits, the President and Congress lose some of their ability to control agency decisions through their oversight functions, which are integral to the deliberative decision-making process.<sup>249</sup> Thus, by encouraging immediate participation in courts by affected individuals and entities, such mechanisms may have the effect of crowding out participation through other institutional channels.<sup>250</sup>

For example, one of the President's most important constitutional duties is the responsibility to "take Care that the Laws be faithfully executed."<sup>251</sup> A unitary executive is important in the policymaking context for several reasons.<sup>252</sup> First, access to the President as a mechanism for influencing policy ensures that the political process is open to any concerned

<sup>248</sup> Agenda setting refers to the ability of politically accountable agency decisionmakers to define the range of policy choices, set priorities, and reach internal consensus as to a course of action. Especially when agencies deal with problems of high significance, they must "attend to these problems in a serial, one-at-a-time (or best a-few-at-a-time) fashion." SIMON, *supra* note 123, at 79.

<sup>249</sup> See GUTMANN & THOMPSON, *supra* note 163, at 138-39 ("deliberative accountability requires representatives to give reasons to citizens and to respond to the reasons citizens give").

<sup>250</sup> For a discussion of how citizen suits may violate Article II's establishment of a unitary executive, U.S. CONST., art. II, § 3 (President's obligation to "take Care that the Laws be faithfully executed"), see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Scalia, J.); Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957 (1995); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993). Several defendants have challenged the constitutionality of citizen suits on the ground that they violate separation of powers principles, but lower courts have uniformly rejected such arguments. See generally *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1137-38 (E.D. Pa. 1993); *National Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 815-17 (N.D. Ill. 1988); *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 623-26 (D. Md. 1987); *Student Public Interest Research Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1478-79 (D.N.J. 1985).

<sup>251</sup> U.S. CONST., art. II, § 3. For a tempered discussion of the importance of presidential control to deliberative democratic decisionmaking models, see Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 12-13 (1994).

<sup>252</sup> On the significance of the unitary executive, see generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that originalist interpretation confirms exclusive presidential authority over the execution of federal law); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing that literal analysis of framer's intent does not justify a strong unitary executive, but "nonhistorical" concerns do).

citizen who disagrees with the steps an agency has taken to address public problems.<sup>253</sup> Second, if agency decisionmakers are accountable both to Congress and the executive branch, the opportunities for participants to avail themselves of strategic behavior, causing delay and, potentially, capturing the agency decisionmaking process, are minimized.<sup>254</sup> Third, and most important to policymaking, giving control over policy decisions to the President brings significant control and coordination advantages.<sup>255</sup>

Further, while agency-supervised agenda setting provides for a certain degree of accountability, or responsiveness, to the political process, it also helps to ensure that the decisionmaking process is not entirely political. This is important for the operation of the expertocratic model, to the extent it reinforces rationality in the decisionmaking process, and the deliberative democracy model, to the extent it facilitates consideration of scientifically informed alternatives in the deliberative process. As described by Thomas McGarity, agency experts are often required to assume the role of policy advocates in order to minimize political backlash against an agency's decision. However, this does not necessarily create a sufficient layer of insulation to allow rational or scientific dialogue to flourish. Expert decisionmaking is grounded in facts and analysis, and must maintain some degree of neutrality if it is to take scientific and professional norms seriously. To maintain neutrality, agency experts should limit their role to informing politically accountable decisionmakers about how various options work toward achieving the goals politically accountable decisionmakers have selected and prioritized.<sup>256</sup> Neutrality depends, in this account, upon effective agenda setting norms within an agency that encourage politically accountable decisionmakers, not policy analysts, to select and rank goals.

With respect to the selection of broad subjects for agency discussion, often referred to as agenda items, John Kingdon—in contrast to McGarity—suggests that the top-down model of the executive branch is a more accurate description of actual agency decisions. By and large, political appointees—not politically insulated experts on an agency's staff—are responsible for setting agendas or determining the subjects to which subordinates will be paying attention.<sup>257</sup> Once policy or enforcement agendas are

<sup>253</sup> See Krent & Shenkman, *supra* note 250, at 1801.

<sup>254</sup> See *id.* But, it has been observed, dual accountability may lead to a disavowal of responsibility. See Shapiro, *supra* note 48.

<sup>255</sup> See Krent & Shenkman, *supra* note 250, at 1801. See also Seidenfeld, *supra* note 251 (noting the importance of strong presidential guidance at the general level, but also warning of problems with presidential micromanagement of issues).

<sup>256</sup> MCGARITY, *supra* note 132, at 11-12. McGarity thus suggests "techno-bureaucratic" rationality as an alternative to comprehensive rationality. *Id.* at 5-16.

<sup>257</sup> KINGDON, *supra* note 90, at 33. According to Kingdon's research, non-political appointees, such as career agency staff, are less likely to choose the issues under consideration in an agency. However, this "hidden cluster" of decisionmakers does have a high impact on supplying the inputs to these broad subjects, such as the range of alternatives and implementation of the agenda topics. *Id.* at 34. "It

set, career bureaucrats are better-positioned than political appointees to deal on a day-to-day basis with such issues because they have more longevity, better expertise, and the relationships with interest groups, committees, and other agencies to forge sound and accountable decisions.<sup>258</sup>

Citizen suits have an adverse effect on ordinary expertocratic and deliberative democracy decisionmaking cultures to the extent that they interfere with agency-supervised agenda setting. For example, it has been observed that private enforcement of water pollution laws through citizen suits has not been directed, as intended, against local violations that tend to escape EPA enforcement.<sup>259</sup> By duplicating the EPA's already effective regulation of point source pollution, citizen suit provisions may have led to over-enforcement.

While it seems counterintuitive to suggest that water can be too clean, over-enforcement of point source water pollution has adverse repercussions for other EPA enforcement priorities and policy decisions, given EPA's limited enforcement resources. Private enforcers under Clean Water Act citizen suits must give notice to the government of their intent to sue, and citizen suits are preempted by governmental enforcement measures.<sup>260</sup> Only by initiating its own "diligent enforcement" action can the government stop private enforcers.<sup>261</sup> As Greve observes, "[s]ince the government cannot stop citizen suits by any means short of instituting its own proceedings, private parties can force the government into enforcement actions, including pointless and counterproductive ones."<sup>262</sup> The Justice Department has insisted that the EPA bring its own suits concurrent with private citizen suits, so that it can remedy inadequate private settlements or ensure that a portion of the settlement goes to the Treasury.<sup>263</sup> Moreover, private interest

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is quite common for the higher-level appointees to define an agenda item and then to solicit the advice of careerists in drafting the proposals." *Id.*; see also *id.* at 72 (distinguishing a "visible cluster" of press and high level appointees from a "hidden cluster" of career bureaucrats and staff).

<sup>258</sup> *Id.* at 35-37.

<sup>259</sup> See Greve, *supra* note 126, at 113.

<sup>260</sup> 33 U.S.C. § 1365(b)(1) (1994).

<sup>261</sup> Clean Air Act, Clean Water Act, and RCRA citizen enforcement suits are precluded if the Administrator or state has commenced and is diligently prosecuting a civil action in a federal or state court. 42 U.S.C. § 7604(b)(1)(B) (1994); 33 U.S.C. § 1365(b)(1)(B) (1994); 42 U.S.C. § 6972(b)(1)(B) (1994). Congress amended the Clean Water Act in 1987 to provide that certain types of administrative proceedings may also bar citizen suits. 33 U.S.C. § 1319(g)(6)(A) (1994).

<sup>262</sup> Greve, *supra* note 126, at 117; Jeffrey G. Miller, *Private Enforcement of Federal Pollution Controls: Laws Part III*, 14 ENVTL. L. REP. 10,407, 10,428 (1984) (arguing that the existing scheme of coordinating private and public enforcement poses awkward problems); see also Boyer & Meidinger, *supra* note 128, at 838-39 (noting that the coordination of private and public enforcers is one of the key problems with private enforcement).

<sup>263</sup> See Greve, *supra* note 126, at 117. Citizen suits could have a res judicata effect on the theory that plaintiffs, acting in the capacity of public enforcers, are in privity with other plaintiffs acting in the same capacity. See Krent & Shenkman, *supra* note 250, at 1814 n.79.

groups are only likely to act once government and private industry have already paid a substantial portion of detection costs.

Thus, citizen suits may represent lost opportunities for the EPA to pursue alternative enforcement priorities. While agencies would not want to exclude matters of high importance from their decisionmaking agendas, supervision of enforcement agendas can reduce the amount of duplicitous information before an agency by excluding certain issues from consideration.<sup>264</sup> Likewise, excising the potential issues raised by private enforcement proceedings from an agency's agenda can help to remove intractable controversies from the decisionmaking agenda<sup>265</sup> and create a layer of insulation for non-political decisionmakers, ensuring that neutral analysis or dialogue—rather than political afterthought—is the norm.

2. *Information Problems.*—Although politically accountable decisionmakers must maintain the ability to supervise their agendas if deliberation is to flourish, participation may provide more information for agency decisionmakers in evaluating agenda issues and for participants in evaluating agency proposals and other participants' positions. Increases in participation may result in large increases not only in the number of persons or groups before an agency, but also in the amount of information available to decisionmakers and participants.

However, as the amount of information in a decisionmaking context increases, agency decisionmakers are more likely to "miss the forest for the trees."<sup>266</sup> The policymaking process consumes an enormous amount of information, and the costs of information analysis for agency decisionmaking are high. The United States Forest Service, for example, spends more on the information intensive process of forest planning than any other item in its budget.<sup>267</sup>

<sup>264</sup> Political parties, for example, are one institution that provide a way of channeling issues. The literature on political parties suggests that "the value in confronting all issues must be balanced against the mediation and consensus-forming benefits of coalitional politics, which in effect keep us unfocused on the long-term or 'logical' implications of our actions." Fitts, *supra* note 122, at 955.

<sup>265</sup> John Rawls suggests that a precondition to the stability of democratic processes is their willingness to accept certain issues as beyond public concern for the decisionmaking context. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 251 (1985); see also PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY* 58 (1986) (increasing the number of participants in a democratic political process increases the probability of a voting cycle).

<sup>266</sup> The value of limited information is widely discussed in organization theory. See DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION* 53 (1963); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 203-04 (1958); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 80-83 (1976); HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: ECONOMIC ANALYSIS AND PUBLIC POLICY* (1982); AARON WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* 36 (1979).

<sup>267</sup> A government-sponsored study suggested that the Forest Service spent at least \$200 million on planning for purposes of complying with the Forest and Rangeland Renewable Resources Planning

Although additional information is one of the primary rationales in favor of increasing the level of participation in agency decisions, the large amounts of information provided by participants may adversely affect the decisionmaking process by impairing the quality of the analysis and polarizing participants' preferences. The NEPA's information-intensive EIS process<sup>268</sup> illustrates how large-scale participation, increasing the quantity of information available to decisionmakers, may also impair the quality of agency decisions as measured by expertocratic, pluralist, or deliberative democratic models. Although the NEPA's EIS process has undoubtedly met some success in encouraging agencies to consider the effects of projects on the environment,<sup>269</sup> there are two potential problems associated with mass participation in this context: first, it may discourage lay participation and tempt decisionmakers to simplify or engage in shorthand scientific analysis; and second, it may create additional opportunities for participants to act strategically.

*a. Information overload for decisionmakers.*—To the extent that critical, rational dialogue does occur among participants during the NEPA's EIS process, the heavy scientific jargon that dominates the process makes it difficult for ordinary citizens to engage in meaningful dialogue about an EIS's substance.<sup>270</sup> It has been observed that most citizen participation in the EIS process occurs through interest groups.<sup>271</sup> Although interest group participation does not impair the quality of the decisionmaking process, it makes citizen interaction less likely. This, in turn, makes it more likely that interaction, to the extent it occurs, is confined to those who are the primary conveyors of scientific information—agency and nonagency experts, or powerful interest groups who can afford to finance their own scientific research. Thus, to the extent the process is expertise-intensive, it may raise some problems for pluralist decisionmaking, which values political bargaining over scientific dialogue.

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Act of 1974 and the National Forest Management Act of 1976, making "the cost of forest planning the largest single item in the national forest system budget, edging out, in fiscal year 1988, such historical and richly endowed programs as road construction (\$171,764,000) and timber sales administration and management (\$185,561,000)." R.W. Behan, *The RPA/NFMA: Solution to a Nonexistent Problem*, 88 J. FORESTRY 20, 22, 20-25 (1990).

<sup>268</sup> This process is described in the text accompanying *supra* notes 100-08.

<sup>269</sup> In 1990, the twentieth anniversary of NEPA, many law reviews published symposia celebrating NEPA's successes. See, e.g., *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447 (1990); *Symposium, NEPA at Twenty*, 25 LAND & WATER L. REV. 1 (1990).

<sup>270</sup> See Ann Bray, Comment, *Scientific Decisionmaking: A Barrier to Citizen Participation in Environmental Agency Decisionmaking*, 17 WM. MITCHELL L. REV. 1111, 1118-19 (1991).

<sup>271</sup> See Daniel J. Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 529, 531 (1989) ("Citizens did not participate—they joined or otherwise supported interest groups that participated on their behalf.").

The EIS process also may interfere with the operation of expertocratic and deliberative democracy decisionmaking models. Expertocratic models may suffer because often the rationality of the analysis that occurs in the EIS process is thwarted by too much information. Agency decisionmakers, like individuals generally, face a "scarcity of attention."<sup>272</sup> Although additional information is often helpful, sometimes it can change how a phenomenon is perceived and evaluated.<sup>273</sup> Too much information is also likely to invite agency decisionmakers more readily to "satisfice"—to "look for *good enough* solutions rather than insisting that only the best solutions will do."<sup>274</sup> As agency decisionmakers increase their usage of heuristic devices or shortcuts, rather than attempt to develop complete and accurate analytical tools, they also increase the potential for error in their decisions. Thus, in the absence of limitations on the amount of information, decisionmakers suffer information overload and are forced to simplify their models, thwarting their ability to engage in complete and accurate rational analysis.<sup>275</sup>

Information overload may also give rise to operational problems for the deliberative democracy decisionmaking model. Lay citizens sometimes participate fully in the EIS process, although, when they do so, decisionmakers often tend to ignore their comments.<sup>276</sup> To the extent that participants provide information during the EIS process, however, they often do so in a manner that discourages civic discussion of values. According to one commentator, "most comment letters from private individuals are either emotional expressions of personal preferences or form letters with the same content but different signatures."<sup>277</sup> Moreover, the expertise-laden format of the EIS may lead agency decisionmakers to view themselves primarily as

<sup>272</sup> SIMON, , *supra* note 123, at 94.

<sup>273</sup> One way it does this is through a "dilution" effect. Irrelevant, nondiagnostic information can weaken judgment or impression. See Henry Zuckier, *The Dilution Effect: The Role of the Correlation and the Dispersion of Predictor Variables in the Use of Nondiagnostic Information*, 43 J. PERSONALITY & SOC. PSYCHOL. 1163 (1982) (describing how subjects respond differently to narratives detailing the same phenomenon but containing different amounts of information).

<sup>274</sup> SIMON, , *supra* note 123, at 85.

<sup>275</sup> According to Christopher Schroeder, "comprehensive rationality . . . reduces choice to an analysis of the efficacy of available alternatives to achieve predetermined goals . . . inevitably entail[ing] simplification, both in the specification of goals and in the modeling methods employed to predict the extent to which alternatives achieve them." Christopher Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 502 n.29 (1986).

<sup>276</sup> Young-Seok Oh, *Public Participation in the Environmental Impact Statement Process: Policy Influence in Forest Service Land Management Planning* 38 (1992) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with *Northwestern University Law Review*). Contrast this with public participation in agency rulemaking hearings: "Even a casual observer can easily note the empty or near-empty hearing rooms and the frequently pointless interchanges that occur during agency rulemaking hearings." Marcus E. Ethridge, *Procedures for Citizen Involvement in Environmental Policy: An Assessment of Policy Effects*, in CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING 115, 123 (Jack DeSario & Stuart Langton eds., 1987).

<sup>277</sup> Oh, *supra* note 276, at 38.

facilitating the objective transfer of information, rather than choosing fundamental values or assessing the quality or integrity of the information exchanged.<sup>278</sup>

*b. Opportunities for strategic behavior on behalf of participants.*—Additional information provided by participation may confer political advantages on participants, creating additional opportunities for lay participants to act strategically in the process. While this is probably not fatal to pluralist decisionmaking cultures, it can raise problems for expertocratic and deliberative democracy models. Large-scale participation may facilitate strategic or irrational behavior by participants, rather than civic discussion among them. For example, in evaluating the environmental impact of a proposed decision, such as building a road through a heavily forested area, conservationists may generate information about endangered populations and environmental risks. While such information may be helpful to decisionmakers, it may also increase the support for conservation by mobilizing participants who value knowledge of what may be jeopardized by resource exploitation. For example, such information may induce active participation in the process by the pharmaceutical industry in protecting sources of biodiversity. Thus, credible and well-disseminated information may increase awareness of risks among participants and the political pressure of mobilized interests.

However, enhanced awareness of risks and mobilization of interest groups will not always contribute to rational decisionmaking or benefit the deliberative process. Rather than promoting dialogue and movement toward consensus, additional information may have the effect of increasing the divergence between participants' preferences and interests, or further entrenching preexisting preferences and interests, as participants are encouraged to join predefined factions.<sup>279</sup> For example, knowledge that a forest has precisely six million significant plant and animal species and two

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<sup>278</sup> Agency experts are often so immersed in their own professional norms that they are incapable of recognizing objectives other than those implicit in their models. Susan M. Schectman, *The 'Bambi Syndrome': How NEPA's Public Participation in Wildlife Management is Hurting the Environment*, 8 ENVTL. L. 611, 633 (1978) (claiming that public participation which does not further the scientific objective of maximizing the biotic potential of a population is "incompatible with sound resource management"). But see Jonathon Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. REV. 53, 88 (1996) (describing the process as a "political-pluralist battle" rather than an expertise-laden scientific discussion).

<sup>279</sup> Large-scale participation creates enormous pressure for conformity to existing sub-groups. In a classic set of experiments, Solomon Asch had undergraduate students say which of three lines was longest; the subject students had to answer the question after all other members of the group—in collaboration with the experimenter—had given an incorrect answer. The subjects were more likely to give the wrong answer if there were more confederates answering incorrectly before them. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 19-24 (7th ed. 1995). The tendency of participants in large groups to act irrationally is well documented in other contexts. See CHARLES MACKAY, *MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS* (1841).



million cubic meters of marketable timber does not draw those concerned with biodiversity any closer to those concerned with timber as an economic resource. It has been observed that, in the context of analysis of forestry data, "[t]he net effect of the information and valuation effort may be to polarize the positions, without contributing greater responsibility, balance, or consensus to the formulation of resource management policy."<sup>280</sup> EIS hearings with large numbers of participants have been described as "meaningless displays of ideological fervor that have no impact on policy or implementation."<sup>281</sup> By facilitating strategic action by participants, such as additional delay and the obfuscation of issues, such information may work to take additional agency time and resources without necessarily improving the rationality of the final agency decision or the deliberative quality of the decisionmaking process. Ultimately, delay may have the effect of killing proposed projects or agency programs.

3. *Impairing Collegiality.*—Agency deliberative processes are not affected by active citizen participation alone. Passive participation also informs the public about the agency's decisionmaking process and its proposed and final courses of action, thus improving citizen understanding and, potentially, breeding responsible citizenship. However, passive participation may also negatively affect the quality of agency decisionmaking processes.

The federal Sunshine Act,<sup>282</sup> for example, requires that all meetings among members of multi-member commissions, such as the Securities and Exchange Commission (SEC) and the Federal Energy Regulatory Commission (FERC), be held in public and with at least seven days advance public notice.<sup>283</sup> A meeting is defined as "deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."<sup>284</sup> Altogether, about fifty federal agencies

<sup>280</sup> Healy & Ascher, *supra* note 68, at 13.

<sup>281</sup> Ethridge, *supra* note 276, at 123. As Daniel Farber has noted, decisionmakers "systematically deviate from rationality in considering combinations of risks; they ignore background information in assessing new data; and they are easily swayed by trivial changes in the presentation of information." Daniel Farber, *Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021, 1035 (1989).

<sup>282</sup> The federal Sunshine Act is briefly described *supra* notes 92-94 and accompanying text.

<sup>283</sup> 5 U.S.C. § 552b(e)(1) (1994). An agency must also designate the name and phone number of the official responsible for responding to requests for information about a meeting. *Id.* Agencies, however, may decide to close a meeting or withhold information about a meeting pursuant to an exemption provided in 5 U.S.C. § 552b(c), but only where a majority of the entire membership of the agency votes to do so. 5 U.S.C. § 552b(d)(1).

<sup>284</sup> 5 U.S.C. § 552b(a)(2). Some state sunshine acts go much further. In Florida, for instance, no quorum is necessary for there to be a "meeting" subject to the open meeting requirements: any gathering, whether formal or casual, of two or more members of an agency to discuss some matter on which foreseeable action will be taken is subject to the open meeting requirements. FLA. STAT. ANN. §

are subject to the Sunshine Act. However, agencies with single administrators, such as the EPA or Department of Interior, are not restricted from having meetings between their high officers (for example, the Administrator or Secretary) and agency staff at any time. The Sunshine Act contains ten exemptions,<sup>285</sup> for the most part paralleling the exemptions in the Freedom of Information Act (FOIA),<sup>286</sup> which ensures public access to agency records.<sup>287</sup>

This type of participation by observation affords the public an opportunity to learn about the agency decisionmaking process, forcing the process into the sunshine. Sponsors of sunshine acts claim that, when in the open and subject to passive participation by the public, decisionmaking process will enjoy an increase in public confidence, promote greater understanding of agency decisions, and improve outcomes.<sup>288</sup> Participation in this sense is conducive to better agency decisions to the degree that decisionmakers are aware of public scrutiny, accountable for the proposals they make, critique, and support or oppose, and publicly responsible for outcomes. Open meetings thus may facilitate effective operation of pluralist agency decisionmaking, to the extent they ensure public accountability to regulatory deal making. For similar reasons, open meetings may facilitate expertocratic decisionmaking, by allowing the public to scrutinize fully the rationality of expertocratic decisions.

However, it has been observed that, in practice, the publicity provided by such participation has impaired the sort of agency decisionmaking deliberative democratic models envision.<sup>289</sup> For example, in a recommendation issued in 1984, the Administrative Conference of the United States

286.011 (West 1997); FLORIDA ATTORNEY GENERAL, FLORIDA GOVERNMENT IN THE SUNSHINE MANUAL 26 (1995).

<sup>285</sup> 5 U.S.C. § 552(c)(1)-(10). Specifically, the Sunshine Act allows an agency to close meetings when the agency determines that the meeting or the disclosure of information during the meeting is likely to:

- (1) disclose matters . . . of national defense or foreign policy . . . ;
- (2) relate solely to the internal personnel rules and practices of an agency; . . .
- (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential; . . .
- (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (7) disclose [certain] investigatory records compiled for law enforcement purposes.

*Id.*

<sup>286</sup> 5 U.S.C. § 552(b).

<sup>287</sup> However there is one important FOIA exemption which is not available under the Sunshine Act: the Sunshine Act contains no exemption for interagency and intra-agency "predecisional" memoranda and letters, as does the FOIA. *Id.* § 552(b)(5). Effectively, then, the Sunshine Act attempts to draw lines based on mental processes, not materials in writing; intrapersonal mental processes can occur without public scrutiny, but interpersonal dialogue must take place in the open.

<sup>288</sup> See S. REP. NO. 94-354, at 4-6 (1975).

<sup>289</sup> A recent examination of public attitudes towards Congress attributes negative perceptions of the institution to the fact that "the public does not like overly deliberate politics." HIBBING & THEISSMORSE, *supra* note 19, at 61.

(ACUS)<sup>290</sup> noted that one of the most significant results of participation provided by the Sunshine Act was a reduction in the collegial character of the agency decisionmaking process.<sup>291</sup>

Many federal agencies have expressed continuing concern that the Sunshine Act has had a chilling effect on the willingness and ability of agency decisionmakers to engage in collegial deliberations.<sup>292</sup> The Sunshine Act's requirements impair the ability of agency members to deliberate, adversely affect the establishment of agency agendas, and promote inefficient practices within agencies.<sup>293</sup> Responding to these and other concerns, in 1995 ACUS established a Special Committee to Review the Government in the Sunshine Act.<sup>294</sup>

The Sunshine Act's effects on agency deliberation are obvious. Private discussions between agency members help promote collegiality which, in turn, improves the quality of agency decisions. Decisionmakers, such as agency heads, staff, and nonagency decisionmakers, play a referee role over lay citizens' civic discussions of the issues.<sup>295</sup> Judicial review of agency action, for example, can be understood as "a meaningful dialogue between [the] court and agency in which the court stands in for the knowledgeable

<sup>290</sup> ACUS, dissolved in 1996, was an independent federal agency that conducted research, issued reports, and made recommendations to the President, Congress, particular departments and agencies, and the judiciary regarding the need for procedural reforms in administrative agencies. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1995 ANNUAL REPORT. Due to a termination of funding by Congress, ACUS ceased operations on October 31, 1995. William Funk, *R.I.P. A.C.U.S.*, 21(2) ADMIN. & REG. L. NEWS 1 (Winter 1996).

<sup>291</sup> ACUS Recommendation 84-3, 1 C.F.R. § 305.84-3 (1993).

<sup>292</sup> See Letter from Steven M.H. Wallman, Commissioner with the SEC, to Thomasina Rogers, Chairperson of ACUS (dated Feb. 17, 1995) [hereinafter *Sunshine Letter*] (on file with *Northwestern University Law Review*). Commissioner Wallman's letter was joined by Reed E. Hundt, former Chairman of the FCC; Arthur Levitt, Chairman of the SEC; Sheila Bair, Commissioner with the Commodities Futures Trading Commission; Andrew Barnett, Commissioner with the FCC; Rachele Chong, Commissioner with the FCC; Susan Ness, Commissioner with the FCC; James H. Quello, Commissioner with the FCC; Richard Y. Roberts, Commissioner with the SEC; Christine Varney, Commissioner with the FTC; Joseph Grundfest, Professor of Law at Stanford University and former SEC Commissioner (1985-90); and Al Sommer, an attorney with Morgan, Lewis & Bockius and former SEC Commissioner (1973-76).

<sup>293</sup> See *Sunshine Letter*, *supra* note 292, at 3.

<sup>294</sup> See Notice of Public Hearing Regarding the Government in the Sunshine Act, 60 Fed. Reg. 40,342 (1995). The Committee held open meetings from May to September, culminating in a public hearing in September 1995, and produced a report in October 1995 making several recommendations. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SPECIAL COMM. TO REVIEW THE GOV'T IN THE SUNSHINE ACT, REFORM OF THE GOVERNMENT IN THE SUNSHINE ACT (Oct. 10, 1995) [hereinafter ACUS SUNSHINE REPORT]. The main text of the Committee Report, without letters and exhibits, has been published as Special Committee, Administrative Conference of the United States, *Report & Recommendation By the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421 (1997). The full membership of ACUS did not have an opportunity to consider the report before the agency ceased operations.

<sup>295</sup> Cf. Sunstein, *supra* note 139, at 46 (noting "the task of the legislator was very close to the task of the citizen in the traditional republican conception").

citizen that the agency must persuade to accept the regulatory policy."<sup>296</sup> One of decisionmakers' most important tasks is "to ensure the flourishing of the necessary public-spiritedness."<sup>297</sup> Decisionmakers have a responsibility to guard the civic state, "prevent[ing] the government from degenerating into a clash of private interests."<sup>298</sup> In so doing, agency decisionmakers, borrowing from the science of traditional expertocratic models, utilize a host of tools to rationalize and explain the proposals they consider and ultimately adopt.

According to deliberative democrats, when Congress chooses to regulate an activity, such as environmental pollution, agency decisionmakers cannot simply sit back and watch private interests solve their own problems. While consensus is ideal to deliberative democratic decisionmaking,<sup>299</sup> consensus is seldom likely among any other than the smallest groups of persons.<sup>300</sup> It is well-recognized that, as the number of participants in a decisionmaking process increases, consensus becomes less likely. As Lawrence Susskind notes,

while public participation requirements are embedded in most of the current laws, they have not produced results that are sufficiently fair, efficient, stable, and wise from the standpoint of the people affected by those decisions. This has forced people into confrontational modes which ultimately exhaust them, before even producing satisfactory outcomes.<sup>301</sup>

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<sup>296</sup> Seidenfeld, *supra* note 120, at 1550.

<sup>297</sup> Sunstein, *supra* note 139, at 36.

<sup>298</sup> *Id.* According to Alexander Hamilton:

When occasions present themselves, in which the [objective] interests of the people are at variance with their inclinations, it is the duty of the person, whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.

THE FEDERALIST NO. 71, at 446-47 (Alexander Hamilton) (Henry Cabot Lodge ed., 1889). *See also* THE FEDERALIST NOS. 55, 59 (Alexander Hamilton), NO. 49 (James Madison).

<sup>299</sup> *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY 17, 22-23 (Alan Hamlin & Philip Pettit eds., 1989) (noting that "ideal deliberation aims to arrive at a rationally motivated consensus," but there is no promise that this ideal will always be realized).

<sup>300</sup> "There has been considerable public debate on the maximum number of people that should be permitted in any one consensus-building process. Some believe that the number should not exceed fifteen. The process can work with fifty to a hundred participants, although it does require more work with larger numbers." Remarks of Lawrence E. Susskind, in STANDING COMM. ON ENVTL. LAW, AMERICAN BAR ASSOCIATION, PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 45 (1994); *see also* GASTIL, *supra* note 244; MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 89-90 (1977).

<sup>301</sup> Lawrence E. Susskind, *Overview of Developments in Public Participation*, in STANDING COMM. ON ENVTL. LAW, AMERICAN BAR ASSOCIATION, PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 2, 5 (1994).

If government or market processes could ensure that all participants in a decisionmaking process, institutional and public, agree, administrative law would lose most of its relevance to American governance.

Although consensus among all participants will seldom be possible, some degree of coordination by decisionmakers internal to an agency decisionmaking process is essential to sustaining the deliberative conception of bureaucratic democracy.<sup>302</sup> If agency decisionmakers themselves treat the process as inherently political, in the pluralist sense, lay persons will also be more likely to do so.<sup>303</sup> Internal agency decisionmakers themselves<sup>304</sup> often reach agreement on difficult issues.<sup>305</sup> Although consensus among participants is seldom achievable,<sup>306</sup> deliberative agency processes can attempt to achieve a sense of collegiality in which decisionmakers, if they disagree, openly state their reasons for disagreement. Such collegial processes, by promoting an ethos of respect, also assure that the agency decisionmakers themselves heed civic virtue.

However, under the Sunshine Act, discussions between agency members that do not fall within one of the exemptions must be open to the public. This has created what has been described as a "chilling effect" on agency members' willingness to engage in open and creative discussions of issues: "[M]embers are often isolated from one another, forced to deliberate, at best, one-on-one or rely heavily on staff to communicate their concerns to other members."<sup>307</sup> As a result, agency members are unable to adequately fulfill their delegated duties, for which the political process attempts to hold them accountable.

Ironically, the Sunshine Act, which applies only to agencies with more than one member, conflicts with the underlying rationale for establishing

<sup>302</sup> See, e.g., Reagan & Fedor-Thurman, *supra* note 118, at 93 (noting substantial agency consensus on policy directions as crucial to success in implementing energy conservation planning).

<sup>303</sup> For instance, it has been observed in the context of congressional committee decisionmaking that the use of a collegial staff may help to alleviate many of the informational problems caused by a staff beholden to a committee chair. See MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT* 99 (1980).

<sup>304</sup> One problem with the literature on deliberative democracy is its failure to separate the decisionmakers from the participants in agency processes. See *supra* note 295. The oversight is understandable: for deliberative democrats, participants' motives merge with those of the institutional decisionmakers, as participants transcend their own private interests and reflect on the public interest. However, in the real world, self-interest of some sort is seldom absent from the process. Institutions cannot hope for civic engagement in every instance; rather, the best institutions can do is hope to create the conditions under which civic engagement will develop.

<sup>305</sup> See Reagan & Fedor-Thurman, *supra* note 118, at 93.

<sup>306</sup> See SUNSTEIN, *supra* note 170, at 247.

<sup>307</sup> Sunshine Letter, *supra* note 292, at 4; see also David M. Welborn et al., *The Federal Government in the Sunshine Act and Agency Decisionmaking*, ADMIN. & SOC'Y 475 (Feb. 1989) (observing that, under the Sunshine Act, most important agency decisions have not emerged from authentic collegial decisions).

independent agencies.<sup>308</sup> Multimember, independent agencies were created by Congress to provide collegial decisionmaking where the collective thought process of many tenured, independent appointees with differing viewpoints (even where these viewpoints are controversial) would be better than a single appointee's decisions.<sup>309</sup> The Sunshine Act inadvertently transforms multiheaded agencies into entities which tend to function as if headed by a number of individual, independently-acting members.<sup>310</sup>

The Sunshine Act also thwarts the ability of agency members to consider and establish an agency's agenda.<sup>311</sup> Agency members may be reluctant to meet privately with an agency head to develop an agency agenda, for fear that discussions may evolve to the point where the Sunshine Act is implicated. Thus, agency heads "are frequently required to determine an agency's agenda without the benefit of the collective guidance of the members."<sup>312</sup> In considering and establishing an agency's agenda, staff members are similarly affected, as they may have difficulty "ascertaining clearly the thinking of members and relating the views of one member to those of others."<sup>313</sup>

The Sunshine Act's restrictions on closed meetings also encourage agencies to engage in inefficient practices and procedures. Agencies affirmatively attempt to avoid situations in which members could be deemed to have "deliberated" or to have engaged in meetings "that determine or result in the joint conduct or disposition of official agency business."<sup>314</sup> Because of the difficulty in distinguishing between preliminary conversations, which are outside of the Sunshine Act's requirements,<sup>315</sup> and deliberations, which must be held in public, many agencies simply prohibit the gathering of a quorum of agency members.<sup>316</sup> Since the Sunshine Act only applies to

<sup>308</sup> Sunshine Letter, *supra* note 292, at 4.

<sup>309</sup> See ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941).

<sup>310</sup> See Thomas H. Tucker, "Sunshine"—*The Dubious New God*, 32 ADMIN. L. REV. 537, 541 (1980).

<sup>311</sup> The importance of agenda setting is discussed in the text accompanying *supra* notes 245-59.

<sup>312</sup> Sunshine Letter, *supra* note 292, at 4.

<sup>313</sup> Welborn et al., *supra* note 307, at 476.

<sup>314</sup> The restrictions of the Sunshine Act are triggered only where there is as a "meeting" within the meaning of the Act. There are four basic requirements for a meeting: (1) a quorum of agency members, (2) acting jointly, (3) to conduct deliberations, (4) that result in the disposition of official agency business. 5 U.S.C. § 552b(a)(2) (1994).

<sup>315</sup> This difficulty was one of which Congress was aware in drafting the Sunshine Act. Congress ultimately substituted the language "deliberations that result in . . ." for the previously suggested language "deliberations that concern," in an attempt to exclude general discussions that "concern" agency business but do not determine or result in the adoption of a firm position on an issue. See RICHARD K. BERG & STEPHEN H. KLITZMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 7-8 (1978).

<sup>316</sup> "Agency Members, and agency general counsel who advise them, are understandably—and appropriately—concerned about engaging in discussions with a quorum of agency members that could be perceived, even arguably, as crossing the line, even though the discussions may, in fact, not dispose

agency "meetings,"<sup>317</sup> it may have resulted in an increased willingness of agency members to use written memoranda to express their views to one another.<sup>318</sup> In addition, in order to avoid the notice and other procedural requirements of the Sunshine Act, agencies are now more likely to vote on agency agenda matters by "notation" or "seriatim" rather than in open meetings.<sup>319</sup> Many agency commissioners have grown to rely on intermediaries to discuss agency business in order to avoid triggering the requirements of the Sunshine Act. For example, staff members, including legal counsel for agency members, may meet to discuss the issues that ultimately will require a decision by their politically accountable principals. This is not an efficient decisionmaking mechanism, as several such meetings are necessary to make even the most minor decisions, and comprehension and interpretation problems, which further hinder agency decisions, occur frequently.<sup>320</sup>

All of these deliberative "costs" might be justified if the Sunshine Act resulted in significant benefits by increasing public participation in agency decisionmaking. While the Sunshine Act's requirements may have resulted in increased public understanding of agency actions and their results, it is questionable whether it has increased the public's understanding of the decisionmaking process.

Consider agency rulemaking. The public is allowed to provide comments on proposed agency rules pursuant to the notice and comment provisions of the APA.<sup>321</sup> On occasion, open meetings during rulemaking proceedings involve substantive discussions and deliberations that are edu-

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of official agency business." ACUS SUNSHINE REPORT, *supra* note 294, at 2. See also Sunshine Letter, *supra* note 292, at 5. Even one-on-one meetings are prohibited if the agency has three or fewer members, as the SEC currently does. For example, at the Occupational Safety and Health Review Commission, a quorum consists of two commissioners and commission members have been very reluctant to talk to any other member outside of public meetings, for fear that if seen together they might be perceived as violating the Sunshine Act. According to OSHA Chairman Stuart E. Weisberg, "In an attempt to overcome this handicap, commission members communicate with each other indirectly through others, usually through their respective counsels, which is a cumbersome process at best." Marcia Coyle, *Agencies Ask for Less Sunshine*, NAT'L L.J., Sept. 25, 1995, at A12.

<sup>317</sup> 5 U.S.C. § 552b(a)(2) (1994).

<sup>318</sup> See Sunshine Letter, *supra* note 292, at 6.

<sup>319</sup> ACUS SUNSHINE REPORT, *supra* note 294, at 2. The ACUS recommended that Congress amend the Sunshine Act "to require agencies subject to the Act to develop and publish rules or policy statements outlining their procedure for notation voting and the types of issues for which it will normally be used." *Id.* at 6. See also HOUSE SUBCOMM. ON GOV'T MANAGEMENT, INFORMATION AND TECHNOLOGY, June 13, 1996 (statement of Randolph J. May) (summarizing ACUS recommendations on the Sunshine Act).

<sup>320</sup> "Another consequence of the [Sunshine] Act has been that it encourages the deliberative process to be conducted by and through the staff of the agency members, enhancing the power of the intermediary staff members vis-a-vis the agency member and, perhaps, reducing the accountability of appointed agency members." ACUS SUNSHINE REPORT, *supra* note 294, at 3. See also Sunshine Letter, *supra* note 292, at 6 n.15.

<sup>321</sup> 5 U.S.C. § 553 (1994).

cative to the public. However, as many independent agency members have observed, in general the benefit the public receives from such meetings "is limited to observing final statements regarding agency decision making rather than the deliberations with respect to the matter at issue."<sup>322</sup> Such meetings are quite short—some last less than one hour for multiple matters. In addition, there is much premeeting coordination between agency members and staff,<sup>323</sup> allowing for little spontaneous and thorough exchange of views.<sup>324</sup> Where matters are discussed, "it is frequently in a cursory manner that is for the record, rather than to further the deliberative process."<sup>325</sup> To the extent that the Sunshine Act was designed to allow the public to see the *process* by which agency decisions are made, in contrast to the *results* of agency action, it has utterly failed to achieve this purpose.<sup>326</sup>

To suggest that *less* participation, even of the passive type, may *improve* the quality of agency decisionmaking seems counterintuitive or, indeed, elitist. Yet in other areas of life, it is well-recognized that there are times when the public might prefer to be less informed. Most people, for example, would prefer to be ignorant about one major piece of quite personal information—the specific date of their own death.<sup>327</sup> While administrative procedure may not present the stark choices comparable to the invocation of one's death, some degree of ignorance by participants may be acceptable in a democracy.<sup>328</sup>

Joseph Bessette, a political scientist, cites as an example of deliberative secrecy the Reagan administration's plan to reform the tax code in the direction of a modified income tax in 1984 and 1985, one of the chief eco-

<sup>322</sup> Sunshine Letter, *supra* note 292, at 7.

<sup>323</sup> "In many instances the opening statements and questions of agency members are either prepared by or shared with staff prior to the meeting to allow them to formulate appropriate responses." *Id.*

<sup>324</sup> Steven M.H. Wallman, an SEC Commissioner, described agency open meetings under the Sunshine Act as "short, scripted and perfunctory events involving no deliberation among agency officials." Coyle, *supra* note 316, at A12.

<sup>325</sup> Sunshine Letter, *supra* note 292, at 8; Welborn et al., *supra* note 307, at 471; *see also* ACUS Recommendation 84-3, *supra* note 291 (noting that discussion in open meetings is sometimes inadequate to allow those in attendance to fully understand the proceedings); Tucker, *supra* note 310, at 543 ("because federal decision-making meetings represent merely the end result of what is often a very long process dealing with complex issues, opening such meetings will be generally not only unenlightening, but also boring to even a highly intelligent spectator").

<sup>326</sup> *Cf.* ACUS SUNSHINE REPORT, *supra* note 294, at 3 ("the Committee is concerned that the public is neither receiving the enhanced access to the governmental decisionmaking process that the Act envisioned, nor . . . is it receiving the benefit of better agency decisions through collegial decisionmaking").

<sup>327</sup> *See* Fitts, *supra* note 122; William T. Fitts, Jr. & Barbara Fitts, *Ethical Standards of the Medical Profession*, 297 ANNALS 17, 25 (1955); *see also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 21 (1989) (observing how too much information can affect the quality of speech); ROGER SHATTUCK, FORBIDDEN KNOWLEDGE: FROM PROMETHEUS TO PORNOGRAPHY 327-42 (1996) (summarizing categories of knowledge in which less information may be desirable).

<sup>328</sup> *Cf.* Reich, *supra* note 80.



conomic initiatives of Reagan's second term.<sup>329</sup> Treasury Secretary Regan met regularly with a group of ten advisors and high-level Treasury officials in 1984, keeping this group isolated from the storms of the 1984 election campaign. According to Besette, "[t]he secrecy insisted upon by Regan effectively screened out political influences on deliberative process."<sup>330</sup> Although Regan's plan was submitted to Congress, it was not endorsed by the President nor adopted. Instead, a plan introduced by Regan's successor, James Baker, was introduced to Congress and adopted into law in 1986. Baker's plan, unlike Regan's, was a political compromise made in the open, restoring enough tax breaks to keep a coalition of interests from killing the bill. According to Besette, the result was a tax reform law not based on the merits of reform, but on the "political forces and prospects for passage."<sup>331</sup> Yet, Besette observes, "[t]o the extent that secrecy may promote deliberation, the executive branch has a distinct advantage over the Congress, where the norm and the public expectation is an open decisionmaking process."<sup>332</sup> Sunshine laws take this advantage away. Apart from specifically identified categorical exceptions, sunshine laws do not allow an agency to give reasons for deliberating outside of the sunshine. Thus, sunshine laws may not even satisfy advocates of publicity in the deliberative process.<sup>333</sup>

### *C. Participation's Constitutive Effects on Agency Selection of a Decisionmaking Model*

Increased participation not only impairs the operative quality of decisionmaking in agency cultures that are decisively expertocratic, pluralist, or deliberative democratic, but also creates incentives for a decisionmaker to make a constitutive shift away from a deliberative democratic decisionmaking culture and towards expertocratic or pluralist models. An agency's decisionmaking culture is influenced by the level and types of participation the agency provides. This results because the perceived value of participation will affect an agency's institutional allocation of resources.

For example, in an agency context providing for mass participation, agency decisionmakers may opt to delegate tough decisions to the experts,

<sup>329</sup> JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 206 (1994).

<sup>330</sup> *Id.* at 207.

<sup>331</sup> *Id.* at 208.

<sup>332</sup> *Id.* at 209.

<sup>333</sup> Gutmann and Thompson are less sanguine than Besette about the value of deliberative secrecy in the executive branch. They cite as an example the Clinton Administration's Task Force on National Health Care Reform, which held secret meetings to develop a national health care policy in 1993. Ultimately, a federal district court required that the names of Task Force experts be disclosed and that meetings be open. *American Ass'n of Physicians and Surgeons, Inc. v. Clinton*, 813 F. Supp. 82 (D.D.C. 1993). Gutmann and Thompson thus suggest that deliberative secrets themselves be the subject of some deliberative process in order to meet their publicity principle. GUTMANN & THOMPSON, *supra* note 163, at 116-17.

encouraging a shift toward expertocratic decisionmaking, rather than deciding to invest resources in the difficult and expensive task of developing deliberation among large groups of participants. Alternatively—or perhaps also—participation may, where interests are strongly held, escalate decisionmaking into a pluralist mode in which decisionmakers are forced to treat the process as a simple political compromise of preexisting preferences. As participation increases, decisionmakers may also find appealing the value skepticism that underlies pluralist decisionmaking models.

1. *Lapsing into Expertocratic Decisionmaking.*—Although it often may fail to meet the deliberative democratic goals,<sup>334</sup> the EIS process has been described as an example of expertocratic decisionmaking. While in form, the NEPA calls for a “systematic interdisciplinary” planning process to evaluate environmental impacts,<sup>335</sup> in practice, the EIS process relies heavily upon scientific experts and other professionals. A mere assertion of an interest by a citizen participant in the decisionmaking process does not require a response by an agency unless it is expressed in data or statements that challenge the scientific basis of an EIS.<sup>336</sup> And, indeed, some have observed that very little critical dialogue occurs among lay participants or between lay participants and agency personnel during the EIS process. The typical exchange fostered by NEPA participation takes place with respect to a draft EIS statement, which allows for a response from a participant and an agency’s reply. If a public hearing is scheduled, it allows for scant critical exchange: typically the agency gives a short presentation followed by audience testimony.<sup>337</sup>

The record of decision, which lays out the reasons for an agency’s decision, is only released at the end of the EIS process and is not widely publicized or utilized.<sup>338</sup> Its expertise-laden scientific format may encourage

<sup>334</sup> See Poisner, *supra* note 278.

<sup>335</sup> 42 U.S.C. § 4332(A) (1994).

<sup>336</sup> See *supra* note 107 and accompanying text.

<sup>337</sup> Consider the following two reflections on the non-dialogical participation provided during the EIS hearing process:

While plenty of opportunity exists to speak and submit written comments, members of the public may feel that their opinions are little more than chits on a tally sheet: ‘Just try to argue with your forester today. No matter what outrageous thing you say, he “appreciates your concern” and is “glad to have your input.” But he isn’t listening, he’s counting.’

Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81, 91 (1993) (quoting William O. McLarney, *Forest Planning: Voices Unheard*, AM. FORESTS, May-June 1989, at 14).

We are not able to sit down at a table with industry and the PCA [Minnesota Pollution Control Agency] and have an *open* discussion. Instead, we drive 120 miles, take a day off work from our jobs, pay large babysitting fees and have the PCA tell us we have 15 minutes total to talk.

Bray, *supra* note 270, at 1134 n.100.

<sup>338</sup> See VALARIE M. FOGELMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT: INTERPRETATIONS, APPLICATIONS, AND COMPLIANCE 122 (1990).

passivity by many citizens. One author has noted that, at best, citizens walk away from the process feeling as if it was dominated by experts and that they had no opportunity to participate.<sup>339</sup> Thus, the high levels of participation provided by the EIS process may have led agency decisionmakers to shift to expertocratic decisionmaking, trading deliberation for rationality.<sup>340</sup>

2. *Regressing into Pluralism.*—Special interests, the modern-day variant of Madison's "factions," are often reactive—rather than proactive—respondents to regulatory policy. Fishkin, reflecting on how technology has influenced democratic decisionmaking in America, idealizes ancient Athenian politics, which relied heavily on representatives elected by public face-to-face deliberation.<sup>341</sup> Fishkin contrasts this with an alternative model of democracy: ancient Sparta, in which representatives were elected by "the Shout."<sup>342</sup> With increases in mass participation facilitated by technology, Fishkin fears, the Spartan rather than Athenian ideal is being realized: "The sting of an offensive sound bite arouses a populace that is only sound-bitten. The ire of talk-show democracy has given us a mass electronic version of the Shout."<sup>343</sup>

In a similar manner, direct participation in selecting agency enforcement priorities, as with citizen suits, encourages parties to assert their non-reflexive preferences in the agency decisionmaking process.<sup>344</sup> While closing off lay participation altogether might favor expertocratic models, the approach of citizen suits—opening up the process to any person or entity who asserts transgression of environmental laws—may have encouraged more pluralism in the administrative process while thwarting the emergence of a truly deliberative process. Interest groups, some of which

<sup>339</sup> See Poisner, *supra* note 278, at 90. *But see* James R. Richardson, *Negotiating Community Consensus in Preparing Environmental Impact Statements*, in *MEDIATING ENVIRONMENTAL CONFLICTS* 139 (J. Walton Blackburn & Will Marie Bruce eds., 1995) (describing successes of a negotiated EIS process in Prescott, Arizona).

<sup>340</sup> Although William Funk gives several negative anecdotal stories about NEPA's performance in the energy context, he concludes by suggesting that NEPA works "just the way it was intended." William Funk, *NEPA at Energy: An Exercise in Legal Narrative*, 20 ENVTL. L. REV. 759, 768-71 (1990). Despite negative anecdotes about NEPA's success, many share Funk's optimism. A classic study concludes that when agencies allow scientists to explore a broad range of alternatives, all projects benefit from inexpensive environmental mitigation measures. In addition, projects with "the greatest environmental costs and little political support" are eliminated. SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STRATEGY OF ADMINISTRATIVE REFORM* 251 (1984). The reduction in the number of NEPA lawsuits filed in recent years may be interpreted as evidence that the process has begun to work well. *See* 1994 COUNCIL ON ENVIRONMENTAL QUALITY: 24TH ANNUAL REPORT 368-69 (noting that 1238 NEPA cases were filed between 1974 and 1983, averaging 124 cases per year, while 714 were filed between 1984 and 1992, averaging 79 per year).

<sup>341</sup> FISHKIN, *supra* note 88, at 18-19.

<sup>342</sup> On "the Shout," see *supra* note 210 and accompanying text.

<sup>343</sup> FISHKIN, *supra* note 88, at 24-25.

<sup>344</sup> *See* KINGDON, *supra* note 90, at 69 (public opinion may compel government to do something, but more often it stops it from doing something).

have benefited from citizen suits, use such mechanisms as blunt instruments to remove their battles from the administrative process and into courts. To the extent that dialogue and deliberation occur because of citizen suits, it is in the judicial, not the administrative, process.<sup>345</sup>

The type of participation provided by citizen suits is undesirable to the extent that it fails to provide for engaged deliberation based in communicative action, instead encouraging strategic behavior by litigants. Agency decisionmakers have too great an incentive to make a constitutive shift away from deliberative democracy and towards pluralist models. By analogy, consider research into jury deliberations. Research has found that individual jurors are more likely to be persuaded to take a position if they have heard a greater number of arguments in favor of that position.<sup>346</sup> Voting during jury deliberations—expressing preferences—can have the opposite effect: voting too early or too frequently promotes conflict.<sup>347</sup> By contrast, if jurors discuss the evidence together they are more likely to come to a consensus and to arrive at a more accurate recollection of the facts.<sup>348</sup> While such deliberation delays formal expression of preferences, it can lead to more complete reflection about preferences. Thus, it is more conducive to goals of consensus. Consensus solutions are more legitimate than mere preference aggregation or mechanisms that allow immediate preference expression. Because individual enforcers, such as those who bring citizen suits, are not politically accountable, citizen suits provide no check against strategic action.<sup>349</sup>

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<sup>345</sup> *Bennett v. Spear*, 117 S. Ct. 1154 (1997). In *Bennett*, ranch operators and irrigation districts in Oregon sued the United States government under the Endangered Species Act's citizen suit provision for the government's failure to follow the ESA's consultation provisions and its failure to consider economic considerations before imposing a limit on water levels. The Ninth Circuit refused to allow the plaintiffs, who were opposed to protecting certain affected species of fish, to sue under the ESA because they were outside of the zone of interests the ESA was intended to protect. *Bennett v. Plener*, 63 F.3d 915, 921 (9th Cir. 1995). The Supreme Court reversed, holding that the ESA's broad citizen suit provision negated the Court's prudential zone of interest standing limitation. *Bennett*, 117 S. Ct. at 1162-63.

*Bennett* resonates for a discussion of the deliberative democratic shortcoming of citizen suits for several reasons. First, it illustrates the strategic behavior of certain citizen suit litigants. Second, it is noteworthy that the plaintiffs in *Bennett* were suing to stop, not start or contribute to, government regulation. Third, the dialogue that did occur in *Bennett* initially was a legalistic one, as the lower court was forced to glean legislative intent in order to get the desired result.

<sup>346</sup> See Bobby J. Calder et al., *The Relation of Cognitive and Memorial Process to Persuasion in a Simulated Jury Trial*, 4 J. APPLIED SOC. PSYCHOL. 62 (1974); Sarah Tanford & Steven Penrod, *Jury Deliberations: Discussion Content and Influence Processes in Jury Decision Making*, 16 J. APPLIED SOC. PSYCHOL. 322, 344 (1986).

<sup>347</sup> See RICHARDSON R. LYNN, *JURY TRIAL LAW AND PRACTICE* 193 (1986).

<sup>348</sup> See JOHN GUINTEHER, *THE JURY IN AMERICA* 85 (1988).

<sup>349</sup> By contrast, centralized executive control over enforcement would provide more opportunity for congressional oversight. See Krent & Shenkman, *supra* note 250, at 1808. While the above analysis focuses primarily on citizen suits against private polluters, it has been observed that citizen suits against the government pose even "more of a threat to principles of accountability and representativeness." *Id.* at 1819.

In addition, a pluralist story might be told about the NEPA's EIS process. Prior to the passage of NEPA, the agency decisionmaking process was biased towards certain private interests, while other interests were ignored. The NEPA, by opening up the process to citizen participation in the form of review and comment, helped to even the playing field for pluralist political exchange. Not surprisingly, the result has been described as "a confusing hybrid of pluralism and synopticism": the EIS process—and its output, the EIS and the record of decision—meets the format of comprehensive rationality, but this form "overlays a decision-making situation that is usually pluralist in orientation."<sup>350</sup> Increases in participation create incentives for agencies to delegate tough political choices to experts. This may lead to a shift towards expertocratic models, but in the case of EIS statements it also encourages pluralist behavior on behalf of participants who may gain information in the process and exploit it for strategic purposes, such as delay.<sup>351</sup> It has also been observed that, rather than encouraging dialogue and a reflexive examination of citizen preferences, the EIS process breeds distrust and cynicism about government, encouraging even more selfishness and strategic behavior on behalf of participants.<sup>352</sup>

Moreover, although citizens may participate in the EIS process through interest groups, there is little evidence that these groups are representative of all significantly affected sectors of the community. Rather, it is more likely the case that, when hearings on an EIS are held, only those with a disproportionately strong interest in the outcome are in attendance.<sup>353</sup>

The relationship between increases in participation and a lopsided pluralist decisionmaking process is well-established.<sup>354</sup> Agency experience with the more elaborate citizen participation requirements of the 1960s was generally regarded as a failure, in part due to the narrow range of interests that actually availed themselves of access to agency proceedings.<sup>355</sup> In the

<sup>350</sup> Poisner, *supra* note 278, at 85.

<sup>351</sup> Funk observes that, in one context, NEPA has worked to provide an environmental analysis to make the job of challengers easier, not to help the agency itself choose the best environmental alternative. Funk, *supra* note 340, at 762-63.

<sup>352</sup> See Bray, *supra* note 270, at 1118-19.

<sup>353</sup> See Poisner, *supra* note 278, at 92.

<sup>354</sup> Mashaw notes,

although the participatory approach seems to presume that the process of decision can be made open and neutral, it seems rather more likely that, with respect to many areas of administrative policy formulation, certain interests, because of their intensity, resources and organization, will come to dominate even an open decisionmaking process. Or to put the point somewhat differently, interests that are substantially affected might, because of lack of resources or organization, fail to participate effectively in administrative forums.

MASHAW, *supra* note 1, at 23-24.

<sup>355</sup> See Rosenbaum, *supra* note 3, at 356. Most participants, according to Rosenbaum, "tend toward the well-educated, affluent middle- to upper-class individuals." *Id.* at 372. See also D. Stephen Cupps, *Emerging Problems of Citizen Participation*, 37 PUB. ADMIN. REV. 478, 481 (1977) (noting that many spokespersons for the environment are pursuing "middle and upper class concerns which are addressed for the most part at the expense of the poor, the aged, and urban and ethnic minorities").

environmental protection area, citizen participation fell far short of expectations. Despite a vigorous effort, for example, the EPA's Water Quality Workshops did not succeed in generating more than negligible representation from a broad range of interests.<sup>356</sup> A quantitative study of the relationship between the "openness" of state administrative procedures and the "aggressiveness" of state environmental regulation confirms these findings; participatory reforms were most strongly associated with the strictness of emissions standards in states where lobbying groups were the weakest.<sup>357</sup>

## V. REGULATING PARTICIPATION TO ENHANCE DELIBERATION

I have argued that some institutions of contemporary administrative law may have provided for too much mass participation, in part because participation impairs ordinary agency decisionmaking, regardless of the specific political-theoretic model, and in part because, at the constitutive level, participation may adversely affect institutional decisions to structure decisionmaking around a deliberative democratic model. While indiscriminate participation in agency decisions may allow governmental institutions to mitigate monopoly rents from the political process and produce quality information to a degree, it is not always a positive good. At some point, participation begins to interfere with—and subverts—deliberative values. To the extent that these values are fundamental to legitimate agency governance, as they are for deliberative democratic models, the tension between participation and deliberation must be addressed.

If deliberative decisionmaking is to succeed in practice, administrative law—and political theory—must recognize that while participation has many benefits, in some instances the costs of participation for bureaucratic deliberation are simply too high. The examples of citizen suits, the EIS process, and sunshine laws are illustrative but not exhaustive.<sup>358</sup> Administrative procedure has become too participatory, at the cost of deliberative bureaucratic government.

To the extent that the ideals of deliberative democracy are important, a reorientation of administrative process could help to implement a balance between the sometimes conflicting ideals of participation and deliberation. One proposal is to require Congress or agencies to establish lay "juries" which have regular input to, but not complete authority over, agenda development or enforcement choices. Ronald Wright, for example, notes that in the nineteenth century grand juries not only considered criminal indictments

<sup>356</sup> See Rosenbaum, *supra* note 3, at 372. Moreover, "eight of every ten participants were likely to be government officials or consultants to government bodies." *Id.* at 374.

<sup>357</sup> See Marcus E. Ethridge, *The Policy Impact of Citizen Participation Requirements: A Comparative State Study*, 10 AM. POL. Q. 489, 503 (1982).

<sup>358</sup> Although this Article has presented only selective examples, a similar analysis could be applied to other participatory mechanisms of governance, such as negotiated rulemaking, citizen boards, blue ribbon panels, and advisory commissions.

but also performed a variety of functions that included policy initiation.<sup>359</sup> Such panels have been utilized to address even the most complex scientific issues, such as DNA research, and their results have been praised in that context,<sup>360</sup> and they have been recommended as a way of encouraging more deliberative democratic participation.<sup>361</sup>

Alternatively, to allow more reasoned citizen input, decisionmakers could utilize focus groups or survey instruments to obtain public input.<sup>362</sup> The Public Agenda Foundation, an organization intended to encourage representatives to make informed decisions about regulatory policy, has created Citizen Review Panels, designed to synthesize both lay jury and survey techniques. These experiments led lay participants to change their views on scientific issues, bridged the gap between lay and scientific attitudes, and helped to identify common and differing values.<sup>363</sup>

However, proposals to involve citizens directly in the agency decisions process do not address the fundamental issue of whether such mechanisms will be treated as courts—with decisionmaking authority—or advisory panels—which could only hold hearings and render advice.<sup>364</sup> Nor do such proposals consider the issue of who, among the relevant community, is the best representative to participate in this capacity,<sup>365</sup> or whether selection for such mechanisms, much as selection for a jury, is to be random.

The tension between participation and deliberation, inherent to deliberative democratic theory, is also apparent in the practice of many adminis-

<sup>359</sup> Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 466-75 (1992).

<sup>360</sup> As Bruce Jennings notes:

[T]he deliberations of the [recombinant DNA] citizen's advisory group demonstrated that when a *participatory* body is given sufficient time, information, and opportunity to make decisions that will have a real impact on issues that truly matter to the participants, it can achieve a high level of sophistication and understanding. And it can produce decisions and recommendations on complex technological problems that are as well informed and reasonable as those made by expert, professional elites.

Bruce Jennings, *Representation and Participation in the Democratic Governance of Science and Technology*, in GOVERNING SCIENCE AND TECHNOLOGY IN A DEMOCRACY 223, 240 (Malcolm L. Goggin ed., 1986) (emphasis added).

<sup>361</sup> See Poisner, *supra* note 278, at 93.

<sup>362</sup> See Katharine K. Baker, *Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss*, 22 ECOL. L. Q. 677 (1995); Lester W. Milbrath, *Citizen Surveys as Citizen Participation Mechanisms*, 17 J. APPLIED BEHAV. SCI. 478 (1981).

<sup>363</sup> CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISIONMAKING 92-93 (1993).

<sup>364</sup> These issues receive excellent treatment in Levmore, *supra* note 195.

<sup>365</sup> This issue is raised in Dale Whittington & Duncan MacRae, Jr., *The Issue of Standing in Cost-Benefit Analysis*, 5 J. POL'Y ANALYSIS & MGMT. 665 (1986). According to Whittington & MacRae, "[s]ociety places moral bounds on the application of cost-benefit calculations by not granting standing to certain individuals or to the preferences of certain individuals in specific situations." *Id.* at 668. In their view, it is quite possible for participants in the cost-benefit process to speak on behalf of non-participants' interests; indeed, they observe, this happens often to the extent that decisionmakers are called on to consider the welfare of future generation or individuals in other countries. *Id.*

trative processes. But the tension is not solvable by mere institutional tinkering. Deliberative democracy lives a paradoxical life: in order to be deliberative democratic, administrative procedure must provide for large amounts of participation; yet, I have argued, if there is too much participation, administrative procedure is no longer deliberative democratic.

While it seems counterintuitive to suggest that less participation may make administrative governance more—not less—democratic, such proposals have been advocated in other legal contexts, including within civil procedure and First Amendment jurisprudence. Owen Fiss, for example, has suggested that, in the context of structural decrees issued to end racial discrimination, “[i]t may be necessary to forgo the right of participation and to leave various individuals with no other assurance that their interests will be adequately represented.”<sup>366</sup> Fiss criticizes Justice Rehnquist’s decision in *Martin v. Wilks*,<sup>367</sup> holding that white firefighters are entitled to participate in a proceeding to formulate a structural decree to end racial discrimination against blacks in the Birmingham, Alabama, fire department. Unlike Rehnquist, who embraces a “right to participation,”<sup>368</sup> Fiss urges focus on a “right of representation”—“not a day in court but the right to have one’s interest adequately represented.”<sup>369</sup>

In a similar manner, Ronald Dworkin has recently urged a reduction of emphasis upon participation in the First Amendment context. According to Dworkin, “each citizen must have a fair and reasonably equal opportunity not only to hear the views of others as these are published or broadcast, but to command attention for his own views, either as a candidate for office or as a member of a politically active group committed to some program or conviction.”<sup>370</sup> In addition, Dworkin recognizes that “the tone of public discourse must be appropriate to the deliberations of a partnership or joint venture rather than the selfish negotiations of commercial rivals or military enemies.”<sup>371</sup> Reasoning from these two premises, Dworkin suggests that the Supreme Court’s decision in *Buckley v. Valeo*,<sup>372</sup> which held that mandatory limitations on campaign expenditures violate the First Amendment, should be overruled<sup>373</sup> or circumvented.<sup>374</sup> Not surprisingly, Fiss has made

<sup>366</sup> Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 979 (1993).

<sup>367</sup> 490 U.S. 755 (1989).

<sup>368</sup> Fiss, *supra* note 366, at 967.

<sup>369</sup> *Id.* at 971. As Fiss acknowledges, it is his objective “to free due process from the grips of an overly individualistic conception of due process and to acknowledge that the fairness of procedures in part turns on the social ends that they serve.” *Id.* at 979.

<sup>370</sup> Ronald Dworkin, *The Curse of American Politics*, THE NEW YORK REVIEW OF BOOKS, Oct. 17, 1996, at 19, 23.

<sup>371</sup> *Id.*

<sup>372</sup> 424 U.S. 1 (1976).

<sup>373</sup> Dworkin, *supra* note 370, at 24 (contending that “the case for overruling *Buckley* is a strong one.”).



some similar arguments in the First Amendment context. Although Fiss does not expressly suggest that *Buckley v. Valeo* be overruled or disregarded, Fiss has also urged that the participatory value of free expression be balanced with deliberative value of political equality.<sup>375</sup>

As in the civil procedure and First Amendment contexts, administrative law might advance other goals, such as deliberation, if it were to reduce its current emphasis on increasing access points, designed to facilitate increased mass participation. A reorientation, considering who best represents the community in agency decisionmaking processes, might be in order. Indeed, until deliberative democracy addresses the issue of representation, it is unlikely to present a compelling alternative to expertocratic and pluralist decisionmaking models. Although this Article can do no more than sketch a framework for discussion, two fundamental questions seem paramount. First, who represents whom in the administrative process? Second, what is the role of the representative?<sup>376</sup>

The issue of who represents whom depends upon a theory of representation. It is accurate as a descriptive matter to say that representation already *does* occur in administrative proceedings, to the extent that interest groups are active in decisionmaking. If a descriptive conception of representation is adopted, individuals or entities who share identical interests with other group members serve as proxies or exemplars for each group member.<sup>377</sup> "The representative does not act for others; he 'stands for' them, by virtue of a correspondence or connection between them, a resemblance or reflection."<sup>378</sup> For example, a trade group representative may stand for the interests of its industry members in the regulatory process. A descriptive conception of representation would simply require regulators to count affected interests and proportion representation in the decisionmaking process accordingly.

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<sup>374</sup> "The decision did not declare a valuable principle that we should hesitate to circumvent. On the contrary, it misunderstood not only what free speech really is but what it really means for free people to govern themselves." *Id.*

<sup>375</sup> According to Fiss:

In some instances, instrumentalities of the state will try to stifle free and open debate, and the First Amendment is the tried-and-true mechanism that stops or prevents such abuses of state power. In other instances, however, the state may have to act to further the robustness of public debate in circumstances where the power outside the state are stifling speech. . . . It may even have to silence the voices of some in order to hear the voices of others.

OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3-4 (1996).

<sup>376</sup> Paul Brest, early in the civic republican constitutional debate, recognized this issue as fundamental. See Brest, *supra* note 84.

<sup>377</sup> Descriptive representation has been described as representation by culturally or physically similar persons. See Bernard Grofman, *Should Representatives Be Typical of Their Constituents?*, in *REPRESENTATION AND REDISTRICTING ISSUES* 97 (Bernard Grofman ed., 1982); see also SAMUEL KRISLOW, *REPRESENTATIVE BUREAUCRACY* (1974). For critique of this concept of representation in the voting rights context, see Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102-09 (1991).

<sup>378</sup> HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 61 (1967).

But the descriptive conception of representation contains some obvious shortcomings. Its effectiveness depends on a tight relationship between the characteristics of the representative and the group. It is also premised on a fundamental myth—that a group is defined by a static and uniform set of interests that can be preidentified. But, if such a group can be said to exist, any individual member of the group can equally serve as a group representative; representation for the group, in other words, is arbitrary. At the same time, individual group members who do not agree with the position articulated by the representative are frozen out of the decisionmaking process.<sup>379</sup>

An alternative conception of representation—“acting for”—presents a more dynamic account of representation, one that is certain to appeal to theorists of deliberative democracy. Appointed judges, for example, have been called representatives. But appointed judges do not merely stand for their appointee, the public at large, or the law; rather they act in an autonomous, deliberative manner that mediates the interests of all of these constituents.<sup>380</sup> This conception avoids the group homogeneity problem of descriptive representation.

This second conception of representation requires that the second question—the role of the representative—also be addressed.<sup>381</sup> The representative’s role under a pluralist decisionmaking model is best described as preference aggregation; however, within a deliberative democracy model, the representative plays an important mediating role between individuals and entities and the regulatory agency. Representatives must enable individual group members to gain access to the contents of the deliberative agency decisionmaking process, while also expressing to agency decision-makers a group position.

Formal mechanisms that force limitations on participation, such as mediation, have worked to encourage deliberative decisionmaking by addressing the issue of representation, not by allowing indiscriminate, immediate participation.<sup>382</sup> In a consensual dispute-resolution model, a third-party facilitator is typically selected to assist stakeholders in the delib-

<sup>379</sup> See Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 1003 (1993) [hereinafter *Participation*]. Sturm, building on her previous work, takes Fiss to task for failing to unpack his premises about the nature of participation and representation at the remedial stage of public law litigation. See generally Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

<sup>380</sup> See PITKIN, *supra* note 378, at 113-14.

<sup>381</sup> If representation is purely descriptive, the question of the role of the representative has been answered: the representative simply speaks as an automaton, asserting the interests of the constituent.

<sup>382</sup> Sturm, *Participation*, *supra* note 379, at 1008 (“Instead of offering a substantive standard to determine who should participate in framing the remedy, the deliberative model establishes a process to identify the individuals, groups, and organizations whose participation is necessary to develop and implement a fair and workable remedy.”).

erative process. In the administrative decisionmaking process, agency decisionmakers can play the role of facilitating representation.

Ultimately, groups must select representatives "empowered to speak for the groups they claim to represent,"<sup>383</sup> although they may do so with the assistance of a third party.<sup>384</sup> Greater weight may be given to underrepresented interests. For example, some communities that have failed to reach agreement on economic development policies have invited mediators to help resolve their disputes; one strategy employed by such mediators has been to devise an alternative government decisionmaking body in which representatives of city government sit together with newly chosen representatives of neighborhoods and businesses and reach consensus over a period of months.<sup>385</sup> Although mediation approaches have been criticized for encouraging the substitution of private interests for the public interest in agency decisionmaking<sup>386</sup> and it can be questioned whether, in practice, they have resulted in better quality agency decisions,<sup>387</sup> mediation has forced decisionmakers to confront the issue of representation in the agency decisionmaking process.

Unlike mediation approaches, which require some pre-selection of a discrete number of participants, many extant agency decisionmaking mechanisms, such as rulemaking and adjudication, do not ordinarily allow the opportunity for pre-selection. Instead, these mechanisms rely on voluntary participation by interests subject to applicable standing limitations. In a recent circuit court decision, Chief Judge Richard Posner offered an interesting approach to a similar problem with participation<sup>388</sup> in the context

<sup>383</sup> LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 101 (1987). This involves identifying individuals and groups directly affected by, responsible, or in a position to block the final decision. *Id.* at 103.

<sup>384</sup> *Id.*

<sup>385</sup> See Lawrence Susskind, *The Role of Negotiation in Planning, Lecture at University of North Carolina at Chapel Hill, cited in Whittington & MacRae, supra note 365.*

<sup>386</sup> See William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

<sup>387</sup> See Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1210-12, 1219-20 (1994). The regulatory negotiation statute sets twenty-five as the limit on membership for regulatory negotiations unless the agency argues otherwise. 5 U.S.C. § 565(b) (1994). As Rose-Ackerman suggests, regulatory negotiations do not help participants acquire scientific or technical information. Rather, they help "clarify[] the interests at stake and help[] disparate interests find common ground." Thus, they "cannot succeed unless basic entitlements are clear and participants can predict what actions the agency will take if no agreement is reached." *Id.* at 1211.

<sup>388</sup> According to Judge Posner,

[i]ncreasing the number of parties to a suit can make the suit unwieldy. Of particular concern, it can impede settlement. With immaterial exceptions, such as the case of a class member who has forgone his right to opt out of the class action, a party cannot be forced to settle a case. An intervenor acquires the rights of a party. He can continue the litigation even if the party on whose side he intervened is eager to settle. This blocking right is appropriate if that party cannot be considered an adequate representative of the intervenor's interests, but not otherwise.

*Solid Waste Agency of N. Cook County v. United States Corps of Army Eng'rs*, 101 F.3d 503, 508 (7th Cir.1996) (citations omitted).

of the right to intervention under Rule 24(a) of the Federal Rules of Civil Procedure.<sup>389</sup> To resolve the problem, Judge Posner allowed the party seeking participation, a citizen group challenging a proposal to build a landfill, to file a conditional or standby application for leave to intervene at the outset of a suit challenging an Army Corps of Engineers denial of a Clean Water Act section 404 permit.<sup>390</sup> The district court, according to Judge Posner, should then defer the question of adequacy of representation until the applicant has demonstrated inadequacy.<sup>391</sup> Likewise, absent major reforms designed to address some of the problems posed by unencumbered participation, agencies might consider a similar limitation on participation. Assuming that an agency proceeding is already providing for participation by an interest identical to an affected would-be participant, an agency might exercise its discretion<sup>392</sup> to presume adequate representation unless the would-be participant proves otherwise, while also allowing the would-be participant to file some sort of standby status for full participation in the proceeding if necessary.

## VI. CONCLUSION

[A] major task of any society is to create a social environment in which self-interest has reason to be enlightened.<sup>393</sup>

Modern political theory has consistently erred in favor of enhanced participation as a solution to the perceived failure of government. The ideals embraced by modern bureaucratic deliberative democrats attempt to make the agency decisionmaking process something more than rational jargon or confrontational exchange politics. However, the examples of citizen suits, NEPA's EIS process, and sunshine laws illustrate how some types of participation, if not tempered, may defeat the goals of administrative process. Participation may also cause deliberative decisionmaking, particularly

<sup>389</sup> Rule 24(a)(2) of the Federal Rules of Civil Procedure confers a right of intervention upon a person who "claims an interest relating to" the subject matter of the suit in which the person wants to intervene, provided that the disposition of the suit might "impair or impede" the person's ability to protect that interest and the interest is not "adequately represented" by a party to the suit. *Id.* at 505.

<sup>390</sup> 33 U.S.C. § 1331 (1994).

<sup>391</sup> In that case, the interests of the Army Corps of Engineers and the intervenor were identical, leading the court to presume adequacy. *Solid Waste*, 101 F.3d at 508.

<sup>392</sup> An agency is most likely to have such discretion in the adjudicative context. In the rulemaking context, agencies are required by the APA to give "interested persons" an opportunity to participate in the proceeding. 5 U.S.C. § 553 (1994). Thus, full implementation of an approach similar to Judge Posner's in agency rulemaking, as well as in the context of citizen suits, the EIS process, or sunshine laws, would require statutory reforms. On appeal of agency action under 5 U.S.C. § 702, however, courts may have considerable leeway to implement such limitations in the application of traditional standing analysis, as Judge Posner did in *Solid Waste*.

<sup>393</sup> SIMON, , *supra* note 123, at 105.

as encouraged by deliberative democracy, to lapse into expertocratic or pluralist decisionmaking cultures.

Such mechanisms, it would seem, should be a part of contemporary discussions aimed at reforming the administrative process. For example, Congress should consider enhancing agency discretion to supervise enforcement and policymaking agendas, rather than encourage private interests dissatisfied with agency decisions to bypass the administrative process and sue in court. While efforts to enhance the amount of information available to agency decisionmakers and participants, such as NEPA's EIS process, are well intentioned, Congress should proceed cautiously before imposing rigorous public participation and information-gathering requirements as a part of cost or risk assessment mandates. In addition, Congress should take seriously the problems the Sunshine Act poses for multi-member agencies and consider adopting a provision that will allow predecisional deliberations outside of the sunshine or closed discussions so long as an agency has publicly deliberated about the necessity of a closed meeting. Agency approaches to managing participation can often be understood as enhancing, not diminishing, the quality and democracy of their decisionmaking processes.

The point of this entire exercise has been to explore whether, in any circumstances, we might justify regulating, instead of blindly increasing, participation in agency decisionmaking. Balanced participation may provide hope for improving ordinary deliberative democratic decisionmaking by restoring agency control over agendas, increasing accountability and neutrality. It may increase the quality of decisionmakers' analysis of information and discourage strategic uses of information by participants. Finally, it may encourage collegial decisionmaking in multi-member agencies. Moreover, regulation of participation may also help to ensure that decisionmakers, as an institutional matter, do not select a sub-optimal decisionmaking culture.

Limiting participation alone will not necessarily make agency decisionmaking more deliberative if it also works to exclude perspectives that do not have representation in the administrative process. However, although for many individuals and interest groups too little meaningful participation currently occurs,<sup>394</sup> this should not justify embracing broad participatory reforms for those who already participate actively in agency decisions. Limitations on participation, by contrast, will likely jump start a discussion about who represents whom in the administrative process. To the extent that this forces a shift in emphasis towards the issue of representation, it holds promise to make administrative procedure more democratic than blindly embracing participation.

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<sup>394</sup> See Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997) (arguing that deliberation requires equality of opportunity to articulate persuasive arguments and the capacity to evoke acknowledgement of one's arguments, to the disadvantage of women and minorities in practice).

On the other hand, to the extent that we feel uneasy regulating participation in bureaucratic decisionmaking, another option exists: re-evaluate deliberative democracy as an account of bureaucracy. But, even a re-evaluation of deliberative democracy as a theory of administrative law must address whether we can have anything at all approaching democracy in agency governance absent deliberation.

