

Rethinking Regulatory Democracy

Mariano-Florentino Cuéllar*

This article empirically examines democratic participation in three different regulatory proceedings, involving financial privacy, nuclear regulation, and campaign finance. It then uses that analysis to critique -- and suggest alternatives to -- existing mechanisms to achieve public participation in the regulatory state. The current mechanism for structuring public participation in regulatory decisions (or "regulatory democracy") relies on demand-driven procedures like the Administrative Procedure Act's notice and comment process. Organized interests and others who decide they have sufficient resources and interest to do so comment on regulations. While some observers consider this process close to ideal, others instead seem to accept the current approach only because it appears to be a reasonable compromise adequate for an imperfect world. Under this "compromise acceptance" view, current procedures seem easier to accept in light of certain empirical suppositions, such as that regulatory problems can be resolved through application of technical, scientific expertise, that individual members of the public tend to lack interest in participating in regulatory policymaking, and that even if they had such interest, they would add little to a process already informed by the views of organized interests. Drawing on an empirical analysis of thousands of public comments in these three regulations, as well as a rich empirical literature in political behavior, I show many of these suppositions to be questionable. (1) Comments from individual members of the public make up a substantial proportion of total comments about some regulations, showing at least some potential public demand for participation. (2) Dramatic differences exist in the sophistication of comments from organized interests and those of individual members of the public. (3) That deficit in sophistication independently affects the probability an agency will accept suggestions in public comments even when controlling for differences in commenter identity. (4) Interest groups do not always raise the range of concerns raised by comments from the lay public. (5) The larger public's interest in a particular regulation and sophistication to take part in discussing it are both themselves shaped by the process used to consult that public. All this hints at a rich set of possibilities for alternative institutional designs to achieve regulatory democracy. I discuss two such approaches here. Both involve constituting a small group of people whose discussions can inform the regulatory process, and appointing a lawyer to serve as a "regulatory public defender" responsible for articulating their views to the agency. Participants can be either selected by lot from the entire population (a majoritarian deliberation approach), or chosen from among constituencies (such as outside experts) who may be especially impacted by the regulation but are essentially unrepresented (a corrective approach). Given that neither the public's sophistication nor its interest in an issue are fixed, the new approaches can generate valuable information about what informed citizens think of regulatory proposals. These mechanisms can provide regulators with valuable information about what makes a new law acceptable to the public. Many of the technical challenges could be solved by creating a separate agency to implement reforms in regulatory democracy, though questions arise about sampling to select participants, framing the issue, and providing representation to the views of the group. Instead, the larger challenge to the reform of regulatory democracy is a political economy that strongly -- though not inevitably -- favors the status quo. I close by discussing three scenarios where reform would be easier to achieve.

* Associate Professor and Deane F. Johnson Faculty Scholar, Stanford Law School. I am grateful for funding from Stanford Law School. Many thanks to Mark Kelman, Pam Karlan, Cary Coglianese, Ian Ayres, Barbara Fried, Deborah Hensler, Lawrence Friedman, Richard Craswell, Dan Rodriguez, John Donohue, Bob Rabin, Bob Weisberg, Roger Noll, Russ Hardin, Bill Simon, Buzz Thompson, Bernie Black, Kathleen Sullivan, and Brigham Daniels. I also appreciate the assistance and candor of staff at the Nuclear Regulatory Commission, the Federal Election Commission, and the Treasury Department. This is for Ria.

INTRODUCTION	3
I. THE FACES OF REGULATORY DEMOCRACY	10
<i>a. Legislative Power and Regulatory Democracy</i>	<i>11</i>
<i>b. Three Case Studies of Participation in Regulatory Policy</i>	<i>13</i>
<i>i. The Treasury Department: Changing Law Enforcement Access to Private Financial Information</i>	<i>14</i>
<i>ii. The Federal Election Commission: Modifying Public Financing of Presidential Campaigns and Nominating Conventions</i>	<i>24</i>
<i>iii. The Nuclear Regulatory Commission: Scaling Back Formal Adjudication in the Licensing of Civilian Nuclear Technologies.</i>	<i>30</i>
<i>c. Comparing Participation Across Regulatory Domains.</i>	<i>36</i>
II. THEORIZING ACCEPTANCE OF THE STATUS QUO	39
<i>a. Justifying Current Regulatory Democracy Under Broad Legislative Delegations</i>	<i>40</i>
<i>i. A Strong Claim: Representative Politics and Interest Group Competition Entirely Resolve the Problem of Regulatory Democracy</i>	<i>41</i>
<i>ii. A Weaker Claim: Current Procedures Amount to a Reasonable Compromise.....</i>	<i>51</i>
<i>b. Challenging Empirical Assumptions Supporting Compromise Acceptance.</i>	<i>52</i>
<i>i. Assumption # 1: Regulatory Problems Are Technical Problems.....</i>	<i>53</i>
<i>ii. Assumption # 2: The Public Lacks Interest</i>	<i>58</i>
<i>iii. Assumption # 3: Interest Groups Provide Effective Representation</i>	<i>61</i>
<i>iv. Assumption # 4: Demand-Driven Procedures Already Provide Diverse Public Perspectives.....</i>	<i>62</i>
<i>v. Assumption # 5: Sophistication Deficits Have No Effect.....</i>	<i>63</i>
<i>vi. Assumption # 6: A Fixed Public Dearth of Sophistication.</i>	<i>67</i>
<i>c. Synthesis: Reconsidering the Status Quo.....</i>	<i>72</i>
III. REDESIGNING REGULATORY DEMOCRACY	72
<i>a. Alternative Frameworks for Participation.....</i>	<i>74</i>
<i>i. Corrective Interest Representation.....</i>	<i>76</i>
<i>ii. Majoritarian Deliberation.....</i>	<i>79</i>
<i>b. The Institutional Design of a Participation Agency and Regulatory Public Defenders.</i>	<i>81</i>
<i>c. Practical Contributions of Redesigned Regulatory Democracy.....</i>	<i>85</i>
<i>i. Democratic Experimentation.....</i>	<i>85</i>
<i>ii. Information About Public Reactions to Specific Regulations</i>	<i>87</i>

IV. POLITICAL CONSTRAINTS ON REGULATORY DEMOCRACY.	88
a. <i>The Political Economy of the Status Quo</i>	88
b. <i>Possible Reform Scenarios</i>	90
CONCLUSION.....	93
APPENDIX: METHODS AND DATA.....	95

INTRODUCTION

Regulatory agencies write twenty times as many new public laws in a year as does the federal legislature,¹ and in the process make an overwhelming number of the nation's public policy decisions.² Agencies regulate privacy,³ political

¹ See John D. Graham, Presidential Management of the Regulatory State, Remarks Prepared for Delivery to the National Economists Club (Mar. 7, 2002), *available at* <http://www.whitehouse.gov/omb/legislative/testimony/graham030702.html> (last accessed May 14, 2004)(noting that federal agencies write “over four thousand” regulations a year). In fact, regulatory agencies promulgate more rules in a month (on average) than Congress passes laws in a year. The U.S. Congress passes 198 public laws in 2003, a rate that fluctuated between a low of 88 (in 1995) and a high of 410 (in 2000) over the last nine years. See *108th Congress, 1st Session: By the Numbers*, CQ WEEKLY (February 14, 2004). These figures obviously do not account for qualitative differences in the importance of legal mandates emerging from agencies versus the federal legislature. Nonetheless, virtually every major statute passed by Congress also leads to new regulatory mandates, and the accumulation of agency legal authority arising under successive statutes allows regulators to issue a considerable number of highly significant regulations (under nearly any plausible definition of significance) each year. States, too, write thousands of regulations a year. For a discussion of the many such rules that have been invalidated by the Supreme Court on the grounds that they interfere with interstate commerce, see Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 CA. L. REV. 1203, 1257 (1986). The central importance of regulation in modern law is also borne out by developments abroad. Developed nations from Switzerland to Korea have forged their own version of the regulatory state during the last century. See, e.g., Brian Levy and Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulations*, 10 J. LAW, ECON. & ORG. 201 (1994); Carl H. Fulda, *The Regulation of Surface Transportation in the European Economic Community*, 12 AM. J. COMP. LAW 303, 304 (1963). Transnational regulatory agencies are also becoming common. See, e.g., Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT’L ORG. 171 (1995); John Braithwaite, *Transnational Regulation of the Pharmaceutical Industry*, 525 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 12 (1993). Even reformers in chaotic corners of Africa, Asia, and Latin America increasingly train their attention on building effective and legitimate regulatory institutions. See, e.g., Bernard S. Black, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).

² For perspective, regulatory agencies write nearly as large a number of *rules* in a year as all the non-prisoner civil appeals filed in U.S. courts of appeal in a year. See ADMIN. OFFICE OF U.S. CTS., JUDICIAL FACTS AND FIGURES, TABLE 1.1 (2004)(avail. at <http://www.uscourts.gov/judicialfactsfigures/contents.html>)(indicating that there were 13,460 non-prisoner civil appeals filed in all federal courts of appeals in 2003).

³ See *Financial Crimes Enforcement Network; Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, 67 FED. REG. 60579, 60580-82 (September 26, 2002)(establishing procedures under which federal law enforcement agencies can obtain otherwise private information about individuals’ financial transactions).

competition,⁴ parks,⁵ pollution,⁶ ports,⁷ power plants,⁸ pork belly prices⁹ and political “pork”¹⁰ among other things. Not surprisingly, scholars, judges, and lawyers have consumed enormous energy debating agencies’ legal and philosophical status.¹¹ This outpouring of theoretical attention is matched, however, by the gaps in our knowledge about the actual workings of what we might call *regulatory democracy*, or how the public participates in those decisions of the regulatory state that so dramatically affect them under existing law.¹² The

⁴ See *Public Financing of Presidential Candidates and Nominating Conventions*, 68 FED. REG. 12484-521 (April 15, 2003)(changing comprehensive rules governing the public financing of presidential campaigns and nominating conventions).

⁵ See *Dunn-McCampbell Royalty Interest, Inc.*, 112 F.3d 1283 (5th Cir. 1997)(discussing the validity of National Park Service regulations allocating mineral rights).

⁶ See *Whitman v. American Trucking Associations*, 531 U.S. 457, 472-73 (2001) (hereinafter “*American Trucking*”)(discussing particulate matter standards under the Clean Air Act).

⁷ See *Implementation of National Maritime Security Initiatives*, 68 FED. REG. 60,448 (Oct. 22, 2003)(implementing port security and cargo inspection rules in U.S. ports, and including several extraterritorial provisions applying to overseas ports).

⁸ See *Nuclear Regulatory Commission: Changes to the Adjudicatory Process*, 69 FED. REG. 2182 (2004). These regulatory changes are discussed in detail in *infra* Part I.b.

⁹ *Clarification of Certain Aspects of the Hedging Definition*, 52 FED. REG. 27195 (July 20, 1987)(Commodity Futures Trading Commission regulations affecting hedging transactions for pork belly and other commodity transactions).

¹⁰ See, e.g., Kristin Loiacono, *Special Interests Overtake Homeland Security*, 39 TRIAL 11 (Jan. 2003)(describing essentially requiring the promulgation of regulations that would result in the creation of a homeland security research center at Texas A&M University).

¹¹ Some classic (or near-classic) examples of this genre: THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 125-26, 148-55 (1969) (administrative state is built on ideas of “interest group liberalism” antithetical to legal standards); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295 (1987). See also MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 135-61 (1995); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); CHRISTOPHER EDLEY, *ADMINISTRATIVE LAW* (1990); Cass R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 17 (1997); Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1762 (2002); Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention* 116 HARV. L. REV. 467 (2002); Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

¹² For three notable exceptions, see Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POLI. SCI. REV. 663 (1998)(finding that Medicare regulations developed pursuant to the regulatory notice-and-comment process appeared to have been impacted by comments from physicians expecting reductions in payments under the new rules); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998)(providing a description of the regulatory rulemaking process and a survey of participants in several rulemaking proceedings, and finding that citizens almost never participate) and CORNELIUS M. KERWIN, *RULEMAKING* 157-203 (2nd ed. 1999)(discussing the extent of public participation in regulatory rulemaking proceedings, and concluding that such participation primarily reflects a process where “interest groups are the major forces”). None of these sources, however, analyze the sophistication of individual comments, nor do they consider the extent to which comments address matters within the scope of the agency’s legal discretion. Neither do they place the empirical analysis in the context of

basic legal requirements built into our current system are clear enough: agencies get statutory authority to regulate from the legislature.¹³ They must ordinarily provide notice of proposed regulations,¹⁴ accept comments about them,¹⁵ and give clear reasons for their actions.¹⁶ Clear, too, are the theoretical insights gleaned from social scientists about the purported difficulty of mobilizing individual members of the public with diffuse interests to affect regulations,¹⁷ the powerful role of the legislature in overseeing the regulatory state,¹⁸ and the incentives of agency officials to pay disproportionate heed to the concerns of certain players in the regulatory process.¹⁹ Less clear is who might be concerned enough to actually

debates about the extent of regulatory democracy, nor do they discuss alternative institutional designs for involving the public in regulatory decisionmaking.

¹³ See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene)* 448 U.S. 607, 646-48 (1980) (plurality opinion) (OSHA statute, if interpreted appropriately to cure constitutional defects, creates a list of factors that the agency must consider in creating a regulation that is not arbitrary and capricious, and emphasizing the importance of the agency balancing several competing concerns grounded in the statute).

¹⁴ See Administrative Procedure Act (APA), 5 U.S.C. § 552-556 (2001).

¹⁵ *Id.*

¹⁶ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (agency must provide explanation for its decision, and decision reviewed on the basis of the full rulemaking record). The full record includes all the comments submitted by the public.

¹⁷ See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (“[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational self-interested individuals will not act to achieve their common or group interests”). See also Pamela Schmitt, Kurtis Swope, and James Walker, *Collective Action With Incomplete Commitment: Experimental Evidence*, 66 SOUTHERN ECON. J. 829 (2000) (presenting results of experiments where individuals must solve a collective action problem in order to receive a payoff, and noting that – while subjects anticipate collective action problems – they still have difficulty reaching agreements or sticking to them). But see Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 138 (2000) (“A substantial gap exists between the theoretical prediction that self-interested individuals will have extreme difficulty in coordinating collective action and the reality that such cooperative behavior is widespread, although far from inevitable.”).

¹⁸ See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (With Applications to the SEC)*, 44 PUB. CHOICE 147 (1984).

¹⁹ See, e.g., Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1, 13 (1994) (“The difficulty in giving formal incentive schemes to civil servants and elected politicians suggests that capture of the decision making by interest groups is of greater concern in government than in private corporations.”). More nuanced accounts also insist that bureaucrats and the regulatory agencies they staff are likely to disproportionately respond to the concerns of regulated parties. See, e.g., JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 73 (1989) (“[A]ny government agency that vests its operators with much discretion will have the tasks of these operators defined by the pressures of external organized interests”).

comment on regulations, what they say, and how agencies react to those concerns in practice.²⁰

My own concern here is to study that process empirically. I then use the insights gleaned in that analysis to offer a new perspective on current regulatory democracy and how it can be reformed.²¹ In Part I, I examine three quite different regulations, from the Treasury Department, the Nuclear Regulatory Commission, and the Federal Election Commission.²² Each regulation was crafted from statutes giving the agency massive discretion over a substantively important issue. None provoked any discernible legislative response either before or since the regulation was finalized. My analysis shows, among other things, that comments from individual members of the public account for the lion's share of total input received about these regulations.²³ Those individual comments, moreover, raise different concerns from those of organized interests.²⁴ While those concerns

²⁰ This is ironic since commentators and lawyers alike often assume that public participation – when coupled with judicial review and legislative oversight – is part what makes the regulatory state legitimate. See, e.g., *Administrative Procedure Act: Legislative History*, S.Doc. No. 248, 79th Cong., 2d Sess. 191 (1947) (noting that the “principal purpose” of the notice and comment provisions in the APA was to “provide that the legislative functions of the administrative agencies shall as far as possible be exercised only upon participation on notice...”). See also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (public participation in rulemaking proceeding is meant to ensure that the regulation is response to the interests and needs of those regulated); *Texaco, Inc. v. Federal Power Commission*, 412 F.3d 740, 744 (3d Cir. 1969) (participation by parties with an interest in the regulatory rulemaking proceeding ensures that agencies’ decisions are based upon relevant information); Roger C. Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L. REV. 525 (1972).

²¹ The prescriptive literature on participation in policymaking (and, by extension, in regulation) tends to fall into two categories: (1) philosophical discussions of the value of participation in policymaking in general (without strong attention to the intricacies of regulatory policy, or institutional detail); or (2) discussions of specialized issues like regulatory negotiation or the use of technology to facilitate participation. For some interesting examples of the former, see Cramton, *supra* note 20; Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 27-29 (1986); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995). For examples of the latter, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Cary Coglianese, *The Internet and Public Participation in Rulemaking*, KSG WORKING PAPER SERIES NO. RWP03-022 (2003), avail. at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=421161.

²² I pre-selected the three agencies to obtain regulations from a range of different substantive issue areas that ordinarily receive less attention than environmental pollution regulations but are no less substantively interesting or important to shaping public policy. Once I selected the three agencies, I identified regulations (a) finalized during the last three years that (b) provided the agency with substantial discretion (enough to make it difficult to accept that the agency’s decision regarding how to write the regulation depended exclusively on factual information generated by expert agency analysts), and (c) did not appear to provoke any meaningful legislative response or interest during the time when the regulation was being drafted. I then selected the final three regulations essentially at random from among those that met the preceding conditions. See the Appendix, *infra*, for further details on how I selected these three regulations.

²³ See *infra* Part I.c. The preponderance of comments from individual members of the public persists for two out of the three regulations I studied even when one excludes form letters.

²⁴ See *id.* See also Part II.

raised by individual commenters are nearly always relevant to the agency's legal mandate,²⁵ they lack the legal and policy sophistication of the comments to which the agencies paid the most heed. In fact this "sophistication deficit" appears to have some effect on the agency's probability of accepting a commenter suggestion, even when controlling for the commenter's status as a regulated entity.²⁶ Yet agencies and existing law have no systematic means of assimilating unsophisticated comments or gleaning any other sort of public insights from among the tens of millions of people who lack either the knowledge of a regulation's existence or the ability to advance their opinion about it in a sophisticated way.

Together with an existing body of empirical research on political behavior, my research sheds light on both the strengths and weaknesses of the procedures epitomizing current regulatory democracy.²⁷ As I discuss in Part II, someone insisting that those strengths outweigh the weaknesses under the current system could do so using one of two plausible positions. One position idealizes the institutions of representative democracy that oversee the regulatory state, and the interest groups that play such a crucial role in setting the agenda for those institutions. The other considers the status quo an imperfect but nonetheless reasonably acceptable system to achieve public participation in a second-best world, even if greater individual participation would be desirable if it could be had without undoing the strengths of the current system.

The first argument is not my primary concern here because it is less falsifiable,²⁸ though I note in passing that it is not obviously persuasive. I focus instead on *compromise acceptance*, the second position purporting to explain why we (should) continue using existing procedures to engage the public in regulatory policy. In contrast to the first, this second position seems to depend more clearly on a number of empirical assumptions about organized interests, the mass public, and regulatory agencies.²⁹ I question those assumptions. My data belie the notion that organized interests raise the full range of concerns relevant to writing regulations.³⁰ Surprisingly, my data also belie the notion that agencies

²⁵ See *infra* Part I.c.

²⁶ See *infra* Part II.c.v.

²⁷ As I discuss in Part II.a, *infra*, the notice-and-comment process as well as virtually all existing participation procedures are *demand-driven*. They only concern themselves with those comments from people who decide to participate on their own initiative (or through the influence of some organized interest). Those procedures let agencies quickly develop regulations and learn from organized interests – many of whom have an economic stake in the regulation. They lack any means to address the concerns of participants who have an opinion but cannot raise it in a sophisticated way, or to canvas the views of countless millions who haven't decided on their own that they want to say something about the regulation.

²⁸ By "falsifiable," I mean that someone can demonstrate convincing that an argument is false by pointing to data, whether quantitative, qualitative, or historical.

²⁹ See *infra* Part II.c.

³⁰ By "relevant," I mean those concerns that an agency is either required or capable of considering given the statutes in question, and that are hard to reject on normative grounds as important

disproportionately respond to the concerns of the companies and entities they regulate, which would make it largely pointless to reform regulatory democracy. Instead my data suggest agencies will heed comments from individual members of the public if they are presented in a more sophisticated fashion.³¹ Along with other research on political behavior, my data also raise questions about whether the larger public's sophistication and interest in regulatory policy are stuck in the "low" positions.³² In short, my data and discussion emphasize the gap between current regulatory democracy and the sort of arrangement that many plausible normative accounts of democracy would consider desirable.³³ If one still believes in compromise acceptance in the face of these data, it is likely because no alternative arrangement appears reasonable. How exactly does one motivate the larger public to think carefully about the regulations that so profoundly affect their lives? Surely the prospect of having a referendum on campaign finance or nuclear licensing regulations is as ludicrous as mass opinions are devoid of any useful content on these technical arguments.

But under scrutiny the feasibility argument favoring the current system turns brittle, too. I show this by pursuing, in Part III, an extended thought experiment in the institutional design of a new arrangement for regulatory democracy. The reformed procedures preserve some of the strengths of the status quo. They also yield a trove of valuable information about public attitudes that the status quo can never provide.³⁴ The key elements of that design include the creation of a specialized participation agency.³⁵ The agency would then select random voter samples (or stratified samples, if the goal is to represent key interests rather than to foster majoritarian deliberation) and provide them with time and balanced information about the regulation, as well as a "regulatory public defender" to articulate views to the agency writing the regulation. This

considerations in writing the relevant regulations. *See infra* Part I.b for a discussion of specific examples in the context of the three regulations I analyze here.

³¹ *See infra* Part II.b.

³² *See infra* Part II.c.

³³ *See infra* Part.I.

³⁴ I take up this institutional design challenge not because the mass public should control all or even most regulatory decisions, nor because I think deliberative democracy is the elixir of regulatory nirvana. As I discuss in Part III, alternative arrangements might further either majoritarian deliberation or quite different goals altogether, such as including the views (enhanced through additional information but not necessarily through deliberation) of potentially interested parties who do not already participate. For a reasonable introduction to this burgeoning literature (replete with the obligatory cites to Habermas), *see* JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY (1996). *But see* James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 447 (1996).

³⁵ As I note *infra* in Part III proposal picks up on some themes that made a brief appearance in legal scholarship during the late 1960s and early 1970s. *See* Arthur Bonfield, *Representation of the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 530-45; Cramton, *supra* note ___, at 545-46. None of these previous efforts provided a detailed theoretical justification for the creation of a new participation agency, though, nor do they go into detail about how to structure it.

approach not only yields richer information about how and when the public might want to comply with regulations, but also treats the regulatory state as a fertile setting for democratic experimentation.³⁶

There's a lot to be said for making the regulatory state and its institutions the focus of such experimentation. Regulatory agencies confront a diet of concrete governance questions.³⁷ New methods of participation could function

³⁶ In Part III I note that such experimentation promises to be most successful if an independent agency assumes responsibility for gathering insights about the benefits and implementation challenges associated with new forms of participation. That agency might also begin by setting up a few baseline procedures to initially serve as alternatives to current regulatory democracy. In contrast to my focus on institutional design in Part III and elsewhere, the idea that the regulatory state can be a fount for experimentation with public consultation has been largely missing from the extant literature on regulation and democracy: neither critics of broad delegations nor its defenders explicitly recognize that the regulatory state is more than just a legal contraption for solving practical problems inherent in national government; it is, too, an incomparable setting for pragmatic experimentation with different mechanisms for democratic participation that might later inform other aspects of modern self-government. Scholars interested in civic republican understandings of the regulatory state have made occasional references to democratic experimentation, but their work tends not to offer concrete new institutional arrangements or detailed analyses of whether existing arrangements live up to their expectations. See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA L. REV. 287 (1990); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). For some important exceptions, see Cass R. Sunstein, *Group Judgments: Deliberation, Statistical Means, and Information Markets*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 219 (2ND SERIES)(August 2004)(reviewing empirical research conducted by scholars of social psychology, group dynamics, and experimental economics to highlight some of the differences in the likely strengths and limitations of different procedures for aggregating individual information relevant to regulatory problems); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996)(providing a speculative discussion of the possibility of using "citizen juries" to advise environmental policymakers on broad environmental policy matters).

³⁷ In fact agencies must constantly solve concrete, not general or abstract, problems that require major value choices. See *infra* Part II.b.i. This is true even if one assumes considerable fidelity to a statutory mandate. This means democratic experiments involving the regulatory state are qualitatively different from exercises like "deliberative polls," which involve the elicitation of thoughtful opinion on some higher-profile, more abstract subject like how to reduce crime or the appropriate extent of unilateral intervention that should be associated with foreign policy. Cf. BRUCE ACKERMAN AND JAMES S. FISHKIN, *DELIBERATION DAY* (2004)(proposing the creation of a paid civic holiday two weeks before elections for citizens to gather in local schools and community centers to talk about "the issues" and the candidates in a structured fashion). A lot rides on this distinction between specific regulatory questions and broader issues. One might naturally question the information content of public opinions (however elicited) about some exceedingly general aspect of public governance, like "foreign policy." Suppose, moreover, that such opinions were considered as valuable as, say, what a random sample of the public thinks about whether the regulations implementing the assault weapons ban should be modified. Any scheme that aims to change, or inform, the process of making broad policy choices must still grapple with the question of how to translate the broad (statutory) command into more specific, concrete rules or standards. That translation process is my primary concern here. The insights

with existing legal features of the regulatory state, including judicial review, agency expertise, and an administrable arrangement for actually getting regulations written at a reasonable administrative and financial cost. At the same time, new methods could yield valuable information about how the public reacts to regulation that is currently unavailable. The regulatory state faces the pervasive challenge of integrating public concerns with rigorous analysis of risk, costs, and benefits. Important as this challenge is, no one has come close to solving it. Making headway on it depends on learning more about how to integrate sophisticated technical information and public input. These experiments can also yield a small but growing group of citizens suffused with new information from a jury-like, meaningful opportunity to take part in shaping the regulations that affect their lives.

This is not to say that changing the current system would be easy. In Part IV I acknowledge as much by discussing how current regulatory democracy was designed by legislators eager to mollify organized interests whose futures and fortunes depended on regulation. Change is more likely, however, under certain plausible scenarios I also describe therein. In the meantime, my modest hope is for this article to show how a combination of close empirical study of the regulatory state and analysis of institutional design problems make for a compelling scholarly agenda on the regulatory state and its reform.

I.

THE FACES OF REGULATORY DEMOCRACY

Last year three teams of lawyers, technical experts, and political appointees in the Washington, DC metropolitan area finalized the following regulations. One altered decades-old laws to transform how federal agents get access to private financial information. Another curtailed the use of elaborate trial-type hearings when federal authorities license civilian nuclear technologies, which range from radioactive medical devices to nuclear power plants. A third set the rules governing publicly financed presidential campaigns and nominating conventions, allowing (among other things) convention organizers to raise unlimited amounts of “soft” money from any person or corporation across the country. Each regulation was forged from legal authority letting the agency write the regulation in a hundred different ways. Each also took shape in accordance with legal rules giving the larger public notice of the regulation’s internecine complexity and allowing that public to have some chance to shape the regulators’ new mandates,³⁸ and each, too, emerged from a distinct political context of organized interests and bureaucratic attitudes. This Part adds to our limited knowledge of regulatory democracy by studying who participated, what they said,

gleaned from this process no doubt may further inform other problems involving the institutional design of democracy.

³⁸ See *infra* Part I.

and how the agency reacted in developing these three regulations. The case studies also anchor the discussion of regulatory democracy in the rest of the paper.

A. Legislative Power and Regulatory Democracy

The stories of the three regulations I discuss here begin, but do not end, with votes in legislative committees and later on the floor of the legislature. The Atomic Energy Act created the system of civilian control of nuclear energy that years later, culminated in the regulatory changes the NRC approved.³⁹ The FEC drafted its most recent public financing regulations with authority it gained in the 1970s from a trio of statutes affecting campaign finance. The agency also considered whether a more recent refinement of campaign finance law restricting certain kinds of donations to political parties also affected the public financing system.⁴⁰ The Treasury Department minted the financial privacy regulations I discussed after the strikingly swift passage of the now-infamous USA Patriot Act, a statute squeezing together provisions reflecting topical concerns like getting more Arabic speakers into the FBI with more longstanding prosecutorial aspirations for greater authority.⁴¹ Just as legislatures affected the regulations by passing these statutes, so too did legislators retain the power to affect those regulations by overseeing the agency's legal authority, controlling its budget, forcing its staff to appear at hearings, and shaping the career of the agency's leaders. All of the regulations discussed here were written using authority from ambiguous statutes that gave the agency a lot of latitude over its regulations,⁴² and (as with most regulations) none drew any observable sign of direct legislative intervention.

Which raises the question of how agencies behave when Congress seems not to be looking closely at what they are doing. Agency leaders might constantly worry about legislators' potential displeasure. As a result, Treasury, NRC, and FEC regulators might nonetheless face some subtle constraints from legislators, despite the lawmakers' apparent passivity.⁴³ For all that legislators can do to

³⁹ See *infra* Part II.b.iii.

⁴⁰ See *infra* Part II.b.ii.

⁴¹ See *infra* Part II.b.i.

⁴² See *infra* Parts I.b.i, I.b.ii., and I.b.iii for discussions of the discretion each agency retained to shape the regulations pursuant to the specific statutes at issue and the agencies' own broad statutory mandates.

⁴³ Perhaps in equilibrium legislators rarely have to explicitly to achieve their goals because the regulators already anticipate the constraints. See, e.g., Randall L. Calvert, Mathew D. McCubbins, and Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM J. POLI. SCI. 588 (1989), Jeffrey S. Banks and Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POLI. SCI. (1992); Kenneth A. Shepsle and Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEG. STUD. Q. 149 (1994). The theories in these papers are all quite persuasive in terms of their internal, formal logic; the

change laws and punish wayward agencies, the lawmakers must contend with the brute fact that regulatory agencies produce more laws than even a diligent legislature and its staff can ever plausibly digest. Which means legislators and their staff must decide where to turn their fitful gaze when they control the regulatory state.⁴⁴ Administrative procedures, including the regulatory notice-and-comment procedure – evolved in large measure to make it easier for legislators to oversee the bureaucracy by focusing their energies on particularly controversial or important regulations.⁴⁵ Those procedures play a role in legislative oversight of regulatory bureaucracies. They also create a process for the agency to gain insights into public reactions to regulatory proposals. In short, the fate of any regulation depends not only on what the legislature wants but the specific political circumstances involved, such as how interest groups and the public actually use the administrative procedures that are, in theory, so integral to regulatory democracy.⁴⁶

B. The Case Studies

difficulty often is in measuring their predictions explicitly beyond a few specialized contexts because of endogeneity problems.

⁴⁴ The prospect of legislative intervention is almost certainly shaped by the legislature's scarce resources and competing uses for those resources. Legislators have to vote on foreign policy appropriations, campaign among their constituencies, evaluate tax law changes, and supervise their staff, all of which means they cannot afford to supervise every development in regulatory policy. See, e.g., Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POLI. SCI. 165 (1984).

⁴⁵ For example, the procedures make it easier for legislators to intervene where it appears that the agency is not adequately considering the interests of organized constituencies to particular legislators. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. LAW, ECON & ORG. 180 (1999).

⁴⁶ Charles Shipan makes this point nicely in a recent article reviewing the literature on congressional influence over regulatory bureaucracies, and providing an empirical test of oversight over the Food and Drug Administration. See Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467 (2004). Once he controls for some key variables, Shipan finds that congressional influence over FDA decisions depends on political circumstances such as the extent of differences in agency and congressional (committee or floor) preferences, and the reactions of industry groups. He writes:

The results also show that agencies are influenced by other factors [besides congressional influence] when deciding what sorts of policy actions to take. Obviously the president, for example, exerts an influence over the agency, as does the overall level of the agency's budget. But we also see that the agency pays attention to other influences, in addition to the preferences of elected politicians, such as the size of the industry. All told, then, agencies are sensitive to a variety of signals that they receive from the political environment.

Id. at 478.

How then do agencies, organized interests, and the rest of the public use the legal procedures that constitute our current regulatory democracy? With few exceptions, members of the public have a legal right to take part in the regulatory process, regardless of whether they are savvy lawyers for a chemical products company or individual laypeople with no particular technical expertise.⁴⁷ This makes intuitive sense, since regulations are forged from statutes passed in the name of everyone.⁴⁸ At the same time, the public's right and opportunity to participate in these decisions is limited. Officially, no one in the public gets a veto over the regulation. Instead participation takes place in a particular legal context. The Administrative Procedure Act requires most regulations to be announced to the public and the agencies to receive comments about them from the outside public.⁴⁹ The right for the public to comment, coupled with legal requirements that the agency must give reasons for what it does,⁵⁰ implies has some kind of legal responsibility to consider significant issues raised in public comments.⁵¹ While the elements of this legal framework are relatively clear, what's less clear is precisely what concerns are raised, by whom, and to what

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

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

⁴⁹ See APA, *supra* note __, at __.

⁵⁰ See *Overton Park*, 401 U.S. at 409.

⁵¹ Let me expand on this. It is generally accepted that an agency must consider all the important dimensions of a regulatory problem – and surely this includes significant dimensions of the problem elucidated in public comments. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) cert. denied 417 U.S. 921 (1974). See also Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 Duke L.J. 1497, 1501 n.19 (1992) (citing *Portland Cement Ass'n*); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 282 (1987) (agencies must respond to all serious dimensions of the problem raised in comments). On the other hand, courts tend to give agencies a good deal of discretion to decide precisely how to handle comments. This makes it hard to fix the precise counters of the agency's responsibility to respond to *individual* comments. See, e.g., *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1355 n.15 (D.C. Cir. 1985) ("An agency need not address every conceivable issue or alternative, no matter how remote or insignificant."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); But cf. Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 27 (1995) ("To be sure, an agency has broad discretion to set its agenda and to deal with problems one step at a time. Nevertheless, the agency's self-interest lies in making a strong record to respond to pleas to go further than it would prefer; brushing such comments aside can be counterproductive.") (footnote omitted). What must be reconciled is (a) the agency's responsibility to consider important dimensions of the problem, (b) the public's right to comment, and (c) the agency's discretion in handling individual comments. Perhaps the most viable way to reconcile these legal principles is to conclude that the agency may not ignore qualitatively important dimensions of the problem raised in the course of the notice-and-comment process (i.e., by some substantial proportion of the comments in the aggregate).

effect – all matters affecting, among other things, legislators’ allocation of scarce resources to oversee regulatory policy. The case studies below shed light on those questions. The Appendix details how I picked these rules, how I analyzed the rules and comments, and how I defined crucial concepts such as “comment sophistication.”

i. The Treasury Department: Changing Federal Agents’ Access to Private Financial Information

Money moves across borders and physical chasms faster than the persons who send it or spend it. Sometimes that movement leaves faint traces in printouts of wire transfer records, digital account data, or even in the fading memory of a currency exchange house employee. Within government some believe it may leave traces of information that reveal dark secrets such as a past crime or an impending terrorist attack.⁵² But authorities’ access to that information depends on laws and regulations designed to protect privacy as well as security. Though scholars of criminal justice seldom dwell on the work of the regulatory state, criminal enforcement is indelibly shaped by regulatory rules.⁵³ To see the impact of regulatory rules on criminal justice and security policy, suppose a team of earnest and trustworthy federal law enforcement agents is almost certain that a specific person is planning a terrorist attack. They know the person has probably been in the United States for about two years. They’ve researched his aliases. They also suspect he’ll soon receive a wire transfer from abroad to help finance the plot. What they don’t know is where this person lives or what bank he uses. Can the authorities locate and obtain his financial records? For nearly 30 years the answer to this question has depended almost entirely on statutes and regulations, and not constitutional interpretations. In the early 1970s the Supreme Court basically decided that individuals’ Fourth and Fifth Amendment rights did not interfere with government efforts to obtain financial information from third parties.⁵⁴ Those third parties, like banks, regularly gain private information in the course of doing business with consumers. In response to these developments, Congress passed the Right to Financial Privacy Act (RFPA) and related statutes that together embody a compromise between strong statutory protections for

⁵² See Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 388-390 (2003).

⁵³ Regulatory programs enhance law enforcement powers to use surveillance methods, to control populations of special interest like immigrants or felons (i.e., preventing them from purchasing weapons), and to obtain and analyze financial records. *Cf. id.*

⁵⁴ See *Cal. Bankers Ass’n v. Shultz*, Sec’y of the Treasury, 416 U.S. 21, 47-49, 61 (1974); *United States v. Miller*, 435 U.S. 435 (1976) (focusing on the justifications for the recordkeeping requirements).

financial privacy and law enforcement demands for financial records.⁵⁵ That balance has changed substantially in recent years.

Before the attacks of September 11, 2001, law enforcement officials were frustrated by their relative lack of access to financial records. Sometimes law enforcement investigators working on ex post enforcement had a hard time actually getting the records of people who were being investigated, because defendants did not always tell authorities where they had accounts. It was harder still to get access to financial records of suspects: that required a judicial subpoena, which in turn required authorities to figure out where their suspect engaged in financial activity and (in most cases) required persons whose records were targeted to receive notice and have a chance to oppose the subpoena in court.⁵⁶

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

For all these pre-September 11 frustrations in using financial data to advance law enforcement goals, the executive branch could take at least small steps to address these concerns. The FBI circulated a periodic “control list” with the names of people considered suspicious, and requested that financial institutions subject individuals whose name appeared on the list to heightened scrutiny.⁵⁷ It could use computers to analyze currency transaction records collected subject to existing regulatory authorities – but these provide only a tiny snapshot of the aggregate financial transactions in the country, the vast majority

⁵⁵ The Right to Financial Privacy Act, 29 U.S.C. §§ 3401-3422, previously restricted financial institutions from disclosing a person’s financial information to the government unless the records were disclosed pursuant to a subpoena or a search warrant. Depending on the details of the regulations implementing Section 314(a), then, federal officials might easily sidestep the existing restrictions on information disclosure in the RFPA. The voluntary law enforcement “control list” containing names of people considered suspicious did nothing to extinguish the applicability of the RFPA in this setting.

⁵⁶ See *infra* notes ____.

⁵⁷ See Shane Kite, *AML Plans Move to Active Phase*, SECURITIES INDUSTRY NEWS, January 6, 2003.

of which do not involve physical currency. Law enforcement bureaucracies could also try to expedite the process for obtaining judicial subpoenas for financial records of suspected criminals. If law enforcement agents knew where a suspect kept accounts and had enough suspicion, then they could obtain a judicial subpoena for her records.⁵⁸ But there was no enactment of broad statutory authority allowing some regulatory agency to prescribe uniform rules governing the mass dissemination of a request to all (or most) financial institutions in the country.⁵⁹ Doing a nationwide subpoena was a questionable strategy at best, on both legal and practical grounds.⁶⁰ In fact, efforts to streamline this sort of activity raised some warning flags for politicians and outside interest groups. For example, while financial institutions might be interested in further expanding the scope of their safe harbors (so they would not have to face liability if they voluntarily chose to share information), they were certainly not interested in being saddled with further legal obligations to produce financial records.

What Section 314 of the USA Patriot Act does is to give the Treasury Department the authority to encourage information sharing between financial institutions and the federal government, and among different financial institutions. Section 314(a) establishes authority for Treasury to create rules for the request and sharing of financial information between financial institutions and law enforcement.⁶¹ While subsection (a) addresses the link between financial

⁵⁸ Under the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.* (hereinafter, “RFPA”), such a subpoena would ordinarily give notification to the person whose records are requested, as well as a chance to fight the subpoena in court. *See generally* Laura N. Pringle and Conni L. Allen, *Privacy and Related Issues for Financial Institutions and Other Regulated Entities*, 53 CONSUMER FIN. L.Q. REP. 28 (1999).

⁵⁹ The impact of such a rule obviously depends on how broadly one defines “financial institution.” Although this may seem like a straightforward matter, even the original Bank Secrecy Act gives Treasury wide latitude over how to define a financial institution. *See* Bank Secrecy Act (hereinafter “BSA”), 31 U.S.C.A. § 5312. The statute gives Treasury the power to define “financial institution” to include, among other entities, commercial banks and trust companies, private banks, branches of foreign banks in the U.S., investment bankers, insurance companies, travel agencies, licensed money transmitters, casinos, or:

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

⁶⁰ Before 2002, there was no nationwide system allowing law enforcement agencies to communicate a request for records to all financial institutions in the country, nor any legal requirement that financial institutions cooperate with law enforcement authorities in searching their records for information. On the contrary, RFPA established notable restrictions on the disclosure of any such information.

⁶¹ *See* USA Patriot Act of 2001, Pub. L. 107-56 (USAPA). Section 314 of the Act is an uncodified provision that appears in the Historical and Statutory Notes to 31 U.S.C. 5311. Section 5311 is part of the BSA, and regulations implementing it appear at 31 CFR part 103. Since the authority of the Treasury Secretary to administer the BSA has been delegated to the Director of the

institutions and federal authorities, Section 314(b) directs Treasury to develop rules for the sharing of information among financial institutions in the interest of preventing money laundering or terrorist financing.⁶² Under the statute, the regulations can allow such information-sharing to take place pursuant to a safe-harbor from legal liability for the institutions sharing the information.⁶³

The potential impact of Section 314(a) starts to emerge clearly if one thinks about the rules affecting how federal agents could get their hands on records before the legislation. For the most part, they had to use a subpoena, which meant federal law enforcement agents needed at least some *ex ante* suspicions about where the suspected wrongdoer might have her records. The latter could then be challenged in court, and the Right to Financial Privacy Act further provides for the challenge of a request for financial records.⁶⁴ In contrast, Section 314(a) could make it easier for law enforcement to get information from

Financial Crimes Enforcement Network (FinCEN), then FinCEN has responsibility for developing the regulations under Section 314. Specifically, Section 314(a)(1) provides in part that:

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

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

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

Id.

⁶² *Id.*

⁶³ It provides:

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

Id.

⁶⁴ See *supra* note __ (discussing RFPA).

any bank in the country. That authority might be restricted to instances where law enforcement bureaucracies certify that the person whose records they want is credibly thought to be engaging in money laundering or terrorism,⁶⁵ but the statute does not provide any remedy for a failure in the law enforcement certification process.⁶⁶ In short, Section 314(a) at least authorizes the creation of a simple means for law enforcement agents to “tell” banks what accounts to scrutinize with particular care. The payoff from this may be specific information, but also an implicit signal to financial institutions about whom they should scrutinize carefully.

That signal to scrutinize or deny services to a suspicious customer could also originate from a financial institution, but those institutions interested in warning their private sector brethren were long concerned about potential legal liability for doing so. So along comes Section 314(b), which gives Treasury the regulatory authority to set up a system for financial institutions to share information among themselves.⁶⁷ How much they actually do that obviously depends on their incentives. But in a world where the potential penalty for unwittingly providing a haven for terrorist or criminal financial transactions may include not only a fine but also public disapproval, one might imagine that financial institutions might be interested in sharing information to minimize the risk of fallout. Such motivations might be patriotic or simply a means of minimizing economic and political costs. Either way, those motivations have to be adjusted for the risk of liability that a financial institution might face by disclosing financial information that would otherwise be private. Thus we might expect financial institutions to do whatever possible to avoid being caught

⁶⁵ Section 314(a)(1) explicitly notes that information sharing should only cover people on “individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.” Section 314(2) states that information sharing procedures *may* focus on “matters specifically related to the finances of terrorist groups” (Section 314(2)(A)); “the relationship... between international narcotics traffickers and foreign terrorist organizations...” (Section 314(2)(B)); or “accounts and transactions involving terrorist groups.” Although someone might argue about the precise extent of the preceding list’s restrictions on information disclosure, the most plausible explanation for why those apparent limits are in the statute is that legislators wanted to restrict the scope of disclosed financial information.

⁶⁶ Cf. *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 2277 (2002). *Gonzaga* concerned the privacy interests that people claimed under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. A former university student sued under Section 1983, alleging that the university had violated his rights under the statute. The Court held that, absent specific “rights-creating” language, a statute did not create a right enforceable under Section 1983 (or through an implied right of action). See *id.* at 2275. Even if the statute includes “rights creating” language, the plaintiff must show Congress also intended to create a “private remedy.” *Id.* at 2276. There might be a theory under which a sufficiently egregious bad faith violation of the details of Section 314(a)’s limitations might give rise to a constitutional tort. But that’s at the extreme, and in any case it would be difficult for anyone aggrieved to discover the facts necessary to make out such a claim (under *Bivens*). Anything short of that would have to be resolved by a remedy created through the statute (which does not provide for a remedy) or the regulation (which could).

⁶⁷ See Section 314(b), *supra* note 62.

between government policies encouraging the sharing of information and potential liability to customers for having disclosed the information.

Treasury's own disclosure of its proposed regulations revealed it was contemplating the creation of an efficient new mechanism to get law enforcement the private financial information it desired, with two major features.⁶⁸ First, the new system would facilitate blanket, nationwide law enforcement queries to financial institutions regarding account information of people suspected of being involved in money laundering and terrorist financing.⁶⁹ Upon finding the records of the person in question, the financial institution would have to turn over any information gleaned from the customer when the account was established, and information about transactions made through the account.⁷⁰ Information requests could therefore become quite routine.⁷¹ Not that the customer whose requests

⁶⁸ If this seems like a straightforward expression of what the statute "intended," it's not self-evident from perusing the statute's legislative history. See Cong. Rec. – Senate, Thursday, October 25, 2001 USA PATRIOT Act of 2001, 147 Cong. Rec. S10990-02, S11008. The report associated with the legislation states (in relevant part) the following:

[The Treasury Secretary has 120 days to promulgate regulations designed] to permit the sharing of information by law enforcement and regulatory authorities with such institutions regarding persons reasonably suspected, based on credible evidence, of engaging in terrorist acts or money laundering activities. This section also allows (with notice to the Secretary of the Treasury) the sharing of information among banks involving possible terrorist or money laundering activity, and requires the Secretary of the Treasury to publish, at least semiannually, a report containing a detailed analysis of patterns of suspicious activity and other appropriate investigative insights derived from suspicious activity reports and law enforcement investigations.

Id. Of course it's hardly obvious that legislative history should determine the scope of regulatory innovation when construing a statute. See, e.g., Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretation of Statutes*, 73 TEX. L. REV. 83 (1994); Kenneth A. Shepsle, *Congress is a "They," Not an It: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244-48 (1992). If that history is considered relevant in this case, though, it certainly did not compel the agency to fashion the regulatory system that it did. Instead, the agency's decision in this regard might have reflected subtler forms of pressure driven by its interaction with law enforcement agencies that served as both a major source of expertise regarding the goals for the regulations and also the primary beneficiaries of the new system.

⁶⁹ See *Financial Crimes Enforcement Network; Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity*, 67 FED. REG. 9879, avail. at 2002 WL 331533(FR) (March 4, 2002) (hereinafter "Section 314 Notice of Proposed Rulemaking"). The final regulations appear at 67 FED. REG. 60579, 60580-82, *supra* note 2.

⁷⁰ *Id.*

⁷¹ See *id.* at 9884. Specifically, proposed Section 103.100 provides in relevant part as follows:

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

would ever know that, because the regulations forbid the requested financial institution from communicating the request with the customer. What the financial institution *can* do is use the information to make a number of decisions on its own, such as deciding not to offer banking services to a person. This could turn the provisions of part 103.100 into something like a warning to financial institutions not to offer services to someone. Second, although law enforcement authorities must certify that all persons whose account information is requested are suspects of terrorism or money laundering, there is no obvious remedy for any violation. As observed earlier, there is no constitutional expectation of privacy in records held by a third party. This means FinCEN and law enforcement agencies must police themselves when it comes to the limits of the justification for information requests.⁷²

Part 103.110 of the draft regulation then turned to the parallel problem of addressing financial institutions' liability fears. The regulations establish a legal safe harbor for many different types of financial institutions to share information among themselves relating to suspected money laundering or terrorist activity.⁷³ To avail themselves of the safe-harbor under the proposed regulation, financial institutions had to "certify" to FinCEN that they were going to engage in information sharing and that they would not use the information improperly.⁷⁴

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

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

⁷² The absence of a remedy means no one else will have much of a chance to discipline anyone in government who abuses Section 103.100 by making unjustified requests for information. *See supra* note 66 (discussing *Gonzaga*). Note that in *Gonzaga*, the presumption of a remedy would have been even stronger since the alleged violation of the Family Educational Rights and Privacy Act (FERPA) was committed by a state government, thereby making § 1983 applicable at least in principle. Since that would not be applicable here, then the only remaining route is a *Bivens* action.

⁷³ *See* Section 314 Notice of Proposed Rulemaking, at 9885. The Section 103.110 proposal states, in relevant part that:

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

⁷⁴ *Id.*

The final regulations were published in the Federal Register after the required notice and comment period.⁷⁵ The revised regulations looked a lot like the original ones. But they involved a few changes, including reorganization for “clarity,”⁷⁶ slight restrictions in the scope of financial institutions’ responsibilities to search for records⁷⁷ when receiving a federal request,⁷⁸ greater liability protections for financial institutions sharing information,⁷⁹ and easier means of triggering the liability protections.⁸⁰

Together the original and modified provisions in Treasury’s regulations created a system where federal law enforcement could easily pinpoint where many individuals have financial accounts, and obtain crucial private information about such accounts, such as information about the individuals or entities transacting with the owner of the account. But while Section 314 conferred considerable legal responsibilities on Treasury’s FinCEN bureau, it stopped well short of compelling the agency to create the system it did. In fact, though Treasury possessed considerable discretion to shape the new system, it held no public hearings, nor did it make any systematic effort to assess the reactions of laypersons or experts not directly affiliated with an interested party. Nor did legislators appear to make any intervention.

Figure 1

Distribution of Comments on the Financial Privacy Regulation, by Type
(N=172)

⁷⁵ See APA § 553 *et seq.*

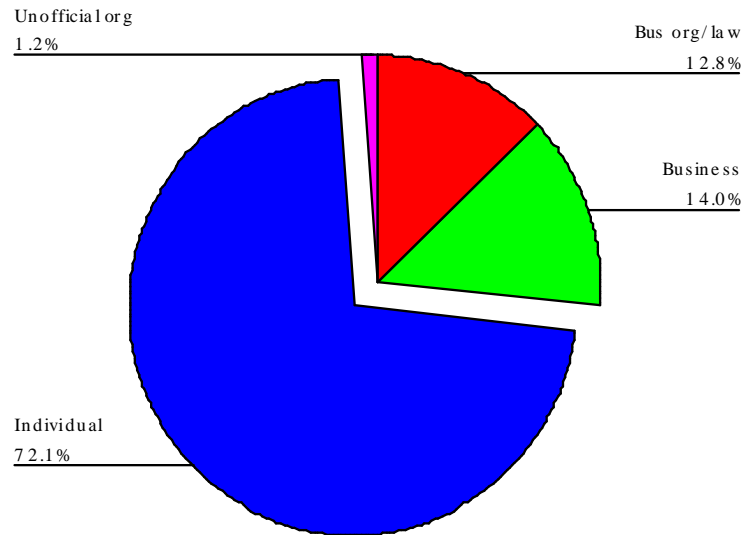
⁷⁶ The regulations (especially 103.100) were reorganized for clarity. Specifically, financial institutions’ obligations to provide information under Section 314 are now grouped in a single paragraph. See Section 314 Final Rule Statement, *supra* note ___, at 60580.

⁷⁷ The regulations added some default rules restricting the scope of what a financial institution would have to provide when receiving a request from the government, unless a request specifically provides otherwise. There are two default rules. One default rule says a financial institution only needs to search its records for current accounts or accounts held during the last twelve months, or transactions taking place during the preceding six months. Another default rule says that financial institutions need not report a customer’s future activity unless the information request from law enforcement (emanating through FinCEN) specifically asks for such future information. See *Id.*

⁷⁸ See *Id.* The final regulations also expand the kinds of financial institutions that can share information and avoid liability for doing so. The new regulation encompasses all financial institutions that are required to maintain an “anti-money laundering” program (which turns out to be a lot more than, for example, commercial banks), unless FinCEN specifically “determines that a particular category of financial institution should not be eligible to share information under this provision. Note that this means the regulations imply that law enforcement may use FinCEN to make a request for future information, because a default nature by its own terms can be altered.

⁷⁹ See *id.*

⁸⁰ The final regulations streamline the certification process, through which financial institutions opt-in to the information-sharing program. Under the final regulation, the requirement is simply that financial institutions provide FinCEN with notice that they will be engaged in information sharing (and there is no way to revoke this), and that they make reasonable efforts to establish if a financial institution with which they are sharing information has also given FinCEN adequate notice.*Id.*



Instead the primary mechanism on which the agency relied to gauge public reactions was the regulatory notice-and-comment process. Figure 1 shows the distribution of commenters, and Table 1 reveals a breakdown of the different commenters' concerns, and sophistication.⁸¹ The table shows, among other things, that not a single mass membership or "public interest" organization concerned about privacy participated in the process. While over 70% of the comments came from individuals – and the vast majority of such comments focused on concerns about privacy -- these comments proved to be tremendously unsophisticated. Few of them recognized the distinction between the regulation and the statute, and only a meager number offered anything remotely resembling a concrete proposal. Instead, individual commenters came across as being angry and exasperated at what they viewed as unjustified changes in government's access to private financial information. The following is a typical comment from among those submitted by individual members of the public.

Privacy is a Constitutional right, why should we the people have any more rights removed. This act means the terrorist [sic] win. You have all the necessary instruments in place to follow the terrorist actions now.⁸²

⁸¹ See Appendix, *infra*, for a discussion of how I measured the key variables.

⁸² Section 314 Comments, *supra* note ___, comment # 45. The commenter continues:

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

Table 1
Financial Privacy Comments (N = 172)

Commenter type	Individual	Unofficial association	Public membership or "public interest" organization	Business	Business association or law firm representing business
	Comment Concerns (by percent of comments raising each concern)				
<i>Law enforcement objectives</i>	12.9	100	--	36.5	30.2
<i>Legal safe harbor for financial institutions</i>	0	0	--	58.3	40.9
<i>Administrative cost associated with the regulation</i>	.8	0	--	79.2	63.6
<i>Technical drafting changes to simplify the regulation</i>	2.4	0	--	79.2	77.3
<i>Privacy</i>	92.7	100	--	12.5	18.2
	Comment Characteristics				
<i>Average comment sophistication</i>	.12	1	--	3.13	3.27
<i>Average length</i>	1.12	1.5	--	4.25	4.41
<i>Average number of suggestions made by commenter adopted by agency</i>	.01	0	--	1.88	1.68

Given the degree of concerns about privacy raised by the vast majority of the commenters, it's interesting to note what the agency did not do. It did not impose an audit system to assess the extent to which law enforcement requests for

This is still one nation under God. How about we do t his, how about we repent and get some super help from him. I guarantee you he knows exactly who's guilty and whose [sic] innocent and where they are.

information under Section 314 actually lived up to the statutory focus on accounts where authorities have “reasonable suspicion” of terrorism or money laundering “on credible evidence.” It did not impose a sunset clause on the regulation to evaluate the system’s effectiveness or the danger of unauthorized disclosures. Neither did the agency create some scheme to police the law enforcement authorities’ information once they acquired it, or to address instances where authorities improperly used or disclosed information acquired through Section 314. In short, the agency appears not to have incorporated mechanisms to review the extent to which the information disclosed to authorities actually was the sort of information that the statute wanted to “encourage” banks to share. The agency’s own statement of the basis and purpose for the rule in the *Federal Register* did not even address this matter.⁸³

ii. The Federal Election Commission: Modifying Public Financing of Presidential Elections and Nominating Conventions

Less than a dozen miles from FinCEN’s modern office in Virginia’s bustling Tysons Corner is the headquarters of the Federal Election Commission (FEC). Every presidential election since 1976 has been financed in part with public funds from a program run by the FEC.⁸⁴ As part of the public financing program the federal government (through the FEC) also helps fund presidential nominating conventions. The FEC signs checks going to campaigns and party convention committees, but it also writes regulatory rules governing this public financing system.⁸⁵ The rules – often complex and technical – set spending limits for primary and general election campaigns. The bulk of the rules, however, govern matters such as permissible expenses for primary and general election campaigns, how they can raise transfer money, how nominating conventions are financed, and whether federal candidates and officeholders can raise money for conventions. The regulations even address the decidedly nit-picky question of whether a major party presidential candidate who is no longer eligible for the nomination can use campaign funds for their own convention expenses. The Commission enforces the regulations by collecting reports from campaign committees and parties. The enforcement staff also conduct audits, and prepare a report highlighting policy issues that the commission can address in revisions of its regulations to coincide with the quadrennial presidential election cycle. The most recent such cycle was further complicated by passage of the Bipartisan

⁸³ *See id.*

⁸⁴ A public funding law was passed in 1966 but later repealed. Shortly thereafter, in 1971, Congress approved the Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. §§ 431-455, and specialized statutes setting up a public financing system for presidential campaigns. *See* Presidential Election Campaign Fund Act (PECFA), codified at 26 U.S.C. §§ 9001-9013; Presidential Matching Payment Account Act (PMPAA), codified at 26 U.S.C. §§ 9031-9042 (2000). It was not until 1974 that the system was implemented along with its spending limits.

⁸⁵ *See id.*

Campaign Finance Reform Act (BCRA), which contained, among other things, various reporting requirements that were obviously relevant to the public financing scheme along with others that could be (but were not obviously) relevant.⁸⁶

For years the public financing system has worked as follows. The FEC gets money from taxpayers who check off the option for providing funds from their tax payments.⁸⁷ The agency then makes certain funds available to presidential campaigns by matching some proportion of contributions raised from the public.⁸⁸ General election candidates also obtain funds in proportion to the party's support in previous elections. In exchange for these funds campaigns are subjected to a tangle of rules about matters such as how much can be spent on winding down a campaign committee's operations,⁸⁹ or on gifts to staff,⁹⁰ to how a candidate and her retinue pay for a trip to a nominating convention. Major party conventions themselves get public funding too. Rules governing convention funding affect both committees established and controlled by the parties, but also the funds that can be provided by "host committees" set up by local businesses and "municipal funds" channeling support from local governments.⁹¹ Together

⁸⁶ See Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81 (March 27, 2002). Briefly, BCRA changed two important aspects of federal campaign finance laws. First, the act eliminated a category of funds known as "soft money," which refers to financial resources raised by the parties, without limits on the size of contributions, and directly from the treasuries of corporations and organizations. Second, the act regulated "issue ads" – advertisements aired by corporations, union, and other organizations that may feature a federal candidate but do not expressly advocate election of that candidate. BCRA prohibits airing of such ads within thirty days of a primary election and sixty days of a general election. These broad changes were achieved through a complex statutory scheme making a number of changes in federal election law and vesting the FEC with considerable regulatory authority to further delineate the scope of legal concepts crucial to the statute's core objectives. See Stephen Ansolabehere and Shanto Iyengar, *The End of Soft Money and Issue Advertising*, 14 POLITICAL COMMUNICATION REP'T: INT'L COMM. ASS'N & AM. POL. SCI. ASS'N (Spring 2004). Because of the statute's complexity and objectives, some observers and advocacy organizations indicated that BCRA's provisions restricting contributions to political parties might have a considerable effect on fundraising practices associated with major party nominating conventions. These potentially affected practices included the raising of large sums of money by local host committees and municipal funds trying to support the convention, or the participation of federal candidates in raising money for host and municipal committees.

⁸⁷ See PECFA and PMPAA, *supra*

⁸⁸ To the extent that the statutory framework that gave rise to these regulations embodies a coherent theoretical justification, it appears to be grounded in the goal of reducing the need for campaigns to spend time and resources raising contributions. At the same time, one element of the scheme stands in some tension with this purpose: the FEC payments to campaigns match only smaller contributions.

⁸⁹ See FEC Proposed Rules, *supra* note ___, at 18484. See also *Final Rules: Public Financing of Presidential Candidates and Nominating Conventions*, 68 FED. REG. 47386, 47389 (August 8, 2003).

⁹⁰ See FEC Proposed Rules, *supra* note ___, at 18491. See also FEC Final Rules, *supra* note ___, at 47390.

⁹¹ See 26 U.S.C. § 9008(b). See also FEC Proposed Rules, *supra* note ___, at 18500.

these rules affect how candidates and conventions are funded, and how campaigns are conducted. Every election cycle the FEC considers adjusting these rules primarily on the basis of the experience of its staff in conducting audits, its policy priorities, and any statutory changes.⁹²

It is in this environment that the FEC issued a notice of proposed rulemaking indicating the possibility this particular set of regulations. After public comments and testimony, the NPRM was followed by a final regulation approved by the Commission. The new regulation made a number of changes to the proposal, particularly in the technical rules governing the process of spending and accounting for public funds spent on financing presidential campaigns. The regulations also reflected the FEC's decision to accept various legal interpretations limiting the applicability of BCRA to the financing of nominating conventions, and to modify even the rules in the NPRM to make that financing process more permissive.⁹³ The Commission even decided to eliminate the requirement that convention-related host committees not controlled directly by the parties raise money only from individuals and businesses residing in the city where the convention would be held.

Together the different provisions of the new regulation created a system with minor changes for the financing of campaigns and more substantial ones for convention financing. Among other things, the rules allowed convention-related host committees and municipal funds to raise unlimited amounts of money from any source (with no geographic limitations), and with federal officeholders and candidates able to help raise that money. The Commission approved these regulations despite BCRA's restriction on unlimited "soft" money donations for entities controlled by parties. This result depended on defining host committees and municipal funds so that they're beyond the reach of BCRA authority. This is certainly a plausible reading of the law, but (by the Commission's own admission) far from the only such reading.⁹⁴ Indeed, in its own NPRM the FEC

⁹² See FEC Lawyer Interview # 1, FEC Lawyer Interview # 2.

⁹³ See, e.g., FEC Final Rules, *supra* note ____ at 47398. There the Commission notes it sought comment on whether BCRA required limits on convention fundraising as follows:

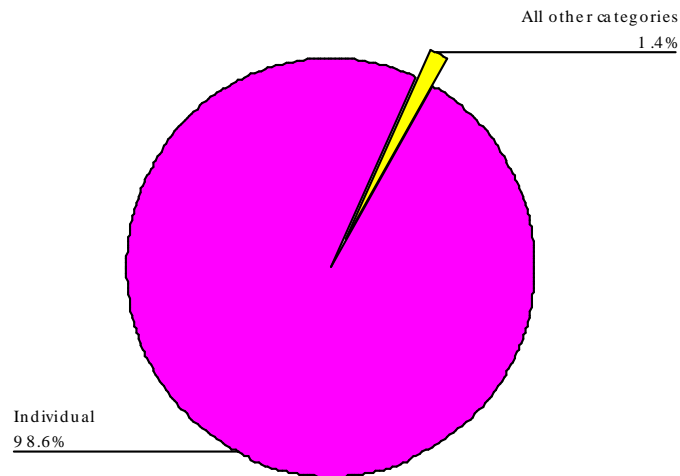
The Commission also sought comment on whether BCRA requires that the list of permissible host committee and municipal fund expenses in former 11 CFR 9008.52 must be modified to ensure that convention committees will not receive "a contribution, donation or transfer of funds or any other thing of value... that are not subject to the limitations, prohibitions, and reporting requirements of [FECA].

Id. The Commission concluded that "none of the proposed changes" to the rules governing convention fundraising "are required by BCRA." *Id.*

⁹⁴ At a minimum, the regulations could have established more elaborate reporting requirements (or perhaps even restrictions) on the funds raised by host committees for nominating conventions, as well as disclosure requirements governing the financing of events to host or honor politicians and party officials in connection with (and in proximity to) convention sites. Moreover, nearly every aspect of the rules governing presidential campaigns contained in the regulation (from whether defeated presidential candidates can pay for their convention attendance expenses from campaign

repeatedly emphasized its own uncertainty about how to interpret BCRA and how to reform the existing rules more generally.⁹⁵

Figure 2
Distribution of Comments on the Campaign Finance Regulation, by Type
(N=1121)



What, then, did commenters have to say about how the FEC should use its discretion? Figure 2 gives a snapshot of public participation here, and Table 2 reports comment characteristics. The FEC received about 20 extremely detailed comments from law firms, members of Congress, large membership organizations concerned with the “public interest,” and other interested parties – nearly all demonstrating some extent of mastery and sophistication that tended to exceed the degree of sophistication shown in comments for the other proceedings. Many of these participants also had a chance to raise concerns in a public hearing before the FEC, though only a small number of interested parties did so. Yet again,

funds to how long a campaign can finance its winding down costs from public funds) are the result of discretionary applications of agency authority, rather than explicit statutory constraints.

⁹⁵ See FEC Proposed Rules, *supra* note ___ at 18484. There the Commission acknowledges that:

The proposed rules... reflect the Commission’s experience in administering [the public financing] program during the 2000 election cycle and seek to anticipate some questions that may arise during the 2004 presidential election cycle. No final decisions have been made by the Commission on any of the proposed revisions in this document.

Id.

though, the vast majority of comments here came from the public, which submitted over 1000 unsophisticated form letters criticizing the proposed rules for funding nominating conventions (which allowed for greater private contributions than these participations would have liked) – thereby raising a concern that does not appear to have been central to any interest group or sophisticated party who participated. A handful of members of the lay public also submitted comments, in some cases (but not always) raising concerns covered by the membership organizations.⁹⁶ The FEC made some changes to the proposal but did not fully address the concerns of the members of the participating lay public. As with the previous case study, more sophisticated comments were more likely to end up containing suggested changes that the agency chose to make in its proposed rules. In fact, sophistication appeared to have a statistically-significant effect on comment “influence” even when controlling for certain commenter characteristics, such as whether the commenter represented one of the primary targets of regulation (i.e., a political party, committee, or candidate).

Table 2
Campaign Finance Comments (N = 1119)

Commenter type	Individual	Local organization or government	Law firm or business	Political party or affiliate	Public membership or “public interest” organization	Politician or his/her representative

⁹⁶ Here is an example of a concern raised by one of the more sophisticated individual member of the public that was not echoed by any organized interest:

Although I feel strongly about supporting candidates for the presidency and vice-presidency with public funds, I do not feel that certain expenditures are justified as qualified campaign expenditures... I am not unmindful that a policy of publicly funding of [sic] a candidate’s salary would perhaps encourage candidates of modest means to run for the presidency. However, I feel this policy is too unlikely to have its intended effect, while at the same time creating the potential for abuse and litigation... Furthermore, I feel from conversations with others that the public is likely to see such a rule as promoting the personal gain of a candidate, at the expense of the public, for no service rendered but job-seeking. It is possible that negative public perception of such a rule would call into question the legitimacy of any public funding of campaigns.

FEC Public Financing Comment # 9. Meanwhile, the following comment offers an example of a comment from an individual raising a concern that organized interests did raise in the course of their own, more sophisticated comments:

Now that Congress has banned corporate funding for national political parties, the FEC should rule that this ban applies to convention funding as well. To rule otherwise would open a huge loophole into the new soft money regulations that were explicitly intended to break the link between officeholders and large contributions.

FEC Public Financing Comment # 11.

	Comment Concerns					
	(by percent of comments raising each concern)					
<i>Legitimacy of the campaign finance system</i>	99.5	0	50	0	100	0
<i>Importance of regulating host committees</i>	0	0	0	0	100	0
<i>Importance of increasing overall convention regulation</i>	0	0	0	0	50	0
<i>Value of decreasing overall convention regulation</i>	0	100	0	100	25	100
<i>Clarifying the scope of the regulation</i>	.1	0	50	40	75	50
<i>Administrative costs of the regulation</i>	0	100	100	80	0	50
<i>Importance of flexibility in funding conventions</i>	0	100	0	100	0	100
<i>Reducing corporate influence</i>	99.8	0	0	0	100	0
Comment Characteristics						
<i>Average comment sophistication</i>	1	4	3.5	4.4	3.75	4
<i>Average length</i>	1	8.5	13	8	14	3
<i>Average number of suggestions made by commenter adopted by agency</i>	0	3	2	2.8	1	2.5

The upshot here is that most of the unsophisticated public comments advocated restrictions on the flow of money to conventions. These tended to come (more so than for the financial privacy or the nuclear licensing regulations) in unsophisticated form letters. The Commission addressed the concerns only in passing in the final rule,⁹⁷ and allowed for a virtually unregulated flow of money

⁹⁷ See FEC Final Rules, *supra* note ___, at 47402 (“More than 1,100 timely, essentially identical comments that the Commission received by e-mail expressed support for the use of tax dollars to fund party conventions ‘precisely so that parties may turn away from other sources of inappropriate funds’”). The Commission then discusses the text and structure of BCRA to conclude that, at least, it retains discretion not to regulate convention fundraising as the majority of commenters would have liked, and cites the canonical case of *Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976)(a *Chevron* precursor) for the proposition that reviewing courts have an

to host committees and municipal funds defraying the cost of conventions. On the other hand, the Commission appears to have responded to a number of sophisticated comments, including some that came from laypeople. This matches what some of the agency lawyers themselves note – which is that sophisticated comments are useful to them regardless of their origin.⁹⁸

iii. The Nuclear Regulatory Commission: Scaling Back Formal Adjudication in the Licensing of Civilian Nuclear Technologies

No energy source inspires as much controversy as nuclear power, and by consequence so too does controversy envelop the process of approving civilian uses for it.⁹⁹ Given its pregnant and ambiguous history, the use of nuclear power implicates a host of competing concerns for both government decisionmakers and their fragmented constituencies.¹⁰⁰ Some erstwhile observers of nuclear power's uncertain journey since it was first harnessed in 1945 have described it as fertile resource replete with peaceful applications, marred only by the nettlesome waste disposal problem. Others pervasively fear it.

In 1975, the newly formed Nuclear Regulatory Commission (NRC) issued the first of many statements emphasizing the value of public participation in its adjudicatory process. The Commission noted that the public's participation in its decisions was "vital ingredient" to assure the NRC carried out its responsibility to protect public safety.¹⁰¹ These observations were understandable given the trade-offs involved in the statutes governing the civilian use of nuclear power: the nascent nuclear industry gained protection from liability through the application of the Anderson-Price Act and preemption of any local or state regulation, and members of the public (such as those who would be living close to a nuclear power plant) who would be likely opponents of the use of nuclear technologies would benefit from elaborate formal hearing procedures imposed through statutory and regulatory requirements to govern most licensing decisions

obligation to defer to reasonable agency interpretations even when other sound interpretations are possible.

⁹⁸ See FEC Lawyer Interview #1 (Washington, DC).

⁹⁹ For a discussion of how that controversy affects individual members of the public's perceptions of nuclear risk, see Tonya L. Putnam, *Communicatinng Nuclear Risk: Informing the Public About the Risks and Realities of Nuclear Terrorism*, STANFORD CENTER FOR INT'L SECURITY AND COOPERATION: WORKSHOP REP'T (Oct. 2002).

¹⁰⁰ Among others, these considerations probably include the political and economic interplay between civilian and military uses of nuclear power (a concern likely to loom large for those with strong views disfavoring the use of nuclear technology in the military sphere), the impact of nuclear power use on discrete economic interests (including those of utility companies, fossil fuel providers, and manufacturers of complements of nuclear technology), the financial costs and benefits of nuclear power for consumers, the strategic implications of civilian use of nuclear power for energy independence, the impact of nuclear waste and pollution, and the environmental consequences of alternative energy sources.

¹⁰¹ See Northern States Power Company, 1 NRC 1, 2 (1975).

involving civilian nuclear power. Thus the construction of a new power plant, the permission to operate it, and the use of nuclear materials in other civilian technologies were for decades all privileges conditioned on the outcome of elaborate trial-type hearings where the NRC could evaluate the economic, environmental and public safety implications of granting a license.¹⁰² Many of those trial-type hearings for license grants and renewals, governed under Subpart G of longstanding agency regulations, allowed for formal cross-examination of witnesses before an impartial presiding officer. The hearings, in turn, provided considerable opportunities for public safety advocates, environmental groups, and other members of the public to participate in proceedings as intervenors.¹⁰³

Over time the NRC came to emphasize that those hearing procedures had costs as well as benefits.¹⁰⁴ “Commission experience suggested,” noted the regulatory agency in a recent statement, “that in most instances, the use of formal adjudicatory procedures is not essential to the development of an adequate hearing record; yet all too frequently their use resulted in protracted, costly proceedings.”¹⁰⁵ Despite some initial reforms in 1989 to reduce the formality and procedural burden of obtaining a license, the agency continued to believe that licensing proceedings took too long and that the trial-type hearing procedures contributed little relative to their financial and administrative cost.¹⁰⁶ In light of these concerns, the most recent iteration of the agency’s reform of its licensing process reached an important milestone in 2001, when NRC issued a notice of proposed rulemaking announcing its intent to make considerable changes in the licensing process for civilian use of nuclear power. The NRC’s interest in “streamlining” the licensing process was probably driven at least in part by a perception that questions about the disposition of nuclear waste, which had helped stall interest in the development of nuclear power plants for decades, were about to be resolved.¹⁰⁷ The licensing process is governed by the Administrative

¹⁰² The key statute here is the Atomic Energy Act of 1954, the history and structure of which the NRC discusses in its decision in *Kerr McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982).

¹⁰³ See NRC Proposed Rule, *infra* note ___, at ___. The subject of external funding for intervenors has produced some controversy, but in recent years a statute has explicitly disallowed it in the NRC context.

¹⁰⁴ See *Final NRC Adjudicatory Changes Rule*, *supra* note ___, at ___.

¹⁰⁵ See *Nuclear Regulatory Commission: Changes to Adjudicatory Process (Proposed Rule)*, 66 FED. REG. 19610, 19610 (2001) (“NRC Proposed Rule”).

¹⁰⁶ See *id.* at 19610-11. In articulating these concerns, the agency accepted a baseline presumption that additional licenses for civilian uses of nuclear power would likely be requested in the future and that the costs of adjudicating those applications should be cut. See *id.* at 1611:

Given [the Commission’s] experience, and with the potential for new proceedings in the next few years to consider applications for new facilities, to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, the Commission concluded it needs to reassess its hearing process to identify improvements that will result in a better use of all participants’ limited resources.

¹⁰⁷ See *Nuclear Energy Inst. V. EPA*, No. 01-1258, slip op. (D.C. Cir. 2004).

Procedure Act and the Atomic Energy Act – both of which leave the NRC with some discretion to decide precisely how licenses will be issued. Since the early development of industrial applications of nuclear power, the licensing had basically epitomized formal quasi-adjudication, with all the associated procedural safeguards and limitations on decisionmaking, as well as substantial opportunities for outside interested parties (including environmental groups) to have their say. After a public hearing process, the NRC issued a new proposed regulatory rule designed to make the new licensing process more informal, streamlined, cheaper, and (probably) quicker.¹⁰⁸ The proposed rule then proceeded to make a number of major changes in licensing resulting in the substantial elimination of formal licensing proceedings with oral hearings, and restrictions in the procedures allowing outside advocacy groups to join proceedings as intervenors.¹⁰⁹

As with the regulations involving financial privacy and campaign finance, the final rule here kept the same basic structure and purpose but included a number of specific changes. (1) The final rule imposes still further restrictions on the most formal adjudication for licenses (those resolved under the elaborate trial-type procedures governed by “Subpart G” of the original regulation). This eliminates discovery and cross-examination for licensing proceedings. The final rule restricts trial-type hearings to instances where the NRC concludes that oral hearings would be materially helpful in the resolution of contested issues of fact. (2) The new rules also make changes in service rules for participants in hearings. (3) Changes in rules to be an intervenor in hearings, and minor adjustments in the requirements for raising a contention during the hearing (i.e., a bit more time). (4) Other technical changes were made, including some that had no material bearing on the availability of formal procedures. Overall, as with the financial privacy and the campaign finance regulations, the NRC’s reading of the law was plausible but not the only reasonable approach. The NRC’s own legal analysis of the AEA’s requirements for licensing procedures only establishes that its core statute

¹⁰⁸ The agency’s proposed rule covered hearing procedures for most of the agency’s functions, but not for the licensing of nuclear waste repositories under 10 CFR Subpart J. The agency believed that watering down the formality of licensing procedures for nuclear waste repositories would probably “engender substantial opposition” and “a very negative reaction.” This prompted one individual member of the public (displaying relatively greater sophistication than most other individual commenters who opposed the new regulations) to write that:

Ironically, the NRC has chosen to ignore the same process concerns and eroding public confidence in expediting its approval process to generate more nuclear waste through fast track reactor licensing. The NRC needs to understand that its reactor licensing proposals will cause the very “substantial opposition” and “very negative reaction” it is trying to avoid.

NRC Adjudicatory Change Comment # 885-0008.

¹⁰⁹ Changes affected the Subpart C hearing selection process, largely eviscerated Subpart G hearings (formal proceedings), and made additional changes in Subpart K (irradiated fuel storage expansion), L (informal hearings), M (license transfer), or N (“fast track” procedures). See NRC Final Regulations, *supra* note__.

does not *require* the use of formal, trial-type hearings for licensing, thereby leaving it with considerable discretion to choose licensing procedures.¹¹⁰ Due process doctrine also sets constraints on the NRC's discretion to shape its internal licensing procedures,¹¹¹ but courts are unlikely to find that the final rules breach the limits of that doctrine.¹¹²

Figure 3

Distribution of Comments on the Nuclear Licensing Regulation, by Type
(N=1431)

¹¹⁰ See *id.* at 19611. The NRC's Office of the General Counsel opined that the key statute at issue (the Atomic Energy Act) allowed the agency considerable flexibility in deciding how to run any licensing process except in narrow circumstances:

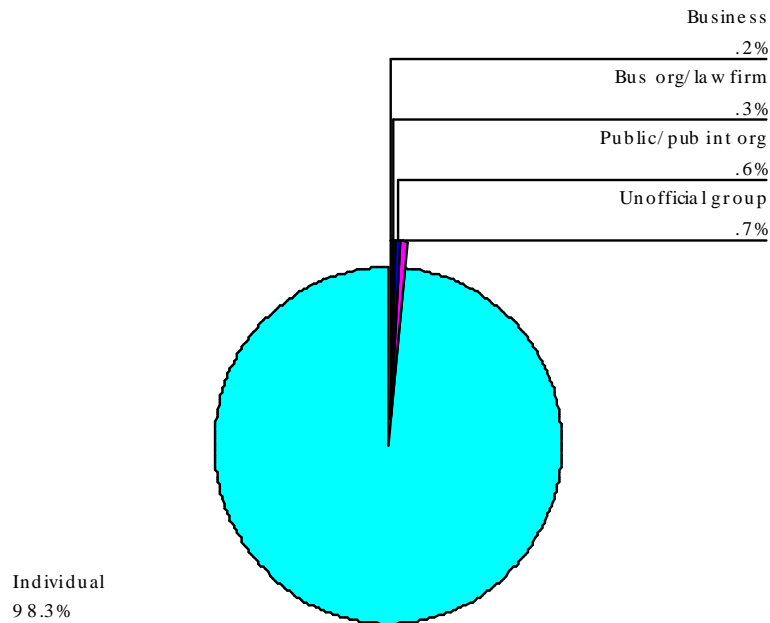
OGC reached the conclusion that except for a very limited set of hearings – those associated with the licensing of uranium enrichment facilities – the Atomic Energy Act did not mandate the use of a “formal on-the-record” hearing within the meaning of the APA, 5 U.S.C. 552, 556, and 557, and that the Commission enjoyed substantial latitude in devising suitable hearing processes that would accommodate the due process rights of participants.

Id.

Not surprisingly, comments from public advocacy organizations contested this analysis, arguing that the AEA and the legislative compromise that created it reflect a presumption (though perhaps somewhat implicitly) in favor of more procedurally complex trial-type procedures for licensing, particularly when it came to licenses for new reactors. See NRC Adjudicatory Change Comment # ____ (Rochelle Becker).

¹¹¹ For example, such problems would arise if the NRC provided no rights of intervention in licensing hearings to people who might end up living a close distance from a nuclear power plant. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973); *Mathews v. Eldridge*, 426 U.S. 319 (1976).

¹¹² This is a point that the more sophisticated commenters opposing the new regulations also contested vigorously.



As Figure 3 shows, the NRC's proposed regulatory changes led to an outpouring of public comments, the vast majority from laypeople against the move to curtail hearings. In its Federal Register analysis accompanying the final rule, the NRC itself provided unusually extensive commentary and discussion of many of the concerns raised by commenters. Even in such a detailed statement, though, the NRC's discussion of why it rejected the commenters' concerns about more informal procedures was a bit more cursory than its discussion of technical changes commenters requested.¹¹³ While most of the public comments came in simple form letters, a few laypeople took the time to articulate more sophisticated concerns about restrictions on formal adjudication, emphasizing the impact of oral

¹¹³ The Federal Register analysis notes:

In general, all of the private individual commenter and citizen groups opposed the move away from the full panoply of hearing procedures in Subpart G [governing the most formal type of hearings] and the expanded use of more-informal hearing procedures reflected in the proposed Subparts L, M, and N. Two citizen group commenters argued that the Commission's proposal to expand the use of more-informal hearing procedures in Subpart L instead of the full panoply of Subpart G hearing procedures in nuclear power plant licensing proceedings was in violation of the AEA [Atomic Energy Act] and APA [Administrative Procedure Act]... In [the commenters'] view, "deformalizing" public participation in the decision-making process to generate more HLW [high-level waste] through license extensions, new licenses, and amendments essentially eliminates the time needed for public awareness and involvement.

hearings on galvanizing public attention and facilitating review of proposed licenses.¹¹⁴ Other comments from interest groups and the private sector emphasized the administrative problems with hearings and the legal flexibility to do without them. Beyond the minor changes to the NPRM rules that the NRC made (discussed above), the bulk of the regulations remained the same. As with the campaign finance and the financial privacy regulations, comments from the lay public mostly showed relatively meager sophistication. Nonetheless, Table 3 shows how a number of mass membership and “public interest” organizations participated in this rulemaking proceeding and raised some of the same concerns that the individual commenters did.

Table 3
Nuclear Regulation Comments (N = 1431)

Commenter type	Individual	Business	Business organization/ firm representing business	law representing organization	Public membership or “public interest” organization	Unofficial group
Comment Concerns (by percent of comments raising each concern)						
<i>Legitimacy of the Nuclear Regulatory Commission</i>	5	66.7		75	100	20
<i>Facilitating energy access</i>	0	100		75	0	0
<i>Protecting the environment, health, and safety</i>	9.7	0		50	50	90
<i>Vale of hearings for involving the public</i>	100	0		50	100	100
<i>Overall efficiency of the regulatory process</i>	.6	100		100	0	80
Comment Characteristics						
<i>Average comment sophistication</i>	2	4.67		5	4	3.8
<i>Average length</i>	1.02	9.67		16.25	10.88	2.6
<i>Average number of suggestions by commenter adopted by agency</i>	.02	3		3.75	.5	1.7

¹¹⁴ See NRC Adjudicatory Change Comment # ____.

To summarize: the agency received well over a thousand comments, the vast majority from members of the lay public, expressing concern about the cutbacks in the use of formal adjudication. Although many such comments were form letters, both those letters and other comments from individuals raised concerns that were proper for the agency to consider given its legal mandate. The nuclear industry raised concerns and made specific recommendations to make the licensing process more permissive. The agency accepted nearly all of these. Otherwise the regulations remained much as they were in the NPRM. If and when regulators, courts, and representative politicians reserve ambiguities about nuclear waste disposal,¹¹⁵ the licensing changes should make it easier to obtain and renew licenses for commercial uses of nuclear power.

B. Comparing Participation Across Regulatory Domains

My analysis shows both striking similarity and variation in participation across these different regulatory domains. Table 4 summarizes some of both.¹¹⁶ The most salient similarity is in the existing institutions of regulatory democracy. Participation is handled exclusively through demand-driven procedures that gather input from people who have already decided they're interested. This certainly applies to the public hearings conducted by the FEC and NRC in connection with their regulations.¹¹⁷ It applies to any potential effort (not present in these case studies) to influence regulators through the legislature. And it certainly applies to the notice-and-comment process that has become the paradigmatic example of modern regulatory democracy. Despite the reliance on demand-driven procedures, comments from individual members of the public account for the vast majority of all the public input received. Even when form

¹¹⁵ See Nuclear Energy Inst., *supra* note ____.

¹¹⁶ My description of the regulatory process and the public reactions to it brings up the question of why government lawyers, analysts, and their political superiors would care about public input at all under the current system. Obviously outside input has the potential to enhance the agency's application of expert, technical knowledge. The agency also gains some insight into the political viability of its regulatory proposals, in all likelihood anticipating some responses and incorporating them into the initial notice of proposed rulemaking, and at other times gauging reaction by the public feedback. No doubt the agency would be especially concerned about feedback from established interest groups and private interests (interest groups). These can claim expertise. They have the political power to which the agency's political overseers in the executive and legislative branches respond. And interest group driven litigation can frustrate the agency's agenda. That threat of litigation can have an impact on the agency's concern with participation because of doctrines emphasizing the agency's responsibility to respond to important concerns raised in public comments.

¹¹⁷ Sometimes agencies supplement regular notice and comment proceedings with public hearings, though these reflect the notice and comment process' complete bias toward people who decide on their own to find out about the regulatory proceeding and who choose to participate. That's what the NRC did in this context. See NRC Proposed Rules, *supra* note ____, at ____.

letters are excluded, comments from individual members of the lay public account for over 70% of comments in two out of the three regulations.

Moreover, these comments from laypersons -- though overwhelmingly unsophisticated -- nearly all raised concerns that were (or should have been) legally important to the agency. By important, I mean that the comments raise issues that are legally relevant given the agency's statutory mandate; and the concerns are normatively hard to dismiss (at least from a sort of democratic theory, or majoritarian deliberation perspective).¹¹⁸ In all the cases I examined, the law gave the agency enough discretion to take the rules in a different direction than it did -- one that might have grappled more with the concerns raised by the comments from laypeople. Indeed, it's at least plausible that an agency analyzing such comments yet facing lower costs in deciphering the unsophisticated public comments might justify its decisions differently, and perhaps might even decide differently.

Moreover, sophistication appears to make a difference in the extent to which the agencies are able to take comments seriously. Lawyers at two of the three agencies mentioned this in my interviews with them. It's also borne out in some preliminary data analysis of the impact of comment sophistication on predictions of when the agency will accept specific recommendations made by the commenters.¹¹⁹ At the least, my data counsel against dismissing the possibility -- consistent with agency lawyers' own accounts -- that agencies have a harder time assimilating, considering, and responding to individual commenters from the larger public because of deficits in sophistication. This is also consistent with plausible theories of agencies' internal organization and the incentives of agency staff.¹²⁰

Sharp differences exist, meanwhile, in the number of comments a regulation attracts. Sharp differences also emerge in the role of mass membership

¹¹⁸ This bears some additional explanation. My standard of legal relevance is grounded not in the idea that the agency is obligated to write the regulation by prioritizing the concerns in question, but that the agency is at least in a position to write regulations that take into account the types of concerns in question. Sometimes outside constituencies -- or the agency itself -- may be tempted to take into account considerations that are beyond the scope of the statute in question. This malady may invalidate the regulations. See *American Trucking*, 531 U.S. at 472. The bulk of concerns raised by the public were among those that would be exceedingly difficult to exclude on the basis of a fair reading of the statutes involved in each regulation.

¹¹⁹ I discuss this in more detail in Part III.b, *supra*.

¹²⁰ Agencies and their staff respond to incentives which can obviously be most directly affected by representative politicians as well as politically and economically powerful organized interests. But this does not eliminate the possibility that agency staff may sometimes have both an interest in and an opportunity to please public commenters -- particularly when their concerns are intelligible, communicated in a persuasive way, and appear reasonable. If agency staff were able to decipher the comments from the lay public, they might also find that these can support the agency's own policy positions. Cf. Thomas H. Hammond and Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in A MODEL OF MULTI-INSTITUTIONAL POLICY-MAKING*, 12 J. LAW ECON. & ORG. 119 (1996) (emphasizing how agency staff tend to have policy preferences over outcomes).

or “public interest” organizations that raise concerns different from those likely to be raised by the most direct targets of regulation. These organizations participated in the campaign finance and nuclear regulation rulemaking proceedings, but were completely absent from the financial privacy regulation. Differences also existed in the proportion of comments from the lay public that were form letters. This is consistent with other regulations, and highlights the extent to which political and social forces affect public decisions to participate. Layperson comments sometimes reflect simple form letters, and sometimes appear to indicate quite different rhetorical strategies and concerns about issues. The level of sophistication of participants in the notice and comment process can vary considerably (both within a regulatory proceeding, and across regulatory domains). And so can the agency’s apparent willingness to make changes in its regulations following public input.

Table 4
Comparing Comments Across Regulatory Domains

Regulation	<i>Financial Privacy</i>	<i>Campaign Finance</i>	<i>Nuclear Regulation</i>
<i>Number of Comments</i>	176	1121	1431
<i>Percent of comments from individual members of the public</i>	72.1	98.6	98.3
<i>Percent of individual comments that are form letters</i>	0	98.4	84.5
<i>Percent of comments that are from direct targets of the regulation</i>	26.7	.8	.5
<i>Percent of comments from public membership or “public interest” organizations</i>	0	.4	.6
<i>Average length of non-form letter comments from individual members of the public (one or more pages)</i>	1.12	2	1.09
<i>Average sophistication of non-form letter individual comments from members of the public (5-point scale, where 5 is highest)</i>	.12	3	1.91
<i>Average number of suggestions made by</i>			

<i>individual member of the public adopted by agency</i>	.01	0	.02
--	-----	---	-----

*

*

*

The preceding case studies provide a snapshot of current regulatory democracy. Participation under its procedures is driven by the demands of people who figure out, on their own or through prodding from organized interests, that they have something at stake when a new regulation is written. Even though agencies have both the incentive and the opportunity to anticipate political reactions to their regulations, the notice and comment process isn't treated as a charade. Agencies in these case studies often respond to comments by making substantive changes in their regulations.¹²¹ Their lawyers grapple with concerns raised by the commenters. They change the proposed laws in response to feedback from interested parties. But the case studies also show the limits in the agency's capacity to respond to comments from individual laypersons, whether they write on their own or send in a form letter. Leaving aside the question of whether agencies would be motivated to respond, it's clear the existing process does next to nothing to remedy gaps in the commenter's own sophistication, or (indeed) to involve members of the larger public in discussions about regulations that will shape their lives. Whether one believes that steps in that direction are warranted depends on one's vision of democracy in this regulatory context. That's what I discuss next.

II.

THEORIZING ACCEPTANCE OF THE STATUS QUO

The case studies say something about who participates in certain regulatory rulemaking proceedings, what they say when they participate, and how certain agencies respond. The case studies do not say anything directly about whether the extent of public involvement or agency responsiveness is appropriate. How should *that* question be answered? No reasonable defender of the regulatory state has ever suggested that the public should be completely screened out of being involved in regulatory decisions. Such exclusion would be politically difficult in a system like our own.¹²² But if complete exclusion of the public is neither possible nor desirable, the question is then how we might want or expect individuals from among the larger public to get directly involved in these

¹²¹ The few researchers who have looked at this in other contexts – primarily environmental policy -- have also found this to be the case. See Martino Golden, *supra* note __, at __.

¹²² See Part V.b, *infra*.

decisions. In this Part I discuss how one might defend the way existing law involves the public in regulatory decisions. Though I am more concerned with normative arguments than political explanations in this section, I return to the political problem in Part IV. The heart of this Part is an effort to scrutinize some empirical assumptions that help bolster support for the current system, thereby making possible reforms of that process seem misguided, unnecessary, futile, or all of the above. I find many such assumptions unsupported.

A. Justifying Current Regulatory Democracy Under Broad Legislative Delegations

Consider the following two justifications for our current regulatory democracy. One rests on the following strong claim: representative democracy and the interest group competition that is such a pervasive feature of it render the existing notice-and-comment procedures close enough to ideal that it isn't necessary to supplement them with any reforms.¹²³ Another justification would rest on a weaker claim, which I call *compromise acceptance*: the position that no institutional mechanism to implement democracy is perfect, but that current regulatory democracy amounts to a reasonable compromise in a second-best world. I then draw on my empirical case studies and research in political behavior to critique some of the empirical assumptions that would bolster compromise acceptance. I suggest that many of the assumptions underlying compromise acceptance turn brittle once they're subjected to scrutiny. The result should lead us to reexamine the normative viability of the status quo, which then leaves the question of whether it's actually feasible to implement any alternatives, and what concrete benefits those alternatives might provide.

i. A Strong Claim: Representative Politics and Interest Group Competition Entirely Resolve the Problem of Regulatory Democracy

The best way to understand the arguments supporting current procedures for regulatory democracy is to take a step back and ask what public participation itself is supposed to accomplish in the first place. When scholars, judges, and policymakers discuss the regulatory state they often emphasize the importance of participation, but those discussions sometimes reflect different strands of thought regarding the right type and extent of participation. The strand I term *participatory democracy* emphasizes the value of broad participation by organized interests as well as individuals. This approach stands in sharp contrast to what might be called *regulatory pluralism*, which focuses on the value of organized interests, representative politics, and technical expertise. When it comes to regulatory democracy current law is far more aligned with regulatory

¹²³ This is not to say that people who like the status quo because they idealize representative democracy are necessarily "pluralist" in the tradition of Robert Dahl.

pluralism than participatory democracy.¹²⁴ Someone who believes strongly in the wisdom of regulatory pluralism would also find wisdom in how current regulatory democracy operates.

The participatory democracy strand holds that broad participation is central to democratic government.¹²⁵ The history of the regulatory state occasionally seems to reflect this concern with mass public participation. Legislators can influence the work of agencies in response to a rare but powerful burst of public attention to some matter of regulatory policy. Agencies are legally required to consider comments raising important issues, regardless of who they come from.¹²⁶ Presidential executive orders sometimes include exhortations for agencies to nurture participation.¹²⁷ With few exceptions, members of the public have a legal right to take part in the rulemaking part of the regulatory process, regardless of whether they are savvy lawyers for a chemical products company or individual laypeople with no particular technical expertise.¹²⁸ Third-party members of the public also have some opportunity to intervene in regulatory adjudication.¹²⁹ This makes intuitive sense, since regulations are forged from statutes passed in the name of everyone.¹³⁰ The regulations themselves are

¹²⁴ See, e.g., Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL. REV. 553, 554 (1997) (“The provision of strong protection for a strongly reviled system of special interest politics thus appears to be less a paradox than an example, familiar in our system, of a sound political and constitutional commitment to take some risks and to bear some costs in return for larger social benefits.”).

¹²⁵ See SIDNEY VERBA, KAY SCHLOZMAN, AND HENRY BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 1 (1995) (“Citizen participation is at the heart of democracy. Indeed, democracy is unthinkable without the ability of citizens to participate freely in the governing process.”).

¹²⁶ See *supra* notes ____ (discussing the limited, but non-trivial, extent of agencies’ responsibility to consider relevant and important concerns raised in comments received pursuant to the notice-and-comment process).

¹²⁷ See EXEC. ORDER 12,866 (1993), SECT. 6(a)(1) (calling on agencies to “seek the involvement of those intended to benefit from and those expected to be burdened by any regulation”). Many agencies probably do little more than honor this in the breach (at least when it comes to doing anything other than just proceeding with the procedures required by the substantive statute in question and the APA). Since most regulations are intended to benefit some defensible definition of the larger “public,” it’s hard to see Section 6(a)(1) as something other than an aspirational goal for mass public involvement in the regulatory process.

¹²⁸ Most of the exceptions to the APA notice-and-comment rulemaking process involve foreign affairs and national security. But as the case studies demonstrate, some of the default requirements for rulemaking contained in the APA still apply to a number of regulations affecting areas ranging from criminal finance enforcement to immigration.

¹²⁹ See, e.g., Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 362 (1972) (“The recent and dramatic expansion of intervention in administrative proceedings has built upon doctrinal developments in three distinguishable but related areas: the right to intervene in court adjudications; standing to seek judicial review of administrative action; and standing to intervene in administrative adjudications”).

¹³⁰ By “regulations,” I mean primarily the regulatory rules enacted pursuant to the notice-and-comment process (also known as “informal rulemaking”) established by the Administrative

obviously important: often they have the force of law just as a civil or criminal statute would.¹³¹ They affect a pervasive and growing share of the nation's domestic and international decisions. In part for these reasons one commentator has described mass participation in regulatory rulemaking as perhaps "the most complex and important form of political action in the contemporary American system."¹³²

Decades ago the U.S. Senate commissioned a study of participation in the regulatory state that appeared to be premised on the value of participatory democracy.¹³³ An early passage provides a short statement of that view and its basic rationales:

Increased public participation and input can provide regulators with a greater range of ideas and information, broaden the active constituency of the agency, and place greater emphasis on public interest concerns and viewpoints. A lack of such public participation, on the other hand, requires regulators to rely too heavily on input from the industry they are charged with regulating.¹³⁴

Democratic theorists and legal scholars writing in previous decades often concurred in the value of this aspiration.¹³⁵ Participation helps render that power legitimate in two ways. Regulations affect the public and are promulgated in its name; members of the public should therefore be able to affect the regulation because they have an interest, however slight when it is disaggregated, in the regulation.¹³⁶ Some also note that participation's value extends beyond its direct impact on governance,¹³⁷ to include the subjective well-being¹³⁸ of people participating and their opportunity for civic education.¹³⁹

Procedure Act, or pursuant to a similar process that allows the public to participate in rulemaking in some way.

¹³¹ See, e.g., Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention* 116 HARV. L. REV. 467 (2002).

¹³² Kerwin, *supra* note __, at __.

¹³³ See United States Senate, Committee on Governmental Affairs, *Vol. III: Public Participation in Regulatory Agency Proceedings*, 95th Cong, 1st Session (July 1977).

¹³⁴ *Id.* at p. vii,. Given this ambitious goal for participation, the study predictably finds that the status quo falls short in fulfilling any expansive version of participatory democracy goals.

¹³⁵ See generally BENJAMIN BARBER, *STRONG DEMOCRACY* (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970). For some examples from legal academia, see Bonfield, *supra* note __, at __; Cramton, *supra* note __, at __; and Gerald Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 574-79 (1990).

¹³⁶ See Kerwin, *supra* note __, at 158 ("The credibility and standing a rule enjoys with those who will be regulated by it or enjoy the benefits it bestows depend heavily on the accuracy and completeness of the information on which it is based").

¹³⁷ See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-14 (1998)(distinguishing among participation, aggregation, and governance interests associated with the right to vote).

Of course, nothing in the participatory democracy strand makes participation infinitely valuable: after some point decisions must be taken, and policies must be executed.¹⁴⁰ What this strand seems to imply is rather that efficiency values should be balanced against the value of participation, and that such participation should regularly allow people to have an effect on regulatory policy. If the existing notice-and-comment, expertise-focused structure of administrative law does not allow this to happen, then people interested in participatory democracy would ask what alternatives exist that could blend expert technical judgment with opportunities for public involvement in decisionmaking. Thus the impulse for occasional experiments like the Carter Administration's drive for expanded public hearings and television advertising soliciting public comments on regulations,¹⁴¹ or the more recent use of "deliberative polls" to advise state utility regulators.¹⁴² And while direct democracy may seem ill-suited

¹³⁸ See, e.g., Michael E. Morrell, *Participatory Democratic Procedures: Normative Theory Meets Empirical Science*, 52 POL. RES. Q. 293 (1999).

¹³⁹ See John M. Strate et al., *Life Span Civic Development and Voting Participation*, 83 AM. POL. SCI. REV. 443 (1989)(emphasizing the impact of participation opportunities on lifetime civic education).

¹⁴⁰ As I have defined it, this "participatory democracy" strand is fairly consistent with the resent enthusiasm for deliberative democracy. See, e.g., JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* (1996). But the "participatory democracy" strand does not depend on some sort of deep, slow deliberation as much as on participation in the process of decisionmaking. See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 248 (2002). Justice Breyer writes:

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

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

¹⁴¹ President Carter issued an executive order directing agencies to explore "holding open conferences or public hearings" to expand the scope of participation. See Exec. Order 12,044. The Carter reforms led to increases in the time for comment for many rules, the provision of advance notice that an agency was considering rulemaking in a certain area, and occasional use of television and radio advertising soliciting comments. See Kerwin, *supra* note ___, at 169 (discussing Carter-era innovations).

¹⁴² See generally Robert C. Luskin, James Fishkin, & Dennis L. Plane, *Deliberative Polling and Policy Outcomes: Electric Utility Issues in Texas*, Paper Presented at Annual Meeting of the Association for Public Policy Analysis and Management (Nov. 1999) (on file with author) (describing changes in the opinions of a sample of people asked to consider electric utility pricing issues in Texas, following the provision of materials to the participants and a chance for them to deliberate about the issue).

for some regulatory issues, it certainly seems like a procedure that imbues a decision with legitimacy.¹⁴³

This kind of mass participation seems downright unnecessary to others.¹⁴⁴ To wit, the regulatory pluralism strand eschews mass public engagement in regulatory policy in favor of what seems like a more pragmatic alternative. A substantial chunk of the empirical and theoretical research on the regulatory state emphasizes the role that interest groups play in shaping regulatory policy.¹⁴⁵ A lot of people have understandably concluded that organized interests have disproportionate power in shaping regulations like the Section 314 rules, compared to the lay public or to interested individuals or organized groups that lack organization and political resources. What makes the regulatory pluralism strand of thinking about public engagement distinctive is not its recognition of the role interested parties play but its tendency to equate the positive with the normative.¹⁴⁶ Echoing Dahl and other pluralist thinkers,¹⁴⁷ proponents of this

¹⁴³ See *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668 (1976).

¹⁴⁴ See e.g., Daniel R. Ortiz, *The Paradox of Mass Democracy*, in RETHINKING THE VOTE 210, 211 (Ann R. Crigler, Marion Just, and Edward J. McCaffery, eds. (2004)) (“For perfectly understandable reasons, the more we broaden and equalize political participation, the more difficult we make thoughtful individual political choice. In other words, there is some trade-off between the quality and quantity of individual political engagement”). See also Arthur Lupia, *Deliberation Disconnected: What It Takes to Improve Civic Competence*, 65 LAW & CONTEMP. PROB. 133 (2002) (noting that many reform efforts to expand deliberation and reasoned decisionmaking among the public are based on faulty assumptions).

¹⁴⁵ There is a vast literature here addressing the role of interest groups in regulatory policy. The following are a few interesting examples. See, e.g., Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985); Mathew D. McCubbins, *The Legislative Design or Regulatory Structure*, 29 AM. J. POLI. SCI. 721 (1985); Randall L. Calvert, Mathew D. McCubbins, and Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POLI. SCI. 588 (1989).

¹⁴⁶ The normative claim is easier to accept if one also believes that group priorities are aligned with those of different segments of the public, and that groups help fulfill a crucial objective by restraining government. See, e.g., WILLIAM N. ESKRIDGE JR., PHILIP FRICKEY, AND ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 49 (1995). Synthesizing a voluminous literature on the role of groups and factions in political representation, they define pluralism in the following terms:

(1) *Citizens organize into groups for political action.* The citizenry has different opinions and different economic interests, which leads to the formation of “interest groups.” (2) *Interest group politics result in... the spreading of political power across many political actors...* Strong interest groups, many of which are private or voluntary organizations, protect individuals against oppressive and tyrannical government. In a way, a decentralized pluralist system expands one of Madison’s checks on self-serving factions, as the ambitions of one group checks the ambition of others and of government actors... (3) *Politics can be conceptualized as the process by which conflicting interest-group desires are resolved.* Because the objectives of one interest group can often be obtained only at the expense of others, the groups will come into conflict. The state regulates that conflict, and indeed the political system might be seen as nothing more than the arena in which interest group conflict is played out.

view might emphasize that a combination of structures of political representation and interest group competition is probably the best (if not the only viable) way to integrate the public in complex regulatory and administrative decisionmaking.¹⁴⁸ This is the sort of view that made the early architects of the Administrative Procedure Act celebrate the fact that – even before the structure of the modern regulatory state had been formalized – many agencies had realized that their success as regulators depended on consulting with interested parties that had both a stake in the outcome of the regulatory process and the requisite expertise to inform that process.¹⁴⁹

What current regulatory democracy achieves is a system to accomplish that sort of consultation. The institutions of the regulatory state help legislators know what sort of regulatory policy is being imposed and how the most important political constituencies will react to it. The existing mechanism for engaging the public seems perfectly suited to allowing organized interest groups to participate at various stages in the process: at the time legislation is written in the first place, later through the notice-and-comment rulemaking process that applies to most regulatory rules, and then subsequently through litigation and informal efforts to shape agency enforcement policy.¹⁵⁰ Agencies must then contend with any serious

Id. (citations omitted).

¹⁴⁷ See, e.g., Robert A. Dahl, *American Hybrid*, in CLASSIC READINGS IN AMERICAN POLITICS 205, 219 (Pietro S. Nivola & David H. Rosenbloom, eds. 1990) (“I defined the ‘normal’ American political process as one in which there is a high probability that an activate and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision”). Dahl not only describes interest group competition as a pervasive feature of the American political system. He also exalts this feature:

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

Id., at 222.

¹⁴⁸ See, e.g., Edward P. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001); Schuck, *supra* note ___, at ____.

¹⁴⁹ See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103-04 (1941) (hereinafter, “ATTORNEY GENERAL’S REPORT”). See also Kerwin, *supra* note ___, at 158 (noting that the lack of participation from interested parties may result in a rule “deprived of information that is crucial...”).

¹⁵⁰ An advocate of the more ambitious participatory democracy approach might note that the formal institutions of the regulatory state – such as the notice-and-comment process -- are set up to engage individuals and informal groups, not only interest groups. Rarely if ever does the law of the administrative explicitly restrict participation to interest *groups*. On the contrary: in most cases, interest groups get to participate because the *individuals* they represent would have a chance to participate – whether because they have the standing to get judicial review or because the public at large has the power to submit their views during the notice-and-comment period. What the

issue raised in the rulemaking record.¹⁵¹ The harder question is whether this arrangement is satisfactory in any deeper sense.¹⁵²

Anyone whose answer to that question considers current regulatory democracy ideal or close to it – and not just a compromise – must harbor a belief in the power of representative politics and organized interests to constantly enrich the process that serves up the regulatory rules.¹⁵³ To believe in regulatory pluralism one has to believe organized interests faithfully represent their members' concerns. One must also believe that allowing competing interests to contribute their ideas, influence, and distinctive points of view will yield desirable outcomes in a regulatory process that is otherwise primarily driven by expert judgment. While both of these assumptions are contestable, at least a few things could keep the regulatory pluralism model looking like a pretty desirable approach to participatory democracy. The agency problems might be assuaged by the fact that interest groups have to compete for members, and at least a few interests – such as large corporations, select not-for-profit associations, and highly-motivated individuals – have the options of representing themselves directly. While involvement in the regulatory process by interested parties may raise the specter of agency “capture,” perhaps the antidote is to be found in

interest groups are supposed to do is to solve the collective action problems that would otherwise keep most individuals from following regulatory developments that would have an effect on them.

¹⁵¹ As one established doctrinal summary of the field put it: “Most remands [of regulatory rules] are based on a court’s conclusion that the rule is arbitrary and capricious because the agency did not discuss ‘adequately’ some decisional factor, comment, data dispute, or potential alternative to the action taken in the rule” RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, AND PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 334 (1999).

¹⁵² Comparing the implications of these different strands of thought about participation would be easier if one could measure the impact of a particular approach to participation on some desired regulatory output. Legislators and organized interests often talk as though such a benchmark exists. Despite such talk and the steady stream of strategic plans that come from the agencies themselves, it is often unclear precisely how regulatory performance should be measured.

Benchmarks are easiest to develop when statutes in question are precise and the subject of regulation intuitively lends itself to some fairly obvious performance measure (like having the FDA limit exposure to dangerous and ineffective pharmaceutical products). Things become at least somewhat more opaque when statutory authority is more ambiguous (as is almost always the case), and the regulatory domain does not itself seem to suggest some obvious regulatory benchmark, as with the case studies on campaign finance and financial privacy. In fact the point of participation may be precisely to inform the agency’s regulatory goals, or (at least) the link between goals set by statute and the details of regulation. The implicit normative questions involved in setting such benchmarks should at least make one skeptical of the position that the extent of democracy in regulation should be determined instrumentally, through reference to some consensually desired set of outcomes. Observers who think they have found such an uncontroversial metric, like wealth maximization and application of the Kaldor-Hicks criterion, would no doubt be inclined to measure different institutional arrangements for regulatory democracy on the basis of how well their desired result is achieved. But for those of us who find such pervasive instrumental criteria at least somewhat unavailing, it becomes important to consider the extent to which the regulatory state conforms to a host of normative criteria, one of which might be its consistency with our preferred views about the nature of democracy.

¹⁵³ See, e.g., Schuck, *supra* note __, at __.

competition. Thus, while individual citizens with diffuse interests may not be able to contribute much to a regulatory proceeding on air quality, industry and environmental groups would have the resources to participate with the requisite technical sophistication. They could challenge each others' assumptions and provide the agency with new information, and blow the whistle if the agency neglected an important aspect of the problem.¹⁵⁴

Nonetheless, that idealized normative view of representative democracy and interest group competition is not obviously correct. It needs to be defended, for reasons that emerge clearly if we think about the blemishes associated with any kind of democracy that is supposed to work in the real world. Unless we make unrealistic assumptions, any collective decisionmaking process will give some people more power than others.¹⁵⁵ Thus, depending on the institutional details, collective decisions that supposedly depend on democratic procedures can still empower an oligarchy. Procedures that are supposed to be explicitly democratic – such as local elections, legislative voting, or presidential contests – reflect dramatic differences in participation. Not *everyone* legally entitled to be

¹⁵⁴ Indeed, there might be a few important reasons why this reliance on organized interests should be perfectly acceptable on normative grounds, at least to some people. One might think that virtually all the work of the regulatory state requires highly-sophisticated technical expertise anyway, which raises questions about just how much we achieve by stepping up the involvement of the mass public in regulatory policy. That's how courts tend to talk about regulatory policy. *See, e.g.,* Pattern Makers' League of North America, AFL-CIO v. NLRB, 473 U.S. 95, 115 (1985) (upholding agency decision regarding an unfair labor practice because the "Board has the primary responsibility for applying 'the general provisions of the Act to the complexities of industrial life'"); National Rifle Ass'n v. Reno, 216 F.3d 122, 134 (D.C. Cir. 2000) (affirming dismissal of a complaint against a Justice Department practice of creating a temporary audit log of gun purchasers, on the ground that "it is the agencies, not the courts, that have the technical expertise... to carry out statutory mandates"). It could be that interest groups are the only ones (along with directly interested parties) with the means and incentives to solve collective action problems to learn about the issues, organize a response, and otherwise meaningfully take part in regulatory policymaking. Moreover, the views of interest groups are often in conflict, so various interests might police each other throughout the regulatory process – including during the notice-and-comment process. Or at least this is supposed to be true in the administrative pluralist version of the world.

Others think legislatures and agencies because are excellent settings for deliberation. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) (suggesting that a "belief in a deliberative conception of democracy..." provides a basis for evaluating administrative and legislative action that has both powerful historical roots and considerable contemporary appeal."). *See also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, AND ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 327-327-380 (describing key institutional features of the legislative process like single-subject rules, generality requirements, and legislative immunities as rules designed to facilitate legislative deliberation).

¹⁵⁵ The literature on this topic is vast. At its center is Arrow's famous impossibility theorem, and the substantial literature critiquing it. For an insightful introduction to the debates surrounding this result, *see* Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy; Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

heard participates equally, and intensity of participation rarely matches the precise extent of the interests at stake. Members of an organization do not always have enough time to get to know the slates for boards of directors. Constituents of a local school district may not all vote in the local election. The electorate for presidential elections may not take the time to discern the differences in positions between two candidates or make the effort to vote in the primary. People face collective action problems. Even where individual members of the public are represented by organized groups, these groups form intermittently, and solve collective action problems only imperfectly. In short, differential rates of participation affect virtually all democratic decisionmaking procedures. Such a skew in participation need not be a disaster. Societies might still value collective decisionmaking procedures that make participation easier for some people than for others.¹⁵⁶

What's more, even voters with little information or opportunities to deliberate can make reasonable choices about representative politicians by interpreting cues from institutions and intermediary individuals that they have reason to trust.¹⁵⁷ Lupia and McCubbins present the most elaborate theory of this type. They use a steady stream of experimental results and formal models to show how voters can make sense of representative democracy even with limited information.¹⁵⁸ It turns out, though, that the normative thrust of their theory depends on key assumptions that sometimes just don't hold. If one rejects the assumption, for example, that voters can rely on trustworthy intermediaries to assess whether they should support a candidate associated with a particular package of policies, then the theory doesn't support the view that representative democracy is ideal.

Despite the preceding reasons for faith in representative political arrangements, it nonetheless remains true that under certain conditions, distortions themselves also entail certain normatively significant costs. Sometimes it makes no sense to assume that voters can rely on intermediaries to interpret policy

¹⁵⁶ If people participate at different rates and with different intensity, perhaps this shows differences in the intensity of their underlying preference – which is certainly valuable information under certain conditions. It would be costly, possibly unconstitutional, and perhaps unworkable to ensure that everyone participated to the same degree in a given collective decision. And despite such limits, differences in a speaker's articulateness or an audience's receptivity would skew the impact of participation in any case. Not only might we still value collective decisionmaking procedures that reflect or depend on differential rates of participation, but changing such differences in participation might entail various kinds of costs – ranging from administrative complexity to free speech restrictions.

¹⁵⁷ See, e.g., Paul Sniderman, *Taking Sides: A Fixed Point Theory of Political Reasoning*, in *ELEMENTS OF REASON* 79 (Arthur Lupia, Mathew McCubbins, & Samuel Popkin, eds. 2000).

¹⁵⁸ See ARTHUR LUPIA & MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998) (emphasizing the role of candidate reputation in voters' reasoned decisions about representative politics). See also SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991) (emphasizing the role of retrospective evaluations and candidate evaluations to argue that voters' choices in presidential elections are "rational").

developments. The value of representative democracy then ends up depending on what we expect that democracy itself will accomplish. For some observers, democratic collective decisions are just inherently valuable -- because they allow people who will be impacted by the decision to participate in making it.¹⁵⁹ For others, democracy is valuable because it allows a majority of the relevant community to choose the best course of action in a public-spirited way after some kind of deliberation.¹⁶⁰ For still others, the potential chaos and unpredictability of democracy is valuable because at least it provides information useful in policymaking that would not otherwise be available to government.¹⁶¹ All of these rationales are reminiscent of the participatory democracy strand of thought regarding regulatory democracy. They are undercut to some extent by distortions in participation. The distortions introduce the possibility that people with a stake in the collective decision will simply not participate. The distortions also make it harder to achieve any sort of majoritarian deliberation in the decision.¹⁶²

Time and again, there is a formalistic answer to quandaries about the appropriate type and extent of democratic participation: Whatever the electoral institutions require as a minimum rate of participation is enough. After all, not everyone *wants* to participate in making decisions about financial privacy, nuclear regulation, or campaign finance, and not everyone should be *made* to do so.”¹⁶³ This answer of course begs part of the question because the minimum degree of participation is determined by law, and the law itself is the product of the democratic process. Nonetheless, whatever one thinks of the formalistic answer in the legislative context, it seems like that answer is even less satisfactory for the

¹⁵⁹ See, e.g., Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 321 (1997)(describing “procedural” theories of democracy that highlight the “inherent fairness or justice of its system of substantial and equal participation in legislation by the governed.”).

¹⁶⁰ See, e.g., Bohman, *supra* note ___, at ___ (discussing the inherent value of incorporating people who will be affected by a decision into the process of decisionmaking). See also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1995).

¹⁶¹ See, e.g., Amartya Sen, *The Economics of Life and Death*, SCI. AM. 40 (May 1993)(describing democracies’ ability to avoid famines). See also Verba, Schlozman, and Brady, *supra* note ___, at 163 n.1 (“[W]e consider the representativeness of the participatory input from the perspective of a concern with its impact on the communication of citizens’ needs and preferences to political elites and thus a concern with equal protection of interests”).

¹⁶² Suppose, for example, that voting in the election for Insurance Commissioner costs the average citizen goes from about \$5 to about \$7 in time and effort (perhaps because polling places are closed). Suppose further that as a result of this change, 10% fewer citizens decide that it is worth their effort to take part in the election. Even if the loss of that 10% of voters does not render the election illegitimate, the loss weakens the claim that the democratic, collective decision is legitimate because people affected participated. The loss of voters also weakens the claim that the election reflects the result of some kind of desirable majoritarian deliberation. Finally, the loss of the 10% of voters deprives the new insurance commissioner of information about (and much of the incentive to care) how some chunk of the electorate reacted to her candidacy.

¹⁶³ Cf. Rubin, *supra* note ___, at ___ (suggesting that the existing arrangements for participation and decisionmaking in the regulatory state are legitimate, and that excessive idealized thinking about democracy is confusing in this arena).

rest of the regulatory state. Consider some of the problems with delegation. The work of agencies is one step removed from the work of legislators.¹⁶⁴ Of course, legislators can also be swayed more directly by voters when the issue catches popular attention. But this again presupposes that the issues capturing popular attention match the list of issues that matter most under any defensible criteria.¹⁶⁵ One might plausibly conclude that delegations, on the margin, make it no easier and perhaps harder for the members of the public to understand and monitor the law's development -- particularly for those chunks of the public who have not yet decided if they care.¹⁶⁶

The point here is just to show that people can raise principled questions about whether representative politics (and associated faith in interest groups) resolves all the important questions about democracy in the regulatory state. That's not so. It's at least possible to raise questions about representative democracy, particularly given voters' cost of gaining information about regulatory

¹⁶⁴ See, e.g., Theodore Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 296-312, 314-18, 321-22 (1987). Theodore Lowi, *The End of Liberalism*, in FOUNDATIONS OF ADMINISTRATIVE LAW 166, 169 (PETER H. SCHUCK ED., 1994) ("modern law has become a series of instructions to administrators rather than a series of commands to citizens").

¹⁶⁵ Berinsky underscores this point in a fascinating empirical study of members of the public who answer "don't know" to pollsters' questions. See ADAM J. BERINSKY, *SILENT VOICES: PUBLIC OPINION AND POLITICAL PARTICIPATION IN AMERICA* (2004). When people are polled they may have a host of reasons for saying they "don't know" the answer. He then shows how opinion surveys are systematically biased because they pervasively fail to consider how "don't know" respondents feel. While some respondents choose to answer thus because they fear their true answer will expose them to social disapproval, others answer "don't know" because of the relatively high cost of forming an opinion. *Id.* at 105. Berinsky convincingly argues that this biases responses towards those that are cognitively easier to justify, thereby biasing the resulting opinion on matters as important as whether intervention in Vietnam was warranted (particularly during the early 1960s). *Id.* at 132. Yet there unlikely to be some inherent connection between the normative importance of an issue (however measured) and the ease in forming an opinion about it (or in considering the justification for a particular position on an issue).

¹⁶⁶ The argument is not that delegations are either undesirable or unconstitutional. On the legal question, Posner and Vermeule, *supra* note ___, advance persuasive arguments against judicial invalidations of legislative action on nondelegation grounds. Earlier, Mashaw argued in a similar vein in favor of delegating powers to the executive branch. See Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON & ORG. 81 (1985). My point here is that delegations might make participation particularly important because they make elections less of an effective proxy for what voters think about regulatory issues. There are, of course, exceptions that I have described earlier, where substantial chunks of the public acquire an intense interest in a regulatory decision. See *supra* note __ (discussing the extent of interest in the tobacco and telecommunications media ownership regulations). But leaving aside these exceptions, my conjecture is that high-profile legislative votes receive more attention than regulatory proceedings that become routine because they have been delegated. Some members of the public take cues from interest groups with which they identify in trying to make sense of legal developments, and those groups might often keep track of regulatory policy. But the literature on leadership dynamics within interest groups and the experience with Section 314 highlight limits in the role interest groups can be expected to play in informing the public about policy developments.

decisions. All of which means that representative democracy, despite all its virtues, is not necessarily an ideal system for involving the public in regulatory decisionmaking. Few institutions are defended on the basis that they are optimal, though. Which means it's worth considering current regulatory democracy not as the ideal but as a reasonable compromise in a second-best world where legislatures routinely delegate power to bureaucratic regulatory agencies.

ii. Compromise Acceptance

Some people might see the status quo not as an ideal system to involve the public in regulation, but merely as an acceptable compromise. An ideal system, in this view, might foster greater participation from the mass public, more reasoned deliberation, or some other desired quality. Yet these goals may also appear too costly, elusive, or questionable in value to warrant replacing the current arrangement. One example of this view appears in some of Cass Sunstein's early writings on regulation, where he concludes that mass participatory democracy in the regulatory state is "unworkable."¹⁶⁷ In this account, representative politics, and regulatory pluralism in general, are not idealized manifestations of democracy for the regulatory state; indeed, those inclined towards compromise acceptance might question the very notion of an idealized manifestation of democracy. Instead the focus of this approach is on what's an acceptable compromise for democracy and public engagement if delegations are going to happen in the first place. Perhaps some people crave deep deliberative discussions in politics, which makes mass participation in regulatory governance irrelevant at best and counterproductive at worst.¹⁶⁸

Another argument that fuels compromise acceptance is the sense of futility about the prospects for changing how regulatory agencies carry out their legal mandate. Precisely how could the present system be changed, and who would do it? Because current regulatory democracy is politically efficient, it is sometimes assumed to be the only politically feasible arrangement. I explore this view in the last section of the paper in the paper and find it wanting.¹⁶⁹

C Challenging Empirical Assumptions Supporting Compromise Acceptance

In fact compromise acceptance is rooted in some widely accepted common wisdom about regulation. Courts and commentators, for example, often accept the premise that regulations should be shaped most by experts imbued with sufficient insights about science, economics or law to know what they are

¹⁶⁷ See CASS R. SUNSTEIN, AFTER RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 14-15 (1990); Sunstein, *Interest Groups in American Public Law*, *supra* note ___, at 39.

¹⁶⁸ See also Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

¹⁶⁹ I explore this view in the final section of the paper and find it wanting. See *infra* Part IV.

doing.¹⁷⁰ In contrast, the individual members of the public whose votes decide mayoral and legislative elections are thought to have little of any importance to say about regulatory policy, because tend to lack both the sophistication and interest that would make such insights possible.¹⁷¹ That's not to say there is no such thing as democracy in a world of broad legislative delegations. On the contrary – while organized interests certainly have a disproportionate share of power to shape regulatory policy under existing arrangements, that may prove to be just a mild problem here, since different interest groups are sometimes assumed to represent a broad enough range of concerns to encompass all or most arguments that informed citizens would make if they were themselves participating in developing regulations.¹⁷² In any case, if members of the public feel strongly enough to supplement what interest groups contribute to the regulatory process they can do so, since members have a legal opportunity to take part in regulatory development through the notice and comment process. Any differences between organized interests and individual members of the public in their ability to express their ideas is unlikely to matter much because regulators' willingness to consider outside views will depend on whether commenters are organized interests capable of affecting the agency's political and litigation environment.¹⁷³ To the extent that important reforms are needed in the regulatory state, they are often taken to involve technocratic improvements to centralize presidential control over regulations or improve the quality of government decisionmaking.¹⁷⁴ There is, in some minds, little point in reforming regulatory democracy because it's both unnecessary, impractical, and futile.¹⁷⁵ The pages that follow question nearly every aspect of this account.

i. Assumption # 1: Regulatory Problems are Technical Problems

Scientists, economists, specialized lawyers, and other technical experts form the core staff of all regulatory agencies. The same pattern is repeated whether the agency's responsible for energy, environmental protection, election regulation, or enforcement of laws against commodities fraud. It figures that regulatory agencies would look this way when they were so ardently justified as sources of technical expertise that would use their special knowledge to implement legislative mandates in a complex and uncertain world. That's an

¹⁷⁰ See, e.g., Breyer, *supra* note __, at ____.

¹⁷¹ See Sunstein, *Risk and Reason*, *supra* note __, at __; Rubin, *supra* note __, at __.

¹⁷² See Schuck, *supra* note __, at ____.

¹⁷³ See *infra* Part II.b.v.

¹⁷⁴ For one thoughtful example of this quite pervasive approach, see Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995). See also Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

¹⁷⁵ See *infra* Part II.b.v.

account that helps justify limited mass public involvement in the regulatory process.

And why not? Regulatory problems about campaign finance, privacy, nuclear power, or environmental protection involve complex judgments about risk and value that probably benefit from expertise. But they also involve policy judgments that often reflect ambiguous statutory commands. Sometimes judges explicitly recognize the importance of policy judgments but note that the agency should make them because it is rendered accountable through representative politics.¹⁷⁶ But most of the time courts defer to agencies, invoking expertise and institutional competence as justification. Commentators have long raised questions about this claim, though lately some scholarly voices have sought to defend the idea of expertise by noting that laypeople have a tendency not to make sound judgments about risk.¹⁷⁷ Still, there is something unsatisfying about the narrow claim that the heavy lifting done by the regulatory state when it regulates is predominantly about expertise. Let me illustrate this first with Section 314, and then with examples from other regulatory contexts.

Take privacy as an example. Like many other issues entrusted to regulators, financial privacy turns out not to be pure technical matters under almost any defensible definition. Even if one assumed that the law enforcement interest at issue in the Section 314 regulations should be treated as the exclusive domain of experts (a questionable assumption), there is almost no way of describing privacy concerns as the exclusive domain for experts. It is true that the statute clearly emphasizes the goal of encouraging the sharing of information about suspected terrorists or money launderers, yet the statute also commands that sharing should be limited. Both the nature of that limit, the rest of the USAPA statute, and the underlying APA notice-and-comment process suggest that the agency is supposed to strike a balance between several different issues.¹⁷⁸ One goal, obviously, is advancing national security and law enforcement objectives. Treating this as a matter for experts to resolve is certainly plausible, though not obviously right.¹⁷⁹ And whatever one thinks of the idea that national security and

¹⁷⁶ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* 403 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (recognizing the impact of partisan changes on the administration of agency programs)(hereinafter "State Farm").

¹⁷⁷ See CASS R. SUNSTEIN, *RISK AND REASON* 295 (2002).

¹⁷⁸ Cf. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene)* 448 U.S. 607, 646-48 (1980) (plurality opinion) (OSHA statute, if interpreted appropriately to cure constitutional defects, creates a list of factors that the agency must consider in creating a regulation that is not arbitrary and capricious). (emphasizing the importance of the agency balancing several competing concerns grounded in the statute).

¹⁷⁹ The question is in part whether people likely to be called on as experts in the field (i.e., law enforcers) are in a position to provide accurate information about what legal changes are needed. This raises at least two different kinds of problems. One is the quality of information and analysis that experts on national security and law enforcement can provide. Another is an agency problem: given that law enforcers, like anyone else, have interests and respond to incentives, there may be

law enforcement can be treated as ripe for technical resolution by experts, the remaining concerns implicit in the statute are about privacy and accountability for the use of sensitive information.¹⁸⁰ Presumably, this is why there are some restrictions on the use of the financial information by the government and financial institutions. One could make similar observations about the other regulations I discuss in detail. Nuclear power licenses are supposed to be granted on the basis of technical standards. But those standards are not the only factor in deciding just how the process of fact-finding and involvement of local community groups should proceed. Nor can anything that plausibly passes for technical standards decide whether convention fundraising should be limited by the donor's city or state of residence.

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

distortions created when they serve both as experts and also beneficiaries of particular legal changes. See Cuéllar, *supra* note __, at __.

¹⁸⁰ For example, one commenter had the following to say:

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

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

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

Id., Comment # 63. In many ways, these two comments from individuals convey the tenor of many of the public comments received. The Appendix, *supra*, lists excerpts from additional comments. Comments such as # 63 and # 124 constitute a far cry from a sophisticated argument to the effect that the agency should minimize the damage done by *Miller* by narrowing the scope of law enforcement authority. But the preceding commenters would probably agree with the existing statement if given an explanation (and if she did not believe that all was lost in any event).

citizen chose to be concerned about the Section 314 regulations and an agency official was *not* concerned, their difference of opinion may have nothing to do with their different estimates of the probability of abuse, but from a different guess about the cost they would bear if 100 people knew that the citizen was sending money to a drug treatment center. Moreover, even if the citizen and the agency official began with the same valuation of the scenario, the government official might be desensitized from repeatedly being exposed to private information.¹⁸¹

Risk analysis and fact-based technical standards may not answer every material question about the regulations I study here, but might they be unique? Consider another two radically different contexts. In *Rust v. Sullivan*¹⁸² the question was whether – and how – the federal Department of Health and Human Services could apply a gag rule limiting abortion-related counseling in federally-funded clinics. While the court made some moves in the direction of acknowledging ideological differences in how a Republican administration would treat the issue, the major thrust of the argument for deference to the agency was expertise and reference to “reasoned analysis”:

At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties’ attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing. When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency.¹⁸³

Technical and scientific knowledge probably matters some to this decision. But only the most expansive definition of expert would let one just call the decision “science.”¹⁸⁴

¹⁸¹ One could think of the existing administrative process and all its political checks as a way to address the regulatory issues that should not be left to the experts. But, as Section 314 also makes clear, not every commenter with a morsel of information about the regulation’s policy implications manages to provide sophisticated input. Not only does this lack of sophistication make it harder for a willing agency to assimilate contributions from many members of the public who do take the trouble to provide their comments. A teeming mass of unsophisticated comments is also likely to reinforce the idea that nothing will happen if the agency ignores the comments from laypeople.

¹⁸² 500 U.S. 173 (1991).

¹⁸³ 500 U.S. at 185-86.

¹⁸⁴ And the bigger the concept of expertise, the more it makes sense to remember James Q. Wilson’s admonition about it. In discussing the politics of bureaucracy, Wilson wrote:

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

It is environmental regulation, though, not abortion, campaign regulation or financial privacy that gets the lion's share of attention in scholarship on regulation. On the surface, it would seem smart to screen out nonexpert opinion on questions about how much particulate matter in the air will make children struggle to breathe. As with the other examples, though, here too legal decisions nearly always encompass policy and value choices along with scientific ones. Consider the Environmental Protection Agency's recent rules governing the concentration of arsenic in drinking water promulgated under the Safe Drinking Water Act.¹⁸⁵ One study critiqued the final rule, alleging that the regulator was insufficiently attentive to technical economic and scientific concerns.¹⁸⁶ Another scholarly commentator defended the rule, suggesting it was not the product of shoddy analysis but instead the result of legitimate judgment calls.¹⁸⁷ According to this commentator, the agency issued a reasonable rule reflecting a legitimate interpretation of conflicting data from wage-premium studies¹⁸⁸ and attention to the need for an adequate margin of safety.¹⁸⁹ It is a separate question to ask whether the larger public would care or understand the debate between the two positions described above – a question I take up below – but the disagreement is obviously not just about science. It is about the type of inference to draw from an imperfect wage-premium study, and even more so about whether there is a need

WILSON, *supra* note ___, at 330.

¹⁸⁵ Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (2000).

¹⁸⁶ See Jason K. Burnett & Robert W. Hahn, *EPA's Arsenic Rule: The Benefits of the Standard Do Not Justify the Costs* (2001), avail. at http://aei.brookings.org/admin/pdffiles/reg_analysis_01_02.pdf.

¹⁸⁷ See Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341 (2002).

¹⁸⁸ *Id.* at 2355. Professor McGarity writes:

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

¹⁸⁹ *Id.* at 2375. The article notes:

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

for an adequate margin of safety in a regulation designed to reduce a potentially dangerous concentration of arsenic.¹⁹⁰

I could go on, but the point should be clear. Precisely because regulations governing everything from guns to germs are so often written from exceedingly general statutory authority, the questions that need to be answered by regulators writing them are not purely technical, or purely anything. Of course agencies are expected to use rigorous analytical tools to weigh the risk of environmental, health-related, security, or occupational risks, depending on their mandate. What such analysis depends on are questions such as how to interpret an ambiguous statute (not just ambiguous facts), or how to make judgment calls about the value of particular outcomes (not just their probability). Unless one defines technical expertise or science in a way that explicitly includes political judgments, it is not plausible to treat all regulatory policy issues as being primarily about expert or scientific decisionmaking. Obviously expert decisionmaking has a role sculpting regulations about domestic security and financial privacy. And sometimes statutes appear to call almost exclusively for scientific and technical determinations.¹⁹¹ Regulatory policy aims to affect complicated problems that are often not easily understood or explained. But the regulatory pluralism model seems to confuse two ideas. One is that regulatory decisions are primarily about expert judgment. The other is that view that most regulatory decisions involve contestable legal interpretations and policy judgments, both of which should be informed by technical and scientific expertise. There is a difference. In one approach the experts are assumed to be the ideal decisionmakers, and the rest of the regulatory process is meant only to assure they do not run amok with the public trust. In the other approach the experts are viewed as being in a secondary, albeit valuable, role.¹⁹² Amidst the pluralist orientation of current procedures of regulatory democracy and the nondelegation doctrine's implicit focus on technical and scientific expertise, something gets lost in the shuffle. What gets lost is the idea that statutory interpretation in the course of writing regulations involves value choices as much as technical and scientific knowledge.

ii. Assumption # 2: The Public Lacks Interest

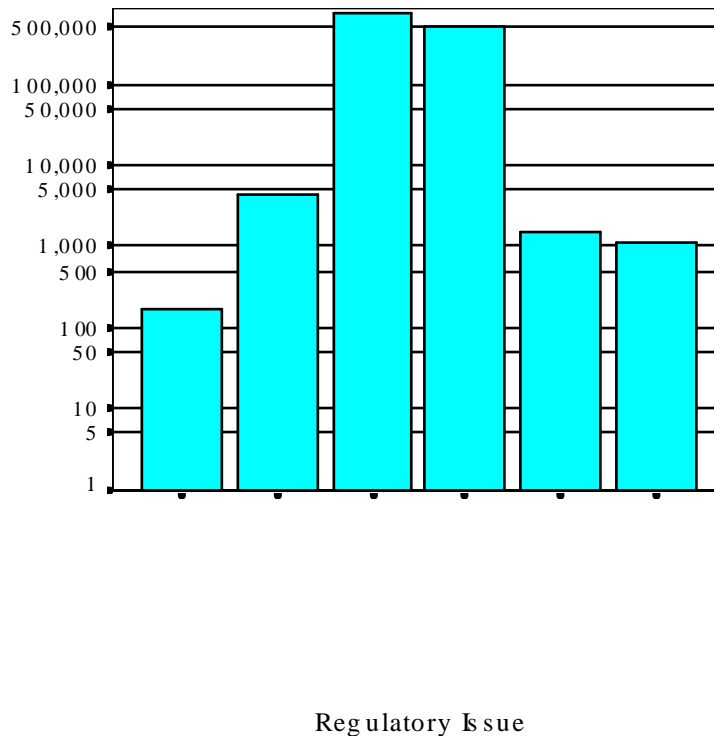
¹⁹⁰ I am not suggesting that one can dispense with expert decisionmaking in determining (a) exactly what amounts to a "dangerous concentration" of arsenic, (b) evaluating the consequences of various methods of arriving at that concentration, or (c) estimating the economic cost of those methods. The point is these tasks do not exhaust the work that needs to be done to turn an ambiguous statutory command into a regulatory rule.

¹⁹¹ See, e.g., *See Whitman v. American Trucking Associations*, 531 U.S. 457, 472-73 (2001) (hereinafter "American Trucking") (interpreting the Clean Air Act to require exclusively a technical determination of what constitutes an adequate air quality standard to protect "public health").

¹⁹² Thus, adherents to the second approach are not surprised to find that agency administrators are rarely apolitical technical experts.

It is received wisdom that individual members of the public tend to have little interest in regulatory policy.¹⁹³ But the three regulatory case studies show that individual members of the public routinely participate, often sending in the vast majority of the comments, producing both form letters and distinctive contributions, and in all the three case studies raising concerns that were appropriate for the agency to consider given its legal mandate. Even when form letters are excluded, individual comments from the lay public accounted for upwards of 70% of all comments received on two out of the three regulations I analyzed.¹⁹⁴ While not all regulations draw such public participation, many do. As Figure 4 shows, many regulations inspire considerably greater participation from the public than the cases I studied here.

Figure 4
Different Rates of Participation in Regulatory Rulemaking Proceedings



¹⁹³ See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 42-51 (1993) (suggesting the public lacks interest in understanding complex risk-related regulatory issues). See also Rubin, *supra* note __, at 725 (“The problem, as stated, is that direct democracy is quite foreign to representative government and is virtually the antithesis of the modern administrative state”).

¹⁹⁴ Comments from individual members of the public (excluding form letters) accounted for 74% of comments on the financial privacy regulations, and about 80% of the comments on the nuclear licensing regulations. For the total percentage of comments (including form letters) see Table 4.

Participation through notice and comment or similar mechanisms may seem adequate or even superfluous if there is little interest in participation from the public. But it turns out that some segments of the lay public engage in spirited acts of participation. Members of the lay public make up the substantial majority of participants in notice and comment proceedings in the regulations I studied. As Figure 4 shows, a number of other regulations generate sufficient interest among the larger public to result in tens – and even hundreds – of thousands of comments.¹⁹⁵ Whatever one thinks about the source of these comments or the non-commenting public's apathy, it is simply inaccurate to suggest that individual members of the public harbor no interest in regulatory policy. Even under current procedures, the extent of that interest depends on the nature of the regulation, the interest group environment, and whether one gauges interest by comparing the percentage of comments that come from individual members of the lay public to comments that come from anywhere else.

A skeptical observer might question whether the interest shown by the hundreds or thousands of individual members of the lay public sending in comments is enough to support the conclusion that the larger public has a latent interest in regulatory policy. But interest is not some kind of fixed constant. The public's interest depends on the process through which they are queried. The motivation to understand an issue – like the motivation to get involved in political activity – can respond to changes in a person's environment. If forming an opinion on an issue seems costly and people believe there is little reason to do so, it is no mystery that people might not invest in being informed. Thus, a person planning to buy a car may not recognize that her vehicle's purchase price might be driven in part by the safety record of the plant where the cars are manufactured, because lower safety might raise the wage that a company needs to offer workers, and (assuming competition does not constrain the manufacturer) the extra labor costs might be passed on to the consumer. The preceding discussion sheds some light on how individuals' sophistication react to the environment, which can help break the cycle where limited information contributes to lack of interest. Regardless of whether the interest perceived is entirely self-regarding or not,¹⁹⁶ people who overcome their lack of time or attention¹⁹⁷ and participate are likely to be those who see specific value in such

¹⁹⁵ Sources on file with author. Obviously, rarely do members of the mass public find out about regulations from poring over the dense pages of the Federal Register. The public appears to find out about the regulations in several ways: (a) from interest groups of which they are members, (b) from media coverage combined with searching for information on the Internet, (c) and from educated opinion leaders in their social networks.

¹⁹⁶ See Verba, Schlozman, and Brady, *supra* note ___, at 529 (“In discussing the reasons they became active, participants make clear... that they think of themselves as acting for the common good.”).

¹⁹⁷ See *id.*, at 129 (surveying the public to assess the determinants of political activity, and finding those not active gave the following among the major reasons for not getting involved: lack of time, 39%; prioritizing family over the welfare of the polity, 34%; irrelevance of politics to “important things in... life,” 20%).

activity. There is no good reason to think that perception of value will be fixed rather than dynamic.

A contrary view would suggest that interests are more rigid, and in particular, that they are driven largely by financial and economic factors.¹⁹⁸ This view would emphasize the idea that when people have financial stakes in the outcome of a regulation (as do the banks in the case of Section 314 or the manufacturers of equipment for nuclear power plants), they will exhibit an interest in the outcome. Yet the reality is that people make decisions on the basis of more than just their own material interests. They also care about how other people in the polity are doing.¹⁹⁹ And when they are concerned about their own situation, the concerns are not only about financial or economic status.²⁰⁰ This helps explain why dozens of individuals wrote to comment on the Section 314 regulations. Nonetheless, interest in politics is rarely enough to make someone participate in political activity – time, money, and skills have also have a large effect.²⁰¹

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

¹⁹⁸ See Michael Lewis-Beck, *Pocketbook Voting in U.S. National Election Studies: Fact or Artifact?*, 29 AM. J. POLI. SCI. 348, 349 (1985) (reviewing survey research indicating that financial and economic self-interest appears to exert a strong effect in the voting decisions of a significant proportion of the American presidential electorate, and critiquing the methodology of studies arguing that such findings are largely artifactual).

¹⁹⁹ See, e.g., Donald Kinder & D. Roderick Kiewit, *Sociotropic Politics*, 11 BRITISH J. POLI. SCI. 129 (1981) (political attitudes not driven by views of personal material gain but by, among other things, conceptions of what would advance overall economic well-being). Any framework that views political activity in terms of rational, goal-seeking behavior must still accept that it's not just narrow material interest that makes people do things.

²⁰⁰ See generally Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

²⁰¹ See, e.g., Henry E. Brady, Sidney Verba, & Kay Lehman Schlozman, *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 285 (1995) (developing and finding empirical support in cross-sectional studies of survey research for a model of political participation where interest in politics is not enough to explain political participation, and instead "[t]he resources of time, money, and skills are also powerful predictors of political participation in America").

individuals' sophistication and interest. In short, because participation is more widespread than commonly thought and interest is itself endogenous, it would be simply wrong to conclude that the public is not interested in regulatory policy.

iii. Assumption # 3: Interest Groups Provide Effective Representation

Organized interests basically raise the same kinds of concerns that members of the public would raise, though perhaps in a more sophisticated way.²⁰² Or do they? Accepted as this view is, my case studies show something different. Some of the case studies show the public raising concerns that are quite different from those raised by organized interests. Agencies often get a lot of form letters. But far from confirming that individual public participation can be reliably equated with organized interest group representation, the form letters showcase some limitations of relying on organized interests. Leaders of interest groups are always likely to have subtly different agendas from those of their members -- even those agreeing to send in form letters.

This result may subtly undermine some versions of compromise acceptance. After all, the greater one's faith in what can be achieved through interest group representation and competition, the more the status quo looks desirable. Committed supporters who idealize representative democracy through politicians and interest groups have considerable amounts of such faith. For those less sanguine about the status quo, acceptance of current regulatory democracy would be easier if interest groups made sophisticated arguments through the notice & comment process covering all or most of the sorts of concerns that a fair-minded external observer would consider important to the development of the regulation (and consistent with any relevant statutory mandates). This is not always the case: (a) on financial privacy, no interest groups developed sophisticated arguments about privacy, which is all but impossible to exclude as a relevant consideration on principled normative grounds or on the basis of what the statute allows the agency to consider. The few other studies on regulatory participation show this is not rare. Kerwin finds that about 15% of rules get no comments at all,²⁰³ and Martino Golden finds that public advocacy organizations fail to participate at all. This means the relative absence of public advocacy groups concerned about the policy implications of the regulations which was so stark in the Section 314 regulations is not an aberration. Even where interest groups participate extensively, their positions are likely to be subtly different from those of their members, and certainly different from those of individuals in the larger public who don't even participate through the proxy of some interest group. (b) In all case studies, the concerns raised by members of the lay public were far from irrelevant in a deeper sense: they go to the heart of what the

²⁰² See Schuck, *supra* note __, at __. See also Dahl, *supra* note __, at __.

²⁰³ See Kerwin, *supra* note __, at __.

agencies tend to claim they want to consider – the larger macro-level impact of the regulation.

iv. Assumption # 4: Demand-Driven Procedures Already Provide Diverse Public Perspectives

Is there really a problem with participation under the status quo, given the considerable number of individuals from the public who actually *do* participate in regulatory proceedings? It's true the public sometimes evinces a considerable demand for taking part in regulatory proceedings by sending in hundreds, thousands, or hundreds of thousands of comments to regulatory agencies. But participating members of the public almost certainly don't reflect the distribution of public opinion (either the public's superficial reactions or some more considered judgment). There is, of course, no certain way of telling whether participating members of the public actually reflect something close to the distribution of public opinion on a particular regulatory issue unless one used a reasonable method to sample the larger public's opinion. But the case studies show considerable clustering in the concerns raised by the public, and related public opinion surveys suggest some of the electorate would have differing views. At the same time, some segments of the public are likely to think of commenting as a high-opportunity cost activity with little return, so their views wouldn't be represented. Nor is the participating public (in the regulatory case studies) raising the full range of plausible political and economic concerns that individual members of the public would have.

Notice what this means for compromise acceptance. If people are inclined toward compromise acceptance but take democratic theory seriously, it would be nice if the notice and comment process at least produced a range of comments from individual laypeople representing a broad array of perspectives from the public.²⁰⁴ Nonetheless, just as interest group comments may not represent the full range of public perspectives on regulatory policy issues, neither do the public comments actually received in my three case studies. While these comments are a valuable indication of certain public concerns that are hard to ignore, they are distorted by the fact that not everyone has an incentive to participate. This is why the jury system requires incentives (negative and positive) for mass participation, and the same is required here.

v. Assumption # 5: Sophistication Deficits Have No Effect

In 1971, Lee C. White, the former chairman of the Federal Power Commission, shared the following parable about regulators' relationship to the people and entities they regulate:

²⁰⁴ Cf. Ian Shapiro, *Elements of Democratic Justice*, 24 POL. THEORY 579 (1996).

A successful lawyer in Keokuk is appointed by the President to serve on an independent regulatory agency or as an assistant secretary of an executive department that exercises regulatory functions. A round of parties and neighborly acclaim surround the new appointee's departure from Keokuk. After the goodbyes, he arrived in Washington and assumes his rule as a regulator, believing that he is really a pretty important guy. After all, he almost got elected to Congress from Iowa. But after a few weeks in Washington, he realizes that nobody has ever heard of him or cares much what he does – except one group of very personable, reasonable, knowledgeable, delightful human beings who recognize his true worth. These friendly fellows – all lawyers and officials of the special interests that the agency deals with – provide him with information, views, and most important, love and affection. Except they bite hard when our regulator doesn't follow the light of their wisdom.²⁰⁵

White's parable helps illustrate the sort of compelling logic bolstering a simple idea coloring many accounts of regulatory agency behavior: that agencies are held tightly in the thrall of the organized interests they are supposed to regulate. This "capture" idea, in turn, lends credence to the view that not much would change if regulatory democracy were reformed to help members of the public articulate their views to the agency in a more sophisticated fashion. The last thing in the world one would expect a "captured" agency to do is pay attention to commenter suggestions on the basis of how sophisticated the comments are, rather than from who they come from.²⁰⁶

Why indeed would anyone believe that a comment's sophistication would lead the agency to take it more seriously? As a theoretical matter, it's doubtful the agency just wouldn't care about sophistication. A more sophisticated comment, drawing (for example) clear distinctions between what the statute requires and what the commenter believes the regulation should achieve, or providing background empirical or legal analysis, might be more informative to an agency. The paragraphs and phrases of such a comment might make it easier for agency

²⁰⁵ Remarks of Lee C. White, Brookings Institute Conf. on Administrative Regulation, Apr. 8, 1971, *quoted in* Cramton, *supra* note ___, at 530 n.14.

²⁰⁶ Indeed, some scholars question whether agencies would pay much attention to any comments at all. Over a decade ago Don Elliott colorfully observed that "Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions – a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."). E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992). What's striking about this observation is how sharply at odds it is with the data I here present, for at least two reasons. (1) The agencies responsible for each of the three regulations made a considerable number of changes in their regulations apparently in response to the notice and comment process (and claimed to do so in response to comments in the Federal Register statements accompanying the final rules). (2) The individual members of the public making up the vast majority of commenters for each regulation did not have a parallel setting where they could have raised their concerns directly to the agency.

lawyers to assimilate and consider. Indeed, some lawyers interviewed for this article specifically say that they do.²⁰⁷ My data support this view. They provide at least some initial quantitative evidence that sophistication may affect the agency's willingness to make a change in the regulatory rules in response to comments (financial privacy, and maybe electoral regulation).

Let me elaborate. Think about the people who *do* choose to participate in notice and comment proceedings by sending in a comment. For those lawyers and commentators inclined to compromise acceptance and seeking to take democratic theory seriously, there would be some cause for concern if the people who sought to participate had dramatically different degrees of sophistication to make their points. Such concern would be based on (a) the plausible intuition that differences in sophistication (in addition to differences in political power) might affect agency reactions to comments, and (b) the notion that differences in sophistication do not parallel distinctions in the strength of the normative claim someone has to participation in the development of regulatory policy. In fact, as Table 5 shows, when examining a pooled dataset of all comments across regulations, sophistication appears to predict whether the agency adopted commenter suggestions. The sophistication variable is highly statistically significant even when we control for whether the comment is coming from an entity regulated by the agency.²⁰⁸ I use logistic regression to calculate the extent to which the probability of the agency's accepting recommendations in a comment can be predicted from comment sophistication. As a rough proxy of the commenter's political and economic influence, control for whether the commenter is among those who are the most direct targets of regulation. Other things being equal, a one unit increase in sophistication would lead to a Y increase in the odds that a commenter's suggestion would be incorporated by the agency.

At the margin, it would be easier to accept the status quo (for people with the above-described beliefs) if it turned out that participants in the notice and comment process all had similar degrees of sophistication to make their arguments. It turns out that's not the case, as I demonstrate in three regulatory case studies. The lay public tends to have lower sophistication than

²⁰⁷ See NRC Lawyer Interview, FEC Lawyer Interview # 1, FEC Lawyer Interview # 2, Treasury Lawyer Interview # 1, Treasury Lawyer Interview # 2, FCC Lawyer Interview.

²⁰⁸ I used ordinary binary logistic regression. This result is tentative because I'm sometimes dealing with small numbers of observations, which make it harder to include controls in the model. The appendix discusses other aspects of my methodology. I checked for robustness of these results in several ways. First, I conducted the same binary logistic regression analyses for each regulation separately and I found significant effects in each case (though may be a higher risk of a multicollinearity problem in the case of the campaign finance data). I also obtained some effect when using alternative control variables, such as those accounting for the substantive issue raised by a commenter's concern. Sophistication was also a significant predictor of agency acceptance of comment suggestions when examining only comments received from the lay public, from directly regulated entities, and from organized interest groups that were mass membership organizations, or groups asserting that they had a "public interest" goal.

organized interest groups, and even people among the lay public vary in their sophistication.

Three plausible theories help explain sophistication's apparent impact here. As some of them claim, agency lawyers may be willing (or even eager) to respond to commenter concerns, but have a limited budget of time and energy to respond to commenters that raise an identifiable concern without recommending an explicit, credible means of addressing that concern.²⁰⁹ Agencies could also be viewing sophistication as a proxy for litigation risk, either because sophisticated commenters are considered more likely to be capable of initiating litigation themselves, or because more sophisticated comments might draw closer scrutiny from courts reviewing the agency's action and its justifications.²¹⁰ Finally, the more sophisticated commenters may think about the regulations in a fundamentally different way, which might affect not only how they appeal to the agency but what their appeal requests on a substantive or procedural level. Possible though it is for new information or assistance in understanding law to have such a deeper transformative effect, it's not necessarily all that different from convincing a commentator to be strategic.²¹¹ In the Conclusion, I propose further research to assess these different theories.

Of course, many facets of life in a democracy reflect variations in sophistication, including (among others) participation in the mass media, speech-making, and jury service. Who knows whether it's possible or even desirable to redress these. My immediate purpose is to emphasize that compromise acceptance of the regulatory democracy status quo should not rest on the notion that individual members of the public and organized interests deciding to participate in the notice and comment process have comparable ability to get their point across to the agency. Nor should it rest on the notion that such ability is irrelevant to what agencies do with regulations at the end of the day.

²⁰⁹ There's nothing implausible about suggesting that government officials' need to make cognitive or analytical efforts might have distributional consequences on what government institutions do. Cf. KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991). It may seem somewhat less plausible to think that agency lawyers and staff would have an interest in giving effect to commenter recommendations. Nonetheless, in my interviews with agency lawyers who worked on these regulations, many insisted their major roadblock to considering individual comments is that they raise a concern but don't offer concrete recommendations to resolve that concern. See Interview with FEC Lawyer # 1, Interview with FEC Lawyer # 2; Interview with NRC Lawyer. These responses, in turn, are consistent with accounts suggesting that lawyers and agency staff have interests other than just minimizing the distance between agency policy and their own preferred outcomes, or that they believe that more sophisticated comments can sometimes raise concerns (or offer insights) that can result in Pareto improvements to the regulation.

²¹⁰ See *Overton Park*, __ U.S. at __.

²¹¹ Indeed, if there were some way to increase an individual commenter's sophistication, she might not necessarily change her views about the value of oral hearings in nuclear licensing or the offensive nature of reductions in financial privacy. What she might be willing to do is to recommend a mild change moving the regulation in her preferred direction if the agency would therefore consider the proposed change more seriously.

Table 5
Logistic Regression Predicting Comment Acceptance From Sophistication and Status as a Target of Regulation (All Three Regulations)

	<i>Total sophistication controlling for status as a regulated party</i>	<i>Adjusted sophistication controlling for status as a regulated party</i>	<i>Status as a regulated party</i>
Variables and Results			
<i>Constant</i>			
B	-9.223††	-5.57††	-4.409††
Std. Error	.611	.273	.178
Wald Stat.	227.5	.415	614.6
Odds ratio (Exp [B])	0	.004	.012
<i>Regulated Party</i>			
B	5.742††	5.228††	6.318††
Std. Error	.587	.502	.419
Wald Stat.	95.6	108.6	227.9
Odds ratio (Exp [B])	311.8	186.3	.554.7
<i>Total Sophistication (qualitative)</i>			
B	2.124	-	-
Std. Error	.185	-	-
Wald Stat.	131.6	-	-
Odds ratio (Exp [B])	8.362	-	-
<i>Adjusted Sophistication (qualitative x comment length)</i>			
B	-	.478††	-
Std. Error	-	.055	-
Wald Stat.	-	76.78	-
Odds ratio (Exp [B])	-	1.613	-
Model Summary			
-2 Log Likelihood	222.5	270.7	394.2
Cox & Snell R-Squared	.18	.166	.127
Nagelkerke R-Squared			

	.737	.677	.519
Models specified (and coefficients calculated) using ordinary binary logistic (logit) regression procedures. A “*” denotes significance at the .25 level, “**” at the .15 level, “***” at the .05 level, “†” at the .01 level, and “††” at the .001 level. Though significance tests provide a basis for probabilistic inference in statistical samples, they also shed light on the likely importance of statistical relationships in populations.			

vi. *Assumption # 6: A Fixed Public Dearth of Sophistication*

Questions of regulatory policy often turn on insights gleaned from rigorous risk analysis, complex technical information, or nuanced legal distinctions, where someone competent considers the extent to which a regulation might achieve a particular benefit given a certain cost. Yet laypeople have difficulty understanding information about probabilities. Some commentators have argued for insulating administrative agencies from political and public interference on this basis.²¹² Such a view might further bolster compromise acceptance of our current regulatory democracy, given a perception that the public's too unsophisticated to think about technical regulatory policy.

Yet this claim also turns out to be unavailing. There are, first of all, multiple publics -- some of whom routinely display sophistication (and we can see that from the comments).²¹³ Unaffiliated experts, for example, are likely to have

²¹² See Sunstein, *Risk & Reason*, *supra* note 3, at ____; CASS R. SUNSTEIN, THE COST-BENEFIT STATE 139 (2002)(defending default rules giving agencies wide latitude to conduct-cost benefit analysis even when the legislature has not explicitly allowed it, in order to “increase the rationality and sense of regulatory policy”).

²¹³ If there were simply an unadulterated “public will” existing in the abstract, it would be easy to evaluate a preference aggregation scheme by comparing the result of the scheme to the preexisting public will. But that is not possible. Moreover, to the extent that some mechanism appears to get closer to this ideal through direct democracy, this does not necessarily make the resulting system “better.” A recent case highlights some of the possible drawbacks of simply incorporating a referendum into the administrative process. In 1995, the Buckeye Community Hope Foundation purchased land zoned for apartments in the City of Cuyahoga Falls, Ohio and set out to build Pleasant Meadows, an affordable housing complex. See *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, avail. at 2003 WL 1477301 (2003). Using low-income tax credits, the Buckeye Community Hope Foundation (Buckeye) obtained financing, bought some land zoned for apartments – and then ran into a problem. As the plan wound its way through the small city’s Planning Commission and City Council, a vocal group of city residents coalesced to oppose Pleasant Meadows. They complained to the Planning Commission, which imposed various conditions on the project, including that Buckeye build an earthen wall around the whole project. Buckeye agreed, and the Planning Commission unanimously approved the project, recommending it to the City Council.

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

plenty of sophistication about a regulation under discussion, whether it involves fishing rights in the Pacific Northwest or financial transaction recordkeeping requirements. Perhaps more significantly, sophistication is endogenous to how one gets participation -- even for members that are less competent to begin with.

It would make little sense to involve members of the public in risk analysis or cost evaluation if people were irrevocably unwilling or unable to understand the subtleties involved. But the fact that people use mental short-cuts does not necessarily imply that different approaches to public engagement are incompatible with reasoned decision-making about risk. Sometimes heuristics may represent a reasonable way for people to economize on decision costs.²¹⁴ Of course, heuristics sometimes lead people astray. For example, people often have trouble evaluating risk²¹⁵ – and much of regulatory policy involves heavy doses of risk analysis.

But this observation merits a few answers. First, people do not always ignore probability information.²¹⁶ Second, regulation is not entirely about risk.

Pleasant Meadows, its opponents filed a petition pursuant to local law requesting that the ordinance approving Pleasant Meadows be submitted to a popular vote, which the City allowed voters the “power to approve or reject at the polls any ordinance or resolution passed by the Council” within 30 days of the ordinance’s passage). Cuyahoga Falls City Charter, Art. 9, § 2, App. 14. The petition led to a referendum, in which voters decisively rejected the prospect of Pleasant Meadows.

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

²¹⁴ See, e.g., LUPA & MCCUBBINS, *supra* note ___, at [REDACTED] (discussing how retrospective evaluations on key issues and other heuristics can help voters discipline politicians); Sniderman, *supra* note **Error! Bookmark not defined.**, at [REDACTED].

²¹⁵ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) at 3.

²¹⁶ See, e.g., Cass R. Sunstein, *Probability Neglect*, 112 YALE L.J. 61, 67-68 (2002). Sunstein writes:

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

Section 314, for example, also required the agency to make decisions about the extent of financial institutions' administrative costs, and degree of financial privacy protections that should exist given the absence of a constitutional right to such privacy.²¹⁷ Third, experts also have some problems dealing with risk: they sometimes neglect or overestimate considerable risks idiosyncratically or in as a result of how their professional task is defined.²¹⁸ This means that disparaging heuristics does not necessarily imply that experts should replace laypeople. It is no surprise that experts are often better at understanding risk and other complex concepts that affect regulation, but that understanding is itself not impervious to the impact of cognitive short-cuts. Fourth, people's failure to consider probabilities in a normatively defensible way can often be affected by the choice situation – which is just another application of the larger principle that sophistication is partly endogenous to the choice setting.²¹⁹ Fifth, some alternative approaches to public engagement could involve experts or other stakeholders who might be as sophisticated as the decisionmakers within the agency. Sixth, there is at least an open question whether some of the public's likely distortions in considering risk (i.e., the *dread* of dying one way versus another way) should affect the assessment of certain risks.²²⁰ The case studies show, moreover, that regulation is not just about risk analysis. It's hard to tell a story where decisions about how to interpret campaign finance laws or financial privacy concerns turn entirely (or even primarily) on risk, unless of course the concept of risk is stretched to the point that it loses all meaning.

Could the public gain the necessary sophistication to take part in all the subtleties of regulatory judgment? In fact the conventional wisdom is that most members of the public lack both the insight and coherence to play a useful role in informing regulatory policy.²²¹ Laypeople tend to experience the world by using heuristics that simplify the complexity of their environment.²²² Some of the problems people have in understanding risk are predictable, and so they can probably be corrected to some extent: in short, the mental short-cuts are not

²¹⁷ Moreover, there is a distinction between risk – involving situations where probabilities can be assigned – and uncertainty – where probabilities are not known. SEE JON ELSTER, EXPLAINING TECHNICAL CHANGE 185-207 (1983). While subjective probability estimates from experts are probably a great place to start in thinking about uncertainty, it may not be the only ingredient one would want to consider. Cf. McGarity, *supra* note ___, at ___.

²¹⁸ See, e.g., SCOTT SAGAN, THE LIMITS OF SAFETY 250-55 (1993) (discussing problems in expert estimates of nuclear weapons safety).

²¹⁹ See, e.g., HOWARD MARGOLIS, DEALING WITH RISK 91-92 (1996).

²²⁰ Put differently, it may be very difficult in principle (and not just because of heuristics people use) to separate the evaluation of dreaded risks from the act of calculating its risk by itself. This is admittedly questionable – but it is not obvious that such “dread” should always be rejected.

²²¹ See, e.g., Breyer, *supra* note ___, at ___. See also Rossi, *supra* note ___, at ___; Sunstein, *Risk and Reason*, *supra* note ___, at ___.

²²² See generally LUPIA & MCCUBBINS, *supra* note ___, at _____. See also Sniderman, *supra* note _____.
Error! Bookmark not defined..

unchangeable.²²³ Their use depends to some extent on the environment.²²⁴ If people experience a change of setting or motivation, they can change the mental short-cuts they use to make sense of a problem.²²⁵ People can probably display some additional sophistication and less reflexive reliance on a mental short-cuts if they think their opinion matters and they have access to more information.²²⁶ In contrast, public opinion polls only provide a momentary snapshot of what people think; providing people with information, and allowing them to think about it or deliberate, can result in something more meaningful.²²⁷

What all this implies is that individuals' sophistication could be catalyzed enough to understand complicated regulations. This observation is consistent with the preceding discussion of democratic accountability in the administrative pluralism model of public engagement. Even the seemingly ridiculous comments about the public financing rules or the financial privacy rules pursuant to Section 314 of the Patriot Act cannot be dismissed completely, because a different process might evoke more sophisticated responses from these very same commenters. This might be achieved for two different reasons: (1) a different process (i.e., explicitly putting risk profiles "on screen") could inform the participants in some regulatory proceeding about what is at stake, and correct some of the limitations of the mental short-cuts they might be using; (2) signaling to someone that their opinion matters might give them incentives to become informed and analyze information on their own.²²⁸

²²³ See, e.g., PAUL SLOVIC, *THE PERCEPTION OF RISK* 190 (2000). Slovic reviews experimental evidence on perceptions of risk and concludes that "an accident that takes many lives may produce relatively little social disturbance... if it occurs as part of a familiar and well-understood system (e.g., a train wreck). However, a small accident in an unfamiliar system..., such as a nuclear reactor or a recombinant DNA laboratory, may have immense social consequences if it is perceived as a harbinger of further and possibly catastrophic mishaps.").

²²⁴ See, e.g., James P. Morris et al., *Activation of Political Attitudes: A Psychophysiological Examination of the Hot Cognition Hypothesis*, 24 POL. PSYCH. 727 (2003)(affectively charged political stimulus can affect evaluations of information).

²²⁵ See Sunstein, *Risk and Reason*, *supra* note ___, at 265 (describing how risk communication studies successfully informed the redesign of EPA information).

²²⁶ See *supra* note ___, at ___ (discussing research showing how changes in the setting can provoke people to use more sophisticated cognition to understand a complex problem).

²²⁷ An entire research program in political science at one point seemed to indicate that public's views were suffused with attitudes that had little if any coherence. See Helmut Norpoth & Milton Lodge, *The Difference Between Attitudes and Nonattitudes in the Mass Public: Just Measurement?* 29 AM. J. POLI. SCI. 291 (1985) (noting that instability in responses to political attitude surveys is partly explained by "nonattitudes," where respondents provide an opinion indicating that they have a particular attitude about an issue when they may not).. See also Luskin, *supra* note ___, at _____. This research program, coupled with the inconsistencies and shortcomings in responses revealed by regular public opinion polls, makes some people question whether the public can ever make a useful direct contribution to choices in policymaking.

²²⁸ Both theories of rational choice and theories of social cognition imply that it makes a difference to convince participants that their opinion matters. For a rational choice perspective, see Morris P. Fiorina, *A Dark Side of Civic Engagement* in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 395, 418 (Theda Skocpol and Morris Fiorina, eds. 1999). Fiorina models the decision to participate as

D. Synthesis: Reassessing Current Regulatory Democracy

My data show that at least some members of the public are at least somewhat interested in playing a role in shaping regulation. Democratic theory implies that these and other members of the public should play a role in shaping regulations that will affect them at least as much as the statutes passed by representatives they have directly elected. Reasonable versions of democratic theory also show the problems with the existing notice and comment process. Because the public's interest in regulations and their ability to understand them is not fixed, then problems might be mitigated through procedures that catalyze public imagination and capacity.

But even if someone wanted to change the status quo, would it be feasible to do so? For some people who believe in compromise acceptance, the status quo may be reasonable not only because of empirical suppositions that make it seem valuable, but also because there's no feasible alternative. Some people might even readily acknowledge that current regulatory democracy is not an ideal way of making regulatory policy, but may not believe the status quo can be feasibly resolved. For example, some might emphasize that if there's no way to promote higher sophistication among the public, more participation means lower-quality decisionmaking.²²⁹ Others might suggest that no changes are feasible because agencies cannot be trusted to expand participation impartially. The following section engages these arguments by asking how we might plausibly design a feasible institutional structure to let members of the public more directly contribute to the regulatory decisions that shape their lives.

IV. REDESIGNING REGULATORY DEMOCRACY

Modern government makes it easier for some people to voice their concerns than for others. Because the "public will" is self-evident, democracy

a function of the individual's expected utility of participating (call this E_p), which is in turn a function of the probability the individual's action is decisive for the outcome (call this p), the individual's assessment of the alternative compared to the status quo (B), and the costs of participating (c). Thus $E_p = p(B) - c$. Holding B and c constant, raising p results in a larger E_p , which gives an individual a greater reason to participate. For a social cognition perspective on the impact of convincing a participant that their voice matters, see Norman Frohlich and Joe A. Oppenheimer, *Choosing Justice in Experimental Democracies with Production*, 84 AM. POLI. SCI. REV. 461 (1990) (using experiments to show expanded productivity and effort among individuals given a chance to participate in decision about social rules).

²²⁹ See, e.g., Ortiz, *supra* note ____ at 211 ("[T]here is some tradeoff between the quantity and quality of individual political engagement")

requires that views must be aggregated somehow. It is the scheme chosen to do that – whether some kind of direct democracy, voting in geographic districts, or the notice-and-comment process – which determines the content of what counts as public’s will.²³⁰

More than 30 years ago a small group of scholars and policymakers writing about administrative law recognized this basic point and used it to buttress their case for reforming regulatory democracy to respond to silent voices. “An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people,” wrote law professor Arthur Bonfield in 1969.²³¹ While “the ample personal economic resources and relatively well-financed organizations of middle and upper income Americans usually assure their particular interests adequate representation in federal administrative rulemaking,” he continued, “under-privileged persons are usually unable to keep themselves adequately informed of...rulemaking authority affecting their interests.”²³² Three years later, U.S. Administrative Conference Chairman Roger Cramton added that:

²³⁰ The preference-aggregation mechanism (or “institutions”) can impact the derivation of the public’s “will” in at least two different ways: most directly (and obviously), institutions determine how preferences are counted up. *See, e.g.,* Sam Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981). *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, *THE LAW OF DEMOCRACY* (2d ed. 2001). But institutions can also shape how people develop preferences over time. *See, e.g.* Cass R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 17 (1997). Sunstein aptly describes why taking preferences “as a given” seems to ignore the fact that preferences are always constructed according to the context:

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

²³¹ *See* Bonfield, *supra* note ___, at 512.

²³² *Id.* at 511. Bonfield provided no empirical evidence to support this proposition. But subsequent studies of income effects on political participation support his intuition. In their comprehensive volume on the social and economic characteristics of political participation in the U.S., Verba, Schlozman, and Brady find (unsurprisingly) that family income is a statistically significant predictor of overall political participation (measured in as an aggregate function encompassing voting, working on a campaign, and other forms of political activity). *See* Verba, Schlozman, and Brady, *supra* note ___, at 352. Comparisons in specific political activity between higher income voters (earning \$75,000 a year or more) and lower income ones (earning \$15,000) are a bit more striking: while only 52% of lower income individuals surveyed voted in the last election, 86% of higher-income ones did. Fully 73% of higher income individuals in the sample were affiliated with a political organization, while only 29% of lower income ones were, and while 56% of higher income respondents made campaign contributions, 6% of lower income ones did. *Id.* at 190.

Those who believe that it is important, within limits that are bounded by considerations of agency effectiveness and efficiency, to improve the administrative process by broadening public participation have a special obligation to develop institutions that will do the job without crippling the administrative process.²³³

Unfortunately, this brief episode of interest in reforming regulatory democracy was rarely if ever accompanied by compelling theoretical justifications or detailed institutional designs to meet charges such as Cramton's. Neither was it followed by a sustained move within government towards "experimentation" with alternative methods of regulatory democracy that could provide insights to "serve as the basis for more general reform."²³⁴

This Part takes up Cramton's charge. It scrutinizes the argument that "feasibility problems" preclude the implementation of any reasonable alternatives to current regulatory democracy. I find that argument wanting. I use an extended thought experiment to sketch the broad outlines of alternative procedures for public consultation that could either assist in representing relevant interests or foster majoritarian deliberation. Both of those approaches could be achieved through the creation of a participation agency to select and inform small groups of participants about the relevant regulation. The agency could deploy regulatory "public defenders" to give such groups legal representation in the regulatory rulemaking process. The financial and administrative costs are reasonable, particularly given that participants would not have a veto over regulations and the financial could be scaled by initially focusing only on particularly important regulations. This arrangement could also yield a number of practical benefits. The work of the participation agency would rapidly generate knowledge about how to structure public consultation that might be relevant beyond the domain of federal regulation. It could spur innovation in the development of methods to integrate public perception with rigorous analyses of risks and costs. The alternative procedures I sketch here could also greatly enrich agencies' knowledge of how the public responds to regulations under changing circumstances, a benefit particularly important where the viability of regulations (such as the speed limit or campaign finance restrictions) depend in some important measure on mass public compliance.

A. Two Alternative Approaches to Regulatory Democracy: Corrective Interest Representation and Majoritarian Deliberation

While respondents feeling "no financial pinch" engaged in a mean number of 2.3 political acts during the previous year, recipients receiving food stamps engaged in .9 political acts. *Id.* at 209.

²³³ See Cramton, *supra* note __, at 546.

²³⁴ *Id.* But see Part II.a (briefly discussing limited efforts in government agencies during the late 1970s to broaden participation, most of which were abandoned).

There's no way to move beyond current regulatory democracy (or even to judge whether such a move is advisable) without addressing the persistent view that no viable changes are practically feasible. Though I dismiss most of the "feasibility" problems in the pages that follow, it's best to start by proposing a reasonable definition of feasibility. It would be hard to accept such a definition if it did not include some of the following elements. Any mechanism for consulting the public should not dramatically raise the financial cost of developing regulations. Neither should it disrupt the regulatory state's existing capacity to analyze complicated technical and scientific information.²³⁵ A feasible alternative, moreover, should incorporate some way to mitigate the drawbacks associated with most versions of direct democracy, where apparently unsophisticated voters do little to enrich the policymaking process.²³⁶ Finally, reforms in regulatory democracy should not weigh down the regulatory process by just adding veto players.²³⁷

The proposals that follow live up to this definition. They also compare favorably to reforms that keep demand-driven procedures but rely on the Internet to achieve ambitious goals,²³⁸ or those that simply allow an agency writing regulations to pick and fund intervention from outside representatives of the larger public.²³⁹ They take advantage of the regulatory state's existing institutions

²³⁵ Cf. Sunstein, *Risk and Reason*, *supra* note ___, at ___ ("[A] well-functioning democracy seeks above all to produce policies that will, in fact, improve people's lives... The task for the future is to develop institutions that will respond to people's values, not to their errors.").

²³⁶ Cf. Ortiz, *supra* note ___, at 215 ("The problem is that the voters do not have an adequate incentive to listen. This is, in other words, largely a demand, not a supply problem and subsidies and penalties directed at merely showing up [and voting] will do little to fix it"). In taking this position, Ortiz seems to neglect the extent to which effort and engagement are endogenously determined by the process through which individual views are solicited in the first place.

²³⁷ Cf. Thomas O. McGarity, *The Court and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

²³⁸ See GAO, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved*, REP'T TO THE COMM. ON GOVT. AFFAIRS, U.S. SENATE (avail. at <http://www.gao.gov/new.items/d03901.pdf>) (Sept. 17, 2003). Of course the Internet and other technologies can enhance various features of my proposed regulatory reforms, but it is not (by itself) some magical fix for issues involving regulatory democracy.

²³⁹ Some of the problems with this approach are underscored nicely by a study conducted over 20 years ago of the Federal Trade Commission's experience with a program designed to fund public participation in agency proceedings. See Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L. REV. 51 (1981). Boyer notes the agency's problem in finding a principled rationale to pick certain representatives of consumer interests over others. He then turns to how lodging responsibility for the program within the FTC itself inexorably entangled the participation program in controversies about the agency's overall regulatory agenda. He notes:

The agency's activism had provoked powerful opposition and most of its activities were regarded with suspicion, if not hostility. The agency's aggressive use of its rulemaking powers during the period studied also tended to make the compensation program less necessary, and its accomplishments less visible than they otherwise might have been. If

without disrupting the capacity of analysts, economists, scientists, and lawyers to develop sophisticated technical analyses of regulatory programs. The costs are manageable when compared to other costs borne in the development of regulations, such as economic analysis or enforcement costs. Moreover, the costs are scalable, so if only scarce resources are available the techniques I describe could be used to focus on particularly important regulations.²⁴⁰ Regardless of whether the proposals end up applying to only a small subset of regulations at first or to most of them, my proposals don't simply add veto players that would further paralyze the regulatory process. Instead they add to the rulemaking record that can be used by agencies to support regulations and by courts to review agencies' work. Most crucially, these approaches solve the problems associated with the more quotidian versions of direct democracy by obtaining a manageable number of participants who can be coaxed toward thinking about regulatory problems in a more sophisticated way.

i. Corrective Interest Representation

Suppose one believes that people should take part in regulatory decisions when they will be materially affected. This is not an unreasonable premise in the regulatory state. Practices like negotiated rulemaking occasionally involve agencies in figuring out *who* might be affected by a particular rulemaking proceeding.²⁴¹ Through negotiated rulemaking, the agency determines who might be interested in participating in the rulemaking proceeding in order to reach an early consensus on the proposed rule. But the point of negotiated rulemaking is not explicitly to identify people or constituencies who might have a particular interest and yet run the risk of being unrepresented. Instead, the major purpose of negotiated rulemaking is to enhance rules, reduce litigation, and shorten the rulemaking process by providing a mechanism for consensus rulemaking proposals.²⁴²

direct funding is intended to counterbalance the persuasive powers of the regulated industry, it was hardly desirable to test the concept in an agency like the FTC, where the chairman admitted publicly that staff attorneys had conducted anti-business "vendettas" in rulemaking proceedings. The FTC of the 1970s, in many respects, was a particularly unfortunate time and place to experiment with direct funding for public participation. Beyond the unhappy circumstances in which the agency compensation program developed, however, was the underlying dilemma involved in striking an acceptable trade off between participants' technical competence and grassroots participation.

Id., at 140 (citations omitted).

²⁴⁰ OMB already draws some distinctions in the "importance" of regulations, and additional methods could be developed to distinguish among them.

²⁴¹ See generally Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens in Public Decisions*, 60 MONT. L. REV. 499 (1999).

²⁴² Note that negotiated rulemaking does not always seem to live up to its expectations. See, e.g., Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*, 9 N.Y.U. ENV'T L. REV. 386 (2001).

Imagine extending just one aspect of the agency's mandate during a negotiated rulemaking procedure, identifying interests that are likely to be particularly affected by the regulation, and transferring this mandate to a specialized agency charged with selecting participants who will be affected by the regulation but are unlikely to speak up on their own. The goal here would not be to speed up the regulatory process but instead to do something that might seem to go in precisely the opposite direction: including people who will clearly be impacted by the regulation but may lack the sophistication to gracefully articulate their concerns, and giving those people a chance to constructively voice their interests. The process would involve at least three components: (1) selecting a "*corrective*" sample of people, (2) providing a setting in which they could *voice their concerns* in a way that corrects for deficiencies in sophistication (i.e., through assistance from counsel or a facilitator), and (3) devising a process through which an agency would be nudged to take seriously the *resulting opinions*. A lawyer from the agency or an independent agency might then be charged with advocating for the group's ideas.²⁴³

Imagine how this could work in the context of the financial privacy regulation I discussed above. The agency charged with issuing the regulations (i.e., Treasury), perhaps along with a separate specialized agency focused on public engagement (call it a *participation agency*),²⁴⁴ make an initial determination about who is likely to be particularly affected by the regulations but unlikely to represent themselves – including, among others, smaller banks and credit unions, bank employees, or legitimate customers particularly likely to be concerned about privacy. No doubt that it would be difficult to design a defensible system for choosing "who will be especially affected yet unlikely to adequately represent themselves."

The participation agency would break down the task into a few different pieces. One is to define the kinds of benefits and burdens that could be caused by the proposed regulation if it went into effect (i.e., privacy intrusions that could

²⁴³ The lawyer's responsibility would be to represent overall tendency of the deliberative group's conclusion. In the absence of consensus, the lawyer would highlight the group's majority position, with perhaps some brief additional attention to the views of any significant minority. All of this raises the question of how the agenda for the group's discussion will be set, how the materials and moderator for the discussion will be selected, and how the lawyer's incentives will be structured to foster faithful representation of the group's views. These are not always easy questions, but they can be solved. Jury deliberations, mock jury and focus group arrangements, deliberative polls, and experimental studies all shed some light on how to resolve the issue of agenda-setting, moderators, and materials. The lawyers' behavior can be addressed in part through employee selection and performance audits. The effectiveness of these procedures in enticing lawyers to faithfully represent the group's views still leaves the question of how executive branch officials, legislators, and interest groups affect the process. I deal with this in Part V, *infra*.

²⁴⁴ The separate agency can serve as an important repository of expertise – which is hardly irrelevant here and may shed important light on how to determine who is interested. A variation on this would make the centralized agency more specialized – focusing on the representation of people with particular kinds of interests, such as privacy concerns.

result in unauthorized disclosure, changes in the probability of being subjected to time-consuming, costly, or harrowing investigation, new tasks for financial institution employees). Another is to make some considered judgment about who among members of the general population may disproportionately bear the preceding benefits and costs.²⁴⁵ This phase of the process could result, for example, in a conclusion that recent immigrants from the Middle East who make small wire transfers would be especially likely to trigger scrutiny.²⁴⁶ Finally, once the agency has made this determination, it might consider whether the constituencies disproportionately affected are constructively represented in the process. This might include considering the sophistication (or even existence) of comments from some of the impacted constituencies. The agency would then select a small number of people in the “underrepresented” constituencies to take part in the rulemaking process.²⁴⁷

How exactly would the selected participants take part in the regulatory process? A mass of comments that do not even distinguish between the Patriot Act (let alone Section 314) and the regulations themselves would not be as useful as comments that acknowledge that Section 314 is the law of the land while providing specific suggestions of how to write the desired regulations. At least two possibilities are worth considering here. One is to provide people with a sort of deliberative forum. Some group of people numbering between 7 and 15 might be chosen to receive information, with the chance to deliberate.²⁴⁸ They would all

²⁴⁵ The methodology for making this determination could range from relying in part on a subsample of people who wrote in comments (admittedly an imperfect mechanism, but perhaps suitable for some issues) to computer simulations or good-faith estimates. In any case, the goal here would be to get a picture of how the regulation might operate in a world where the agency making use of it (in this case, an entity like the FBI) would be making discretionary decisions about its use.

²⁴⁶ Cf. Cuéllar, *supra* note ___, at ____.

²⁴⁷ The resulting assemblage of participations could not be called representative of the interests of the larger population. While the notion of the government deciding who to include as affected parties may strike some as troubling, it is not without precedent: government agencies often have a legal obligation to consider the implication of a regulatory rule on some relatively unrepresented constituency, like small business. See, e.g., Exec. Order 13272 (requiring agencies to consider the implications of their regulations on small businesses). It is not obvious that allowing agencies to simply claim that they are considering the interests of a constituency results is better than actually getting people from that constituency to comment. During the Carter Administration, the Department of Agriculture sought to obtain more comments from groups that were affected by regulations establishing agricultural marketing orders for commodities. Among other things, the department investigated “public attitudes and views on a planned marketing order through a solicitation of comments mailed directly to affected groups.” Kerwin, *supra* note ___, at 171.

²⁴⁸ For a discussion of the value of choosing groups of approximately this size, see SIDNEY VERBA, *SMALL GROUPS AND POLITICAL BEHAVIOR* (1961). Deliberation has its share of perils arising from group dynamics, see Lupia, *supra* note ___, at ___, but it is far from obvious that such perils outweigh the benefits of group discussions (particularly when led by a moderator trained to minimize some of the risks of group deliberation, such as insistence on consensus), and the efficiency benefits of structuring a process targeting multiple participants simultaneously (i.e., in contrast to the cost of having to provide, for example, 12 separate briefings to the participants).

get balanced materials explaining the arguments for and against the proposed regulation.²⁴⁹ Then they would get the chance to talk to each other and question experts from the agency about the possible alternatives. The agency would use the existing proposed regulations as a basis for discussion. The goal of the deliberation would not be to subject the regulations to an up-or-down vote but rather to elicit concerns, observations, and ideas about how the regulation should evolve.²⁵⁰ Part of what the process would have to accomplish is to separate the factual issues best resolved through expert analysis from interpretation of an ambiguous statute and policy judgments. The deliberation group would be in a position to inform what to do about the latter but not necessarily the former.²⁵¹

The corrective sample's discussions then inform the rulemaking process and become part of the record. Accordingly, the public can raise valid concerns given the statutory scheme, and these in turn can become a basis for litigation. Later I will consider other alternatives that give legal effect to the deliberations.²⁵² In the meantime, the most important point is that the corrective sample's deliberations would have some legal effect – for example, by creating a presumption in favor of a particular regulatory strategy, such as the issuance of Section 314 regulations with a remedy for unauthorized disclosure of sensitive financial information.

ii. Majoritarian Deliberation

This leaves another alternative to current regulatory democracy, one that tries to enrich regulatory policymaking through majoritarian deliberation rather than enhancing the discussion among competing interests. By this I mean the idea that decisions are best made by deliberative, electoral majorities or some sort of equivalent proxy. A popular referendum is not the only way to involve a wider slice of the public in regulatory decisions. Majoritarian deliberation implies a

²⁴⁹ The agency would prepare these with oversight from the centralized agency.

²⁵⁰ Cf. Luskin, Fishkin, & Jowell, *supra* note ___, at 463. Their description of a deliberative poll in the United Kingdom provides one example of how the deliberation groups could function:

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

The difference here, of course, is that the subject matter is not as general as what participants in the deliberative poll had to discuss, and that the participants would collectively have the benefit of a lawyer (“a regulatory public defender”) to articulate their views to the agency writing the regulations. Instead of fairly open-ended questions about criminal justice policy (for example), the basis for discussion among the deliberation groups would be the agency's proposed rule.

²⁵¹ See Part IV.a

²⁵² See *id.* for additional technical details involving the presentation of information to the deliberation group.

process where a majority makes a decision in accordance with its views about what would be best for the polity.²⁵³ Regardless of whether this is practically feasible (it may not be), it represents a particular view of what regulatory policymaking should be.

To some people the legislature and organized interests are already providing a mechanism to represent (and perhaps even deliberate²⁵⁴ about) majority views.²⁵⁵ All this talk about a “majoritarian” deliberation alternative may therefore seem confusing since the regulatory rulemaking process is often analogized to the legislative process, which is often assumed to be majoritarian.²⁵⁶ But neither the rulemaking process nor legislation necessarily live up to this idea. For one, electoral majorities can differ in their views about regulatory policy when compared to mobilized, economically and politically powerful interest groups.²⁵⁷ The preceding sections highlight how different the reality of the regulatory rulemaking process is from some kind of ideal version of majoritarian deliberation.²⁵⁸ Contrast that with majoritarian deliberation, which aims to replace voters’ superficial ideas with informed opinions shaped by deliberation. As with the corrective approach, the idea is that informing people and giving them a chance to deliberate could shed light on what satisfies their own interests. In addition, the chance to learn and deliberate might signal to participants that there is some value in thinking beyond their self-interest when they consider the regulatory decision.²⁵⁹

²⁵³ It is the sort of process reminiscent of Rousseau’s discussion of the “general will.” See JEAN-JAQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* 5 (WORDSWORTH CLASSICS 1998) (1762).

²⁵⁴ See Sunstein, *Interest Groups in American Public Law*, *supra* note ___, at ___. This aspiration of a deliberative legislature or agency staff is sometimes recognized to fall short of the reality, but the theorizing about how to close that gap is treated more as a matter of changing theories of governance and less as a matter of institutional design].

²⁵⁵ See, e.g., ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 150 (1989).

²⁵⁶ See generally ERIC SCHICKLER, *DISJOINTED PLURALISM* (2001).

²⁵⁷ By “electoral majorities,” I mean majorities of voters in a particular jurisdiction. What constitutes a majority obviously depends on the boundaries of the jurisdiction and the process through which preferences are aggregated. See ISSACHAROFF, KARLAN, & PILDES, *supra* note 230, at 1 (“At the heart of a democratic political order lies a process of collective decisionmaking that must operate through pre-existing laws, rules, and institutions. The kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures.”).

²⁵⁸ To be sure, elected politicians can intervene on behalf of electoral majorities to affect regulatory policy when the issues in question have mass political appeal. But once again, this sort of argument assumes a view about democracy that has to be defended. The regulatory pluralism view leaves it to interest groups and voters to figure out what matters in regulatory policy, and in politics more generally. Anything that is not already important enough to voters when it comes time to vote or make a donation to an interest group is assumed not to matter.

²⁵⁹ This is not meant to suggest that individual participants could ever (or should) put aside their own interests. Such interests are important and the existing model does not represent these. Moreover, personal interests may serve as a heuristic through which voters can form views about a complicated policy. Nonetheless, the deliberative process might expand the scope of that inquiry

The majoritarian deliberation approach largely follows a similar plan: there needs to be a way of selecting the sample of people, a space to deliberate and learn about the issue, and a means of giving their input at least some legal effect. The major differences are in the selection of the sample and the goal of informing the participants. Here the participation agency would not need to figure out a way to discern who might be especially affected. Instead the animating vision of democracy here is to provide a group of laypeople (as a proxy for a majority) with the chance to shape the regulatory process. If the goal is something other than a referendum, then the group would have to be small enough to make it feasible to educate its members and to give them a chance to deliberate among themselves.²⁶⁰ In short, the process would involve selecting a random sample of people from throughout the country, helping them understand Section 314 (or nuclear licensing, campaign finance, or a hundred different regulatory domains), and asking them what they think. As before, a lot of the choices about the structure of the deliberative process are really about how to create the relevance condition. To the extent that such a relevance condition could be met, the majoritarian deliberation approach would focus on eliciting the views of people regarding what regulation would be in the putative interests of the polity, rather than on considering whether people with strong interests support or oppose the policy in question.

B. The Institutional Design of a Participatory Bureaucracy and Regulatory Public Defenders

It takes special knowledge to run a new means of infusing agencies with public participation. The new “participation agency” could handle a panoply of functions supporting the process of public participation in the regulatory process. A separate agency would have a specific mandate to enhance decisionmaking across agencies, without having to concern itself with competing tasks involving civil servants and political appointees who get invested with a specific point of view. Its leadership might consist of a board of appointees with fixed, staggered terms. Their job would be to supervise the staff in discharging a few interrelated functions. First, the agency would promulgate rules²⁶¹ for how members of the public would be selected to participate in deliberation groups. Second, the agency would prepare risk and cost-benefit analysis materials that would be presented to either corrective or majoritarian deliberation groups. These analyses would be

and get people to think about how others might be affected. Whether this happens because people are genuinely capable of altruism or because people simply further expand the scope of their own evaluations of their self-interest does not really matter that much. The point is that they might view an issue differently when they have a chance to talk to people about it and learn about it. Cf. Luskin, Fishkin, & Jowell, *supra* note ____, at ____.

²⁶⁰ See Hackman, *supra* note ____, at ____.

²⁶¹ The first set of rules could be promulgated subject to the traditional notice-and-comment process to avoid an infinite regress problem.

designed to complement those of the agency with direct responsibility for the regulatory program. Deliberation groups would therefore get more than one point of view about the risks, costs, and benefits associated with any given proposal.²⁶² Third, the participation agency would provide trained moderators to facilitate the discussion among either the corrective or the majoritarian deliberation groups. Finally, the agency would provide the lawyers to take the contributions of participants and turn these into more sophisticated comments that would become part of the administrative record.

The agency would also have the responsibility of promoting the participation of people selected to be part of the deliberation group associated with the majoritarian deliberation approach. This would require legislation giving people some incentive to participate (or forcing them to bear some cost if they did not). Potential participants could be enticed with a financial reward, a mild penalty for non-participation, or a combination of both. Otherwise valuable people would be excluded and there would be overrepresentation of people for whom the opportunity cost of participation is lower. This is probably what happens when laypeople participate in the notice and comment process. While the participants in the Section 314 rulemaking proceeding made intelligible contributions and raised concerns about an important issue, neither their degree of unsophistication, nor their substantive views, are likely to be representative of the larger public. Members of the public with more sophistication are likely to be the kinds of people who face a higher opportunity cost from participating in rulemaking instead of spending time with their kids, their friends, their garden, or advancing their careers. If reforms in regulatory democracy are to enrich the regulatory state with perspectives that are largely ignored today, then there must be participation from among these higher-opportunity cost folk. In any case, the defining features of reforms would be to get participants as close to the actual decision as possible, instead of keeping their input general. The more specific the feedback, transmitted through a moderator or legal representative, the more possible it would be for the implementing agency to grapple directly with public input about specific proposals.²⁶³

²⁶² The participation agency could also generate information about how the public weighs trade-offs between different regulatory programs, a project that would raise the separate question of how (and how much) to give effect to those participants' preferences. For present purposes I want to focus instead on how the participation agency would enhance the record in the context of the development of a single regulation.

²⁶³ Otherwise the implementing agency has to do all the work of translating vague opinions into regulations, which may be no different from agency responses to a vague delegation and therefore no different from the status quo. Obviously, there is a limit to the public's potential sophistication (even after all the institutional reforms I have described). My point is that sophistication is not fixed in the "low" position. The people participating in the corrective mechanism will have less of a challenge, because (by definition) they will be motivated by their stake in the outcome (they may even be experts with a "professional" stake in the regulatory policy). The majoritarian mechanism could take advantage of techniques like panels of competing experts, contingent valuation, and pedagogically sound uses of analogical reasoning, the public participating

The agency would develop mechanisms to select the relevant sample and structure discussions among people (in a manner that mitigated any potential adverse effects to decisionmaking arising from collective discussions and from distinctions in the manner some members of the public consider risk-related probabilistic information). For the corrective approach, the external agency could empanel groups of unaffiliated experts who would identify stakeholders for consultation. For the majoritarian deliberation approach, the external agency could administer a system consisting primarily of jury service exemptions, perhaps supplemented by oversampling and incentives for people less likely to be subject to (even compulsory) jury service, or to select to carry out their jury service by participating in a majoritarian deliberation group. Many members of the public have quite high opportunity costs arising from their desire to work, spend time with family, rest, or otherwise live life to the fullest. They must be given an incentive to act.

The agency would then structure discussions among the selected participants. The main goal of structuring the discussion is not necessarily to realize some deliberative ideal. It's just to have the public react to a specific agency policy proposal – such as that contained in the Notice of Proposed Rule Making (NPRM) – rather than some vague generality. That's what makes virtually any version of this reformed regulatory democracy different from proposals to hold deliberation days²⁶⁴ or deliberative polls.²⁶⁵ All that may be fine, but it still requires a regulatory state to translate ambiguous legal commands into regulatory rules and enforcement patterns, and therefore the question remains (even with deliberative polls and deliberation days) regarding how the regulatory agencies themselves should function.²⁶⁶

The agency's role would further encompass the provision of regulatory public defenders – teams of lawyers whose role would be to promote the perspective of the group constituted to consider the regulatory proposal in question. The agency could also leverage resources such as the Internet to promote and facilitate forms of participation consistent with the corrective and majoritarian deliberation approaches. A reasonable oversight structure (perhaps similar to that of the Federal Election Commission) would be a critical ingredient of all this, to preserve the agency's ability to act and appear in a manner that would be perceived as legitimate and politically unbiased. The agency would also have to be at least somewhat insulated from interference from the president's administration and the legislature's.²⁶⁷ If such a reasonable oversight structure seems difficult to achieve, it is because the larger political conditions that it

²⁶⁴ See Ackerman and Fishkin, *supra* note ____.

²⁶⁵ See Luskin, Fishkin, and Plane, *supra* note ____, at ____.

²⁶⁶ Of course, the concern of the external participation agency (and my concern here) is with how regulatory democracy can function, not with retooling every aspect of democracy itself. While the alternatives I propose may be somewhat costly, they are rendered less so and more administrable because they are grafted onto an existing regulatory process.

²⁶⁷ Such insulation need not be complete or permanent to achieve its broader objectives.

requires – for example, where legislators support that structure when it’s created and over time -- seem unlikely to materialize. In take this up in the final section. In the meantime, I recognize I’ve provided only a rough sketch of how the participatory bureaucracy would be designed. Even such a sketch should make it amply clear that such a design is feasible and would help solve a number of practical problems that currently affect the regulatory state.

There is also the question of how much all this would cost.²⁶⁸ Between 1981 and 2000, the number of regulations considered important enough to be reviewed by the Office of Management and Budget totaled 34,386.²⁶⁹ While this averages to about 3,800 a year, the number of rules reviewed in some years is considerably less (about 500 per year in the late 1990s).²⁷⁰ Depending on the details of how they are structured, the reforms might cost as little as a focus group. The higher the projected cost, the more it would make sense to try the proposals through a pilot project. Regardless of whether the new approaches are implemented through pilot projects, I do not expect the agency would to solve all the problems associated with the changes. But it could help address them and in the process it would create opportunities to protect the public engagement process from naked manipulation by the agencies or their political superiors.

C. Practical Contributions of Redesigned Regulatory Democracy

²⁶⁸ Obviously, all of the benefits from alternative arrangements for regulatory democracy must be weighed alternatives will have some financial costs and logistical costs. *See, e.g.,* Rossi, *supra* note 221, at [redacted]. Hiring moderators, lawyers, and analysts takes money, as does the compensation of people selected to be part of the deliberation groups. Moreover, participation can slow down regulation. Deliberation groups would need to be chosen, constituted, and dismissed. Agency lawyers would need to take more time to think about the concerns raised in the deliberation groups. Delay is not always a problem, as poorly thought-out regulation may be worse than no regulation at all. But it may be a problem in the sense that statutes passed by Congress reflect an interest in getting regulations implemented. All of this means that the benefits of the alternatives may not always exceed the costs. The question of regulatory agency *inaction* is worth thinking about separately. One might think that *Heckler v. Chaney*, 470 U.S. 821 (1985), is wrong, but as it stands today it limits the public’s ability (or that of any interest group) to compel regulatory action. Even if one does not accept that the alternative approaches rest on a uniformly “better” or more defensible approach to democracy, one might accept that choosing the right kind of approach to public engagement depends a little on the circumstances. For example, one might prefer some kind of corrective interest representation for nuclear licensing (with its explicit costs and benefits for regional populations) but some kind of majoritarian deliberation process to enrich the financial privacy regulations (given their impact across regions and social strata).

²⁶⁹ *See* Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 846 (2003). The Office of Management and Budget Reviews only “economically major” and otherwise “significant” rules, and only 1,693 were economically significant during the relevant time-period.

²⁷⁰ *Id.*

The point of all these changes is as simple as it is profound: a redesigned system of regulatory democracy can achieve things – in particular, three – that the present system cannot. The new system can leverage the existing structure of the regulatory state to experiment with alternative democratic arrangements involving the representation of interested constituencies or majoritarian deliberation. That sort of experimentation can also extend to encompass the methods used to combine democratic participation with rigorous technical analyses of costs, benefits, and risk. All of this can also yield valuable information about how the electorate views specific regulations – including some that depend on public support.²⁷¹

i. Creating a Framework for Democratic Experimentation that Leverages the Existing Structure of the Regulatory State

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

Experimenting with new forms of democracy forces regulators and the society to which they are supposed to be accountable to confront some important questions. Different issues may call for dissimilar versions of democracy. If it is possible to solve the technical problems associated with the alternative approaches to public involvement in the regulatory state, then how is one to choose among them? That depends on the version – or vision – of democracy that seems appropriate for particular kinds of problems. The question is difficult because there is no one right answer. Prosperous countries mix and match different kinds of democratic procedures successfully.²⁷² The U.S. Constitution determines only a fraction of the rules for involving the public in regulatory decisionmaking.²⁷³ The rest can be changed by statute or executive branch

²⁷¹ It makes no sense to assume that legislatures would be interested in obtaining these benefits, unless specific political circumstances arose. Part IV discusses how and when legislators might support the alternatives.

²⁷² See, e.g., DAVID M. FARRELL, *COMPARING ELECTORAL SYSTEMS* (1997).

²⁷³ But note that the Constitution leaves open many of the most important rules of electoral competition. The Voting Rights Act, the recent electoral reform legislation and associated appropriations, and the requirement that the House of Representatives have only 435 members are

practice. Indeed, while the federal constitution's architecture obviously relies heavily on representative politics,²⁷⁴ legislatures can delegate power. That opens up the question of how democracy should work its way into the regulatory process, and what kind of democracy one prefers.

Parallel to the question of what kind of democracy is desired is the question of how to integrate the views of experts and those of a larger public. The alternative framework for regulatory democracy, and the participation agency in particular, can provide a reliable means for aggregating new insights about how to make this happen. Sometimes agencies use survey methods to shed light on the public's "contingent valuation" of different states of the world.²⁷⁵ The fact that contingent valuation is already a reality might make the present project seem a bit besides the point. Not so. Far from being a reason to be skeptical about the regulatory democracy alternatives I discuss here, agencies' interest in contingent valuation shows some of the possible contributions of a reformed conception of regulatory democracy. For there is plenty to learn about how the public evaluates risks and considers regulatory alternatives. Indeed, there's considerable ground left to cover in combining rigorous risk analysis with public engagement. The regulatory democracy alternatives leverage the existing institutional structure of the regulatory state not only to facilitate democratic experimentation, but to enhance the development of new mechanisms to consult the public about risk regulation. Contingent valuation as it's been practiced thus far in the regulatory state is not the only principled approach to consulting the public about risks, or about the costs they'd be willing to bear in order to reduce them.²⁷⁶

In some ways it seems the ambition of the regulatory state has always been to provide a legal mechanism for harmonizing expert judgment and public

just a few examples of how some of the rules of the political game are not set directly by the constitutional text.

²⁷⁴ The "Republican guarantee" clause has been held not to mean much of anything as a practical matter. *New York v. United States*, 505 U.S. 144, 184 (1992) (finding no violation and stating "[T]he Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."); *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001) ("challenge based on the Guarantee Clause, however, is a nonjusticiable political question"); *Padavan v. United States*, 82 F.3d 23, 27 (2nd Cir. 1996) (noting traditionally "claims brought under the Guarantee Clause are nonjusticiable political questions" and to the extent that this is not always the case, exceptions are rare). Direct democracy is not considered per se a violation of any federal constitutional guarantee against arbitrary decisions, *see Cuhyoga Falls*, ___ U.S. at ___ (2003), or any other kind of constitutional guarantee for that matter.

²⁷⁵ *See* ROBERT CAMERON MITCHELL AND RICHARD T. CARSON, *USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 2* (Resources for the Future, 1989).

²⁷⁶ For one of the more illuminating discussions of this aspect of "contingent valuation" method, *see* John M. Heyde, Comment, *Is Contingent Valuation Worth the Trouble?*, 62 U. CHI. L. REV. 331 (1995) (defining contingent valuation as "a controversial survey technique used to establish both the 'use' and 'nonuse' values [of a resource, where]... a surveyor asks 'affected' people how much they would pay to prevent contamination of a natural resource, or alternatively, how much they would demand to accept contamination").

input. That's what many of the system's advocates and proponents say.²⁷⁷ Alternative mechanisms for public engagement need not give the public a monopoly on the content of a regulatory rule, any more than the existing system – so strongly identified with the regulatory pluralism strand of thinking – gives commenters total control over the resulting rule. The challenge is to strike a balance. The alternative conceptions of regulatory democracy provide a means through which to do so. One goal is to entice the administrative process to take public input seriously. The other is to preserve the agency's flexibility to act in accordance with executive branch policy prescriptions and the views of technical experts. Which means one can imagine alternative methods of public input coexisting with technocratic schemes to inform regulatory policy, such as cost-benefit analysis.²⁷⁸

ii. Expanding Knowledge of Public Reactions to Regulations

Besides being useful in living up to a defensible standard of democracy in the regulatory state and in learning more about how to blend expert and lay opinion, reforms in regulatory democracy can also help enhance the *effectiveness* of regulatory policy in some cases. (a) The reformed process can help the agency learn more about the perceptions of regulatory policy among members of the public, under different conditions (i.e., engaged versus passive) which probably adds to the agency's reservoir of information about how to promote support of regulatory policies among the public. This is obviously directly useful in instances where the regulation depends directly on public compliance, but it also enhances the agency's capacity to design regulations that might withstand changes in public perceptions. Some examples involving direct public compliance: speed limits, airport security regulations, campaign finance.²⁷⁹ What is more, changes in public perceptions can influence the viability of regulations even if they don't directly depend on public compliance, like speed limits, travel and immigration regulations, banking rules, and some pollution control rules. Finally, the new reformed process of regulatory democracy can sometimes expand the feasible set of options,²⁸⁰ which allows the regulatory agency to

²⁷⁷ See, e.g., Sunstein, Arsenic, *supra* note ____, at ____.

²⁷⁸ See, e.g., Matthew D. Adler and Eric A. Posner, *Introduction: Cost Benefit Analysis – Legal, Economic, and Philosophical Perspectives*, 29 J. LEGAL STUD. 837, 838 (2000). Adler and Posner note:

Even the proponents of cost-benefit analysis do not generally argue that it should be the sole decision procedure for administrative agencies and other governmental bodies. There may well be scenarios where it is welfare maximizing for agencies to employ some other procedure, such as... (nomonetized) multidimensional assessment.

²⁷⁹ If no one followed these rules then it would become nearly impossible for the government to enforce them.

²⁸⁰ This assumes the new procedures can be made politically viable, which I discuss in *infra* Part IV.

pursue some courses of action that are probably closer to optimal in terms of either political satisfaction, efficiency, or both.

The key point is that a reformed version of regulatory democracy delivers a rich lode of information about how people react to the regulations under which they live. Current regulatory democracy persists not because this information is normatively irrelevant or useless in the design of regulations. Instead the status quo persists because it serves a political purpose for legislators and policymakers that respond to political costs and benefits. But neither political difficulties nor the persistence of still other problems in regulatory policy should stop us from thinking carefully about how the current system works or the persuasiveness of its theoretical justifications. Instead of an antidote to resolve all the difficult questions in regulatory policy, I am offering observations about how the law of the regulatory state shapes the process of deciding on what those difficult questions really are.

IV.

POLITICAL CONSTRAINTS ON REGULATORY DEMOCRACY

Despite all the feasible reforms of regulatory democracy, the defining feature of the regulatory state has nearly always been the reliance on demand-driven procedures for engaging organized interests in developing regulations. Here I sketch three political scenarios that might give life to the alternative approaches that I have described. Since these scenarios depend on certain preconditions, some of which are unlikely, no one is likely to topple the current arrangement for regulatory democracy any time soon. What is left is a recurring opportunity for change that the margins that may inform the perceptions of legislators, regulators, interest groups and the public, and thereby gradually make it easier to pursue alternatives to the status quo.

A. The Political Economy Supporting the Status Quo

Legislatures shaping the developing administrative system harbored a substantial interest in contributing to the development of an regulatory state that could be subject to their oversight, and (just as important) could generate information about the impact of regulatory policy on important constituencies. Viewed in this light, the APA and its notice-and-comment procedures become part of a fire-alarm approach to overseeing the bureaucracy. As one article describes it:

When something goes awry, constituents pull the fire alarm, bringing the attention of political officials down on agency proceedings. To the extent that sustained congressional attention is costly to an agency, it will seek to avoid attention by serving congressional constituents so that alarms do not get

pulled. Nevertheless, if agencies can keep their actions secret, especially if they can conspire with particular interests against others, congressional interests might not know about agency proceedings until it is too late... The APA helps mitigate this problem by requiring a substantial degree of transparency... Affected constituents must be notified in advance of proceedings and given opportunities to participate and provide their views.²⁸¹

If politicians care about fire alarms and interest group opposition, then they would *want* a system that responds to political power as well as interest. The resulting model of public engagement would predictably have a focus on generating information about the views of people and groups who would most be willing to expend resources to shape the regulations in question – or to punish politicians and bureaucrats for an unwelcome one.²⁸²

None of this implies that powerful interest groups would exclusively rely on administrative procedures like the notice-and-comment process to signal their displeasure to politicians. Interested parties could also rely on having their allies serve as political appointees or deploying congressional staffers to gather information. Nor is it necessary to argue that the sole or primary purpose of administrative procedures was to benefit politicians' favored interest groups.²⁸³ Instead the contention is that, on balance, the APA and associated procedures probably helped (and continues to help) politicians track the reactions of outside interest groups, a development that in turn could advance their electoral and policy agendas.

Thus there is more than just a conceptual attraction to current regulatory democracy. There is a political and economic logic behind its brawn. The result is a system that does not necessarily benefit everyone, nor does it live up to all the ideals participatory democracy. But existing procedures certainly make it easier

²⁸¹ McNollgast, *supra* note ____ at 199.

²⁸² The Final Report of the Attorney General's Committee on Administrative Procedure (issued in 1941) suggests that even before passage of the APA, agencies already understood the value of avoiding confrontation with interest groups that might undermine the agency in Congress:

Early in the present century a number of agencies appear to have adopted regularized consultation in connection with their rule-making processes.... The practice of holding conferences of interested parties in connection with rule-making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule-making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented conferences have evident advantages over hearings in the development of knowledge and understanding. ATTORNEY GENERAL'S REPORT, *supra* note ____, at 103-04. The report implies that the goal of administrative procedures to involve the public should be to involve interested parties.

²⁸³ *Contra* Balla, *supra* note ____, at ____.

for interest groups and representative politicians to work with the regulatory state to achieve their goals.

B. Possible Reform Scenarios

All of the preceding admittedly makes it somewhat difficult for legislators, regulators, and high-level political appointees in the executive branch to adopt reforms in regulatory democracy. But change is not necessarily impossible, so in closing let me provide a sketch of three scenarios that could bolster the prospects for the alternatives. Nothing in the empirical literature on congressional dominance suggests that agencies are bereft of meaningful discretion. Indeed, most formal models illustrate circumstances where the agency retains considerable political power to choose how to use its authority.²⁸⁴ And if the agency is able to keep some control, the views and desires of its leadership may reflect more than just pre-existing fixed policy preferences.

In light of all this, I offer three scenarios where it becomes more possible to redesign regulatory democracy. The three scenarios reflect the premise that ambiguous statutes do not represent legislators' genuine desire to defer to experts, but instead a political compromise.²⁸⁵ That compromise may, in turn, be affected by politicians' guesses about what sorts of policies are politically palatable.²⁸⁶ Figuring out what precisely is politically acceptable (by congressional district, by state, or by national electorate) is difficult, perhaps even for politicians who survive a competitive process weeding out the ones who cannot do the figuring very well. Nonetheless, some guesses about the political popularity of legislation are probably easier to make than others, and sometimes politicians just get it wrong.²⁸⁷

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

²⁸⁴ See Craig Volden, *A Formal Model of the Politics of Delegation in a Separation of Powers System*, 46 AM. J. POL. SCI. 111 (2002).

²⁸⁵ See, e.g., Joseph A. Grundfest and A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN L. REV. 627 (2002); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

²⁸⁶ See Epstein & O'Halloran, *supra* note __, at __.

²⁸⁷ See, e.g., John Hardin, *An In-Depth Look at Congressional Committee Jurisdiction Surrounding Health Issues*, 23 J. HEALTH POL. POL'Y & L. 517 (1998) (describing legislators' travails involving catastrophic health insurance amendments to Medicare-Medicaid).

issue. The same could be said for transportation security policy. In such situations, voters' pre-crisis responses in opinion polls would not provide an accurate perspective about the electorate's take on things *after* the crisis. This means that politicians would have to be guessing how a crisis could affect the public's judgment, and therefore the politicians' prospects in future elections.²⁸⁸

The logic of this scenario would make the viability of reforms in regulatory democracy depend on politicians' beliefs about the state of the world. Reforms in regulatory democracy would be most attractive in the following situation: (a) there is a high enough probability that a low-importance issue might skyrocket in importance later on; and (b) they cannot guess what a voter would think once circumstances forced her to reflect more about it. This means that at least sometimes, a deliberation group could help politicians go about their business of supervising the work of the regulatory state.²⁸⁹ If reforms in regulatory democracy were politically valuable to legislators but faced bureaucratic resistance, outside interest groups might fund corrective or majoritarian deliberation proceedings and then funnel the results to agencies through the existing notice-and-comment process (perhaps with a quick "cc:" – the equivalent of a knowing glance – to interested legislators). The corrective or deliberative proceedings themselves might be conducted by companies or not-for-profit organizations with a reputation interest in the integrity of the results.

Now imagine a different scenario. Reforms in regulatory democracy are promoted by political entrepreneurs and become popular among the public. They are not diluted because they are used to resolve statutory ambiguities in areas where the interest group context is not strong enough to predetermine the result. So imagine that for some issues, interested parties lack the power or interest to achieve objectives through the existing approach. Think, for example, of regulations governing the use of money provided to state governments for the development of drug offender diversion programs (i.e., "drug courts"). If no

²⁸⁸ To some extent, experts and agencies working under the aegis of the executive branch serve as proxies for public engagement. They can also help solve controversial matters for which politicians occasionally want to avoid responsibility. But the alternative approaches could perform useful functions, helping provide additional insulation from responsibility when politicians have to deal with a hot potato. One useful function would be to help provide an additional line of insulation from responsibility when politicians have to prospectively deal with a scalding hot potato – a means of dropping a cool dollop of sour cream on the potato by saying "we didn't make a decision, and it was so important we didn't even want the experts to do it by themselves. We had real people help us make the decision."

²⁸⁹ If legislators decide that there is a high probability of an exogenous shock dramatically increasing the salience of a particular issue, they may find the alternatives as desirable as the existing procedural mechanisms to oversee the bureaucracy. In both cases, the goal is to ensure that the output of the regulatory process redounds to the legislators' benefit. Cf. Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995)(developing a formal model highlighting legislators' interest in designing procedures forcing agencies to make technically sound decisions that balance competing interests as legislators intended).

group is strong enough to sway the policy, legislations might see a political payoff in telling the electorate that the public will be more involved in these decisions.²⁹⁰

Suppose, in still a third scenario, that legislators and bureaucrats promote reforms in regulatory democracy as a means of allocating political responsibility – even when there is some short-term (or even longer-term) personal political gain for them from maintaining the status quo. This is unlikely but not impossible. It is unlikely because political constraints give legislators a reason to support the existing arrangement instead of some more elaborate approach to participatory democracy in the regulatory state.²⁹¹ But change under this scenario is possible because those political constraints do not always overwhelm (at least in principle) countervailing impulses to pursue reforms in regulatory democracy. I have argued above that some of those impulses could arise from the possibility that changes in regulatory democracy could be popular. What is also possible is that legislators and agency policymakers would just be curious to know what reforms in regulatory democracy can reveal.²⁹² “What would a group of unaffiliated outside expert think of this?” might wonder a legislator asking an agency to use the corrective approach. An agency official might wonder if deliberating citizens share her intuition about the need for an adequate margin of safety in drinking water regulations governing the permissible concentration of arsenic.

None of the preceding scenarios guarantee success in reforming regulatory democracy. In the meantime, some things resembling the corrective approach are

²⁹⁰ Cf. Hugo Hopenhayn and Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 J. LAW, ECON. & ORG. 196, 109 (1996)(using a formal model to demonstrate the implication that interest-group “information providers may have incentives to deceive the political recipient of their signals in order to manipulate her decisions”). Indeed, politicians may seldom be in a position to ascertain whether interest groups are providing accurate information about agencies. Sometimes politicians will be able to learn what they need just by *knowing* that certain interest groups are opposed to a regulatory policy, because the interest group opposition makes enough of a difference to an electorate outcome. But where interest groups are *not* powerful enough to offset the electoral benefits of a particular policy, then politicians may prefer to have some independent mechanism to inform them about what the larger public thinks of specific regulatory policies.

²⁹¹ See *infra* Part IV.a.

²⁹² Some agency lawyers I interviewed expressed just such curiosity, and the data I discuss in Part II belie the notion that agency lawyers would simply care about the views of powerful interest groups (particularly those that they regulate). As Wilson notes in his exhaustive discussion of empirical studies of government bureaucracies through the late 1980s:

Clearly, some distinctions are in order. The influence of outside interests on an agency will depend, in the first instance, on the way those interests are arrayed in the agency’s environment. To oversimplify, a government agency can occupy one of four kinds of political environments. It can confront (1) a dominant interest group favoring its goals; (2) dominant interest group hostile to its goals; (3) two or more rival interest groups in conflict over its goals; or (4) no important interest group. Which kind of environment they face will shape the forces working on operators as they try to define their tasks.

Wilson, *supra* note __ at 76.

already in use, such as negotiated rulemaking, blue-ribbon commissions, and the selection of political appointees from constituencies that are impacted by an agency's regulations. On occasion politicians can use these tactics to supplement the political mechanisms of the APA. What is unsatisfying about these approaches is that, unlike the corrective approach I have described, there is no *explicit* discussion of what interests are likely to have a big stake in the regulation but lack the sophistication, interest, or ability to overcome collective action problems. Which means, by and large, that these approaches fail to address the endogeneity of sophistication and interest.

CONCLUSION

Conventional wisdom limns the regulatory state as a setting for expert decisionmaking and conflict between sophisticated organized interests. Laypeople are supposed to lack the time and intellectual ability to think about effluent standards, civilian nuclear power licensing requirements, alternative energy sources, or financial information disclosure policies. Regulation by referendum seems like a ludicrous parody of what the regulatory state should be. At the same time, it also seems unrealistic to force legislators to make all the major regulatory decisions themselves. So legislators continue making broad delegations of legal authority, agencies keep on regulating, and regulatory democracy continues relying on organized interest groups to shape and comment on regulations affecting our lives.

This article trains empirical and analytical attention on democratic participation in that system. It sought to scrutinize assumptions about how the current system works and why it is legitimate. My empirical study scrutinizes three regulatory rules, involving financial privacy, nuclear regulation, and campaign finance. I show that at least some of the intuitions that would support complacent acceptance of the status quo turn out to be wrong. Laypeople and unofficial groups try to participate in legal and policy arguments relating to the regulations under which they must live, but agencies often seem to disregard even those public comments directly relevant to the legal and policy questions at issue. Organized interest groups may help advance similar arguments, but sometimes even the members of the lay public who participate harbor different concerns from those raised by any organized interest group. What's more, existing regulatory democracy is demand driven, so it does absolutely nothing to involve people lives are touched by regulation but who decided not to comment on the regulation.

Much of this would be beside the point if the public's sophistication and interest in regulation were impossible to change, or if changes in the sophistication of participants were unlikely to have any effect on agencies. Yet the opposite appears to be the case: the public's sophistication and interest can change depending on how their opinion is solicited. If no one asks them, many

members of the public will have no opinion at all, even if the regulation will affect their interests or if the regulation merits some degree of majoritarian deliberation. If they are asked without being given a chance to learn about the regulation or an opportunity to think about it, their answers will be worthless as a barometer of more considered judgment. All of this should limit the tendency to assume a lack of public capacity or desire for nuanced thinking from public silence about regulation, or from participation in the regulatory process by sending in a simple form letter. Silence and form letters reflect some preexisting distribution of attention under current regulatory democracy. There is nothing inherently optimal or ideal about that distribution. There are practical and equitable ways of changing it. Finally, preliminary analysis of data from the three case studies support a (plausible) theoretical conclusion that agencies are likely to be more influenced by sophisticated comments.

The impact of these potential changes, and of still other possibilities, will no doubt be even better understood with additional empirical research. Projects could compare differences in regulatory democracy across a still larger set of regulatory contexts. Research could also analyze (among other things) qualitative differences in how people find out about and become interested in regulations, who comments, what lawyers reviewing comments do, what alternative mechanisms for public involvement agencies use, and how regulations evolve in response to public engagement. This agenda would also encompass detailed experimental studies showing when and how members of the lay public can absorb the greatest degree of complex information about regulations, and precisely how this changes their views. In the meantime, the process of rethinking regulatory democracy can enrich not only regulatory policy but our sense of how (and how much) people can participate in their own governance. The regulatory state is more than just a convenient mechanism for solving the practical problem of regulation and incorporating scientific insights. It is a vehicle for experimenting with novel democratic arrangements that honor both the legal mandates generated through representative politics and the technical, scientific knowledge that regulatory issues demand.

The kind of participation that conventional regulatory democracy produces may serve the practical designs of legislators and organized interests. It lets politically powerful interest groups get what they want from government. It helps representative politicians align the outputs of the regulatory state with the concerns of those who can most obviously affect the politicians' careers. It allows regulators to forestall the wrath of critical constituencies. Nonetheless, my empirical analysis emphasizes just how far removed such participation is from many defensible accounts of what democracy should deliver. The rest of this article has discussed the possibility of a far richer conception of regulatory democracy – one that allows for correcting gaps in representation and deficits in sophistication. I have sought to show that such a conception is legally feasible, administrable, and desirable. Without it, the regulatory state will remain shackled

to the imperfections of representative democracy and pluralist politics, unable to serve as a stimulating setting for practical experimentation on how to integrate democratic participation with expert technical knowledge. A principled defense of the current approach must therefore rest either on an idealized conception of representative politics and interest group politics, or on a sense that no changes to regulatory democracy are politically feasible. Both of those positions need to be defended, and many such defenses are far from satisfying.

APPENDIX: METHODS AND DATA

A. Case Selection and Analysis

My choice of case studies was informed by several considerations. I wanted to include both regulatory matters that tend to receive more attention in the scholarly literature (involving safety and environmental policy) as well as some that receive less attention (like regulations explicitly designed to enhance law enforcement and national security). I also sought regulatory agencies that were quite different. In light of these factors and my own substantive interest and expertise in particular areas, the three agencies I studied came to include two multi-member commissions (the Nuclear Regulatory Commission and the Federal Election Commission, each with quite different internal procedures and institutional responsibilities) and one agency within a cabinet department (the Treasury Department's Financial Crimes Enforcement Network or FinCEN).²⁹³

There is at least some reason to believe that many members of the public could have more than a passing interest in financial privacy, campaign regulations, or nuclear power regulation. Though not all regulatory rules address matters of obvious public concern, neither are these three regulations *unusual* in addressing matters that are both important and likely to be controversial. I could have just as easily chosen (and may in future work evaluate) regulations involving firearms ownership, land use, ergonomics, or water quality. Finally, I chose regulations that had not provoked any direct legislative response.²⁹⁴ In the meantime, the regulations I analyze here provide a broad snapshot of the regulatory mosaic across the federal government. While I do not claim they are a representative sample of regulations, hundreds (if not thousands) more likely fit many features of the ones I describe here.

In the course of developing my case studies, I analyzed the legal aspects of the regulatory program in question as well as the empirical aspect. My legal analysis covered the statutory mandate governing the regulations, placed in the larger context of the agency's legal

²⁹³ This is not to say that the regulations I chose are particularly distinctive when compared to other regulations issued by the agencies in question. For each agency, there are plenty of regulations that generated both smaller and larger numbers of public comments. They are not necessarily the most important regulations (where importance is measured in any defensible sense). Each of the agencies has responsibility for regulations that generated more than the meager media coverage these received.

²⁹⁴ As I note earlier, few regulations actually provoke direct legislative oversight or amendment. This raises at least some questions about the most superficial version of the argument that legislative involvement in the regulatory process is what makes the regulatory state legitimate. Whether the lack of legislative involvement here arose because of the legislature's success in designing procedures to police agencies (which seems more likely) or because of the legislature's genuine disinterest is not critical to my argument here.

responsibilities. This sheds light on the sorts of considerations that an agency *may* bring to bear in developing the regulations. Under what I consider to be the most plausible reading of the doctrine on this issue, the statutory factors can also interact with the concerns raised in comments to establish the factors that the agency had a *responsibility* to address in the development of its rules. In each case, I considered at least some of the feasible alternatives the agency could have implemented given the extent of its discretion under the relevant law.

My empirical analysis then focused on analyzing the comments during the notice and comment process. In particular, I sought to discern the comments' sophistication, the general issue that the comment addressed (particularly those that were relevant under the statute involved), and the extent to which the comment mentioned a concern that was (at least partially) addressed by a change that the agency made in the regulation. Together the legal and empirical analysis shed light on who participates in the notice and comment process, how they participate, and ultimately how public participation shapes regulatory policy. What follows describes the rest of my methodology.

B. Measuring Sophistication

Comments reflect not only a set of substantive views. They also reveal some information about the presence (or absence) of rhetorical, cognitive, and information sophistication. To measure this, I used a mix of fairly straightforward proxies. I developed an initial list of potential proxy measures by consulting the scholarly literature on cognitive complexity.²⁹⁵ I validated and adjusted this list by interviewing 11 lawyers who worked on the regulations I analyze here (and on other regulations) and whose responsibilities included handling public comments on the regulations.

The resulting qualitative sophistication score constituted the sum of the following five factors derived from the interviews with lawyers and from the relevant literature in cognitive psychology: (a) Did the commenter distinguish the regulation from the statute?²⁹⁶ (b) Did the commenter indicate an understanding of the statutory requirement?²⁹⁷ (c) Did the commenter propose an explicit change in the regulation provided in the notice of proposed rulemaking?²⁹⁸ (d) Did the commenter provide at least one example or discrete logical

²⁹⁵ See, e.g., Roberta Corrigan, *A Scalogram Analysis of the Development of the Use and Comprehension of "Because" in Children*, 46 CHILD DEV. 195 (1975)(associating sophistication with the provision of examples and separate arguments justifying a specific position); Shawn W. Rosenberg, *The Structure of Political Thinking*, 32 AM. J. POLI. SCI. 539 (1988)(distinguishing among different modes of political thinking, but emphasizing that these different approaches all depend on differentiating between general and specific rules and reasoning from certain core abstract premises).

²⁹⁶ This category is meant to distinguish between comments that primarily address the scope of the underlying statute from comments that recognize in some way that the agency cannot legally abrogate its responsibility under the statute and must therefore issue regulations of some kind.

²⁹⁷ Whether or not the commenter distinguishes the regulation from the statute in a comment, there is the question of whether the commenter understands the scope of the statutory requirement. For example, a commenter might simply use the comment to complain about a statutory requirement that allows further flexibility for the sharing of financial information among banks and with government in the absence of much individualized suspicion.

²⁹⁸ The notice-and-comment rulemaking process seems to have as a major premise that people can provide feedback that could result in changes in a given regulation. It seems logical to think that the chances of achieving such an impact are heightened when the commenter provides a specific recommendation for a change in (or for maintaining a particular aspect of) the proposed rule. In

argument for why the commenter's concern should be addressed?²⁹⁹ (e) Did the commenter provide any legal, policy, or empirical background information to place the suggestions in context?³⁰⁰ These categories were meant to shed light on the extent of the commenter's information about, and understanding of, the problem faced by the agency.

Comment length was the second measure, on the theory that longer comments tended to provide additional qualitative detail or support for the commenter's assertions.³⁰¹ Comments of any length were coded as being at least one page long. Any fraction of a page over a full page counted as an additional page. I used the total qualitative sophistication as the major explanatory variable to assess comment sophistication. I also tested comment length and an interaction term of length and qualitative sophistication. There was no substantial difference in the results.

C. Assessing Commenter Concerns

The regulations were quite different as to their substance, so one would expect somewhat different kinds of concerns to be raised. My scheme for coding comments accordingly dealt somewhat different categories for each comment. I read through a large sample of the comments (about 200), and assessing the range of issues that commenters raise, and matching them back to the issues in the regulation. Of course, this is not an entirely scientific process. It's entirely possible that others would have picked somewhat different categories. The categories I discerned were, nonetheless, consistent with the process I have described above. I validated these results with agency discussion of concerns raised (though not allowing these concerns to drive the final categories).

D. Measuring Agency Acceptance of Commenter Suggestions

The essence of my strategy for measuring agency acceptance of commenter suggestions was to compare the notice of proposed rulemaking with the final regulation. The three final rules published in the Federal Register that I studied all included a discussion describing the changes, though in some cases this discussion missed one or more substantive changes. I used a detailed comparison of the proposed and final regulations, further informed by the agency's own description of the changes, as a basis for the analysis – rather than relying on the agency's own description of the changes alone.³⁰² I then coded each comment

any case, the capacity to ask for such a specific change plausibly reflects a commenter's degree of sophistication about the rule and the underlying statute.

²⁹⁹ This is meant to assess whether the commenter provided some measure of justification for the concerns raised, rather than simply stating the concern without indicating why such a concern was important. No distinction was made between self-regarding arguments (i.e., this is a problem because it affects *my* business in a particular way) and public-regarding arguments (i.e., this is a problem because it will make *Americans* feel like they are constantly under surveillance, which will chill free expression).

³⁰⁰ The key criterion was whether the comment provided at least one page of background material separate from any specific concern or recommendation about the regulation.

³⁰¹ While there was a mild correlation between comment length and sophistication, there were certainly plenty of comments that appeared to have "impact" and were just one or two pages long. Indeed, comment length was a weaker predictor of impact than the adjusted sophistication variable reflecting the qualitative indicators.

³⁰² On the rare occasions where an agency indicated in the relevant Federal Register notice that it was uncertain and explicitly seeking comment on whether to keep a particular provision in the regulation, I coded the agency's decision to retain the provision in question as the equivalent of a

for whether it included a recommendation or raised a concern that was addressed through one of the changes. I coded the comments both for the total number of recommendations that the agency accepted, and also for whether the comment included any suggestion that the agency adopted.³⁰³

E. Commenter Identity

I assessed commenter identity by examining the comment itself. If a commenter did not self-identify as a business, organized “public interest” or public membership organization, organization representing business, or law firm, then I treated the comment as either coming from an individual member of the public or an “unofficial organization.” Unofficial organizations (such as the “San Jacinto Constitutional Study Group”) were those where the commenter identified himself as the representative of a larger group, where (a) neither the comment nor the stationery on which the comment was printed indicated that the group was representing business, (b) neither the commenter nor the stationery indicated that the group was a tax-exempt organization, and/or (c) the commenter indicated that the group was informal or operated solely in a particular neighborhood.

Obviously some comments that were coded as being from individual members of the public were spurred by the activities of organized interest groups. Those interest groups play a role in informing their members and other segments of the public about the regulation in the first place, and may also encourage their members to send in a specific form letter comment. I did code comments for whether they appeared to be form letters on the basis of whether precisely the same language as at least three other comments. The interest group strategy of encouraging members to send in form letters raises the question of what the groups think they will achieve by galvanizing the public to send in form letters. In part for this reason, the form letters are worth analyzing separately from interest group activity because they may have a separate impact on the agency (either as a proxy for interest groups to demonstrate their political strength, or as a means of conveying intensity of preference to the agency). The letters also reveal the willingness of many individual members of the public to expend time and energy on a political activity that is at least as costly as many others that receive more routine academic scrutiny (like the act of voting). A methodology that treated form letters as merely reflecting the concerns of an interest group would fail to recognize the difficulty groups sometimes face in getting their members (and others who sympathize with their cause) to actually engage in political activity, and also the possible independent impact of form letters on the regulatory process. A future study could shed light on these issues by analyzing how the presence of form letters impacts regulatory policymaking in a large number of regulations. In the meantime, my analysis codes comments for whether they are form letters, but otherwise treats them like any other comment. Which means it can be analyzed to see what sort of person or entity sent the comment, how sophisticated it was, what concerns it raised, and whether it includes suggestions the agency actually adopted.

change. For robustness, I also assessed the impact of excluding these data. The conclusions I report about the impact of sophistication and status as a directly regulated entity on agency acceptance of commenter suggestions are unaffected regardless of whether these data are excluded from the analysis.

³⁰³ By suggestion, I mean either of two things: (a) a specific request that the agency resolve a specific alleged problem in the regulation that was then resolved (in the final rule) in essentially the manner the commenter requested, or (b) a more general concern raised by the comment that, by the agency’s own admission and in a plausible manner, is substantially mitigated through some change in the regulation.