

THE MISSING LINK IN CITIZEN PARTICIPATION IN U.S. ADMINISTRATIVE PROCESS

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The participatory process that lies at the heart of U.S. administrative law is hailed by some to be among the most comprehensive in the world. Agencies promulgate rules under elaborate procedures designed to place public participants as important collaborators and watchdogs at virtually every step in the agency's decision. Indeed, in this process, citizens are guaranteed – by legislation – important rights of participation, which include commenting, accessing information, and ultimately challenging agency rules in court.¹

In practice, however, the work of the U.S. agencies has become increasingly inaccessible to many of the individuals and groups that their rules affect.² Rulemaking records are often very large and can run into the hundreds of pages.³ Comments submitted on agency proposals, standing alone, can include thousands of submissions, many of which are dozens of pages each.⁴ The agency's own explanations, proposals, and rule text can be opaque and gratuitously complicated in ways that even experts cannot follow.⁵ As Professors Farina, Newhart, and Blake observe, from the perspective of affected citizens, the agency's rule and accompanying analysis "is about as accessible as if the documents were written hieroglyphics."⁶ The net result is an administrative

¹ See Administrative Procedure Act, 5 U.S.C. 553(c) and 706(2); The Freedom of Information Act, 5 U.S.C. § 552.

² See Cynthia R. Farina & Mary J. Newhart, *Rulemaking 2.0: Understanding and Getting Better Public Participation* at 12 (IBM CENTER FOR THE BUSINESS OF GOVERNMENT 201) (identifying "the length and complexity of rulemaking materials" as a barrier to meaningful citizen participation in U.S. agency rulemakings).

³ See generally See Cynthia R. Farina, Mary J. Newhart, & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 THE GEORGE WASHINGTON LAW REVIEW 1358, 1365 (2015) (observing this phenomenon). For a first-hand experience, go to regulations.gov and search the rulemaking docket for a rule. For a current rule governing a workplace standard for silica, go to: <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dt=SR%252BO%252BN%252BPR%252BFR%252BPS;D=OSHA-2010-0034>.

⁴ See Kimberly D. Krawiec, *Don't 'Screw Joe the Plummer': The Sausage-Making of Financial Reform*, 55 ARIZONA LAW REVIEW 53-103 (2013) (examining over 8000 comments on the proposed Volker rule and raising questions about the quality of citizen participants as opposed to the engagement by the financial industry).

⁵ See COMM. TO REVIEW EPA'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE, NAT'L RESEARCH COUNCIL, REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE 4 (2011) (noting in the course of their review "[p]roblems with clarity and transparency of the [EPA's] methods [for assessing the risks of formaldehyde] appear to be a repeating theme over the years, even though the documents appear to have grown considerably in length. In the roughly 1,000page draft reviewed by the present committee, little beyond a brief introductory chapter could be found on the methods for conducting the assessment").

⁶ Farina, Newhart & Blake, *Plain Language*, *supra* note 3, at 1365.

process that – despite its promises otherwise – has become increasingly inhospitable to meaningful engagement by stakeholders in general and citizens in particular, including their self-appointed experts and advocates.⁷

This paper explores the growing gap between the legally protected “right” to participate in administrative process and the practical ability to act on that right in U.S. administrative law. The basic argument is a simple one. If a legal process depends on public participation, then the process should be designed to ensure that meaningful participation takes place.⁸ Merely providing opportunities for citizens to inform and hold agencies accountable is futile if the agency is allowed or even encouraged to develop policies and rules that are voluminous, analytically opaque, and effectively incomprehensible to all but the most well-funded expert. Yet this seemingly obvious and important feature of administrative process – namely the failure to require that the decisions be reasonably comprehensible to the diverse set of interests⁹ – has gradually slipped through the cracks in the design of administrative process.

More specifically, a disconnect or missing link has developed between the mandated *means* of ensuring participation in administrative process and the unenforceable, but overarching *end goal* of engaging affected groups.¹⁰ This disconnect occurs because the measures for ensuring participation (opportunities to comment; transparent processes; right to review) are legally enforceable but are effectively severed from any effort to ensure the penultimate goal of vigorous participation.¹¹ Even more perversely, as the U.S. legal system grows more proceduralized,¹² comprehension barriers to participation grow with them. The resulting information deluge ushered in by various analytical and paperwork requirements, in fact, appears to be inversely correlated with the ability of less sophisticated parties to understand the implications

⁷ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1331-34 (2010) (making this general argument).

⁸ See generally Farina, Newhart & Blake, *Plain Language*, *supra* note 3.

⁹ Farina identifies four categories of participants. Farina & Newhart, *Rulemaking 2.0*, *supra* note 2, at 14. The first consist of “sophisticated stakeholders”, which include high stakes regulated parties and in some settings might also include well-organized NGOS. The second category – missing stakeholders – tend to be directly affected but impeded from participation due to a lack of expertise and resources. The third and fourth categories (unaffiliated experts and interested members of the public) are less essential to ensuring vigorous participation, although by no means are they wholly peripheral either. For purposes of this article, however, references to the “public” includes all three of these absent categories. Since directly affected groups vary from rule to rule and may not be organized or organized at all, they are drawn from the larger population by virtue of the impacts of the rule on them. Yet they are still part of the larger “public,” broadly defined.

¹⁰ Needless to say, since the focus is exclusively on administrative process the scope of this analysis does not consider many other important forms of citizen participation – in the political process, in reinforcing enforcement cases, in impacting agency priorities and framing of priorities and decisions, and in local or nonlegal community decision processes or collective action.

¹¹ See RALPH L. KEENEY, *VALUE-FOCUSED THINKING* vii-ix, 29-30, 44-51 (1992) (highlighting the benefits of value-focused thinking and discussing how neglecting a universal map of the goals, problems, and possible solutions can result in wrongheaded decisions).

¹² See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. STATE. U. L. REV. 533 (2000).

of the underlying regulatory decisions with respect to their interests.

This essay begins with a brief overview of the design and structure of U.S. administrative process. It then proceeds to identify ways that the end goal of meaningful participation has been lost in the proceduralization of U.S. administrative law and how this omission serves to ultimately undermine the end goal of ensuring vigorous participation. The paper closes with some suggestions for future research. Since it has been suggested that U.S. participation may in fact provide a model for other countries, the hope is that by exposing fundamental problems in the design of administrative process, others can sidestep these pitfalls or at least be aware of the limitations of the U.S. approach.

§ 1 – THE CENTRAL ROLE OF PARTICIPATION IN THE DESIGN OF U.S. ADMINISTRATIVE PROCESS

The design of U.S. administrative government is premised on vigorous engagement and oversight from all affected parties, including citizens.¹³ Since agencies sit outside the electoral process as the fourth branch of government, agency accountability is ensured in significant part through public rights to participate and judicial review. This goal of engaging the affected parties in the decision is fundamental to the design of U.S. administrative process.¹⁴

In theory, to ensure vigorous public engagement and oversight, the agency would be forced to communicate meaningfully with those affected by its decision.¹⁵ Affected groups would be identified and educated about the issues, their views would be solicited, and they would remain active throughout the decision process. In this participation-focused design, the speaker (in this case, the agency) would place as its highest priority engaging in meaningful communications with the directly impacted stakeholders. Given the wide variations in regulatory contexts, mandating a formulaic checklist to ensure successful communication would not be practical, but the process would at least be designed so that effective communication with all affected groups – rather than just the litigious ones – was foremost in the agency's incentives. In satisfying this central goal, the agency would, for example, provide a succinct but detailed summary of the issues and options at stake, clear evidence to support its decision, and identify important

¹³ See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003).

¹⁴ FINAL REPORT OF THE ATT'Y GEN'S COMM. ON ADMIN. PROCEDURE 103 (1941).

¹⁵ Effective communication is difficult, of course. Rhetoric scholars alert U.S. to the fact that there is no neutral speech – all communications have a valence. See JAMES A. HERRICK, *THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION* (2005). But there are also methods to correct for the worst pathologies. Moreover, a process in which the “speaker” has incentives to be incomprehensible would seem to lead to a broader range of communication challenges than one in which the speaker is at least encouraged to engage the audience.

consequences that flow from its preferred choice.¹⁶ The more visible the options, framing, assumptions, and methods embedded within the agency's regulatory decision, the better.¹⁷

Yet the actual design of U.S. process does not provide these strong incentives for the agency to engage in meaningful communication with all affected parties. U.S. administrative law instead requires only that, in developing a rule, the agency follow a set of passive procedures that provide opportunities for affected groups to weigh in if they so choose.

First, the agency must solicit comments from all persons on its proposed rule and ensure that the necessary information and records are readily available to these groups to make the comment opportunity meaningful.¹⁸

Second, agencies must "consider" all comments and explain how or whether each comment impacted the final rule.

Third and finally, if a party alerts the agency to flaws in the logic, facts, process steps, or statutory interpretation of their mandate in their formal comments and that comment is ignored, the party can sue the agency in court.¹⁹ In presiding over these challenges, the courts are deferential to the agency and will remand a rule only if the rule is "arbitrary and capricious."²⁰ Still, this is not at all uncommon and some courts give agency rules a "hard look."²¹ Through these three procedural steps, the U.S. process seeks to ensure that the work of the agencies is accountable to the public that they serve.

Over the last few decades, additional requirements have been imposed on agency rulemaking processes by Congress and the President. Agencies are now also required to conduct a number of additional analyses – cost/benefit and small business related analyses among them – on the most significant rules.²² These added measures – like the procedural requirements themselves – are touted as increasing the agency's own self-awareness of the impact of its rules on regulated parties as well as providing simple metrics that enhance the general accessibility of the agency's work.²³

However, in all of these process steps and analytical measures, from the comment process through the added rationality assessments, there is no expectation that the agency will actively engage all affected parties in the decision-making process. Agencies are neither required nor rewarded for notifying or educating

¹⁶ See NRC, *supra* note 5, at chpt 9 (making this point).

¹⁷ See Pasky Pascual et al, *Making Method Visible: Improving the Quality of Science-based Regulation*, 2 MICHIGAN JOURNAL OF ADMINISTRATIVE AND ENVIRONMENTAL LAW (2013).

¹⁸ 5 U.S.C. 553(c).

¹⁹ *Id.* at 706(2).

²⁰ *Id.*

²¹ See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 593-97 (5th ed. 2010).

²² Seidenfeld, *supra* note 12.

²³ Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern, *Controversies Surrounding Regulatory Impact Analysis*, in REFORMING REGULATORY IMPACT ANALYSIS 12-13 (WINSTON HARRINGTON, LISA HEINZERLING, & RICHARD D. MORGENSTERN EDS. 2009) (touting these advantages of the RIA process).

affected parties on the important issues, particularly those parties that lack resources and expertise to weigh in on decisions that affect their interests.²⁴ Moreover, there is no demand on the agency to ensure that its work is accessible; simple and clear rules are legally irrelevant. The resulting disconnect between the procedural “means” to ensure vigorous participation and the ultimate “ends” of accomplishing it creates a process that drifts – sometimes quite far – from participatory goals that were intended to serve as its foundation and guiding force.

§ 2 – THE MISSING LINK: THE DEARTH OF AGENCY INCENTIVES TO ENSURE VIGOROUS ENGAGEMENT BY AFFECTED CITIZENS

In the abstract, if a process is founded on the need for vigorous and meaningful participation, underlying process steps should be designed and calibrated carefully to advance those goals. In the U.S., however, the means (process) and ends (vigorous participation) have become so decoupled that the means work at cross-purposes from the overarching objectives. As a result, “the current rulemaking process, despite its formal promises of transparency and broad participation rights, routinely and systematically disadvantages consumers, small business owners, local and tribal governmental entities, nongovernmental organizations, and similar kinds of stakeholders, as well as members of the general public.”²⁵

There are two features of current administrative process in particular that facilitate this substantial disconnect between the legally required procedural steps and maximizing vigorous participation. First, there is no accounting or tracking system – either mandatory or even recommended – to gauge whether an agency is in fact reaching its diverse audience.

Instead, if the active commenters are few or badly lopsided in favor of well-financed groups, this is not relevant to assessing how well the agency has complied with administrative process requirements. Second, the elaborate proceduralization of administrative law – however unintentionally – cumulatively institutes more disincentives than incentives for agencies to communicate meaningfully with those affected by their decisions. Thus while in theory U.S. process purports to be oriented towards ensuring public participation and oversight, both the requirements and the incentives built into the design of U.S. administrative procedure point agencies in the opposite direction. Each feature is discussed in turn.

²⁴ Cynthia R. Farina, *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 419-20 (2011) (observing that the “requirement to accept public comments has never been understood as an affirmative, inquisitorial duty to seek out members of all affected groups and ensure a broadly representative range of participation”).

²⁵ Farina, Newhart & Blake, *Plain Language*, *supra* note 3, at 1362-63.

A) No Measures to Track Participation and Encourage Vigorous Communication with Affected Citizens

While the Administrative Procedure Act (APA) calls on agencies to produce a “concise general statement” of their proposals and rules,²⁶ the elaborate system of U.S. process places no meaningful requirements to back up this requirement. Richard Pierce notes that in the U.S., “[t]he courts have replaced the statutory adjectives, ‘concise’ and ‘general’ with the judicial adjectives ‘detailed’ and ‘encyclopedic.’”²⁷ Hypothetically, in fact, if an agency produced a rule and accompanying explanation that was, by all accounts, incomprehensible, this feature does not serve as a grounds for upsetting the rule under U.S. administrative law. There are no page limits on rules, criteria for the understandability of the agency explanations, or expectations that an agency actively reach out to affected parties.

Not only does U.S. administrative law lack direct incentives for meaningful communications, there is a lack of secondary measures to assess whether participation is ultimately occurring. More specifically, under U.S. law: Agencies are not required nor do they provide simply tallies of the nature of the participant who weigh in at various stages of their processes. Agencies are not required to actively solicit participation from affected groups, even when it is clear that those who are affected by or benefiting from a rule are likely to lack expertise or resources to participate effectively. For the citizen representatives who do engage (typically a few NGOs), there is no inquiry or analysis by the agency to determine whether or how well their advocacy positions map against the broader interests or whether NGO procedures are in place to communicate and ensure that the perspectives are largely in accord with the citizens they purport to represent.²⁸ Added analytical assessments, like cost-benefit and small business assessments, need not be comprehensible to the public. The technical and large size of these assessments (regularly more than 500 pages) in fact may serve to undermine their accessibility.²⁹

In the U.S., the procedural inattention to the necessity of a meaningful connection between agency rules and engagement by the public leads to a passive or market-based model for public participation – an “if you build it, they will come” approach. Agencies must publish proposed rules; but if there is no engagement by affected parties, this feature is a reflection only of the participants and not of the quality of the agency’s rule. In highly salient and publicized rules where all interests are engaged and active, the APA’s passive approach is not problematic.³⁰ But in

²⁶ 5 U.S.C. § 553(c).

²⁷ PIERCE, *supra* note 1, §7.4 at 445.

²⁸ See Farina & Newhart, *Rulemaking 2.0*, *supra* note 2, at 15-16 (arguing that the comments of these organizations “rarely convey the rich and nuanced detail of individual experiences, practices, and operations”); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA LAW REV. (forthcoming 2016).

²⁹ MORGENTERN ET AL., *supra* note 23, at chpt. 9.

³⁰ See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 125-33 (2008).

rules where some affected groups cannot afford to participate, their absence will not necessarily be noted, much less addressed by the U.S. administrative process. Moreover, this indifference occurs as a matter of procedural design.

B) Missing Incentives to Encourage Effective Communication

It is bad enough that U.S. processes are blind to the core objective of ensuring that the agency engages in meaningful communication with affected groups, but the incentives created by the legal procedures serve to ultimately reward agencies for incomprehensibility through such means as undue complexity, length, or an unnecessary reliance on technical arguments.

Administrative agencies in the U.S. were created to develop detailed rules that implement the broader laws passed by Congress. The existence and survival of agencies as this Fourth Branch thus depends in large part on their success in promulgating rules, which in turn requires navigating those rules through mandated comment periods, court challenges, and the political process.

However, if the enforceable procedural requirements are framed in this way, how would a rational agency behave with respect to engaging the public – even defined most narrowly as diverse experts who represent broader sets of interests? Rules that are in fact voluminous and incomprehensible, while at the same time covered in technicalities would seem to provide the surest means of navigating controversial rules through the political and legal processes.³¹ The fewer the comments, the less chance that the agency will be sued and the fewer criticisms the agency must address in its revision process. The agency also faces a much better chance of dodging both congressional and presidential oversight with long, technical rules.³² It logically follows, then, that rules that are incomprehensible are more likely to survive precisely because most of the audience will not know what to make of them.

Case law emerging in the courts' review of agencies only serves to reinforce rather than counteract these incentives for agencies to promulgate detailed, complex, and even inscrutable rules. For their part, the courts require commenters to raise each and every concern "with specificity" during notice and comment if they wish to preserve their ability to challenge the issue in a subsequent appeal.³³ Long, detailed, and often multiple rounds of comments

³¹ The more elaborate version of this argument is developed in Wagner, *supra* note 7.

³² For discussions of the large role that both the President and Congress play in the substance of agency rulemakings in the U.S., see Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014) (discussing the important role of the President in intervening in regulations); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) (describing the same for Congress).

³³ See generally *McKart v. United States*, 395 U.S. 185 (1969); see generally Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEORGE WASHINGTON L. REV. 1 (1985).

are the most responsible way for commenters to protect their interests.³⁴

Agencies' incentives for excessive detail and technicality, at the sake of comprehensibility, run in parallel to those of interested parties. Courts review challenges to an agency's rule based in part on how well the agency responds to facts and related arguments raised by commenters. Like interested parties, then, agencies are encouraged to be overly thorough, exhaustive, and to leave no stone unturned.³⁵ Prof. Melnick observes: "Since agencies do not like losing big court cases, they react[] defensively, accumulating more and more information, responding to all comments, and covering their bets. The rulemaking record grew enormously, far beyond any judge's ability to review it."³⁶ And "[t]hus began a vicious cycle: the more effort agencies put into rulemaking, the more they feared losing, and the more defensive rulemaking became."³⁷

Courts have also invented a "logical outgrowth test" that encourages agencies to develop a proposed rule that is effectively complete.³⁸ Under this test, any material changes made to final rules that are not presaged in the agency's proposal require a new proposed rulemaking, with its own separate notice and comment period. Agencies thus again face legally-backed incentives to develop a proposed rule that is as complete as possible.³⁹

In response to these incentives, some agencies seek out the most litigious participants early in the development of their proposed rule to work out the details in advance, outside the formal notice and comment period.⁴⁰ These contacts are not regulated by the APA and in fact are implicitly encouraged by the court's logical outgrowth rule since the proposal will be endorsed by the most litigious and well-funded groups before it is published, minimizing the need to revise the rule again. As one agency staff remarked "We help them; they help us."⁴¹ Yet these negotiation-styled discussions, occurring before the agency's proposal is published, can lead to an elaborate, complex, and contract-like rule proposal that is even

³⁴ Andrea Bear Field and Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NATURAL RESOURCES AND ENVIRONMENT, Summer 5, 9-10 (1995) (recounting the following advice from regulatory attorneys; "Make sure that you submit to the Agency all relevant information supporting your concerns in the rulemaking. This is the best way to convince the Agency to respond favorably to your concerns.").

³⁵ Prof. Pierce describes what the lengths agencies must go to show they have adequately considered all comments. See PIERCE, *supra* note 27, §7.1 at 413,

³⁶ R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992).

³⁷ *Id.*

³⁸ *SEE SHELL OIL CO. V. EPA*, 950 F.2d 741, 757-63 (D.C. Cir. 1991) (HOLDING THAT AGENCY FAILED TO PROVIDE MEANINGFUL NOTICE AND COMMENT OPPORTUNITIES ON ISSUES IN THE FINAL RULE; THE ISSUES WERE RAISED BY COMMENTERS DURING THE NOTICE AND COMMENT PROCESS); GABRIEL MARKOFF, *THE INVISIBLE BARRIER: ISSUE EXHAUSTION AS A THREAT TO PLURALISM IN ADMINISTRATIVE RULEMAKING*, 90 TEX. L. REV. 1065 (2012).

³⁹ See E. Donald Elliott, *Reinventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992).

⁴⁰ See William F. West, *Formal Procedures, Informal Processes, Accountability and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUBLIC ADMINISTRATION REVIEW 66 (2004).

⁴¹ See Cary Coglianese, "Challenging the Rules: Litigation and Bargaining in the Administrative Process," U. of Michigan Dissertation unpublished, at 14 (1994).

more inaccessible to the parties not present during the pre-proposal negotiations.⁴²

Rationality requirements – laid atop the notice and comment process – may serve only further to aggravate, rather than correct the problem of inaccessible rules, despite their justification as increasing agency accountability. These rationality requirements include requirements that agencies prepare a full cost-benefit analysis on significant rules, assess impacts on small businesses, and conduct various other related assessments.⁴³ Beyond the need for commenters to invest still more expertise and resources examining these additional analyses, the agency itself might have incentives to use the analyses strategically to further insulate its decision from meaningful scrutiny.⁴⁴ Indeed, the most rational course for the agency is to produce these analyses in end-oriented ways that support the agency's preferred rule, a possibility that enjoys some support from empirical studies of agency practice.⁴⁵

In fact, rationality requirements that operate in this way – alienating rather than educating participants – appear to be fundamentally incompatible with deliberative-based processes.⁴⁶ To the extent that rationality measures imply that objective measures can be used to identify “good” or “public benefitting regulation,” then in cases where deliberation and rationality diverge, the correct outcome is presumably the “rational” or quantitative output. Seen in this way, public participation ultimately operates more as a paper weight, reinforcing quantitative measures in cases where the two converge and sidelined in cases where public comment leads to a different analysis or result.

C) U.S. Administrative Process Up-Close

On the ground, agency rules are in fact often voluminous and complex in ways that evince a gratuitous complexity that cannot be attributed solely to inherent features of the regulatory decision itself. For these rules, moreover, there is routinely a dearth of participation from stakeholders who are directly affected. The evidence recounted below consists of several complementary lines of evidence that reveal the general inaccessibility of many agency rulemakings to the publics directly affected by them.⁴⁷

First, a series of largely unenforceable commands by Congress and the President to agencies to make rulemakings clear and accessible have not altered the agency practice of promulgating convoluted, incomprehensible rules. Over the last few decades, for example,

⁴² See Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 3 ADMIN. L. REV. 99 (2011).

⁴³ See Seidenfeld, *supra* note 12.

⁴⁴ See Cynthia R. Farina, Mary J. Newhart, & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 THE GEORGE WASHINGTON LAW REVIEW 1358, 1365 (2015).

⁴⁵ See Morgenstern et al., *supra* note 23, at 221-25.

⁴⁶ See Martin Shapiro, *On Predicting the Future of Administrative Law*, 6 REGULATION 18 (1982).

⁴⁷ For a more extended discussion supporting this point, see Wagner, *supra* note 7.

agencies have been directed to use plain English and include executive summaries in their rules to make them more accessible to a broader range of stakeholders.⁴⁸ Yet the resulting rulemakings, by and large, are slow to improve and some remain as complex as ever. A recent study found that that reading level required to understand executive summaries, written in response to a new Presidential initiative for greater clarity, “are now being written at a grade level not even close to the suggested seventh to ninth grade level” and tend to be even more complicated than the text of the rule they are summarizing.⁴⁹

Second, limited empirical studies reveal a significant dearth of participation from thinly financed interests in many agency rules. In virtually every empirical study examining interest group participation, public interest groups and other affected citizens participated in only half of the rules under study, despite the fact that the public was affected by all or nearly all of the rules.⁵⁰ Moreover, in the rules in which they do engage, the representatives of the public are badly outnumbered.⁵¹ For example, in one set of rules – air toxic standards – the public interest nonprofits and other affected citizens were not only absent from half the rules, but when they did engage, they were vastly overpowered by industry in the number of comments filed (14 to 1).⁵² Moreover, public interest representatives and other citizens were essentially absent from all extensive discussions leading up to the proposed rule that occurred between the agency and industry; in that category, for every 87 communications the agency logged with industry, nonprofit groups logged in less than one communication.⁵³ Given these findings, one does not need a particularly nuanced theory of public interest to conclude that the engagement and agency pressures are lopsided in ways that lead to significant gaps in the consideration of all affected interests.

Third, the courts have noticed the general inaccessibility of agency decisions to even the most expert lawyers, with clear implications for what that might mean with respect to eliciting broader participation. As a federal court of appeals judge remarked in a case with a record that spanned more than 10,000 pages. [T]he record presented to U.S. on appeal or petition for review is a sump in which the parties have deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation[...] The lack of discipline in such a record, coupled with its sheer mass [...]

⁴⁸ Farina, Newhart & Blake, *Plain Language*, *supra* note 3, at Part I.

⁴⁹ Farina, Newhart & Blake, *Plain Language*, *supra* note 3, at 1396.

⁵⁰ See generally Wagner et al., *supra* note 42, at 109, 125 (citing and summarizing this literature).

⁵¹ See *id.*; Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006) (identifying a “bias towards business”).

⁵² See Wagner et al., *supra* note 42, at 128-29.

⁵³ *Id.* at p. 125.

makes the record of information rulemaking a less than fertile ground for judicial review.⁵⁴

Other judges reiterate this core concern, portraying themselves as victims to the agencies' incomprehensible rules as well as the larger public affected by the decisions.⁵⁵

But perhaps the most persuasive evidence that agency rules are inaccessible to all but the most sophisticated and well-financed stakeholders rests on first-hand experience with a typical rule.⁵⁶ As one illustration, consider a relatively typical EPA rule promulgated in the mid-1990's regulating the emissions of toxic air pollutants from chemical storage tanks in tank farms at large petrochemical plants.⁵⁷ The proposed rule, which included three other subparts, was over 187 pages long. Just on the storage tank rule alone, EPA met with industry groups at least three times before publishing the proposed rule, communicated with them through letters, and prepared at least 15 background documents. After publication of the proposed rule, 22 industries and industry associations and a smattering of public interest advocates engaged first in formal notice and comment and then presented their concerns at a public hearing. EPA's final rule that responded to comments identified more than 100 significant issues in contention.

The final rule and preamble gained still more girth – this time reaching 223 pages and over 195,000 words in the *Federal Register*. With a statutory deadline looming, the agency pushed the process through in 3 and a half years from start to finish. However, because of a vocal constituency of unhappy interest groups, within 18 days after publishing the final rule, the EPA reopened public comment on one of the key issues in the rulemaking and received another sixty formal communications. Before it could issue a revised rule, one of the companies petitioned for reconsideration of the entire rulemaking. The agency ultimately issued a proposed clarification to the original rule two years later, received another 20 comments on its proposed clarification, and issued a final revised rule at the end of 1996.

One would imagine that with all of this input and deliberation, the agency ultimately devised a standard that ensured that significant quantities of hazardous chemicals would not volatilize from large open tanks without detection. Yet the EPA's resulting standard, while requiring sealed lids on chemical storage tanks, requires little

⁵⁴ *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

⁵⁵ See *Florida Peach Growers Ass'n v. Department of Labor*, 489 F.2d 120, 129 (5th Cir. 1974) (lamenting that the record is "some 238 documents occupying approximately two and one half feet of shelf space" that contains a mix of technical information); *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 837 (5th Cir. 1978) (observing that judicial review was complicated by the record that consisted of a "jumble of letters, advertisements, comments, drafts, reports and publications [...] run[ning] for almost 2,000 pages [...] [with] no index").

⁵⁶ See also Farina, Newhart & Blake, *Plain Language*, *supra* note 3, at 1365 (discussing the inaccessibility of an airline rule to all stakeholders except the airlines, who were the parties being regulated)..

⁵⁷ 40 C.F.R. § 63.100-183. This example is drawn from Wagner, *supra* note 7.

of owners in ensuring that these lids are intact and operating effectively. Rather than periodic monitoring or “sniffing” for chemicals from tanks, owners need only conduct a visual inspection of the lids. And rather than require this inspection weekly or regularly, the rules require only an annual inspection – with another 3 ½ months of grace period to rectify leaks once discovered.

How could all of these administrative transactions lead to such a seemingly counter-intuitive result? One can surmise that there were simply too many battles – each of them intricate and time-consuming – for the two public interest representatives and four state regulatory groups to keep up with all of the moving parts. One can also conclude that in slogging through more than 100 contested issues under a tight schedule, the agency itself had to tread lightly on issues for which the industry might have claimed superior knowledge.

§ 3 – GETTING TO BETTER

If citizen participation in governance requires incentives for effective “communication” between the agencies and the citizens, then what kind of changes could be made to U.S. process to ensure this communication takes place? At least in the U.S., there is not much literature available to help gain traction on this question. As a result, the thoughts offered here are preliminary and offered primarily to spark conversation rather than attempt to resolve the problem.

A) Learning more about the Status Quo

In the short term, it is imperative to learn more about the level and nature of general citizen engagement in current administrative decision-making in the U.S. Recommending or requiring that agencies tally up the nature and types of affected publics engaged in rules could provide valuable information that is currently unavailable. Additionally, tracking the extent to which citizen comments ultimately lead to changes in an agency rule, as compared with the comments from other more sophisticated stakeholders, could provide a finer grained view of the current levels of meaningful citizen participation in agency rules.⁵⁸

Case studies, surveys, and other targeted qualitative studies will also provide valuable information on how participatory practices in the

⁵⁸ See Krawiec, *supra* note 4 (providing this type of initial, valuable data on one important rulemaking). To lessen burdens on agencies, this data could also be conducted voluntarily by those offering comments. Commenters could offer an assessment of the extent to which they believe their comments were taken seriously. While this input may be self-serving, it will still provide a helpful indication of the effectiveness of participation from the participants’ standpoint. Of course when issues are litigated precisely because the agency did ignore them, this too could be easily recorded in a score sheet that identifies that petitions for rehearing and appeals were taken on individual rules. The crowdsourcing literature may provide some insights on how these various participant-based assessments could be conducted.

U.S. currently work. For example, sets of rules could be followed with respect to how well citizens were alerted to the issues; how well the agency communicated the substance of the rule to the affected citizens; and the ultimate level and extent of citizen engagement throughout the entire decision-making process. Case studies of particularly successful citizen engagement in agency rules could also be developed with an eye to extracting the mechanisms that may be capable of being used to spark broader citizen engagement.⁵⁹

B) Intermediate and Longer Term Reforms

To reorient the agency to the importance of citizen engagement, the incentive system for administrative process needs to include rewards to agencies for broader and more meaningful engagement by all affected parties. First and most important, agencies should be required to demonstrate – in a rigorous way – that they have successfully communicated with the affected stakeholder groups or at least ensured that these groups’ interests are effectively represented by advocates or others throughout their decision-making process. Ideally, the agency should be required to identify the main affected parties and reach out to ensure they understand the implications of the proposals and are able to contribute meaningfully. To make this requirement legally enforceable, this “outreach and engagement” could become yet another process step that is legally required, in addition to the notice and comment process.

A softer version would mete out some type of rewards for agencies to engage in an active, rather than passive, participation process. Agencies that do engage stakeholders, for example, could be relieved of some of the other procedural requirements – like cost/benefit analysis, small business protections, or Presidential review since these interventions are arguably largely redundant if agency rules are successful at engaging all affected groups.⁶⁰ Indeed, if Congress is silent, the President could institute this reform simply by providing this type of reward in exchange for a demonstration of vigorous engagement of all identified sets of stakeholders.

A still more tentative approach would be to encourage agencies to launch pilot efforts for individual rules that would benefit from more vigorous engagement from missing, but directly affected stakeholders. The Rulemaking 2.0 project at Cornell Law School

⁵⁹ Agencies like the EPA sometimes hold numerous location-specific meetings with communities that are currently impacted by a type of industrial emission, for example. Some, including from the NGO community (for example, EarthJustice), have suggested that the resulting citizen input does inform the agency in important ways. These anecdotes and experiments are vital, but to make the best use of them there needs to be a mechanism for collecting their findings and feeding them back into process design.

⁶⁰ See Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 MICH. L. REV. 1497, 1502–03 (2007) (arguing that the results of White House involvement provide greater political accountability because of the electoral process); see also Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARVARD L. REV. 1838 (2013) (highlighting the importance of inter-agency coordination).

provides a superb, how-to manual for such an exercise.⁶¹ Thus agencies need only be given some type of incentive to engage in this type of incremental experimentation with regard to enhancing public participation.

Second, as an important supplement (but not substitute) for forcing agencies to engage actively in outreach to affected participants, agency's processes should be "audited" for their participatory qualities – perhaps following roughly on the concept of a "democracy audit."⁶² Perhaps the best approach to this outcome-based oversight is a requirement that agencies verify that all affected stakeholders have in fact submitted detailed comments in the record and were fully engaged in the process. When citizen and related public interest groups are absent, under this approach, the agency's rule would be deficient as a matter of process.⁶³

Another, complementary approach, would assess agency rules with regard to the rules' accessibility and success in reaching out to affected parties. Even if the text of the preamble or rule is difficult to understand, if the agency is providing educational materials, conducting training, or otherwise ensuring that the affected citizens are weighing in, then the agency's rulemaking process would still satisfy the participation goal. To conduct these types of audits, crowd-sourcing of at least the major affected, but thinly financed groups and constituencies with regard to the comprehensibility and accessibility of the agency's rulemaking project might offer a useful indicator of how well the agency is doing. Thus, beyond advocating the substantive position on behalf of the general public, these groups would be enlisted also to speak to process – whether their clients or more diffuse groups are being adequately informed and engaged in the agency's rulemaking process.

Alternatively, an advisory committee could be empaneled to review the accessibility and comprehensibility of an agency's explanations and decisions. Science advisory panels are becoming a staple in the promulgation of science-intensive rules. One could imagine a similar type of oversight system that scrutinizes the agency's rules with regard to the effectiveness of the agency's communication of the core messages, assumptions, framing, and implications. This type of oversight operates in a way that helps the agency come to terms with its own blind spots and communication difficulties.

Finally, for some regulatory projects that affect individual citizens directly, but for which these individuals are unlikely to have the resources to participate meaningfully, agencies could be expected or required to provide alternative means of representation. One

⁶¹ See generally Farina & Newhart, *Rulemaking 2.0*, *supra* note 2.

⁶² Cf. IDEA, State of Democracy Assessment Framework in Germany, at:

<http://www.idea.int/sod-assessments/approach/sod/>

(providing an elaborate framework for assessing, among other things, the link between governmental processes and citizen perceptions of meaningful opportunities for participation in those processes).

⁶³ This deficiency could simply be recorded – for example, via an Executive Order – as a shaming device. Alternatively, Congress could include this process feature as a fundamental basis for judicial review or adjusting standing requirements, most of which have developed through common law interpretations of the APA.

scholar has suggested an administrative jury; citizens could be drawn from affected stakeholder groups or communities and compensated for advising the agency.⁶⁴ Less ideal but perhaps more cost-effective, agencies could be required to identify superb “advocates” to act on behalf of these communities. The advocates would be responsible for interviewing, surveying, and acting as a type of agency-appointed intermediary to ensure that certain sets of citizen interests are vigorously represented in the rulemaking process. In settings in which it appears that there are distinct groups of directly affected, but inevitably missing stakeholders, multiple appointed advocates may be necessary to provide meaningful input into the administrative apparatus.

Additional incentives could be put in place formally or informally. A congressional or presidential edict that simply identifies the communication gap as a fundamental and serious problem in the design of administrative process and tasks each agency with responsibility to consider ways they could address or close this gap could begin the reform process. Best practices might then emerge from the agency responses that could be used as models to inspire agencies to engage in rigorous and meaningful communications with the full range of participants. With focused attention on the problem, agency administrators may wish for good press and be motivated simply out of reputational gains to provide clearer communications. Moreover, if lapses in agency efforts ultimately did occur, critical members of Congress could then seize on problems since incomprehensible rules impair their oversight, as well as the oversight of the larger affected groups.

Yet, reputational incentives may not be enough to reverse the existing legal incentives for incomprehensibility in agency decision-making; added sticks or sanctions may be required to focus the agency on ensuring that their communications to the public are meaningful. Agencies that fail to engage citizens in a rulemaking – measured by the diversity of participants or with respect to the accessibility of agency rules – could be a basis for judicial remand. Congress could institute this requirement and impose penalties on a noncompliant agency – for example the agency could be put in receivership for an incomprehensible rule and an ombudsman or other entity would be tasked to work with the agency to make it accessible and engaged all affected parties in the decision process. Even absent legislative procedural changes, these failing rules could be the subject of greater oversight, perhaps as directed by an Executive Order, that takes public engagement seriously.

CONCLUSION

The enforceable procedural requirements of administrative law have overshadowed and even undermined the larger objective of ensuring vigorous participation by all affected groups. Agencies do

⁶⁴ See David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458 (2013).

not have incentives to communicate effectively with their audiences; rather, the design of U.S. administrative process leads to the opposite set of incentives. Agencies are more successful under the current legal and political process when their rules are voluminous, overly technical, and effectively incomprehensible. Although it may not be possible to rebuild the process from ground up, there is still a great deal of progress that can be made to better ensure that the end goal – vigorous public participation – is fed back into the central incentives for agency action.