

MAKING THE ADMINISTRATIVE STATE “SAFE FOR DEMOCRACY”: A THEORETICAL AND PRACTICAL ANALYSIS OF CITIZEN PARTICIPATION IN AGENCY DECISIONMAKING

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In recent years, academics, politicians, and journalists have hailed the rise of a new model of governance in which citizens take a more active role in government decisionmaking. To the extent citizen participation advocates offer a normative justification for their proposals, they tend to appeal to democratic ideals, contending that increased citizen involvement lends enhanced legitimacy to the government's actions. This Article seeks to explore these normative justifications in greater depth and offer a new model for integrating public input into government decisionmaking. Confining its focus to citizen participation in the decisionmaking of administrative agencies, it first examines whether or not democratizing such processes is desirable and, after concluding that increased citizen participation is beneficial in at least a limited set of circumstances, explores the characteristics that render such participation effective and useful. This Article also considers several of the practical aspects of enhanced citizen participation and proposes certain legal reforms that would allow agencies to pursue such citizen involvement.

Specifically, this Article advocates the use of advisory committees, including demographically representative panels of citizens to provide public input on matters of

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agency policy. Though the agency would not be bound to honor a committee's conclusion, which would merely constitute one entry in the administrative record on which an agency would base its decision, such committees might prove invaluable in offering accurate, informed data concerning public opinion on important matters of policy. By merely exploiting new technologies and making relatively minor amendments to the Federal Advisory Committee Act, the law that governs the activities of advisory committees, the federal government could enable its agencies to experiment with the use of such committees. These relatively modest reforms could be enormously beneficial in providing relevant public input to administrative agencies and quelling popular perceptions of a "democracy deficit" in the workings of the administrative state.

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INTRODUCTION

In the summer of 2009, in the period preceding the passage of the Patient Protection and Affordable Care Act¹ (typically dubbed "Obamacare" by its critics for its association with the Obama Administration's health care policies), advocates of universal health care were pitted against those who felt that a national health care system would

1. Pub. L. No. 111-148, 124 Stat. 119 (2010).

improperly increase costs and/or decrease the quality of medical care. “Town hall” meetings hosted by Senators and Representatives seeking to garner public input on the proposed legislation often degenerated into angry shouting matches in which opponents of the law accused its advocates of attempting to foist “socialized medicine” on an unwilling American public.² Perhaps the most controversial critique of the legislation came from the 2008 Republican candidate for the Vice Presidency, Sarah Palin. Palin infamously accused the Obama Administration of attempting to implement “death panels” that would ration health care to Americans based upon their perceived usefulness to society, with more “productive” citizens receiving superior care whilst the disabled, infirm, and elderly receive sub-par care or are simply left to die³ and, in the words of Charles Dickens, “decrease the surplus population.”⁴

Though it takes a volatile imagination to characterize the end-of-life counseling provisions in the proposed health care law as “death panels,”⁵ these words undoubtedly obtained some purchase on the public imagination. As a result, the health care law provoked intense controversy during its passage and remains a highly polarizing piece of legislation.⁶

2. See, e.g., *Health Care Town Halls Turn Violent in Tampa & St. Louis*, FOXNEWS.COM, Aug. 7, 2009, <http://www.foxnews.com/politics/2009/08/07/health-care-town-halls-turn-violent-tampa-st-louis/> (noting that Democratic lawmakers attempting to deliver remarks on the proposed health care law in Tampa were met with shouts of “‘You work for us!’ ‘Tyranny! tyranny! tyranny!’ and ‘Read the bill!’”).

3. See Michael Kessler, *Sarah Palin’s “Death Panel” Lies*, WASH. POST, Aug. 13, 2009, http://onfaith.washingtonpost.com/onfaith/georgetown/2009/08/the_death_panel_lies.html (quoting Sarah Palin as stating “the America I know and love is not one in which my parents or my baby with Down syndrome will have to stand in front of Obama’s ‘death panel’ so his bureaucrats can decide, based on a subjective judgment of their ‘level of productivity in society,’ whether they are worthy of health care”).

4. CHARLES DICKENS, *A CHRISTMAS CAROL, IN PROSE: BEING A GHOST STORY OF CHRISTMAS 12* (Hill Press 1966) (1843) (When informed that “many would rather die” than seek provisions at public poorhouses, Ebenezer Scrooge replies “if they would rather die . . . they had better do it, and decrease the surplus population”).

5. See Ezra Klein, *Is the Government Going to Euthanize Your Grandmother? An Interview with Senator Johnny Isakson*, WASH. POST, Aug. 10, 2009, http://voices.washingtonpost.com/ezra-klein/2009/08/is_the_government_going_to_eut.html (quoting *Republican* Senator Johnny Isakson as responding to Palin’s “death panel” claims by stating “how someone could take an end of life directive or a living will as that is nuts”).

6. See, e.g., Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP POLITICS, Feb. 27, 2012, <http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx>. At its inception, the Affordable Care Act provoked intense controversy, with Americans starkly divided in their support for or opposition to the Act (with 49% in favor and 40% opposed). *Id.* Since that time, support for the law has slowly dwindled and opposition has gradually increased, with 45% of Americans currently

Though Ms. Palin's precise claims are easily debunked, her remarks reflect a general anxiety felt by a large number of American citizens: that they have lost the ability to influence government policymaking and instead are subject to the whims of elitist bureaucrats who, like the Caesars of Ancient Rome, dictate policy from a distant capital with little to no interest in the everyday concern of their public charges.⁷

A similar uproar emerged when the United States Preventive Services Task Force, an independent panel of experts appointed by the United States Department of Health and Human Services, recommended that women begin regular mammogram screenings for breast cancer at the age of fifty rather than forty, as had been the standard in the past.⁸ Though the panel's recommendation was based upon scientific evidence strongly indicating that the drawbacks of early screening outweighed its benefits, many assumed that the panel's recommendation was an attempt by the Obama Administration to ration health care.⁹

In short, recent health care controversies betray deep-seated suspicions of the federal government and, in particular, federal agencies, on the part of the American public.¹⁰ Of course, a certain degree of disconnect between policymakers and the general public is inevitable. First, agencies

opposed and 44% in favor. *Id.* Though Americans as a whole are roughly equally divided between the pro- and anti-camps, members of the two major political parties are fairly uniform in their support for or opposition to the law: 87% of Republicans favor repeal of the Act while 77% of Democrats oppose repeal. *Id.*

7. See, e.g., Nancy Coppack, *The United Bureaucracy of America*, BRYAN/COLLEGE STATION TEA PARTY, May 23, 2011, <http://bcsteaparty.com/2011/05/bureaucracy-of-america> ("His salary paid by the taxpayer, the bureaucrat is the face of tyranny and opposition rather than service.").

8. See Gina Kolata, *Panel Urges Mammograms at 50, Not 40*, N.Y. TIMES, Nov. 16, 2009, <http://www.nytimes.com/2009/11/17/health/17cancer.html>.

9. *Id.*

10. See, e.g., Clint Bolick, *Obamacare's Other Unconstitutional Provision*, DEFINING IDEAS, Dec. 16, 2011, <http://www.hoover.org/publications/defining-ideas/article/103021> (criticizing the Affordable Care Act for its creation of multiple new agencies and, in particular, for its investiture of significant power in the Independent Payment Advisory Board, which is responsible for recommending legislation designed to contain the rising costs of healthcare). Needless to say, the publicity surrounding the Supreme Court's recent decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), reveals the extent of public antipathy toward increased governmental intrusion into the erstwhile domain of the private sector. Prior to the issuance of the Supreme Court's decision, which ultimately upheld most provisions of the Affordable Care Act including the highly controversial "individual mandate," which required citizens to procure health insurance or face a monetary penalty, *id.* at 2600, 72% of Americans (and 56% of Democrats) expressed a belief that the "individual mandate" provision of the Affordable Care Act is unconstitutional. Jones, *supra* note 6.

often rely on esoteric, highly technical information that is overly complex for the typical citizen. For instance, though climate science overwhelmingly indicates that industrial carbon emissions create a significant threat of catastrophic climate change,¹¹ the average citizen does not observe any uniform pattern of each year's weather being warmer than the previous year's and therefore doubts that climate change exists.¹² Second, public policymaking tools sometimes rely upon assumptions that some citizens find distasteful. For instance, cost-benefit analysis requires the assignment of a dollar value to individual lives, a notion that may conflict with Judeo-Christian doctrines regarding the pricelessness of human life. Nevertheless, widespread antipathy towards administrative agencies¹³ may also reflect a sense that the public has been foreclosed from making decisions regarding the proper allocation of resources, decisions that instead are made by relatively insulated bureaucrats remote from mechanisms of democratic accountability and unaware of citizens' preferences.

This Article examines the extent to which public input can and should be considered in agency policymaking and assesses possible mechanisms for enhancing such input where appropriate. Section I examines the theoretical justifications for increased citizen input in the administrative state. It acknowledges the decline of the non-delegation doctrine and the reality that administrative agencies increasingly engage in policymaking, a fact that arguably justifies improved citizen participation in agency decisionmaking. It then chronicles existing efforts to promote enhanced public input but concludes that these efforts largely consist of hortatory proclamations in favor of citizen involvement and generally lack any set of

11. See Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCI. 1686 (2004), available at <http://www.sciencemag.org/content/306/5702/1686.full> ("Scientists publishing in the peer-reviewed literature agree with [the Intergovernmental Panel on Climate Change], the National Academy of Sciences, and the public statements of their professional societies. Politicians, economists, journalists, and others may have the impression of confusion, disagreement, or discord among climate scientists, but that impression is incorrect.").

12. For instance, the winter of 2009–10 was unusually cold in parts of North America and Europe, an anomaly caused by "Arctic oscillation." Kenneth Chang, *Feeling That Cold Wind? Here's Why*, N.Y. TIMES, Jan. 9, 2010, <http://www.nytimes.com/2010/01/10/weekinreview/10chang.html>. One would expect a certain degree of variation in regional temperatures, even in an environment undergoing sustained warming, but laymen often interpret any temporary downturn in average temperatures as disproving the scientific consensus behind anthropogenic climate change.

13. See Gallup Consulting, *Gallup Study Provides Valuable Insights on the Individual Experience with Federal Agencies*, GOV'T EXECUTIVE 2, <http://www.govexec.com/pdfs/11160911.pdf> ("Nearly half of Americans tend to view federal agencies neutrally (46%), with significantly more negative views (34%) than positive ones (20%).").

unifying principles or concrete goals.

Section II situates the issue of the appropriate level of input into agency policymaking within the broader theoretical debate over the appropriate role of “democratic” elements within our constitutional republic. It examines recent literature that argues that the Nation’s founders valued “democracy” not for its own sake, but rather as a check on the representative elements of government. It applies this insight to administrative agencies, contending that general calls for “enhancing democracy” in the administrative state are misguided, but that a nuanced integration of certain “democratic” elements where appropriate is beneficial.

Section III then considers aspects of effective public participation. In particular, it contends that whenever an agency seeks public input, it should strive to ensure that the group providing input is representative of the national populace and that the participants are well-informed on the relevant issues. It considers existing proposals for enhancing public input and puts forth a new model involving the use of citizen advisory committees.

Lastly, Section IV explores potential objections to the citizen advisory committee proposal. It answers criticisms related to inappropriate reliance on deliberative groups, excessive cost, and the non-binding nature of committee determinations. Finally, it explores various legal issues, most notably those raised by the Federal Advisory Committee Act (FACA), and proposes relatively minor adjustments to the law that would facilitate use of such committees.

Ultimately, every modern government must maintain a delicate balance. On the one hand is “mobocracy,”¹⁴ where the caprices of the uninformed masses dictate public policy. On the other is technocratic oligarchy, where a selected group of “elitist” decisionmakers impose their “enlightened” will upon the general populace. American administrative agencies, like the Republic as a whole, evince elements of both systems, inviting mass input in some areas while relying largely on technical expertise in others, attempting to achieve an optimal balance between democratic norms on the one hand and ideals of efficient and accurate decisionmaking on the other. This Article explores the theoretical foundations of that balance and offers modest suggestions for readjusting it. Equilibrium between competing goals necessarily leaves some dissatisfied; however, the present system has left a disturbingly large segment of the public alienated and dispirited,

14. Robert Justin Lipkin, *Which Constitution? Who Decides?: The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1076 (2006).

feeling that their government neither values their input nor makes decisions that ultimately promote the public good. By readjusting the modern system of administrative procedure to allow meaningful collaboration with the public in certain areas—rather than an empty charade wherein the government nominally gathers public input and then promptly ignores it¹⁵—and eschewing public participation where it is neither desirable nor beneficial—rather than disingenuously acting as if public opinion were relevant to technical issues, such as the viability of climate change science—our government could garner greater trust amongst the electorate while improving the overall quality of its policymaking.

I. PUBLIC ACCOUNTABILITY OF ADMINISTRATIVE AGENCIES

A. *The Decline of the Non-Delegation Doctrine and the Increasing Relevance of Citizen Input*

Traditional theories of the administrative state viewed agencies as the terminus of a “transmission belt,” bearing responsibility for implementing the technical details of public policy decrees issued at earlier stations.¹⁶ Voting citizens choose the President and Members of Congress, who adopt policy, and agencies simply decide the most efficient means of executing that policy. The “non-delegation doctrine” theoretically polices the line between the role of Congress and that of administrative agencies, but as

15. In this light, some have argued that the entire notice-and-comment requirement of § 553(c) of the Administrative Procedure Act (APA) is an exercise in futility, representing a merely symbolic practice of gathering public input that has little bearing on agency decisionmaking. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (“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.”). But see Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs (OIRA), Keynote Address at Joint Brookings Institution/Administrative Conference Forum on the Future of E-Rulemaking (Nov. 30, 2010) (“In the last year and a half at least, and I bet it’s true before, [the Kabuki theater] cliché just turns out to be wrong. Proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously.”), transcript available at http://www.brookings.edu/~media/events/2010/11/30%20electronic%20rulemaking/20101130_electronic_rulemaking_1. Whether or not one subscribes to this perspective, the APA simply requires agencies to consider the “relevant matter” presented in public comments, 5 U.S.C. § 553(c) (2006), and in practice, agency decisionmakers generally limit their attention to relevant data contained in such comments and largely ignore any policy preferences expressed therein. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1346 (2011).

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

every law student learns a few weeks into an administrative law survey course, that doctrine is essentially a dead letter.¹⁷ The last serious application of the non-delegation doctrine occurred in the middle of the New Deal, when the Supreme Court that had evinced some degree of hostility to the policies of President Franklin Delano Roosevelt struck down provisions of statutes that granted broad decisionmaking authority to the Executive Branch.¹⁸

In *Mistretta v. United States*,¹⁹ the Court formally acknowledged that the non-delegation doctrine was not intended to draw a clean line between policymaking and implementation, and explicitly rejected the argument that delegations “may not carry with them the need to exercise judgment on matters of policy.”²⁰ Articulating the so-called “intelligible principle” theory of non-delegation, the Court asserted “[s]o long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’”²¹

The premise that Congress sets policies and agencies iron out the details of such policy directives, which is central to the “technocratic” theory of the administrative state,²² has had to confront the end of the non-delegation era. Thus, at least in certain instances, bureaucrats set national policy with no direct input from the electorate. Of course, the system is not devoid of checks and balances. The elected branches always possess ultimate

17. See PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 66 (rev. 10th ed. 2003) (“Nearly two centuries of nondelegation caselaw reveals a Court that consistently talks a harsh line against the delegation of ‘legislative power,’ but rarely finds a statutory delegation it can’t sustain.”).

18. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23, 551 (1935) (finding the Live Poultry Code was an impermissible delegation of legislative powers as it allowed the President to create a law if one had not been approved by Congress); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (asserting that Congress cannot abdicate its legislative power in favor of administrative agencies).

19. 488 U.S. 361 (1989).

20. *Id.* at 378.

21. *Id.* at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

22. See Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 566 (1987) (noting that proponents of the New Deal feared that politics would “contaminat[e] the purity of technocratic decisionmaking”); Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161, 170 (2001) (“During the New Deal, agencies in the U.S. were viewed as neutral technocrats who served the public by deciding technical issues based on special expertise.”).

authority over agencies: Congress can delegate authority more narrowly, withhold funding from agencies that pursue disfavored policies, or legislatively override an agency's decision.²³ Similarly, the President can generally remove the head of an executive agency²⁴ and can exercise centralized control over agency decisionmaking.²⁵ The federal courts can review agency decisionmaking under the Administrative Procedure Act (APA).²⁶ Finally, the public itself possesses a number of opportunities for participation in agency decisionmaking processes as guaranteed by the APA and the various transparency laws.²⁷

At the same time that agencies have taken a greater role in governmental policymaking, everyday citizens have become substantially more capable of informing the process. With the rise of e-rulemaking and the erosion of barriers to entry in the rulemaking comment process,²⁸ agencies sometimes receive hundreds of thousands of comments on a given rulemaking. Most of these comments are unsophisticated (and oftentimes duplicative) and add little to the relevant pool of information,²⁹ but nonetheless demonstrate the strength of public sentiment concerning the subject of the proposed rule. Under the "technocratic" theory, the agency should simply ignore the number of comments received and glean whatever relevant information the comments contain (with the marginal value of a duplicative or unsophisticated comment being zero). Nonetheless, as Professor Nina

23. See, e.g., Congressional Review Act, 5 U.S.C. §§ 801–08 (2006).

24. Paul R. Verkuil et al., *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 78 (2002) ("In the case of executive agencies, whose officers are removable at will, the President can remove an official for failure to follow supervision."). The President's ability to remove the head of an agency is more limited with respect to independent regulatory agencies, whose members Congress often makes removable only "for cause." *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935); see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'").

25. See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (requiring agencies to submit major rules to the OIRA for review).

26. 5 U.S.C. § 702 (2006).

27. See, e.g., Freedom of Information Act 5 U.S.C. § 552 (2006); Government in the Sunshine Act 5 U.S.C. § 552b (2006); Federal Advisory Committee Act 5 U.S.C. app. § 14 (2006).

28. See, e.g., E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (2002).

29. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 959 (2006) ("According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of those comments reportedly had anything original to say.").

Mendelson has argued, the prospect of an agency simply ignoring the preferences expressed in such comments, particularly in those instances in which the agency receives an overwhelming response, is “very hard to square with a vision of rulemaking as a democratic process.”³⁰ Recent efforts to enhance citizen participation in agency decisionmaking reflect an underlying intuition that citizen input can be valuable, but agencies have yet to develop a comprehensive framework for integrating policy-related input into their decisions.

B. Existing Efforts to “Democratize” Agency Decisionmaking

Though calls for enhanced public input into agency decisionmaking pervade legal writings,³¹ little beyond negotiated rulemaking has actually been adopted into law as a result of such scholarship.³² Nonetheless, in recent years, executive branch officials (including the President) have explicitly endorsed enhanced citizen participation, and legal scholars have put forth detailed proposals for accomplishing that goal.

The Executive Branch’s endorsement of enhanced public-private collaboration has generally been hortatory rather than directive. For instance, President Barack Obama issued a memorandum to agency heads within his first few days in office calling for “a system of transparency, public participation, and collaboration,” without providing much detail on

30. Mendelson, *supra* note 15, at 1359.

31. See, e.g., Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 298–99 (2010) (“Collaborative governance can take many forms, including many experiments in deliberative democracy, collaborative public or network management, and appropriate dispute resolution in the policy process; these processes all share a related role by providing ways for people to exercise voice and to work together in governance.”); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 417 (2005) (“[R]egulators could systematically experiment with, and compare, different methods for blending public input with expert opinions about risk and science.”); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 6 (1997) (“I argue that the goals of efficacy and legitimacy are better served by a model that views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process”); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343–44 (2004) (“Government [has] harnesse[d] the power of new technologies, market innovation, and civic engagement to enable different stakeholders to contribute to the project of governance.”).

32. See, e.g., Negotiated Rulemaking Act of 1990, Pub. L. No. 101–648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561–70); see also Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 50 Fed. Reg. 52,895 (Dec. 27, 1985); Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 47 Fed. Reg. 30,708 (July 15, 1982).

how agencies might go about effectuating that mandate.³³ A subsequent Executive Order built upon those proposals, asserting that “regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.”³⁴ Unfortunately, the Executive Order relies largely upon existing mechanisms for public comments and contains no concrete recommendations for supplementing those existing processes.³⁵

Academic proposals for increasing public input into agencies’ decisionmaking, though highly detailed, typically do not propose any comprehensive system for enhanced citizen participation or grapple with the legal implications of adopting the programs proposed. For instance, Professor Beth Simone Noveck, who has written extensively on the promises of modern technology for enhancing public participation in government, declares that “advances in communications, information sharing and record keeping mean that participation once thought impracticable on a large scale is now possible.”³⁶ In support of this claim, Noveck offers a number of examples of enhanced public participation facilitated by technology. For example, Professor Noveck describes a software called “Unchat,” a program that enables “synchronous small group deliberation” designed “to create deliberation processes.”³⁷ Essentially, “Unchat” enables a virtual “town hall” meeting, permitting a group of participants to convene in an online forum similar to a discussion board.³⁸ As a legal matter, it is not entirely clear whether “Unchat” could

33. Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009).

34. Exec. Order No. 13,563, § 2, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

35. *Id.*

36. Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U.J. SCI. & TECH. L. 1, 7 (2003).

37. *Id.* at 60.

38. *Id.* at 62–63. Unlike a traditional Internet discussion forum, “Unchat” offers a number of features that allow the board to optimize the discussion based on the goals of the particular meeting. For instance, the user can select whether or not to appoint a moderator for the discussion. *Id.* at 75–76. The software also allows participants to send a selected number of private messages directly to other users rather than posting to the overall forum (termed “whispering”) and post a selected number of messages to the forum without the permission of the moderator (termed “shouting”). *Id.* at 81–82. The user can also require participants to take a quiz on preparatory materials prior to entering the discussion. *Id.* at 86. In this sense, the process resembles a physical town hall meeting, wherein participants may be asked to study certain materials prior to attending the forum and, once at the actual meeting, may choose to whisper thoughts to fellow attendees in close proximity or shout certain statements over the objection of the facilitator.

be used by agencies in gathering information relevant to a proposed rule or other agency action.³⁹

Other academics have put forth similar proposals. For instance, Professor James Fishkin has conducted a number of experiments involving “citizen juries.” Essentially, Professor Fishkin convenes a random group of citizens who have been provided with materials offering background information on a particular issue.⁴⁰ After having read the materials, the citizens meet in large groups, in which relevant experts will provide additional background information, and in small jury-like groups, in which the citizens deliberate on the assigned issue.⁴¹ Professor Fishkin measures citizens’ preferences over the course of the process, and, in every iteration of the experiment, a significant number of citizens change their earlier positions.⁴² Again, it is not entirely clear to what extent an agency could convene a “citizen jury,” either in-person or online, and use the results of the deliberations as a data point in subsequent agency actions.⁴³

39. A number of potential constraints on an agency’s ability to conduct such an information-gathering exercise exist. First, if the agency is seeking group consensus from a specifically selected set of participants, the forum arguably must comply with the various strictures imposed by the Federal Advisory Committee Act (FACA). *See* Ass’n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993). Second, though the principle is quite controversial, if the agency has already initiated a formal rulemaking process, it arguably has an obligation to avoid ex parte contacts with any party without formally integrating those comments into the rulemaking docket. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977). Section IV.D addresses these and other potential constraints in detail.

40. James S. Fishkin, *The Televised Deliberative Poll: An Experiment in Democracy*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 135 (1996); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFFALO L. REV. 903, 910–11 (2006).

41. *See id.*

42. Fishkin, *supra* note 40, at 137–38; Leib, *supra* note 40, at 910–11.

43. *See supra* note 39. Professor Cynthia Farina and her colleagues at the Cornell eRulemaking Initiative have developed an online application known as “Regulation Room” that works *within* the legal framework of traditional notice-and-comment rulemaking, providing an enhanced opportunity for citizens to submit public comments in connection with rulemakings that may engender strong public interest. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 397 (2011) (“Regulation Room is purposefully designed to include elements that could make rulemaking more transparent, participatory, and collaborative.”). Regulation Room involves a discussion forum that works in tandem with an agency’s formal collection of public comments, permitting a more free-flowing discussion of the topics implicated by a proposed rule. *Id.* at 412–13. Regulation Room staff breaks a proposed rule into a series of topics suitable for consideration by general citizens, facilitates discussion by posing relevant questions, and then summarizes the public discussion in a formal comment submitted to the sponsoring agency. *Id.* at 413–14. Unlike Professors Noveck’s and Fishkin’s proposals, which involve solicitation of public input on underlying policy questions, Regulation Room is designed to “comport with the nature of

The literature reflects an underlying assumption that enhancing citizen participation in administrative decisionmaking (and government decisionmaking more generally) is a positive development and contains a number of promising ideas for achieving expanded public input. As a general matter, this confidence in the value of citizen participation accords with the conclusions of Section I.A of this Article: if agencies are to make substantive policy rather than merely implementing the technical details of federal statutes, then the public should, to the greatest extent possible, enjoy the opportunity to contribute to and even exert some degree of control over such policymaking. Much as elected governmental officials, at least under more “democratic” views of our Constitutional system, are chosen to implement the policy preferences of a public that cannot practicably vote on each contemplated government decision by plebiscite,⁴⁴ agency policymakers should make the fullest use of the various advances in public-private collaboration.

On the other hand, it would represent a fairly radical departure from the prevailing paradigms of administrative law to treat agencies as mere conduits for implementation of the policy preferences of the general public.⁴⁵ Thus, enhanced public participation is in some tension with the current reality, where public input is limited and focused on obtaining relevant technical information rather than ascertaining public policy preferences. To the extent the literature is motivated by a belief that public input can be relevant to agency policymaking,⁴⁶ it raises the question of the precise extent to which public policy preferences should impact agency decisionmaking. The next Section seeks to answer this question, calling upon democratic theory to examine the precise level of public involvement

rulemaking as a technocratically rational (as opposed to preference aggregation) process,” seeking to glean relevant information from public comments rather than conduct a referendum on questions of policy. *Id.* at 410. Nevertheless, the successful use of Regulation Room in connection with two prominent Department of Transportation rulemakings suggests that citizens can provide meaningful input on even relatively complex questions when provided with relevant, comprehensible information and an opportunity to consider a particular issue. *See id.* at 441–43.

44. Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *IND. L. REV.* 65, 104 (2003) (“There are practical barriers to plebiscites, such as the natural apathy of class members with small stakes in the litigation and the cost of voting mechanisms as well as voter education.”).

45. *See, e.g.*, Farina et al., *supra* note 43, at 430 (criticizing “the assumption that rulemaking is a plebiscite”).

46. *See, e.g.*, Bingham, *supra* note 31, at 332 (“Numbers [of comments . . .] can provide useful information; the comments may all be the same, but if they all identify the same strongly held value among thousands of ordinary citizens, this may be important information for an agency to consider.”).

that administrative agencies should encourage.

II. PUBLIC PARTICIPATION IN A CONSTITUTIONAL DEMOCRACY

Dean Edward Rubin explains that the term “democracy” derives from ancient Greece.⁴⁷ Following the reforms of Solon and Cleisthenes, the Greek city-state that came closest to achieving the democratic ideal was ancient Athens.⁴⁸ Given the Greco-Roman vintage of Western culture, modern “democracies” universally consider themselves heirs of the Athenian democratic heritage. Unfortunately, harkening back to this revered culture, though perhaps inspiring, obscures fundamental disparities between true democracies, such as ancient Athens, and modern governments. As Dean Rubin asserts, “the difficulty with the [term democracy’s] adoption into the Western political tradition is that it is not very useful—it has no relationship to any government that has ever existed in the post-classical, Western world.”⁴⁹ Western governments and those inspired by the Western tradition (which include the vast majority of modern governments) are invariably *representative*, integrating some scheme whereby the people select a group to represent their interests rather than voting on all matters directly.⁵⁰ Such schemes of representation owe more to medieval corporatism, wherein commoners seeking to form collective entities would select certain members to act on behalf of the group, than to the polis of ancient Athens.⁵¹

The drafters of the American Constitution were keenly aware of the limitations of classical democracy⁵² and sought to implement a government that relied on representation to integrate the will of the people into government decisionmaking. According to Professor Rebecca Brown, the unique genius of the founders lay not in their implementation of a representative scheme of government, which was fairly common in Europe and was central to the British parliamentary system against which the

47. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 715 (2001).

48. LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING AMERICAN DEMOCRACY IN THE INFORMATION AGE* 34 (1995). Though Athens undoubtedly implemented the most democratic government of ancient Greece, it is worthwhile to note that the franchise was limited to a small minority of Athenian citizens. *Id.*

49. Rubin, *supra* note 47, at 717.

50. *Id.* at 718.

51. *Id.* at 718–19.

52. *See* THE FEDERALIST NO. 10 (James Madison) (“Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”).

colonists rebelled, but rather in treating the people as a separate entity from the elected government with the power to check the government's actions through exercise of the franchise.⁵³

Thus, whereas the British Constitution essentially held that members of Parliament were proxies who acted on behalf of all commoners of the realm, the American founders, recognizing the abuses that could emerge from the fiction that "the government and the people were one," preserved a consistent role for the people to police their representatives' conduct at the ballot box.⁵⁴ As Professor Brown avers, "The accountability provisions do not establish a preference-maximizing constitution. They establish a tyranny-minimizing constitution."⁵⁵ In this light, the "will of the people" simply comprises an additional check in a Constitution replete with various checks and balances to ensure that no portion of the government comes to monopolize power. Thus, to speak of "democracy" as if it were the chief end of our constitutional system of government ignores the actual intent of the founders: the popular franchise is merely a means of constraining the power of the elected government.

Dean Rubin applies similar insights both to the traditional branches of government and to the administrative state. With respect to the elected branches, regularized elections of representatives solve the practical problems of succession, competence, and nonresponsiveness.⁵⁶ As the Chinese philosopher Mencius recognized, aristocratic systems tend to follow a particular lifecycle whereby a new dynasty gives way to corruption and incompetence and is eventually replaced by another dynasty.⁵⁷ The history of America's mother country illustrates how quickly this cycle can work its course; English history is abounds with beloved monarchs such as Henry II and Edward III whose progeny proved far less capable.⁵⁸ Elections resolve these issues by ensuring that a leader who has become incompetent or unresponsive is relatively quickly succeeded by a more capable successor.⁵⁹

53. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 558–59 (1998) ("The Constitution's answer, arrived at with much difficulty and contest, was that the people would stand apart from their representatives and would enforce the terms of their delegation of power to the government. The people's power would be given away, but reclaimed in an oversight role on election day.").

54. *Id.* at 564–65.

55. *Id.* at 565.

56. Rubin, *supra* note 47, at 764.

57. REG LITTLE & WARREN REED, *THE CONFUCIAN RENAISSANCE* 10 (1989).

58. See WINSTON S. CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES* 46–58, 66–74, 88 (Henry Steele Commager ed., 1965).

59. Rubin, *supra* note 47, at 758–60.

The administrative state, by contrast, already handles the issues of succession and competence through the appointment process.⁶⁰ With respect to responsiveness, though citizens elect neither the heads of agencies (who are appointed by the President and confirmed by the Senate) nor their staffs (who are hired at the behest of the agency heads), they have a number of opportunities to participate in the various actions undertaken by the agencies.⁶¹ This public interaction is valuable both to the agencies, which benefit from participation by everyday citizens, and to the citizens themselves, who “feel they have had some input into the process.”⁶² In deciding upon the level of citizen participation that agencies will implement, the focus should not be upon making the administrative state “more democratic,” which improperly exalts a style of governance that was viewed by neither the nation’s founders nor the creators of the administrative state as an end in and of itself. Instead, the focus should be on “achiev[ing] agreed-upon goals such as security, prosperity, and liberty.”⁶³ That is, to the extent that public input is beneficial in administrative decisionmaking, it should be sought and considered; to the extent such input is not beneficial, administrators should not seek it out of an unnecessary obeisance to the principles of democracy.

Of course, up until the last few decades, the debate about the virtues of public involvement in government decisionmaking was largely academic. As James Madison recognized, “a democracy . . . will be confined to a small spot. A republic may be extended over a large region.”⁶⁴ For reasons of practicality, any government much larger than ancient Athens could not practically rely on direct citizen participation because it is impossible to convene a large number of citizens to vote on all matters of public importance.⁶⁵ Modern technology has called that longstanding assumption into question. It is not difficult to imagine a computerized system whereby citizens could vote in an Internet plebiscite on all major issues. Though implementing such a system to replace or even supplement representative government would contravene the Constitution’s careful balance of powers at the national level and likely violate the “republican form of government” clause at the state level,⁶⁶ administrative agencies can, and perhaps should,

60. *Id.* at 775.

61. *See id.* at 776–77.

62. *Id.* at 783.

63. *Id.* at 784.

64. THE FEDERALIST NO. 14 (James Madison).

65. *See* GROSSMAN, *supra* note 48, at 36.

66. U.S. CONST. art. IV, § 4, cl. 1. *But see* Leib, *supra* note 40, at 914–15 (proposing a “popular branch of government” consisting of a random sample of eligible voters who would

exploit new technologies to allow relatively direct participation by average citizens. Thus, Dean Rubin's insight that agencies should seek public input only to the extent it is valuable becomes particularly salient. In the next Section, this Article explores the characteristics of effective public participation and examines the contexts in which agencies should seek such input.

III. ENHANCING PUBLIC PARTICIPATION IN THE MODERN ADMINISTRATIVE STATE

The previous Section makes clear that agencies should not pursue opportunities to enhance citizen participation in the administrative process out of a misguided obligation to promote democracy. Nevertheless, if cultivated properly, public participation can both enhance the quality of agency decisionmaking and imbue citizens with a sense of investedness in the workings of the administrative state. But exactly what are the qualities of effective public participation? The next Section explores such properties and the irreconcilable tensions between them; for instance, more widespread participation gives citizens a greater sense of connectedness to the process, but it comes at the cost of rendering agency decisionmaking much less efficient. The Section then explores a number of potential models for procuring citizen input, examining the extent to which each potential model achieves the various desiderata of effective participation. Finally, the Section proposes a new model for citizen participation that, at least in a select set of circumstances, admirably satisfies the various goals of public input.

A. *Policies of Effective Public Participation*

Ideally, public participation in agency decisionmaking should possess the following characteristics: (1) it should be widespread, including as many citizens as practicable; (2) it should be informed; (3) it should be educational for the participating citizens; (4) it should produce information that is useful to the agency seeking public input; and (5) it should be conducted efficiently. This subsection analyzes these qualities and some of the tensions that arise in any effort to balance them.

(1) *Widespread Participation*: Agencies already solicit public input through the notice-and-comment process of informal rulemaking,⁶⁷ but the process is often skewed to favor more organized interests that can marshal the

meet to discuss and decide upon issues and work alongside the elected branches).

67. See 5 U.S.C. § 553(c) (2006).

resources to lobby the agencies more effectively.⁶⁸ An alternative system of soliciting public input would collect information from a much broader segment of the populace and weigh input from individual citizens equally, in keeping with the principle of “one person, one vote.”⁶⁹ This more open system is arguably superior for two reasons. First, agencies are more likely to receive accurate information if more perspectives are represented rather than relying on a selective and skewed information set.⁷⁰ Second, even though polling⁷¹ a statistically valid cross-section of the overall public should yield a result essentially as accurate as soliciting the views of every citizen individually, promoting widespread participation creates a sense of investedness on the part of public participants and minimizes alienation from the decisionmaking apparatuses of government.⁷²

68. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3, 3 (1971) (“As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 725–26 (1986).

69. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

70. The principle that truth is more likely to emerge when all sides of a question are represented is fundamental to the Anglo-American system of law. See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (asserting that the adversarial system of justice is premised on the notion that truth is best discovered when the most powerful arguments on both sides of a question are considered). Furthermore, the principle is not merely a relic of an archaic legal regime. Empirical investigations have shown that aggregating data points from a large number of participants can produce a remarkably accurate result, largely because errors in one direction cancel out those in the other direction. See JAMES SUROWIECKI, *THE WISDOM OF CROWDS* xiii–xiv (2005) (“[U]nder the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them. . . . [W]hen our imperfect judgments are aggregated in the right way, our collective intelligence is often excellent.”).

71. Whenever an agency disseminates a series of identical inquiries to a group of ten or more persons outside of the federal government, it must comply with the Paperwork Reduction Act (PRA). 44 U.S.C. § 3502(3)(A) (2006). Amongst other things, the PRA requires that agencies evaluate the necessity of proposed information collections, § 3506(c)(2)(B)(i), solicit public comments on information collection instruments, § 3506(c)(2), and obtain approval of each collection instrument from the OIRA prior to utilizing it, § 3504(c)(1). In Section IV.D, this Article will discuss the restraints that the PRA might place upon agencies’ interactions with private groups and will explain how agencies might structure such interactions to avoid triggering the statute.

72. See Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J.L. & POL’Y FOR INFO. SOC’Y 33, 39–40 (2005) (“[P]ublic participation can be viewed as intrinsically valuable for citizens themselves, for such participation fosters important personal virtues.”); see also Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 921 (2006) (noting that one of the benefits of e-

(2) *Informed Participation*: Citizen participation is most valuable to agencies if participating citizens comprehend the issues on which they provide input. From the early days of the Republic, many states offered free public education on the theory that an electorate must understand at least the basic tenets of constitutional government to exercise the franchise effectively.⁷³ In the administrative state, a similar train of thought underlies theories of “deliberative democracy.” As Beth Simone Noveck states, “Theorists from Rousseau to Dewey emphasize that consent is not merely the aggregate of personal preferences, but the result of ‘reasoned public discussion of political questions.’”⁷⁴

Notwithstanding the universal preference for informed citizens, such theoretical ideals are seldom attained in practice. Even in formal elections, which are sufficiently infrequent that voters should theoretically be able to invest the time to study the candidates’ positions prior to casting their ballot, empirical research indicates that voters are often terribly uninformed.⁷⁵ When citizens contribute to administrative decisionmaking, where the issues are often more complex than those that drive traditional elections, one can expect many (if not most) participants to base their input on irrelevant considerations. Nevertheless, as the work of Professor Fishkin analyzed in Section I.B demonstrates, citizens who receive information on the topic they are considering and who can discuss their thoughts with others often change their views, suggesting that they are capable of reaching an informed conclusion if given the opportunity to do so.⁷⁶

(3) *Participation as Civic Education*: The process of learning about an issue and providing informed input thereon serves an important educational purpose for the participants. An apt analogy is the Anglo-American system

rulemaking includes “making participants feel that their views have been heard”).

73. See HORACE MANN, LECTURES ON EDUCATION 122–23 (1845) (“I venture, my friends, at this time, to solicit your attention, while I attempt to lay before you some of the relations which we bear to the cause of Education, because we are the citizens of a Republic; and thence to deduce some of the reasons, which, under our political institutions, make the proper training of the rising generation the highest earthly duty of the risen.”).

74. Noveck, *supra* note 36, at 6; see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988) (“Politics has a deliberative or transformative dimension. Its function is to select values, to implement ‘preferences about preferences,’ or to provide opportunities for preference formation rather than simply to implement existing desires.”) (citation omitted).

75. Jodi Miller, “*Democracy in Free Fall*”: *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L., 1, 32 (“Voters are often uninformed about the issues. One poll revealed that only 15% of those surveyed felt that they consistently knew enough about ballot measures to make an informed decision.”).

76. Fishkin, *supra* note 40, at 137–38; Leib, *supra* note 40, at 910.

of trial by jury, which is justified not only by the superior truth-finding function of juries, but also by the public benefit derived from civic service as a juror.⁷⁷ As Alexis de Tocqueville remarked, “I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people, which society can employ.”⁷⁸

The educational functions of citizen participation are closely tied to the first two policies. First, the right to participate in governmental processes should extend broadly, ideally to all citizens, to promote civic education as widely as possible. Second, institutions seeking citizen participation should strive to ensure that participants are informed on relevant issues to meet the goals of the exercise. Not surprisingly, the policies are in some tension with one another. For instance, a relatively small group of citizens, such as a jury, may be capable of efficiently considering all relevant material and collectively reaching a group consensus, an exercise that is highly educational for the participants. In a relatively large group, however, the likelihood that only a small sub-group will assume responsibility for considering the background information and reaching a result while others “free ride” on their efforts greatly increases. This diminishes the educational value of the exercise for all but the most active participants.

(4) *Usefulness of Participation in Agency Decisionmaking*: Though purely symbolic participation in which citizens suggest a result that the decisionmaking body ignores would inculcate civic virtues in the participants, the process might also lead to frustration.⁷⁹ Hence, the results of the participatory processes should ideally be of some use to the governmental entities sponsoring the exercise. Public input is only useful to the technocratic functions of agencies insofar as it produces information to which the agency would not otherwise have access. To the extent that agencies assume the role of policymakers, public input is also important for reasons of institutional legitimacy.

77. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 232 (Isaac Kramnick ed., 2007) (“The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions.”); see also Terrence M. Messonnier, *Neo-Federalism, Popular Sovereignty, and the Criminal Law*, 29 AKRON L. REV. 549, 598 (1996) (“Serving on a jury educates its members on civic problems, and exposes citizens to the views of fellow members of the community.”).

78. DE TOCQUEVILLE, *supra* note 77, at 233.

79. Indeed, were an agency merely to solicit public input and then promptly ignore it, citizens would eventually become dispirited and cease participating, erasing any educational value that such a Sisyphean task might otherwise create. Benjamin, *supra* note 72, at 921.

Agency decisionmakers can sometimes discern public opinion without actually soliciting public input, but they naturally approach policy matters with a different set of assumptions than do public participants. Though citizen judgments are often subject to cognitive errors,⁸⁰ citizens sometimes will reach fully valid decisions that differ from those of bureaucrats simply as a result of differing conceptions of value.⁸¹ In assessing the comparative risks associated with a particular policy decision, bureaucrats tend to rely on sophisticated models that seek to maximize a specific benefit or minimize a specific harm, such as reducing the total number of annual deaths.⁸² Citizens, by contrast, often apply a much more complex, less abstracted model.⁸³ For instance, citizens may show greater concern at the risks of being infected with HIV than with those caused by smoking, though smoking-related illnesses result in far more deaths annually.⁸⁴ Thus, seeking direct citizen input can provide the agency with information on public policy preferences that it cannot simply develop based on its own expertise.⁸⁵

The goal of procuring useful information is advanced by promoting certain earlier mentioned policies and hindered by others. For instance, input from informed citizens will be more useful than that from uninformed citizens. By contrast, the policy of widespread participation can lead to irrelevant or even useless results. Specifically, soliciting input from a statistically representative sample of citizens should produce a result as accurate, and therefore useful, as polling the entire populace.⁸⁶ Moreover,

80. The eminent cognitive psychologist Daniel Kahneman has catalogued a significant number of cognitive errors that human subjects frequently commit in assessing specific problems. *See generally* DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

81. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 48 (1995).

82. *Id.* at 49.

83. *Id.* at 48.

84. *See id.* at 50–51 (noting how citizens judge the severity of certain risks on factors other than likelihood of causing death).

85. The State of Oregon recognized this insight in setting up a deliberative process for determining how to distribute Medicaid funds. *Id.* at 92–94. The State arranged for meetings allowing members of the public to deliberate on the issue of how they would rank various health conditions in terms of relative impairment of quality of life. *Id.* at 92–93. Based on the public's input, the state was able to rank certain conditions and treatments so as to allocate limited funds in an optimal way. *Id.* at 93.

86. Of course, were a poll conducted, individuals who are particularly interested in the poll questions are far more likely to participate than are those who are not, leading to a skewed result. The distortion is likely to be somewhat less than in traditional notice-and-comment rulemaking, however, insofar as one must opt out of participation in the poll, whereas filing a comment requires an affirmative act on the part of the commenter. *See, e.g.,*

to the extent that participation is expanded, the participants are likely to be less informed, and the result of the exercise therefore becomes decreasingly useful, except perhaps as a means of gauging likely public reaction to a predetermined policy outcome.⁸⁷

(5) *Efficient Participation*: Agency resources will constrain any effort to procure public input, so the process should be conducted as efficiently as possible. The drive for efficiency could stand in tension with any one of the previously enumerated policies. Despite the many virtues of widespread participation, the cost of participation will expand in proportion to its extent. There is, of course, likely to be a diminishing marginal cost of participation, which may reach zero, to the extent that agencies can exploit technology to disseminate information to an unlimited mass of persons, but activities that require human assistance, such as explaining complex issues, will always increase in cost to the extent participation is expanded.⁸⁸ Similarly, though informed citizens will generally reach superior conclusions and will derive personal benefits from the process, the cost of educating the participants and affording them time to deliberate could be substantial. Resource constraints inevitably place a limit on efforts by an agency to achieve a useful result, and the agency may be forced to circumscribe its efforts to ensure that the process is conducted efficiently.

B. *Potential Models for Citizen Participation*

No system of public participation can simultaneously maximize all of the various social goals addressed in the previous subsection. Thus, a practical system will necessarily sacrifice some goals in favor of others. This subsection will explore several potential methods of citizen participation in agency policymaking and consider the extent to which they accomplish the

RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83–87 (2008) (discussing the importance of default rules and how most will follow the “path of least resistance”).

87. Modern communications technology can significantly decrease the costs of spreading information, and one can certainly envision a process wherein agencies electronically disseminate information to all potential participants. Indeed, agencies already must include explanatory materials in the statement of basis and purpose of a proposed rule, RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW & PROCESS 326 (3d ed. 1999), and the marginal cost of distributing this information to additional recipients is effectively zero if it is made available electronically. Nevertheless, the marginal cost of *explaining* the information to additional participants is not zero, and it would be far more economical to commission a group of experts to explicate an issue for a small group than for a large group or the entire populace.

88. See *supra* note 87.

various desiderata set forth in the preceding subsection.

(1) *Referendum Model*: The most straightforward means of gathering public input would be to collect all comments that an agency already must gather in connection with notice-and-comment rulemaking procedures,⁸⁹ tabulate the number of comments in favor of a particular course of action and those opposed, and then select the option favored by the largest number of commenters. Notwithstanding its simplicity, this mechanism of public participation has been almost universally rejected by courts,⁹⁰ administrative law scholars,⁹¹ and by agencies,⁹² all of which strongly asseverate that the rulemaking process is not a plebiscite.

Though the referendum model is in tension with the technocratic model and therefore likely strikes many as fundamentally incompatible with the underlying goals of the administrative state,⁹³ the referendum model fairly effectively achieves several of the underlying aims of effective citizen participation. First, participation is exceedingly widespread insofar as every individual citizen, corporation, non-profit entity, governmental agency, or other group that wishes to submit a comment may do so. Second, the model is also highly efficient and is likely to impose scant costs upon the agency: the APA already requires the solicitation of public comments in most rulemakings, and the expense of calculating the number of comments favoring and opposing a given policy is likely *de minimis*.

Despite its virtues, the referendum model fails to satisfy the remaining goals of effective citizen participation. First, the participation is unlikely to be particularly well-informed. Though a proposed rule must be

89. 5 U.S.C. § 553(c) (2006).

90. See, e.g., *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 87 (D.C. Cir. 2001) (“The Commission has no obligation to take the approach advocated by the largest number of commenters”); *Natural Res. Def. Council v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) (“The substantial evidence standard has never been taken to mean that an agency rulemaking is a democratic process by which the majority of commenters prevail by sheer weight of numbers.”).

91. See, e.g., Farina et al., *supra* note 43, at 430; Stuart W. Shulman, *The Internet Still Might (But Probably Won't) Change Everything*, 1 I/S: J. L. & POL'Y FOR INFO. SOC'Y 111, 138 (2004) (“Administrative law scholars worry about a perceived shift away from agency discretion and expert decisions toward the politics and the psychology of plebiscites. They are not alone. At a recent agency focus group, one participant stressed, ‘Rulemaking is not a democracy.’”).

92. See, e.g., A GUIDE TO THE RULEMAKING PROCESS, FEDERALREGISTER.GOV, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Aug. 2, 2013) (“The notice-and-comment process . . . is not like a ballot initiative or an up-or-down vote in a legislature. An agency is not permitted to base its final rule on the number of comments in support of the rule over those in opposition to it.”).

93. Harter, *supra* note 22, at 566; Peerenboom, *supra* note 22, at 170.

accompanied by an explanation of the need for and purpose of the rule,⁹⁴ the written material is often exceedingly verbose and quite abstruse, rendering intelligent participation very unlikely for all but the most erudite citizens.⁹⁵ Second, for similar reasons, the exercise is unlikely to be educational for those everyday citizens who do participate: the few intrepid souls who bother to file comments are unlikely to comprehend the subject matter of the proposed rule and will likely gain little to nothing from the experience.

Most importantly, the result produced by tabulating the number of public comments filed for and against a particular policy is unlikely to be particularly useful to the soliciting agency. First, the group of individuals who respond to a request for comments may not represent the populace as a whole, and the response therefore may not reflect the general public will.⁹⁶ Second, since the right to submit comments is not limited to individual citizens, difficult questions concerning the proper tabulation of votes would emerge. For instance, in keeping with the principle of “one person, one vote,”⁹⁷ should an organization’s comment represent the same number of votes that the organization has members? If so, must all members first affirm their assent to the organization’s position? In keeping

94. 5 U.S.C. § 553(c) (2006); PIERCE, *supra* note 87, at 326.

95. Coglianese, *supra* note 29, at 958–59 (“The occasional rulemaking does continue to attract a large number of citizen comments, but most of these comments remain quite unsophisticated, if not duplicative. According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of these comments reportedly had anything original to say.”). *But see* Cuéllar, *supra* note 31, at 416 (“[T]hough individual members of the public who write comments usually make unsophisticated statements, those messages tend to include, at their core, constructive insights relevant to agencies’ legal mandates.”).

96. Indeed, there is every reason to expect that the response to a solicitation for comments is very likely to be wildly unrepresentative of overall public opinion. In those instances in which agencies receive thousands of comments in connection with a given rulemaking, most of the comments received are frequently form comments that an organization has urged its members to submit. *See* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers’ Attitudes about E-Rulemaking*, 62 ADMIN. L. REV. 451, 456–57 (2010); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1476 n.311 (2012). Thus, one can easily envision a case where 99% of the comments received are form comments opposing a given policy when a strong majority of the public would favor the policy (or vice versa). Treating comments as a vote would further incentivize interest groups to organize comment writing campaigns so as to skew the process in favor of their preferred policy.

97. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (citing *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

with the legal fiction of corporate personhood,⁹⁸ should comments by corporations be considered? If so, should the entire corporation be considered one vote or should it receive the same number of votes as it has shareholders? Must the agency implement a system to prevent voter fraud? Third, the entire process would be subject to capture by regulated entities.⁹⁹ Even if the agency limited each corporate commenter to a single vote, affected industries could still mount a campaign urging citizens to submit form comments favoring the corporate position. In short, simply tabulating public comments, though seemingly straightforward, is so riddled with potential flaws and so susceptible to abuse that it is unlikely to prove viable in practice.

(2) *Taking Account of Value-Laden Comments*: Professor Nina Mendelson has proposed a refinement to the referendum model that corrects for many of the flaws illustrated above without imposing substantial additional costs on the agency. Unlike the previous model, which treats the comment process as a plebiscite, Professor Mendelson's model relies upon the following criteria to determine if value-laden public comments (i.e., those that express a normative position on the course of action proposed by the agency) should be considered: "(1) comments submitted are particularly numerous, (2) a particular viewpoint represents a strong majority or a supermajority of the comments filed, (3) the comments raise an issue relevant under the agency's statutory authorization, (4) the comments are coherent and persuasive, and (5) the comments point in a different direction from that considered by the agency."¹⁰⁰ Professor Mendelson's model preserves the chief virtues of the referendum model, to wit, it permits universal participation and it relies on the preexisting notice-and-comment process and therefore imposes minimal marginal costs on the agencies.

Though Professor Mendelson's model mitigates the various flaws associated with the referendum model, it does not eliminate them entirely. Her system partly corrects for the risk of a highly skewed set of respondents by requiring that the comments point strongly in a given direction,¹⁰¹ but an organization that does not represent the public will could still hijack the process by urging its members to flood the agency with form comments.¹⁰²

98. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819); *see also* *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010).

99. Stigler, *supra* note 68, at 3 ("As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."); Wiley, *supra* note 68, at 725–26.

100. Mendelson, *supra* note 15, at 1375.

101. *Id.*

102. Of course, Professor Mendelson's proposal protects against this problem to a certain degree by placing a preference on persuasive comments, *id.*, and a comment that is

In this light, Professor Mendelson's proposal is likely to be most successful in those scenarios wherein participation by the general public is fairly robust, the cross-section of commenters matches the demographic characteristics of the underlying populace reasonably well, and corporations and other interest groups neither overwhelm general citizen participation nor excessively influence such participation by encouraging the submission of comments expressing a particular viewpoint.

(3) *Information Markets*: A major feature of both the referendum model and Professor Mendelson's variation thereof is the exceedingly low cost of commenting.¹⁰³ This has the virtue of promoting widespread participation, but it also can incentivize the submission of unsophisticated comments to the extent that citizens believe they can influence the agency decisionmaking process with minimal expenditure of effort. One potential means of correcting for this problem is to require a pecuniary investment to participate and offer a monetary incentive for submitting information that proves particularly valuable to the agency.

Information markets, wherein participants wager a sum of money on the resolution of an issue and receive a payout if their submission proves particularly accurate, offer one means of ensuring that participants have "skin in the game" and therefore will strive to offer accurate input.¹⁰⁴ Though creating a market for regulatory participation may strike some as an anathema, reducing the noble tradition of the Athenian polis to the vulgar hustle of the Las Vegas casino, information markets actually achieve many of the goals of effective citizen participation. Though participation may not be as widespread as in the referendum model, an agency could encourage broad involvement by setting a low investment cost, and the possibility of a reward for reaching the "correct" conclusion may actually increase overall participation. Participants are also more likely to learn about the issues at hand if they have a monetary stake in the outcome, and their participation is therefore more likely to be informed and to produce positive educational externalities for the participants themselves. Finally, if participation were sufficiently widespread, the process could be conducted

identical to another has little to no marginal persuasive value.

103. In light of technological developments, submitting a public comment has never been simpler or more inexpensive. Pursuant to the E-Government Act of 2002, agencies must allow commenters to offer their views in an online forum. Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (2002). Agencies have satisfied this obligation through the development of regulations.gov, a website that allows users to search for pending requests for comments at all agencies and submit such comments online.

104. Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1023-24 (2005).

at minimal to no cost to the agency: the participation fees could fund the prize offered to the investors who provide the “correct” response.

Notwithstanding their numerous virtues, information markets possess one major drawback that is likely to limit the circumstances in which they can yield a useful result: such markets are only possible for problems yielding an objectively correct answer.¹⁰⁵ Thus, information markets will generally not produce valuable information on the normative issues that are most likely to benefit from citizen input.¹⁰⁶ Nevertheless, some normative problems can be recast in a form that is susceptible to such analysis. For instance, the Environmental Protection Agency (EPA) could accept estimates on the amount of public resources citizens would be willing to allocate to combating the likely effects of climate change, and those individuals who submit values that are closest to the consensus estimate would receive a monetary reward.¹⁰⁷ Though the process may be susceptible to manipulation, including efforts by affected interests to artificially inflate or deflate the market,¹⁰⁸ such interference would prove ineffective in a widely subscribed market,¹⁰⁹ and the agency could implement regulations to combat outright fraud and prohibit participation by individuals with vested interests. In short, the set of circumstances in which agencies might deploy information markets is relatively limited; however, they can provide valuable input in those instances in which the agency can reconceptualize a normative inquiry as a question with an

105. *Id.* at 1045 (“No information market could be helpful in answering normative questions, simply because there is no way to establish whether a particular investor was correct.”).

106. Professor Cass Sunstein proposes that information markets may be useful for answering questions of the following type: determining whether a foreign government will fall; assessing the costs and benefits of a proposed environmental regulation; estimating future pollutant concentrations; projecting future budget deficits; and assessing the potential fallout from a natural disaster. *Id.* at 1025–27. Each of these problems admits of an objectively correct solution.

107. Of course, by phrasing the problem in this manner, the agency has fundamentally altered the nature of the inquiry: it is not seeking a personal normative expression of one’s willingness to pay to remediate environmental harm, but rather an objective estimate of one’s fellow citizens’ willingness to pay. Though this largely removes any personal value judgment from the process, it has the virtue of forcing citizens to consider the interests of their compatriots and to produce an estimate that accounts for others’ viewpoints.

108. For instance, were the Environmental Protection Agency (EPA) to conduct a market assessing public willingness to pay to combat climate change, affected industries might short sell the relevant futures to produce an artificially low estimate.

109. Specifically, such interference would be unsuccessful insofar as sophisticated investors would recognize the artificial expansion or contraction in the market and would invest in the opposite direction, thereby correcting the imbalance. *Id.* at 1037.

objectively correct answer and in which the equities favor limiting participation to paying investors.

(4) *Jury Model*: Since the reign of King Henry II, England and former realms of the British Empire that have adopted the common law have utilized a system of trial by jury in both criminal and civil cases.¹¹⁰ Essentially, the common law jury represents a delegation of government decisionmaking power to a selected group of private citizens empowered to serve as the voice of the community. David Arkush has proposed that administrative agencies adopt a variant of the traditional jury system, empanelling boards of over one thousand randomly selected citizens and empowering them to answer policy questions pertaining to administrative decisionmaking.¹¹¹ Unlike a criminal or civil jury, the proposed citizen jury would not answer open-ended inquiries, but rather would focus on discrete questions susceptible to simple binary or multiple-choice answers.¹¹² Like a traditional jury, the citizen jury's determination would be binding upon the agency.¹¹³

The jury model, like each of the aforementioned models, possesses certain strengths and weaknesses. Arkush advocates providing "resources adequate to the task of making the decision presented," including "money, information, and time."¹¹⁴ In this light, the participation is likely to be relatively sophisticated, given that the participants will perhaps feel a moral obligation to consider the question presented if provided with compensation and an adequate opportunity to contemplate the key issues. Similarly, the experience of participating in a decisionmaking process related to a significant issue under consideration by an agency would probably prove educational to the participants. Finally, though the cost of convening a jury including a thousand or more participants is likely to be substantial, Arkush estimates that the EPA could deploy a one thousand person citizen jury to consider issues implicated by each of its major rules for an annual cost of approximately \$9 million, which is a mere 0.1% of the agency's annual budget.¹¹⁵

Arkush's jury model also suffers from a number of drawbacks. First, though the proposed citizen juries would include one thousand or more

110. *The Civil Jury*, 110 HARV. L. REV. 1408, 1415–16 (1997) (discussing the role of both Henry II and the Norman Conquerors in developing the right of trial by jury).

111. David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. (forthcoming 2013) (manuscript at 36–37).

112. *Id.* at 36–37.

113. *Id.* at 36.

114. *Id.* at 37.

115. *Id.* at 43–44.

jurors,¹¹⁶ the participant pool still represents a very small segment of the broader public. As such, the potential participation is quite limited in comparison to the previously discussed models, wherein any citizen can theoretically participate. Second, Arkush would require that the agency adopt the “verdict” of the citizen jury on those issues that the jury decides.¹¹⁷ Regulatory problems generally feature both technical questions (e.g., the concentration of a pollutant at which adverse health effects arise) and policy questions (e.g., whether the deleterious effects of the pollutant justify the costs required to abate it), and regulators often conflate both types of issues.¹¹⁸ Unless regulators are extremely cautious in disambiguating questions of science and policy, parties adversely affected by an agency’s decision will likely allege that the agency acted arbitrarily and capriciously in relying on public input on technical issues on which the citizen jury is unqualified to opine.¹¹⁹ Further, mandated implementation of the citizen jury’s “verdict” may place an agency in a politically untenable position; the mere fact that more than 50% of jurors on a citizen jury favored a particular course of action does not mean that the policy selected will prove viable on the broader political stage, wherein competing considerations (e.g., limited budgets, congressional and presidential priorities, division of responsibility with other agencies and with state and local governments) may render the preferred course of conduct infeasible. In short, though delegating decisionmaking power to citizen juries certainly advances democratic principles, it has the effect of straitjacketing the agency policymaking function and potentially tying agencies to policies that will be highly susceptible to challenge in the courts, the political arena, or both.

116. *Id.* at 33.

117. *Id.* at 36.

118. See Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 482 (2012) (“Because the goal of the rational-instrumental paradigm is to make agencies a transmission belt, it is in an administrator’s self-interest to claim that ‘science made me do it’ as legal and political cover for a set of professional judgments.”); BIPARTISAN POLICY CENTER, IMPROVING THE USE OF SCIENCE IN REGULATORY POLICY 15 (2009), available at <http://bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20fnl.pdf> (noting the tendency of regulators to conflate scientific and policy issues). Even assuming that regulators always act in good faith and never try to conceal policy decisions as scientific problems, technical and policy issues can be exceedingly difficult to disambiguate. For instance, determining statistical significance or deciding the quantity of evidence required to accept a proposition as “proven” inherently integrates both technical and policy determinations. Carl F. Cranor, *Science Courts, Evidentiary Procedures and Mixed Science-Policy Decisions*, 4 RISK 113, 118–19 (1993).

119. 5 U.S.C. § 706(2)(A) (2006).

C. *A New Model for Public Participation: Citizen Advisory Committees*

No model of citizen participation in agency decisionmaking is likely to achieve each of the objectives articulated in Subsection III.A, especially as the various goals often pull in conflicting directions (e.g., widespread participation is less likely to be well-informed or to prove especially educational for the participants). Furthermore, the appropriate participation mechanism will often depend on the circumstances surrounding a particular problem. For instance, reviewing value-laden public comments may be the optimal means of public input when the agency cannot devote significant resources to constructing a separate participatory process. In contrast, relying upon the verdict of a citizen jury may be preferable wherein the issue depends heavily on general public buy-in and justifies a large outlay of agency funds.

One potential mechanism for gathering public input that has shown some promise based on a series of experiments conducted by social science researchers is the use of relatively small bodies of citizens that study expert materials and deliberate upon a particular issue of public policy. Professors Richard Pildes and Cass Sunstein describe experiments where agencies or private foundations sought public input from a small group of citizens brought together in a setting amenable to deliberation.¹²⁰ In each instance, the group addressed a relatively technical, complex issue.¹²¹ To ensure that the participants understood the matters at hand, the convening authorities also provided some initial instruction and gave participants the opportunity to digest this information prior to deliberating on the issue.¹²² Finally, the citizens met in relatively small groups wherein they discussed the relevant questions prior to submitting their input.¹²³ The experiments yielded a number of promising results. As Pildes and Sunstein observe, “laypeople will substantially change their views on many issues involving science and technology if they are exposed to a complete and balanced discussion—one that both acknowledges relevant uncertainties and presents a framework of options.”¹²⁴

120. Pildes & Sunstein, *supra* note 81, at 89–94.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 90; *see also* CARNEGIE COMM’N ON SCIENCE, TECHNOLOGY, & GOVERNMENT, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 92–93 (1993), available at <http://www.ccstg.org/pdfs/RiskEnvironment0693.pdf> (describing a study involving a panel of citizens convened to consider relatively complex scientific issues associated with solid waste disposal and global warming and observing that “the public will substantially change its views on many [science and technology]-rich issues if they are

As discussed in Section I.B, Professor James Fishkin has achieved similar results. In an experiment conducted in the United Kingdom, he assembled a group of citizens deemed to be “representative of the entire country.”¹²⁵ Fishkin convened the participants in a group setting and allowed them to discuss and debate certain selected issues with fellow participants.¹²⁶ He compared the stated views of participants prior to the deliberative session with their ultimate votes following the workshop and found that support for particular stances often increased or decreased by 10% or more following the deliberations.¹²⁷ As Fishkin concludes, “their new, considered judgments represented what the public would think if it actually had a better opportunity to think about the issues.”¹²⁸

Building upon the success of these experiments, agencies might structure relatively small, deliberative bodies of citizens to serve as advisory committees designed to address policy issues relevant to agency decisionmaking.¹²⁹ Such an advisory committee would include a number of citizen representatives that is sufficiently large to ensure a diversity of viewpoints yet small enough to allow relatively extensive interaction amongst the members of the group, such that the group can deliberate on the question at issue.¹³⁰ Though the ideal number of participants will vary

exposed to a full and balanced discussion that acknowledges uncertainty and presents a framework of choices” and that public participants “come to positions that ‘strikingly’ paralleled those of prominent scientists”).

125. Fishkin, *supra* note 40, at 136.

126. *Id.* at 137.

127. *Id.* at 137–38.

128. *Id.* at 137.

129. In some instances, federal agencies have already deployed citizen advisory boards to address discrete issues affecting defined groups of persons. Professor John S. Applegate describes the Department of Energy (DOE) and EPA successful use of a site-specific advisory board to determine how to dispose of nuclear waste in the community of Fernald, Ohio. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 926–31 (1997). The advisory board functioned much as a widely inclusive negotiated rulemaking committee, with its membership drawn from “members of local and national environmental groups, neighbors of the site, township and county government officials, representatives of the major trade union councils at the site, local businesspeople, health professionals, and area educators.” *Id.* at 930. Professor Applegate examines the principles that characterize the successful use of such citizen advisory boards and recommends greater use thereof. *Id.* at 932–51. Though this Article proposes an even more ambitious use of advisory committees including representatives drawn from throughout the nation to address far-reaching issues, DOE and EPA’s successful use of a site-specific advisory board suggests that small groups of non-experts can engage in relatively sophisticated collaborative decisionmaking on complex, controversial questions.

130. See Sunstein, *supra* note 74, at 1548–49 (describing the benefits of group deliberation); see also Noveck, *supra* note 36, at 6 (“Deliberation is more than just talk; it

from case to case depending upon the complexity of the issue and the number of perspectives to be represented,¹³¹ the total size of the group likely would not exceed a few dozen participants, as a larger number would likely stifle group interaction.¹³² The agency should ensure that the participants represent a cross-section of the United States populace; the membership should reflect, at a minimum, the ethnic, gender, and geographic diversity of the overall population. In addition, the agency should seek diversity of viewpoints as relevant to the subject matter under consideration.¹³³ For instance, a committee examining a politically sensitive topic should include both Republicans and Democrats. Similarly, a panel dealing with welfare reform should include representatives from diverse socioeconomic backgrounds.

To ensure that the committee includes a sufficiently diverse group of citizens, agencies likely would need either to seek legislation rendering committee service mandatory, as in federal and state juries, or to make committee service sufficiently attractive so that an adequate number of citizens from each relevant demographic group would voluntarily participate, which likely would require drawing from a very large pool and offering some sort of compensation for service. Though agencies would probably use citizen advisory committees only in a very small number of rulemakings that implicate particularly serious issues of policy, the collective

requires weighing together various approaches to solving problems Deliberation may also be a means of exercising democratic virtues, articulating policy options, understanding how others view a problem and its potential solutions, and talking through the options to find common ground, even where disagreement is rife.”) (internal citations omitted).

131. To the extent possible, recruiting nine or fewer citizen committee members would ensure that the agency does not inadvertently trigger the PRA when posing inquiries to the participants. 44 U.S.C. § 3502(3)(A) (2006). Section IV.D will discuss considerations associated with the PRA in greater detail.

132. By way of comparison, negotiated rulemaking committees, which similarly involve participants who represent diverse interest groups, generally include no more than twenty-five individuals. Negotiated Rulemaking Act of 1990, 5 U.S.C. § 565(b) (2006) (“The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership.”); see also DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 127 (1995) (“In practice, it appears that the maximum number of parties for which the process can be kept manageable is approximately 25.”). Citizen advisory committees, which would likely be subject to similar considerations concerning the optimization of group interaction, also should seldom exceed twenty-five members.

133. See Federal Advisory Committee Act, 5 U.S.C. app. §§ 5(b)(2), 5(c) (2006) (requiring that members of federal advisory committees be “fairly balanced in terms of the points of view represented and the functions to be performed”); 41 C.F.R. § 102-3.60(b)(3) (2012) (same).

burden of mandated service would potentially be quite heavy, given the tremendous number of problems addressed by federal agencies, thereby rendering the first alternative politically unpopular and likely unviable.

Accordingly, agencies would likely solicit committee members by randomly selecting candidates from amongst all individuals with certain demographic characteristics, offering an invitation and a promised monetary stipend (with a value based upon the projected time commitment of committee service) to selected candidates, and then screening volunteers to ensure that the ultimate group reflects a demographic cross-section of the overall populace and that the participants can objectively assess the problem at hand (much as attorneys conduct voir dire to winnow down a pool of prospective jurors).

By structuring committees in this manner, agencies arguably would face a considerable risk of obtaining a skewed panel containing disproportionately large numbers of individuals with passionate views on the issue in question and of relatively impecunious citizens or those with leisure time for whom committee service reflects a less severe imposition.¹³⁴ Of course, the same problem arises in the use of traditional civil and criminal juries: relatively humble citizens for whom the modest compensation afforded to jurors more closely approximates their regular income and persons who feel strongly about the issues at hand are less likely to circumvent jury service (e.g., in a capital murder trial, victims' rights advocates and ardent opponents of the death penalty may be much more willing to serve than an average citizen).¹³⁵ Thus, agencies must maintain a high degree of vigilance in interviewing prospective committee members to ensure that they are willing to impassively and objectively assess the issues

134. Though the risk of obtaining a skewed pool of volunteers looms quite large in theory, Professor Fishkin's work suggests it may not prove particularly problematic in practice. Professor Fishkin randomly selected 869 potential volunteers for participation in a deliberative poll, and the 300 who agreed to participate were statistically indistinguishable from the larger pool in terms of "age, class, geographical representation, gender, education, and every other important dimension." Fishkin, *supra* note 40, at 136. Further, the class of volunteers did not contain disproportionately large numbers of politically active individuals: "We assessed this both with specific knowledge questions and newspaper readership. In both cases, it was obvious that we got an excellent microcosm . . ." *Id.* In any event, though the risk of obtaining a skewed sample set may not pose a significant risk in all cases, agencies should nevertheless police against it by ensuring that the participants are willing to objectively consider the issue at hand.

135. Archon Fung, *A Tea Party for Obama: The Power of Mobilized Independent Citizens Is Easily Forgotten and Often Denied by the Washington Cognoscenti*, AMERICAN PROSPECT, (Mar. 27, 2010), <http://prospect.org/article/tea-party-obama-0> ("Imagine . . . if criminal juries were made up only of people who actively wanted to participate: Many juries would be composed of the families of victims and defendants, and justice would suffer.").

at hand, disqualifying individuals who express an unwillingness to consider differing perspectives if necessary.

Of course, the group empowered to select the criteria upon which committee members are to be selected would possess significant power to affect the result. Were the agency itself to define these criteria and select the committee members who satisfy them, it may favor groups or individuals likely to rubber-stamp its preferred outcome. This could be remedied in one or both of the following ways. First, agencies might issue guidance that pre-defines the qualifications for panel members or even create an independent body empowered to define the dimensions on which committees must be balanced and select members who meet those criteria. Second, to the extent an agency relies upon the conclusions of a citizen advisory committee to support a policy it adopts, a court reviewing that rule could examine the balance of members to ensure that the panel was impartial.¹³⁶

Once formed, the committee would operate in a manner similar to the groups described by Professors Pildes, Sunstein, and Fishkin. Committee members would receive background materials that provide analysis of the issues at hand, and they would study such materials prior to participating in any formal meeting.¹³⁷ The participants would then have the opportunity to debate the relevant issues over a period of time, which could be as long as several weeks or months.¹³⁸ At the conclusion of these discussions, the participants would ideally have reached consensus, but if they do not agree upon a particular recommendation, they could then hold a vote, with the majority position constituting the group recommendation. The agency then would consider this recommendation in deciding upon the policies it would pursue in subsequent rulemaking or other policy-setting activities. Though it would not be bound to follow the advisory committee's recommendation, the agency would be wise to carefully consider it, especially if the recommendation evidences a strong public preference for a particular policy course.

Prior to the "digital revolution," convening citizen advisory committees to consider various issues before an agency may have proven prohibitively expensive in all but the rarest instances. In particular, the need for geographic diversity on the committee would have posed significant logistical and monetary issues, insofar as the agency would be required to

136. See, e.g., *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232–33 (10th Cir. 2004); *Cargill, Inc. v. United States*, 173 F.3d 323, 334 (5th Cir. 1999).

137. Fishkin, *supra* note 40, at 135; Leib, *supra* note 40, at 910; Pildes & Sunstein, *supra* note 81, at 90–91.

138. Leib, *supra* note 40, at 910; Pildes & Sunstein, *supra* note 81, at 90–91.

defray all of the expenditures associated with convening a group in a single location. Fortunately, technological advances have obviated the need to assemble all participants in a single geographic locale. Using teleconferencing technology, an agency could host a “virtual” meeting whereby all committee members participate remotely via web video. An even more economical solution would be for the agency to arrange a meeting on an online discussion board.¹³⁹

Though the use of citizen advisory committees will not necessarily be optimal in all instances and need not serve as the exclusive mechanism of procuring public input, such advisory committees satisfy many of the desiderata for effective citizen participation. First, as in the experiments described by Professors Pildes, Sunstein, and Fishkin, the committee members would receive expert instruction on the issues relevant to the policy question under consideration,¹⁴⁰ ensuring that the participants should be relatively well-informed. Second, the process of considering the expert-furnished materials and deliberating with a diverse group of fellow citizens should ensure that the process is educational for the participants. Third, the result is likely to prove exceedingly useful to the agency, for the views expressed by a group of citizens with demographic characteristics similar to the overall populace should hew fairly closely to the preferences of the general public. Indeed, the result is likely to be far superior to treating the process as a referendum, wherein the result is often skewed by low participation¹⁴¹ and misleading advertising directed towards

139. In a recent recommendation relating to FACA, ACUS has specifically asserted the legality of agencies’ hosting advisory committee meetings via online discussion boards and urged them to do so in appropriate circumstances. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 6, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012). Under ACUS’s proposal, an agency could implement a moderated web forum that would allow advisory committee members to post their thoughts on a dedicated website over the course of days, weeks, or months. REEVE T. BULL, ONGOING WEB FORUM MEETINGS OF FEDERAL ADVISORY COMMITTEES: A PROPOSED USE OF “NEW MEDIA” UNDER THE FEDERAL ADVISORY COMMITTEE ACT 1–7 (Mar. 17, 2011), available at http://www.acus.gov/wp-content/uploads/downloads/2011/03/FACA-Web-Forum-Memo-3-17-2011-_2_.pdf. Such a web forum would meet all of the requirements of FACA, see generally *id.*, and it would arguably be more transparent than traditional committee meetings insofar as perusing the committee’s discussions on a nationally accessible website is much simpler than attending an in-person meeting held at a set time at a specific locale.

140. Fishkin, *supra* note 40, at 135; Leib, *supra* note 40, at 910–11; Pildes & Sunstein, *supra* note 81, at 90.

141. Ronald M. Pierce, *Valuing the Environment: NOAA’s New Regulations Under the Oil Pollution Act of 1990*, 22 PEPP. L. REV. 167, 185 n.135 (1994) (“An actual referendum may be skewed by low voter turnout or failure of some groups to vote at all.”); Michael Vitiello &

participants,¹⁴² or simply conducting an opinion poll, wherein the participants have likely not studied the issues presented in any detail. At the same time, the agency would not be bound to follow the recommendations of the advisory committee and could balance the importance of implementing the policy preferences of the public against competing legal and political considerations. Fourth, the proposal is likely to be fairly cost effective as the committees would be relatively small,¹⁴³ though it is likely to cost the agency somewhat more than proposals such as Professor Mendelson's, which utilize existing public comments.¹⁴⁴

With respect to widespread participation, by contrast, the citizen advisory committee proposal is less effective than the referendum model, Professor Mendelson's recommendation, or even information markets insofar as it forecloses participation by all but a small subset of citizens. Of course, as will be explained in more detail in the following Section, the FACA requires that advisory committees permit members of the general public to submit written comments, offer oral statements before the committee, or both.¹⁴⁵ Thus, citizens who are not selected to serve on an advisory committee can still influence the process by presenting information relevant to the committee's deliberations. Nevertheless, disaffected citizens would still potentially assail the committee's conclusions as illegitimate, contending that the participants selected were not truly representative of the overall populace or that they received biased information during their deliberations.¹⁴⁶

Andrew J. Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275, 1289 (1998) (describing how the initiative process is an imperfect application of direct democracy insofar as "low voter turnout skews results").

142. See, e.g., GROSSMAN, *supra* note 48, at 14 ("What chance do ordinary citizens have to come to sound public judgments on health care reform, for example . . . given the unlimited sums of money available for lobbying and political campaigns by those with large-scale financial professional interests . . . ?"); Kevin O'Leary, *The Voice of the Crowd—Colorado's Initiative: The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1492 (2007) ("The evidence is in: mass direct democracy is anemic. Voters are uninformed, manipulated by slanted television ads, and rarely determine the agenda on which they vote.").

143. Cf. Arkush, *supra* note 111, at 36–37 (proposing citizen juries that would consist of 1000 or more participants).

144. See Mendelson, *supra* note 15, at 1375.

145. 5 U.S.C. app. § 10(a)(3) (2006); 41 C.F.R. §§ 102-3.140(c)–(d) (2012).

146. By way of comparison, the mere fact that criminal defendants are tried before a "jury of their peers" hardly settles the issue of their guilt or innocence in the court of popular opinion, as high profile defendants such as O.J. Simpson and Casey Anthony could undoubtedly attest. See Paul Duggan, *Casey Anthony and the Court of Public Opinion*, WASH. POST, July 5, 2011, <http://www.washingtonpost.com/local/casey-anthony-and-the-court->

In this light, the citizen advisory committee model is not intended as a panacea or as the sole mechanism of procuring public input. In some instances, one of the alternative models described in Section III.B may prove preferable or a beneficial supplement to the use of such a committee. Nevertheless, in many instances, citizen advisory committees will provide the optimal means of integrating public input into agency decisionmaking. In particular, agencies should closely consider the use of such committees in those cases wherein: (1) an issue is sufficiently important to justify the investment of resources and time in constructing an advisory committee; (2) popular opinion expressed in public comments is likely to differ from the well-considered views of a deliberating body of citizens; and (3) the problem involves competing political considerations such that delegating the decisionmaking function to a citizen jury is inappropriate.

Notwithstanding these significant advantages, the citizen advisory committee model is susceptible to certain criticisms, particularly as it relies upon group deliberation. The next Section explicates and responds to some of the more salient criticisms. It also examines the legality of the use of citizen advisory committees and recommends minor revisions to existing law to facilitate their use.

IV. POTENTIAL OBJECTIONS AND RESPONSES

A. *Deficiencies of the “Deliberative Model”*

An unstated assumption of the preceding Section is the belief that a deliberating group of citizens can reach a result superior to that attainable by merely aggregating the preferences of a representative sample of citizens expressing their views individually.¹⁴⁷ Though the American system of government reflects a fundamental faith in the power of deliberative bodies

of-public-opinion/2011/07/05/gHQAUAbkzH_story.html (“In magazine racks this week, the cover of *People* features a photo of [Casey] Anthony, and wonders: ‘Getting Away With Murder?’ A lot of people think so, shouting angrily in front of the courthouse and banging out righteous condemnations on the Web.”); Susan Donaldson James, *Court of Public Opinion Harsh on Simpson*, ABC NEWS (Sept. 17, 2007), <http://abcnews.go.com/TheLaw/OJSimpson/story?id=3614685&page=1> (“Scour the Internet blogs and it’s hard to find an O.J. Simpson supporter these days.”).

147. See, e.g., David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1144 n.107 (2012); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1691 (1984); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 4–5 (2009); Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 171–72 (2012).

of everyday citizens,¹⁴⁸ numerous scholars have conducted empirical research on the dynamics of group interaction and concluded that deliberating bodies often fail to achieve their full potential. Furthermore, group interactions can diminish the decisionmaking capabilities of a group (such that a deliberative group reaches a result that is objectively worse than the result the same set of persons acting individually would reach).

Under idealized conditions, a group should be capable of reaching a result superior to that which an atomized body of decisionmakers would achieve. To provide a simplified, abstract example, the correct answer to a problem may require the aggregation of data points A, B, and C. Though any individual is unlikely to possess each of these data points, a group of citizens who are permitted to exchange information may include several members with data point A, several with B, and several more with C, and interchange during group deliberations will lead to the combination of the relevant inputs and the production of a correct result.¹⁴⁹ Alternatively, even in situations in which the correct result does not require the aggregation of individual data points, group interaction may still be beneficial if it disseminates correct information amongst the deliberating members. For instance, imagine that reaching a correct outcome requires access to data point A, but 80% of the populace lacks access to that information. In a deliberating group, the 20% of members with access to A will ideally convince a large proportion of the remaining 80% of members of the correct result, and a majority of group members may ultimately reach the correct conclusion (whereas a random poll of the populace would almost certainly produce an incorrect result).¹⁵⁰ Though such a group will not reach a result superior to what the enlightened 20% of the public would achieve acting alone, it will serve to educate group members who do not initially possess the relevant data.

Of course, this model is vastly oversimplified, and the mere fact that group deliberation may possess certain virtues in theory does not establish

148. See, e.g., U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”); U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

149. See Sunstein, *supra* note 104, at 980 (“Deliberation could aggregate existing information in a way that leads the group as a whole to know more than any individual member does.”).

150. See *id.* at 979–80 (“Groups might operate in such a way as to equal the performance of their best members. One or more group members will often know the right answer, and the other group members might well become convinced of this fact.”).

that those virtues will eventuate in practice. Relaxing the simplifying assumptions, the aforementioned examples all presume that an objectively correct answer exists. Most problems of public policy are not susceptible to resolution by the application of an objective methodology. Furthermore, even assuming that a “right” answer exists, deliberating groups frequently fail to reach it, according to recent empirical research related to the dynamics of group interactions. Professors Mathew D. McCubbins and Daniel B. Rodriguez conducted a series of experiments wherein they posed math problems to various groups of test subjects, offering a reward (\$1) for a correct answer and a bonus (\$10) if all members of a group reached the correct answer.¹⁵¹ They constructed the following groups: (1) a control group, wherein subjects must solve the problems individually; (2) a group wherein subjects can freely exchange information and collectively solve the problems; (3) a group wherein subjects must pay a fee (\$2) to impart information but can receive information without charge; (4) a group wherein subjects must pay a fee (\$2) to receive information but can impart it gratis; and (5) a group wherein subject must pay a fee (\$2) to impart or receive information.¹⁵² Ultimately, they found that the ability to exchange information freely improved aggregate results vis-à-vis the control group, but groups in which participants were required to pay to receive information performed worse than the control group, and the group required to pay to send or receive information performed substantially worse.¹⁵³ Professors McCubbins and Rodriguez concluded that the final group, group five, most closely models real-life deliberation, since sending or accepting information generally entails certain costs (e.g., expenditure of time, risking adverse social consequences if the information imparted is incorrect), and that deliberation is therefore unlikely to improve group decisionmaking.¹⁵⁴

The mathematical precision of McCubbins and Rodriguez’s model perhaps detracts from its applicability to real world deliberative scenarios. For instance, though communication indubitably entails certain costs, one

151. See generally Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9 (2006).

152. *Id.* at 24–25.

153. *Id.* at 32.

154. *Id.* at 31 (“Given that [the final] experimental condition is most similar to real world deliberative settings, this result suggests that scholars’ assumption that deliberation will improve social welfare is unfounded.”). Though McCubbins and Rodriguez acknowledge that real-life problems will not always admit of objectively correct solutions, they suggest that deliberation will prove even less valuable in subjective problems insofar as “it is quite possible (in fact, likely) that no one in the deliberative group will have knowledge about the particular problem or issue at hand.” *Id.* at 35.

could question whether the expense of group communication generally represents 20% of the potential payoff the group might achieve by reaching a correct result. Nevertheless, other scholars have catalogued a series of flaws associated with deliberation that do not depend upon assigning an arbitrary cost to group exchanges. Professor Cass Sunstein has persuasively argued that groups that include relatively homogenous members tend to polarize, adopting group positions that are more extreme than the aggregated individual positions of the members.¹⁵⁵ This occurs, in part, because individuals who are already predisposed towards a particular position will likely become even stauncher advocates of that viewpoint when confronted with more radical partisans (so as to maintain a positive reputation in the group).¹⁵⁶ In addition, the limited pool of arguments available in a group predisposed toward a particular viewpoint may lead participants to conclude (falsely) that no compelling arguments on the other side exist.¹⁵⁷ Hence, assuming that polarization is an undesirable outcome, group interaction may lead to results that are objectively worse than those obtained in the absence of deliberation.

Furthermore, even in relatively heterogeneous groups wherein polarization is less of a concern,¹⁵⁸ deliberative bodies may suffer from various inherent flaws. First, “information cascades” may occur even if the group does not suffer from a limited argument pool. For instance, if A believes position X and reveals this fact, B may be more likely to support position X as well if she does not strongly oppose it; C, in turn, may not wish to contradict A and B, even if he was initially somewhat disinclined to support position X, and so on.¹⁵⁹ Second, individuals with relatively low social status (e.g., impoverished individuals, members of disadvantaged minority groups) may be reluctant to contribute to the discussion even if they possess information that would be valuable to the deliberative process.¹⁶⁰ Third, certain cognitive errors may be amplified in the group setting. For instance, empirical research has shown that groups are more susceptible than individual decisionmakers to “framing effects,” wherein subtle alterations to the phraseology of a question can lead to large,

155. See generally Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

156. *Id.* at 75, 83–84.

157. *Id.* at 75, 82–83.

158. *Id.* at 105 (“In terms of institutional design, the most natural response is to ensure that members of deliberating groups, whether small or large, will not isolate themselves from competing views . . .”).

159. *Id.* at 82–83; Sunstein, *supra* note 104, at 999–1002.

160. Sunstein, *supra* note 155, at 111–12.

irrational changes in the response.¹⁶¹ Hence, deliberation may actually diminish the decisionmaking capacities of a group of citizens, and the proposed citizen advisory committees may prove inferior to a simpler process wherein citizens simply express their views individually.

Fortunately, the various limitations associated with deliberation are generally not insurmountable, and one can lessen many of the potential flaws by carefully designing a deliberative body. With respect to the problem of polarization, ensuring that the deliberative body reflects a statistically valid sample of the American electorate should act as a prophylactic against the “echo chamber” effect of deliberations amongst groups of like-minded individuals.¹⁶² Of course, promoting group heterogeneity can create certain unintended consequences, as relatively low-status group members are often reticent in a diverse assemblage in which their views constitute a minority position, but are more likely to speak out in a more homogenous group in which their views are more strongly represented.¹⁶³ Though some degree of self-silencing is probably inevitable, a citizen advisory committee could correct for this problem by holding deliberations amongst the larger group, but allowing small groups of like-minded persons to conduct “breakout sessions” wherein they meet privately to develop their positions. Then, a representative of each subgroup could present these arguments to the broader group in its deliberations.

The other problems associated with group deliberation, which tend to involve suppression of viable arguments and the susceptibility of group members to cognitive errors, could also be mitigated (though likely not completely eliminated) by careful structuring of the deliberative group. One valuable innovation is the use of a moderator, who can elicit participation from all group members, ensure that the debate retains a civil tone (and thereby hopefully diminish the self-silencing phenomenon), and encourage participants to take account of all relevant information.¹⁶⁴ In

161. Sunstein, *supra* note 104, at 991–92. For instance, a group of prospective patients is more likely to opt to undergo an optional procedure if told that “90% of patients who received this treatment are alive after 10 years” than if told that “10% of patients who received this treatment are dead after 10 years,” notwithstanding the fact that the two statements are identical. THALER & SUNSTEIN, *supra* note 86, at 36; *see also* KAHNEMAN, *supra* note 80, at 367.

162. Sunstein, *supra* note 155, at 105.

163. *Id.* (“A certain measure of isolation will, in some cases, be crucial to the development of ideas and approaches that would not otherwise emerge and that deserve a social hearing. Members of low-status groups are often quiet within heterogeneous bodies, and deliberation in such bodies tends to be dominated by high-status members.”).

164. *Id.* at 117.

addition, the group should receive instruction by experts on both sides of a competing issue, which would ensure that deliberating members have access to relevant information and diminish the effect of cognitive errors that might otherwise taint group decisionmaking.¹⁶⁵ Groups are also less likely to suppress unconventional arguments if the group is encouraged to engage in “critical thinking” and if the moderator fosters an environment in which novel ideas are promoted.¹⁶⁶ Relatively high profile group members can also be recruited to act as “devil’s advocates,” given that other group members are more likely to consider contrarian arguments carefully if raised by high-ranking group members.¹⁶⁷ Finally, group members are less likely to be swayed by “reputational cascades,” in which they are reluctant to reach a conclusion that differs from the group consensus,¹⁶⁸ if they are permitted to cast their ballots privately.¹⁶⁹

This is not to suggest, of course, that a properly structured deliberative body will always reach optimal results. Nor does it suggest that flaws such as group polarization or cognitive errors can be completely eradicated. The various palliative mechanisms should, however, be sufficient to correct some of the more egregious limitations of deliberative decisionmaking, and one can reasonably expect that, in a number of cases, the use of deliberating groups will be superior to alternative means of gathering public input. Thus, though a citizen advisory committee may not always be the optimal mechanism, especially in those instances in which group polarization is particularly probable,¹⁷⁰ it is likely to prove beneficial in a

165. Michael Binder et al., *Shortcuts to Deliberation? How Cues Reshape the Role of Information in Direct Democracy Voting*, 48 CAL. W. L. REV. 97, 115–17 (2011); McCubbins & Rodriguez, *supra* note 151, at 35–39; Sunstein, *supra* note 104, at 1019–20.

166. Sunstein, *supra* note 104, at 1013–14.

167. *Id.* at 1015–17.

168. Sunstein, *supra* note 155, at 83–84 (“There can be reputational pressures and reputational cascades as well, in which people speak out, or remain silent, or even engage in certain expressive activity, partly in order to preserve their reputations, at the price of failing to say what they really think.”); Sunstein, *supra* note 104, at 985–86.

169. Sunstein, *supra* note 104, at 1018–19.

170. Polarization is especially likely in those instances in which individuals have strongly-held, preconceived beliefs related to a particular issue. Social science researchers have discovered that, though deliberating citizens will frequently change their views if they receive relevant information bearing upon a question of public policy, individuals with strong partisan affiliations are much more likely to parrot their party’s views on that issue even in the face of evidence that would undermine that position. Binder et al., *supra* note 165, at 117. Hence, a deliberative vote on a relatively non-partisan issue, such as the optimal level of patent protection to afford to innovators, is likely to prove far more successful than a vote on a more politically charged issue, such as whether religiously-affiliated institutions should be required to provide birth control to female employees.

sufficiently large number of instances that agencies should strongly consider the use of such committees when attempting to gather information on public policy preferences.

B. Excessive Cost

Even if one accepts the premise that, at least in a number of cases, the use of deliberative citizen advisory committees is superior to existing participation mechanisms, the cost of utilizing such committees is almost certainly greater than that of the simpler participatory vehicles. Though the cost of conducting citizen deliberation is likely to be significantly reduced through the use of a “virtual meeting” forum,¹⁷¹ the agency would still face considerable expenses associated with identifying a statistically valid set of potential participants, recruiting experts to brief the committee members and moderators to conduct the deliberations, and providing a stipend to all members so as to encourage participation. This cost, of course, likely pales in comparison to the overall budget of the agency. Arkush has used fairly liberal assumptions to calculate that the EPA’s presentation of all its major rules¹⁷² to citizen panels including one thousand individuals would cost roughly \$9 million per year, which represents approximately 0.1% of EPA’s annual budget.¹⁷³ Though certain aspects of the present proposal would cost more than Arkush’s system, such as the upfront investment required to develop a software suite allowing effective deliberation, the overall expense would likely be significantly less insofar as the number of committee members contemplated on each panel is much smaller. Assuming that the typical citizen advisory committee would contain around twenty members, the overall annual cost for even a large agency with significant rulemaking activity is likely to be well below \$ 1 million.¹⁷⁴

Of course, in a constrained budget environment in which agencies are

171. See *supra* Section III.B.

172. As a general matter, “major rules” are those that meet the definition of “significant regulatory action” in Executive Order 12,866. Exec. Order No. 12,866, § 3(f), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993). That order defines significant regulatory actions as those that have an annual impact of \$100 million or more, interfere with actions planned by other agencies, materially affect certain financial programs, or raise novel legal or policy issues. *Id.*

173. Arkush, *supra* note 111, at 43–44.

174. Specifically, if the typical citizen advisory committee consists of twenty members, then it is 1/50 the size of the jury contemplated by Arkush. Assuming all other factors are equal, the annual cost of the present proposal would be \$180,000. Admittedly, certain aspects are likely to cost more than Arkush’s system, as acknowledged above, but the overall cost should likely be well short of one million dollars.

relentlessly seeking cost *savings*, an *additional annual expense* of even a few hundred thousand dollars may prove excessive. Nevertheless, though the citizen advisory committee proposal is likely to represent an immediate short-term expense to agencies, it offers numerous countervailing benefits that may justify the initial expenditure. First, the agency may acquire enhanced legitimacy in the eyes of the general public as a result of its outreach efforts, though the benefits of such goodwill are difficult to quantify. Second, the agency may enjoy long-term cost savings as a result of its public consultation efforts if the enhanced legitimacy it develops leads to a decrease in challenges to agency decisions. Though it is likely Pollyannaish to conclude that parties adversely affected by an agency's decision will voluntarily forgo the opportunity to sue in appreciation of the agency's outreach efforts, the added legitimacy that public consultation can lend to a decision may diminish the prospects of successful challenges to agency actions (thereby weakening the incentive to file suit, increasing the likelihood that meritless suits will be dismissed early in the litigation process, or both). As will be discussed in the next subsection, providing "credit" for an agency's public consultation efforts on judicial review should enhance the incentives for engaging in such outreach.

C. *Disincentives to Public Participation*

Unlike Mr. Arkush's model for citizen juries¹⁷⁵ (but like Professor Mendelson's proposal),¹⁷⁶ the decisions of a citizen advisory committee would not be binding upon the agency.¹⁷⁷ This eliminates the various legal and political issues associated with fully delegating decisionmaking authority to a private body of citizens,¹⁷⁸ but it also raises the specter that citizens will deem their participation futile insofar as the agency is under no obligation to adopt their recommendations. Were citizens to perceive their involvement to be completely superfluous, they may lack any incentive to invest the time required to carefully consider the issues and render an informed decision.¹⁷⁹ In this light, it is important that the agency carefully

175. Arkush, *supra* note 111, at 36 ("This system is *direct* because it involves citizens deciding policy matters themselves with binding authority.").

176. Mendelson, *supra* note 15, at 1378–79.

177. *See, e.g.*, Pub. Citizen v. DOJ, 491 U.S. 440, 446 (1989) (stating that the work of advisory committees should be advisory and not binding); Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1225 (10th Cir. 2004) (stating that the advice of a resource advisory council was not binding); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 736 F. Supp. 2d 24, 28 (D.D.C. 2010) (stating that advisory committee work should be only advisory).

178. *See supra* Section III.B.

179. Benjamin, *supra* note 72, at 921.

consider the recommendations of the citizen advisory committee and adopt them whenever feasible.

At the same time, agencies may lack any incentive to procure public input and accord it the consideration required to ensure vigorous citizen participation. No statute explicitly directs agencies to integrate public opinion into its decisionmaking process.¹⁸⁰ An agency assessing whether to use a citizen advisory committee would face a stark calculus: the immediate benefits of seeking such input are quite abstract, given that the law does not affirmatively require solicitation of public views,¹⁸¹ whereas the potential costs loom large, since a litigant may challenge an agency's reliance on public opinion or its failure to pursue the policy course favored by a citizen advisory committee as "arbitrary and capricious."¹⁸²

The case law addressing agencies' reliance upon policy-laden public comments or upon policy-oriented public input solicited outside of the notice-and-comment process is sparse, though a few cases have held that an agency need not adopt the position favored by the majority of commenters.¹⁸³ As a theoretical matter, one could envision a number of approaches to judicial review of agency decisions that rely partially or fully upon public input: (1) at one extreme, a court could hold that reliance upon the input of a citizen advisory committee is per se arbitrary and capricious; (2) at the other extreme, a court could uphold all agency decisions that accord with the policy preference expressed by a citizen advisory committee as valid; (3) a court could consider the input of a citizen advisory committee irrelevant and require other factors to justify any agency decision; or (4) a court could consider the policy preferences expressed by a citizen advisory committee as probative (but generally non-dispositive) evidence in support of a particular policy (and potentially consider a citizen advisory committee's opposition to an agency's ultimate decision as evidence weighing against the propriety of the course taken).

The first three alternatives can be summarily dismissed. Penalizing an agency's consideration of the public's views on judicial review would be in tension with presidential directives that encourage agencies to solicit and

180. *Id.* at 907.

181. Of course, the agency may encounter soft norms in favor of seeking citizen input. For instance, the Obama Administration has encouraged agencies to promote public participation to the greatest extent practicable. Exec. Order No. 13,563, § 2, 76 Fed. Reg. 3821, 3821-22 (Jan. 21, 2011); Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (memorandum dated Jan. 21, 2009).

182. 5 U.S.C. § 706(2)(A) (2006).

183. *See, e.g.*, U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001); Natural Res. Def. Council v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987).

consider public input.¹⁸⁴ Rubber-stamping agency decisions that accord with a citizen advisory committee's conclusions, by contrast, would improperly treat administrative agencies, originally conceived as a technocratic arm of the government, as little more than polling organizations acting as conduits for enacting popular will into law,¹⁸⁵ and it would be in tension with those cases that have held that rulemaking is not a plebiscite.¹⁸⁶ Merely ignoring a citizen advisory committee's conclusions on judicial review would improperly suggest that public input is necessarily irrelevant to an agency's work, an assumption that reflects the discredited notion that agencies merely "fill in the details" of policy pronouncements issued by Congress,¹⁸⁷ and would eliminate any incentive for agencies to utilize citizen advisory committees or otherwise solicit public input beyond that required under the APA.

Thus, a reviewing court must provide an agency "credit" for having invested the resources in convening a citizen advisory committee and considering its conclusions, but it must neither penalize the agency for having sought public input nor hold the agency too closely to the committee's conclusions, lest any incentive for utilizing such committees disappear. Accordingly, if an agency solicits the input of a citizen advisory committee on a particular question of policy and integrates the committee's conclusion into the evidence supporting its ultimate rule, a reviewing court should consider the committee's decision as evidence supporting the proposed rule so long as it is material to the policy question posed (i.e., the committee's conclusion concerns a matter of policy rather than a technical

184. Exec. Order No. 13563, § 2(a), 76 Fed. Reg. 3821, 3821–22 (Jan. 21, 2011) ("Regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."); Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (memorandum dated Jan. 21, 2009) ("Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.").

185. See, e.g., Coglianese, *supra* note 72, at 56 ("Efforts to increase citizen participation through e-rulemaking will need to tread carefully so that those judgments that regulatory agencies are charged with making on the basis of scientific or technical expertise do not become displaced by decision-making by plebiscite.").

186. See *Natural Res. Def. Council*, 822 F.2d at 122 n.17 ("The number and length of comments, without more, is not germane to a court's substantial-evidence inquiry.").

187. *Mistretta v. United States*, 488 U.S. 361, 378 (1989) ("Our cases do not at all suggest that delegations . . . may not carry with them the need to exercise judgment on matters of policy.").

issue and the agency is not otherwise foreclosed from considering citizen input). Conversely, if an agency solicits the input of a citizen advisory committee and ultimately reaches an inconsistent conclusion, the court may consider the committee's findings as countervailing evidence, but it should tender a high degree of deference to the agency's conclusion and accept any tenable justification for departing from the committee's recommendations. By crediting a citizen advisory committee's recommendations as evidence in favor of an agency's conclusions, reviewing courts would preserve incentives for agencies to solicit public input, and exhibiting a high degree of deference to agency decisionmaking in those instances in which the agency chooses to depart from a committee's conclusion would minimize the disincentives for such voluntary public engagement.¹⁸⁸

D. Potential Legal Issues

Agencies commissioning citizen advisory committees and considering the conclusions they render in agency decisionmaking raises a number of legal issues. Though none of the potential legal complications are insurmountable, agencies must nevertheless exercise caution to ensure that they do not inadvertently act unlawfully. Most notably, as advisory committees, such groups would be subject to FACA. An agency can deploy a citizen advisory committee within the confines of FACA, though the statute makes the operation of such committees somewhat unwieldy, and this Article proposes several modest reforms to the law designed to streamline the process. The use of citizen advisory committees may also create issues under the Paperwork Reduction Act (PRA) or raise concerns regarding ex parte contacts. This subsection discusses each of these issues in turn.

(1) *Federal Advisory Committee Act*: FACA is a federal statute that regulates agencies' ability to obtain advice from groups of persons outside of the government.¹⁸⁹ Enacted in 1972, it addressed two pressing concerns: (1) Congress feared that federal advisory committees, (i.e., groups of persons including at least one non-federal employee that provide advice to the government)¹⁹⁰ had proliferated unnecessarily and did not function

188. In addition to the benefits that inure on judicial review of a rule, an agency that solicits public input would also honor the presidential directives that encourage public engagement and increase the likelihood that the general citizenry will view the agency as responsive.

189. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app.).

190. 5 U.S.C. app. § 3(2) (2006).

efficiently; and (2) Congress wished to limit the ability of special interests to hijack the advisory committee process and exert undue influence on committee advice.¹⁹¹ In response to the first concern, FACA imposes a number of requirements on advisory committees to ensure that they operate efficiently and cease to exist when they have accomplished their mission. Relevant provisions of FACA require that each committee have a charter that describes its intended mission,¹⁹² that the agency head periodically review the work of the advisory committees his or her agency hosts to ensure that each is working towards its respective goals,¹⁹³ and that the General Services Administration (GSA) conduct an annual review of all advisory committees to ensure that they are operating efficiently and to urge agencies to terminate those committees that have outlived their useful lifespan.¹⁹⁴

In response to the second concern, FACA imposes a number of requirements to ensure that committees operate objectively and serve the overall public interest. The Act accomplishes these goals in two separate ways. First, it directly limits the ability of special interests to dominate committee business by requiring that committee membership “be fairly balanced in terms of the points of view represented” and that the authority creating a committee implement appropriate controls to ensure that it is not “inappropriately influenced by . . . any special interest.”¹⁹⁵ Second, the Act strives to ensure committee objectivity by applying Louis Brandeis’s insight that “publicity is justly commended as a remedy for social and industrial diseases.”¹⁹⁶ Specifically, FACA requires that committees meet publicly and that they offer members of the public the opportunity to provide input on the committees’ work.¹⁹⁷ All advisory committee meetings must be announced in advance in the Federal Register¹⁹⁸ and must be held in a

191. 5 U.S.C. app. § 2(b) (2006) (enumerating various purposes of the Act, which, as a general matter, reflect the desire to ensure that committees do not outlive their useful lifespan and that committees conduct their work openly); Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L.J. AM. U. 111, 117 (1996) (The “goals [surrounding the enactment of FACA] reflect previous worries that advisory committees had become a hidden vehicle for special-interest access to agency decisionmakers.”).

192. 5 U.S.C. app. § 9(c) (2006); 41 C.F.R. §§ 102-3.70–75 (2012).

193. 41 C.F.R. § 102-3.105(e).

194. 5 U.S.C. app. § 7(b); 41 C.F.R. § 102-3.100(b).

195. 5 U.S.C. app. §§ 5(b)(2)–(3), (c).

196. LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

197. 5 U.S.C. app. § 10.

198. 5 U.S.C. app. § 10(a)(2); 41 C.F.R. § 102-3.150.

place permitting attendance by a reasonable number of interested citizens.¹⁹⁹ Members of the public must have the opportunity to file written statements for consideration by the committee and, if the committee's guidelines permit their doing so, the opportunity to speak before the committee.²⁰⁰ All documents considered by the full committee must be made available for public viewing and copying upon request.²⁰¹ At the conclusion of a meeting, the committee must prepare meeting minutes, which the committee chairperson must certify within ninety days of the meeting.²⁰²

Agencies could substantially reduce the costs associated with traditional, in-person committee meetings by using the "virtual meeting" process described in Section III.C, which would meet all of the requirements imposed by FACA.²⁰³ Unfortunately, even if they were to utilize such "virtual meetings," the strictures of FACA are still likely to hamper agencies' ability to engage citizen advisory committees. To facilitate the use of such committees, Congress should enact certain amendments to FACA. Such action is appropriate because the proposal for citizen advisory committees implicates few, if any, of the original policy concerns that motivated FACA's passage. Most significantly, the concern that advisory committees would be controlled by special interests, a major motivation for the enactment of FACA,²⁰⁴ is essentially inapplicable in the context of citizen committees. The only potential means for organized interests to influence the process would be through submission of comments for the committee's consideration,²⁰⁵ the same public input mechanism available to the entire citizenry.²⁰⁶ Similarly, the concern that committees

199. 5 U.S.C. app. § 10(a)(1); 41 C.F.R. §§ 102-3.140(a)-(b).

200. 5 U.S.C. app. § 10(a)(3); 41 C.F.R. §§ 102-3.140(c)-(d).

201. 5 U.S.C. app. § 10(b); 41 C.F.R. § 102-3.170.

202. 5 U.S.C. app. § 10(c); 41 C.F.R. § 102-3.165.

203. For instance, the committee would announce the web address for the forum fifteen days in advance in the Federal Register, Bull, *supra* note 139, at 7-8, thus satisfying the notice requirements. 5 U.S.C. app. § 10(a)(2); 41 C.F.R. § 102-3.150(a). Members of the public would be able to view all postings and submit comments to the forum, Bull, *supra* note 139, at 5-7, thereby satisfying the public attendance and comment requirements. 5 U.S.C. app. § 10(a); 41 C.F.R. § 102-3.140. For a complete analysis of how such "virtual meetings" comply with each of the major provisions of FACA, see generally Bull, *supra* note 139.

204. Croley, *supra* note 191, at 117.

205. 5 U.S.C. app. § 10(a)(3); 41 C.F.R. § 102-3.140(c).

206. Of course, these public comments may be equally as unrepresentative as those submitted through notice-and-comment rulemaking, but they would be counter-balanced by expert presentations to the citizen advisory committee. Thus, it would be entirely appropriate for the agency to exhort committee members to ignore policy preferences expressed in the comments received and simply review them for relevant information, given

would unreasonably proliferate or survive far beyond the completion of their mission does not apply in the citizen advisory committee context: an agency would convene such an advisory group only when it required input on a specific issue of policy and would presumably disband the group upon receiving the committee's advice.²⁰⁷

In light of the attenuated applicability of the concerns driving the enactment of FACA to citizen advisory groups, Congress would presumably be justified in amending the Act to facilitate such interactions. First, Congress could significantly streamline the chartering process, eliminating any requirement that an agency consult with the GSA, and instead simply require that the agency itself formally determine the scope of a proposed committee's work prior to convening such a committee.²⁰⁸ Congress also could eliminate the formal Federal Register notice requirement²⁰⁹ and instead permit the agency to announce meetings on its website or by a mailing list, which likely would reach a larger number of potential attendees, in any event. Finally, the President should rescind Executive Order 12,838 insofar as it imposes a cap on the number of advisory committees an agency may host.²¹⁰ Capping the total number of

that the committee itself is representing the public perspective. Furthermore, committee members should rely primarily upon the expert presentations and should avoid becoming bogged down in the extensive, highly detailed comments that affected interests may submit. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1325–26 (2010) (discussing the problem of “filter failure,” wherein regulators are subjected to a barrage of information from regulated entities). Unlike the APA, which requires agencies to consider the “relevant matter presented” in public comments, 5 U.S.C. § 553(c), FACA does not explicitly require committee members to place any weight on public comments, and committee members should therefore only consider such comments to the extent they provide relevant information that is not adequately addressed in the pre-deliberation expert presentations.

207. See HOUSE. COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 4, 12, 15–16 (1970) (expressing concerns about the proliferation of unnecessary advisory committees).

208. 5 U.S.C. app. § 9(a)(2). Administrative Conference Recommendation 2011-7 would resolve this issue by eliminating any requirement that agencies consult with the General Services Administration (GSA) prior to forming a discretionary advisory committee, though agencies would still be required to file a formal charter. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 1, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012).

209. 5 U.S.C. app. § 10(a)(2); 41 C.F.R. § 102-3.150(a).

210. Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 12, 1993). The Administrative Conference has recommended the removal of this cap on the total number of government-wide discretionary advisory committees. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 4, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012) (“The President and the Office of Management and

advisory committees is an extremely blunt and inefficient mechanism for ensuring that committees do not proliferate unnecessarily. Instead, agencies should be required to justify each citizen committee they establish as part of the revised chartering process, which should ensure that the agency does not create an unnecessarily large number of committees.

(2) *Paperwork Reduction Act*: The PRA, a law enacted in 1980 with the intention of reducing the burden of governmental collections of information on private individuals, businesses, and state and local governments,²¹¹ imposes limits on agencies' ability to solicit information from groups of citizens. Whenever an agency intends to circulate an information collection instrument that contains identical inquiries to a group consisting of ten or more parties, it must undergo a relatively elaborate approval process.²¹² Specifically, the Act requires agencies to establish offices tasked with overseeing information collection activities, to justify the necessity of information collections, and to obtain public comment on proposed information collections.²¹³ In addition, agencies must submit proposed information collections to the Office of Information and Regulatory Affairs (OIRA) for approval.²¹⁴ If OIRA approves an instrument, "it assigns it a control number that must appear" on disseminated copies of the document.²¹⁵ If any agency fails to do so, individuals who fail to comply with such requests for information cannot be penalized.²¹⁶

Though the PRA may create certain inconveniences associated with convening a citizen advisory committee, an agency can structure group interactions so as to avoid triggering the Act. Indeed, citizen advisory committees are far less likely to trigger the PRA than is a poll of the general populace or a sub-set thereof, another distinct advantage of the citizen advisory committee model. Specifically, a form survey circulated to ten or more individuals would implicate the PRA,²¹⁷ thereby requiring the agency to obtain public comments on the proposed survey and OIRA approval thereof, a process that would likely require expenditure of significant time and resources. Given that an agency would almost certainly require more than nine responses to obtain a statistically valid sample of the relevant

Budget should eliminate the cap on the number of discretionary advisory committees established by Executive Order 12,838 and Circular A-135.").

211. Pub. L. No. 96-511, § 3501(1), 94 Stat. 2812 (1980).

212. See 44 U.S.C. §§ 3502(3), 3507; PIERCE, *supra* note 87, at 403.

213. PIERCE, *supra* note 87, at 403.

214. 44 U.S.C. § 3504(c)(1); PIERCE, *supra* note 87, at 403.

215. PIERCE, *supra* note 87, at 404.

216. *Id.*

217. 44 U.S.C. § 3502(3).

population, the likelihood of triggering the PRA is large.

By contrast, an agency would not necessarily submit formal surveys consisting of a battery of identical inquiries to a citizen advisory committee. Rather, the process is more likely to resemble the experiments conducted by Professor Fishkin, wherein a group of participants receives briefing materials and then conducts a series of discussions and debates with the aim of reaching a consensus on a particular issue.²¹⁸ In short, the process would be more akin to deliberations of a criminal or civil jury rather than a survey of a statistically representative sample of poll subjects, and it therefore generally would not implicate the PRA.²¹⁹ Furthermore, though the size of citizen advisory committees is likely to vary from a handful of participants to several dozen, many groups would likely feature nine or fewer participants, and any information collection device submitted to such an assemblage would not trigger the Act.²²⁰ In short, though the PRA poses a potential impediment to the use of citizen advisory committees, an agency can easily structure the process to avoid running afoul of the Act.

(3) *Limitations on Ex Parte Contacts*: A final legal doctrine that could ostensibly limit an agency's pursuit of outside input via a process other than the formal commenting procedure of the APA is the prohibition on ex parte contacts. In *Home Box Office, Inc. v. Federal Communications Commission*,²²¹ the Court of Appeals for the District of Columbia Circuit held that agency officials should refrain from discussing matters implicated in a proposed rulemaking with private parties once a notice of proposed rulemaking has been issued.²²² In the event that such ex parte contacts nonetheless occur, the agency should document them in written form and place the

218. Fishkin, *supra* note 40, at 136–38; Leib, *supra* note 40, at 910–11.

219. Of course, the agency would need to exercise some degree of caution in avoiding any activity that might trigger the PRA. For instance, though an agency may wish to circulate an informal poll amongst the citizen committee members to gauge their initial opinions, doing so might trigger the Act. Therefore, the agency would need to remain vigilant in structuring the deliberations of the participants to avoid the use of any information collection instruments with a series of identical questions.

220. 44 U.S.C. § 3502(3) (2006). Civil juries often consist of nine or fewer jurors. See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 137 n.6 (1997); Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 268 (2002). Though a citizen advisory committee including nine or fewer citizens may not be sufficiently large in all instances, the successful use of civil juries consisting of as few as six jurors suggests that a relatively small group may be adequate in many cases.

221. 567 F.2d 9 (D.C. Cir. 1977).

222. *Id.* at 57.

documentation in the public file for the rulemaking docket.²²³ To the extent that this decision remains valid precedent,²²⁴ it is unlikely to pose an impediment to the citizen advisory committee proposal for two reasons. First, the committee process is likely to begin prior to the issuance of a notice of proposed rulemaking, insofar as the agency would likely use the committee's recommendation to shape the proposed rule, and the prohibition on ex parte contacts would therefore not be implicated.²²⁵ Second, to the extent the agency adopts the "virtual meeting" proposal discussed above, a record of all outside contacts will exist insofar as the discussion will take place entirely in written form on an online web forum; as such, the agency can merely attach that discussion to its rulemaking docket.²²⁶

CONCLUSION

Americans have largely lost faith in their system of elected government. Opinion polls inquiring as to the effectiveness of the President, Congress, or the overall government have shown a significant deterioration in already abysmal results.²²⁷ This widespread condemnation derives from a variety of sources, but a major cause is certainly the perceived disconnect between the aspirations of the general public and the decisions rendered by unelected bureaucrats.²²⁸

When agencies exercise a policymaking role, they arguably are under an obligation to consider public input. Incorporating insights from democratic theory, this Article contends that agencies should seek enhanced public input when it actually promotes a better outcome. In assessing the value of public input, agencies should consider the extent of citizen participation,

223. *Id.*

224. *See* *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) ("Where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility."); *see also* *Action for Children's Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1997); *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1044 (2d Cir. 1982).

225. *See Home Box Office*, 567 F.2d at 57 (proscribing ex parte contacts only "once a notice of proposed rulemaking has been issued").

226. *See id.* (noting that to the extent that ex parte contacts occur, agencies should maintain a written record thereof and place that record in the public file for the rulemaking docket).

227. Michael Cooper & Megan Thee-Brenan, *Disapproval Rate for Congress at Record 82% After Debt Talks*, N.Y. TIMES, Aug. 4, 2011, <http://www.nytimes.com/2011/08/05/us/politics/05poll.html> (citing an 82% disapproval rating for Congress, a record low dating back to the period when statistics were first collected, and significantly better but still disappointing results for the President).

228. *See* Coppack, *supra* note 7.

the ability of citizens to reach informed conclusions, the educational effect of participation on the citizenry, the usefulness of the product, and the efficiency of the overall process. This Article contends that the use of citizen advisory committees can effectively advance these policies, though alternative input models may prove preferable under different sets of circumstances.

Of course, enabling the use of citizen advisory committees will not necessarily lead to a renaissance of citizen participation in the administrative state. Citizens may not immediately exploit the opportunities for civic engagement opened by such reforms, and the use of citizen committees to obtain public input on agency policymaking is unlikely to immediately reverse the charges of “elitism” and “unresponsiveness” leveled against the federal government. Given that the system proposed necessarily sacrifices widespread public participation in favor of other policies, members of the public opposed to an agency’s decisions are likely to contend that it selected biased committee members, that it submitted slanted materials to the participants, and that it otherwise failed to consider the views of the “real Americans” who oppose the agency’s policies. Thus, this Article does not promote the citizen advisory committee concept as a panacea to any perceived illegitimacy of the administrative state. Though the proposed reforms will not bring a “democratic” golden age to the administrative state, as that term has come to be (mis)used, they would advance a more modest goal of achieving a more appropriate balance between participation by the general citizenry and decisionmaking by the people’s government, a process that has arguably comprised the preeminent goal of our constitutional republic from its inception.