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Direct Republicanism in the Administrative Process

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Direct Republicanism in the Administrative Process

David J. Arkush*

ABSTRACT

This Article offers a new response to an old problem in administrative law: how to secure sound, democratically legitimate policies from unelected regulators. The question stems from a principal-agent problem inherent in representative forms of government—the possibility that government officials will not act in the public’s best interests—and it is rarely absent from legal and policy debates. Major regulatory failures and the government’s responses to them have renewed its significance in recent years, as agencies implement new laws and adapt old ones, courts review their actions, and the White House and Congress debate proposals for regulatory reform.

Traditional models of democratic legitimacy in administrative law focus on agency accountability to elected officials or increasing interest group participation in the regulatory process. These models are valuable but ultimately fall short, largely because their representative nature replicates rather than remedies the core principal-agent problem. More recently, some scholars and reformers have attempted to engage citizens directly in the regulatory process. But these efforts have not circumvented the representation-based problems, and they also suffer from the high costs and other complications of direct democracy that counsel in favor of representative forms of government.

This Article introduces a new model for democratic legitimacy, “direct republicanism,” which attempts to combine elements of representative and direct approaches. In a direct republican system, large panels of randomly selected citizens decide policy questions presented to them by government officials. In this way, citizens can act as their own representatives, the principals their own agents. The Article sketches an initial application of direct republicanism to the regulatory process in the form of “administrative juries.”

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INTRODUCTION

Administrative law suffers from a prolonged sense of crisis regarding the legitimacy of regulatory action.¹ Regulators have little accountability to the public, and many agencies have structures or authorities that are in tension with traditional separation of powers principles.² As a result, courts, commentators, and the general public have long been concerned that agencies will seek to advance private or partisan ends rather than the public interest.³ This is a classic principal-agent problem, in which the American people are the principals and public officials the agents.⁴

The past fifty years have seen many responses to administrative legitimacy concerns. In the legal literature, theories have been proposed to legitimize and improve administrative action, as well as to criticize and curb it.⁵ The courts, Congress, and the White House have produced a raft of responses, including increased participation in the administrative process by various interest groups,⁶ new analytical requirements,⁷ and new forms of accountability or review.⁸ Some of these developments have improved the regulatory process, while others may have hurt more than they helped.⁹ Whatever the impact of past developments, few students of administrative law would argue that adequate progress has been made on the principal goals: legitimizing regulatory action and balancing the desires, often seen as conflicting, for regulatory decisions to be grounded in public values and

¹ See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 6–14 (1978); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1279–80 (1984); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678–80 (1975). The concept of “legitimacy” is not always well defined in debates over administrative law, see, e.g., Paul H. Brietzke, Book Review, 14 VAL. U. L. REV. 361, 362–65 (1980) (reviewing FREEDMAN, *supra*), but it centers around justifying “the use of often substantial public power by unelected agency officials,” Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 393.

² See Stewart, *supra* note 1, at 1678–79; Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986) [hereinafter Sunstein, *Factions, Self-Interest, and the APA*].

³ See generally, e.g., Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2.

⁴ See *infra* text accompanying notes 230–232. It can be useful to think of these arrangements as reflecting two layers of agency. The public’s primary agents are its elected representatives. Those officials have in turn created agents of their own, the administrative agencies.

⁵ See *infra* text accompanying notes 31–56.

⁶ See *infra* text accompanying notes 39–40; 132–143.

⁷ See *infra* text accompanying notes 41–44, 222.

⁸ See *infra* text accompanying notes 42–48.

⁹ See *infra* text accompanying note 222.

technical expertise.

Proposals to reform the regulatory process are rarely absent from public debate, but in recent years, they have become matters of intense interest as federal policymakers have struggled over their responses to high-profile environmental, financial, and health and safety catastrophes.¹⁰ A flurry of interest in regulation has arisen, as well as a near-simultaneous backlash, with Congress holding dozens of hearings on regulatory accountability and considering several pieces of reform legislation.¹¹ The President has disputed some of the congressional proposals,¹² but has ordered executive-branch agencies to review significant regulations and consider updating or repealing them.¹³ In addition, courts have scrutinized agency cost-benefit analyses with new rigor in an attempt to make rulemaking more rational.¹⁴ These congressional, executive, and judicial responses are similar to others in the recent past, none of which quelled legitimacy concerns.

Proposals to enhance democratic legitimacy in the regulatory process, whether academic theories or concrete reform measures, usually focus on

¹⁰ In some instances, Congress has passed new legislation, which agencies are working to implement and courts to review. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In other areas, agencies or the courts have sought to use old laws to respond to new problems. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (rejecting the Environmental Protection Agency's ("EPA") argument that it lacked authority to regulate tailpipe emissions of carbon dioxide and other greenhouse gases under the Clean Air Act); Barack Obama, President of the United States, Address Before a Joint Session of the Congress on the State of the Union (Feb. 12, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> ("[I]f Congress won't act soon to protect future generations [from climate change], I will. I will direct my Cabinet to come up with executive actions we can take . . .").

¹¹ *See, e.g.*, Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. (requiring independent agencies to submit proposed rules to the White House for review); Regulations from the Executive in Need of Scrutiny ("REINS") Act of 2011, H.R. 10, 112th Cong. (providing that final agency rules must be approved by the Congress and the president before going into effect); Regulatory Accountability Act of 2011, S. 1606, 112th Cong. (requiring regulators to adopt the "least costly" rule, effectively requiring formal rather than informal rulemaking procedures for most major rules, and substantially expanding judicial review of agency action); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (same).

¹² *See, e.g.*, Statement of Administration Policy, Exec. Office of the President, H.R. 3010—Regulatory Accountability Act of 2011 (Nov. 29, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3010r_20111129.pdf; Statement of Administration Policy, Exec. Office of the President, H.R. 4078—Regulatory Freeze for Jobs Act of 2012 (July 23, 2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4078r_20120723.pdf.

¹³ *See* Exec. Order No. 13,563 § 6, 3 C.F.R. 215, 217 (2012).

¹⁴ *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149–51 (D.C. Cir. 2011).

participation by representatives of interest groups or oversight of the regulatory process by one of the political branches of government.¹⁵ These models are valuable, and each plays an important role in regulatory legitimacy. But each suffers from significant limitations as well. A common shortcoming is that they attempt to advance public values through representative institutions, an approach that replicates rather than remedies the core principal-agent problem in administrative law.¹⁶ Because none of the democracy-based models or proposals supplants bureaucratic decisionmaking with directly democratic decisions, and because each relies on government officials or private organizations to represent the public interest rather than involving the public directly, each has an inherently limited potential to respond to democratic legitimacy concerns.¹⁷

In view of this problem, other proposals seek to involve citizens more directly in the administrative process. These direct-engagement models typically involve small, self-selected groups of citizens who are not necessarily representative of the broader public and who advise or inform agency officials rather than instruct them.¹⁸ As a result, they follow the representation-based models in offering only a limited response to the core principal-agent problem. They also have other shortcomings, most notably the high costs, collective action problems, and other drawbacks of direct democracy.¹⁹

This Article proposes a new response to legitimacy concerns that attempts to avoid the pitfalls of prior models: “direct republicanism,” in which large panels of randomly selected citizens make policy decisions presented by government officials. The model is “direct” because it involves citizens making policy decisions themselves rather than merely voicing their views to decisionmakers. It is “republican” because the panels are intended to represent the views of the broader public and reproduce characteristics of deliberative decisionmaking by representatives.²⁰ In the regulatory process, we might call these panels

¹⁵ Notions of regulatory legitimacy are usually grounded in one or more of three ideals—the rule of law, sound public policy, and democracy. This Article focuses on the third because it holds the most promise for enhancing legitimacy at present. *See infra* text accompanying notes 57–72; *see also* David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611 (2012).

¹⁶ *See infra* text accompanying notes 219–225.

¹⁷ *See infra* text accompanying notes 219–225.

¹⁸ *See infra* text accompanying notes 226–228.

¹⁹ *See infra* text accompanying notes 226–228.

²⁰ The term “republic” and its derivatives lack simple, well-settled definitions. This Article follows a long tradition of using them in a broad sense, to refer to representative rather than direct democracy. *See, e.g.*, THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 1961) (using the word “republic” to mean “a government in which the

“administrative juries.”²¹ By participating in administrative juries, citizens can serve as their own representatives in the regulatory process; the principals their own agents.

This proposal is not just a thought experiment, but an attempt to outline a practicable model of meaningful citizen engagement in the administrative process. It should be evaluated not just conceptually for whether it helps mediate competing values in administrative law or provides a satisfactory theoretical account of legitimacy, but also pragmatically for whether it improves agency operations and enhances perceived legitimacy among the public, regardless of its conceptual merit.²² This Article sketches a model and conducts a preliminary evaluation, but a full assessment will require further study.

Part I of this Article reviews longstanding legitimacy concerns in administrative law and the responses to them, focusing on the question of

scheme of representation takes place”).

²¹ Only two previous articles in the legal literature have proposed using citizen panels in administrative agencies. *See infra* notes 173–181, 259–260 and accompanying text. Each proposal is more limited in scope or less administratively feasible than the one in this Article. One proposes “grand juries” that would serve in a broad, agenda-setting capacity. Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 512–14 (1992). The other proposes large, face-to-face deliberative bodies to advise agency rulemakings. David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 82–83 (2005). Three other articles raise the idea of citizen juries in the administrative process in a single paragraph or less, with no further development. *See* David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1365 [hereinafter Arkush, *Situating Emotion*]; Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J.L. & POL’Y 33, 44 (2005); Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 573 (1990). A great deal has been written regarding both trial juries and citizen panels in the policy process outside of administrative agencies. That literature is beyond the scope of this Article, which addresses the prospect of direct republicanism in the administrative process rather than other forms of policymaking and adjudication.

²² *Cf.* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 18 (2003) (summarizing the pragmatists view that an idea is rational “if holding it leads to more useful relations with the world,” meaning, in the context of public policy, that the idea “solves some specific complexity or problem better than existing beliefs and understandings”); *id.* at 19 (citing Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 258 (1989)) (stating that pragmatism “has no substantive content of its own” but “avoids an analytical muddle by adopting and clarifying existing values relevant to the problem at hand”); Sidney Shapiro, *Pragmatic Administrative Law*, 5 ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, at 4, available at <http://www.degruyter.com/view/j/ils.2005.5.issue-1/ils.2005.5.1.1057/ils.2005.5.1.1057.xml?format=INT> [hereinafter Shapiro, *Pragmatic Administrative Law*] (citing RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS 1972–1980) 162 (1982)) (“Pragmatism seeks to measure the worthiness of an idea by its operation in actual experience, rather than by its consistency with the precepts of one particular theory or another.”).

how well the administrative process satisfies democratic values. It concludes by highlighting two central, persistent problems: the widespread perception of agency “capture” by regulated interests and the question of how best to blend agency expertise and public values.

Part II reviews traditional models of democratic legitimacy in the regulatory process and identifies shortcomings common to all of them. It classifies the models into two broad categories: those based on representative institutions and those that attempt to engage citizens more directly. It argues that both types suffer from flaws inherent in using representative institutions to advance democratic values and that the direct-engagement models carry additional problems inherent in direct democracy. As a result, the traditional models leave us with a dilemma: Flaws inherent in representative institutions lead some observers to seek more direct citizen engagement in administration, but citizen-engagement models suffer from the very problems that counsel in favor of representative governance in the first place.

Part III offers direct republicanism as a potential response to this conceptual bind and sketches its application to the regulatory process through the use of administrative juries. It outlines provisional principles for designing direct republican proceedings and suggests that they can be made logistically and fiscally feasible. It then discusses the types of questions that administrative juries might resolve and considers potential benefits of juries for administrative law and practice. Part III concludes by discussing a number of questions for further study, some of which should be empirical. Part IV anticipates and responds to objections.

I. LEGITIMACY AND DEMOCRACY

A. *The Rise of Agencies and Legitimacy Concerns*

Federal regulatory agencies do not fit comfortably within the constitutional framework or legal culture of the United States, and concerns about their legitimacy arose shortly after Congress began to establish large federal agencies to regulate the economy in the late nineteenth and early twentieth centuries.²³ The sense of concern, even “crisis,” regarding administrative legitimacy has proved remarkably persistent over time,

²³ See, e.g., Shapiro, *Pragmatic Administrative Law*, *supra* note 22, at 2–3. This Article generally addresses agency actions that involve economic regulation, not the enforcement of rights or the provision of services or benefits. Differences between these functions might suggest that direct republicanism would be more or less fruitful in one context or another. For example, concerns regarding majoritarian excess may be more significant in rights enforcement or service provision than in economic regulation. A thorough treatment of the question is beyond this Article’s scope.

although its precise focus has shifted in different eras.²⁴

One set of concerns involves the separation of governmental powers. Many regulatory agencies wield a mixture of legislative, executive, and judicial powers that the authors of the Constitution deliberately separated into distinct branches of government.²⁵ Furthermore, agencies termed “independent” because the President can remove their directors only for cause arguably exist either outside of the three branches of government established by the Constitution or within all three.²⁶ Separation of powers was not an idle construct. It was intended to mitigate the problem of faction—the possibility that a putatively democratic government would be commandeered by special interests or politicians who serve their own ends rather than those of the public—which remains at the core of administrative legitimacy concerns.²⁷

Closely related to the issue of separation of powers is that of administrative discretion. It is widely accepted that the task of crafting sound rules to structure the vast and complex modern economy is beyond the abilities of the Congress, and therefore federal regulatory agencies are here to stay.²⁸ To rely on agencies, however, requires determining how to constrain and legitimate exercises of discretion by administrative officials

²⁴ See FREEDMAN, *supra* note 1; Shapiro, *Pragmatic Administrative Law*, *supra* note 22, at 2–3; Stewart, *supra* note 1, at 1678–79.

²⁵ See, e.g., PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 548–61 (10th rev. ed. 2011); Stewart, *supra* note 1, at 1677–79.

²⁶ The first major federal regulatory agency, the Interstate Commerce Commission, established by the Interstate Commerce Act of 1887, was a five-person commission whose members could be removed only for “inefficiency, neglect of duty, or malfeasance in office.” Act of Feb. 4, 1887 ch. 104, § 11, 24 Stat. 379, 383. As Justice Jackson famously lamented, such independent agencies “have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting).

²⁷ See THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1961) (“By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”); see also Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 271 (“In attempting to control administrative processes, the drafters of the APA responded to two quite general constitutional themes, both of which have played a central role in administrative law since its inception. The first concerns the usurpation of government by powerful private groups. The second involves the danger of self-interested representation: the pursuit by political actors of interests that diverge from those of the citizenry.” (footnotes omitted)).

²⁸ Justice Blackmun expressed this view well in the context of the Nondelegation Doctrine, noting the Court’s “practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

who are not elected, cannot be fully directed by statute, and can be difficult for the constitutional branches of government to monitor.²⁹ The problem of discretion arises for all administrative agencies, as no regulatory statute is free of gaps or ambiguities. But the problem is even greater under the broad statutory mandates that have rapidly become the norm for modern administrative agencies.³⁰

B. A Short History of Responses to Legitimacy Concerns

Over the last hundred years, legal scholars, judges, and practitioners have formulated a number of responses to these concerns.³¹ The earliest model of administration treated agencies as “mere transmission belt[s]” of legislative directives.³² In this view, agencies had relatively little discretion, and courts policed the boundaries of their authority.³³ During the New Deal era, an “expertise model” arose, in which legislative mandates were acknowledged to grant substantial discretion, but agencies were thought to be restrained and directed by their own technical expertise.³⁴ Given sufficient time and freedom of action, expert administrators with clear goals would not wield authority arbitrarily, but rather converge around the right answers to regulatory problems.³⁵

Another far less noted model of administration emerged around the same time: legitimacy through public accountability and citizen

²⁹ See, e.g., Stewart, *supra* note 1, at 1676.

³⁰ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2256 (2001) (“[S]weeping delegations, of a kind utterly inconsistent with the classical ‘transmission belt’ theory of administrative action, became many decades ago a simple, even if not an inevitable, fact of regulatory legislation.”); Stewart, *supra* note 1, at 1676–88. Claims of unconstitutionality typically are grounded in the breadth of congressional delegations more than the independence of agencies. See Kagan, *supra*, at 2256 n.20 (citing Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994)).

³¹ As is common in administrative law literature, the history given here and the descriptions of various models of administration are simplified and stylized to convey relevant information in a tidy and useful manner, not to provide the most accurate historical account possible. Cf. Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 691 (2000) [hereinafter Shapiro, *Administrative Law After the Counter-Reformation*] (noting that “[t]he reformation, the counter-reformation, and the responses to it are policy stories” that “are useful because they capture and clarify essential elements in competing schools of thought” even though they “distort the messy reality of actual events”).

³² Stewart, *supra* note 1, at 1675. Stewart dubbed this the “traditional model” of administrative law in 1975, *id.* at 1671, some forty-odd years after it had already receded. Now, with the passage of nearly forty more years, the model has been disfavored longer than it was in favor, and the name “early” seems a better fit than “traditional.”

³³ See Stewart, *supra* note 1, at 1671–76.

³⁴ See, e.g., *id.* at 1677–78.

³⁵ *Id.*; Kagan, *supra* note 30, at 2261.

participation. President Roosevelt's National Resources Planning Board ("NRPB"), in a 1942 report that detailed an extensive expansion of the welfare state, also emphasized the need for decentralized, democratic control of its programs.³⁶ Although the NRPB report illustrates the rise of public accountability and participation as important tools to enhance administrative legitimacy, it appears to have had little direct influence on administrative law or practice.³⁷

By the 1960s, observers had become concerned that agencies could not be trusted to advance their mandates, largely because regulated entities had too much influence over them.³⁸ In addition, agencies were increasingly viewed as quasi-legislative bodies that, much like legislatures, were required to mediate between competing interest groups and political values.³⁹ If agencies were overly influenced by regulated entities, and if they were the locus of quasi-legislative tradeoffs, then perhaps the solution was to provide better representation of the public in agency proceedings. Accordingly, the courts began engaging in a "reformation" to expand dramatically the range of interests represented in the administrative process, creating a model that Richard Stewart dubbed "interest representation."⁴⁰

By the time Stewart identified and named the reformation, a counterreformation was already under way. Counterreformers contended that agencies behaved irrationally, for example, embracing misplaced priorities or imposing regulatory costs that far exceeded the benefits.⁴¹ They urged "comprehensive rationality," the use of tools like cost-benefit analysis to set priorities and make regulation more rational, and "analytic management," the central coordination of this rationalizing process.⁴² Central coordination is typically conceived as a role for the White House, and it was first implemented with vigor by the Reagan Administration.⁴³

³⁶ See JAMES T. KLOPPENBERG, *THE VIRTUES OF LIBERALISM* 106–07 (1998).

³⁷ See *id.* at 108.

³⁸ See Stewart, *supra* note 1, at 1684–85.

³⁹ See *id.* at 1681–82.

⁴⁰ See *id.* at 1711–60.

⁴¹ For an extensive review of the counterreformation, see Shapiro, *supra* note 31, at 697–720.

⁴² Shapiro, *Administrative Law After the Counter-Reformation*, *supra* note 31, at 744; Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 443 (2003) ("This initiative reflected . . . [the] view . . . that a largely uncontrolled, hydra-headed array of federal regulatory agencies, afflicted with tunnel vision and spurred by 'public interest' advocates, were using vague statutes to adopt ever more intrusive, rigid, and costly regulatory requirements, oblivious to their burden on the economy and U.S. international competitiveness.").

⁴³ See Exec. Order No. 12,291, 3 C.F.R. 127 (1982); see also Shapiro, *Administrative*

The courts also took part in the counterreformation, most notably by restricting standing to challenge agency action, making it more difficult to challenge agency failures to act, and overturning agency actions using doctrines of heightened scrutiny that were developed during the reformation.⁴⁴

It is difficult to write a tidy story of the developments in administrative law and theory since the onset of the counterreformation. Several scholars have urged presidential control as a mechanism for enhancing the democratic accountability of the administrative process,⁴⁵ and presidential administrations have continued to use enhanced White House review.⁴⁶ The Congress has also asserted more control over regulation, establishing an expedited process for rejecting agency rulemakings within sixty days,⁴⁷ which it has used once.⁴⁸

Amid strong interest in “civic republicanism” among constitutional scholars⁴⁹ and the rise of deliberative democracy theory in other disciplines,⁵⁰ Seidenfeld proposed a “civic republican” theory of administration, in which the administrative process serves as a venue for public-minded discourse, through which a community of individuals formulates new, public-spirited preferences and policies rather than merely choosing among or aggregating their preexisting, private interests.⁵¹ Cost-benefit analysis has remained a constant, if controversial, feature of the regulatory process, and scholars such as Cass Sunstein have argued that it

Law After the Counter-Reformation, *supra* note 31, at 707–08.

⁴⁴ See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1747–49 (2008); Shapiro, *Pragmatic Administrative Law*, *supra* note 22, at 14.

⁴⁵ See, e.g., Kagan, *supra* note 30, at 2251–52; Richard J. Pierce, Jr., Response, *Presidential Control Is Better Than the Alternatives*, 88 TEX. L. REV. SEE ALSO 113 (2009) [hereinafter Pierce, Jr., *Presidential Control*], <http://www.texasrev.com/wp-content/uploads/Pierce-88-TLRSA-113.pdf>; see also Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 562–65 (2006) [hereinafter Pierce, Jr., *Democratizing*].

⁴⁶ See, e.g., Kagan, *supra* note 30, at 2277–82.

⁴⁷ See Congressional Review Act, 5 U.S.C. §§ 801–808 (2012).

⁴⁸ See *OSHA 35-Year Milestones*, OSHA <http://www.osha.gov/as/opa/osha35yearmilestones.html> (last visited Aug. 6, 2013) (Congress exercised its authority under the Congressional Review Act to repeal OSHA’s ergonomics standard).

⁴⁹ See, e.g., Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493–1851 (1988).

⁵⁰ See, e.g., JOSHUA COHEN, *PHILOSOPHY, POLITICS, DEMOCRACY* 16 (2009); Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 102, 104 (Robert A. Goldwin & William A. Schambra eds., 1980).

⁵¹ See Seidenfeld, *supra* note 1, at 1514–16.

enhances public deliberation.⁵²

Several new regulatory approaches were proposed or employed as well, most involving some form of collaboration between regulators and stakeholders. The most prominent is “negotiated rulemaking,” in which a committee of stakeholders conducts a series of meetings with agency officials in an attempt to reach a consensus on a draft rule for the agency to adopt.⁵³ Some of the new models have also emphasized decentralization, localism, and participatory democracy.⁵⁴ Several observers have offered names for particular new models or the entire set, but the literature has not settled on a label.⁵⁵ It is not uncommon to refer to these models simply as “new.”⁵⁶

C. *Legitimacy and Democracy*

At present, many commentators have abandoned the quest for a unified theory of administrative law or its legitimacy,⁵⁷ but scholars and policymakers continue to propose theoretical models or reforms that might enhance legitimacy in particular respects.⁵⁸ In recent years, most attention

⁵² See, e.g., Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1092–93 (2000) (“A prime purpose of the approach is to ensure more in the way of reflection; cost-benefit analysis, as understood here, is a guarantee of greater deliberation, not an obstacle to it.”).

⁵³ See Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570a (2012); see also Seidenfeld, *supra* note 1, at 1558 n.235 (discussing the Negotiated Rulemaking Act).

⁵⁴ See generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Charles Sabel, Archon Fung & Bradley Karkkainen, *Beyond Backyard Environmentalism: How Communities Are Quietly Refashioning Environmental Regulation*, BOSTON REV., Oct.–Nov. 1999.

⁵⁵ See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4 (1992) (“responsive regulation”); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4 (1997) (“collaborative governance”); Lobel, *supra* note 54, at 343 (the “Renew Deal”); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1232 (1995) (“[R]eflexive environmental law aims to establish self-reflective processes within businesses to encourage creative, critical, and continual thinking about how to minimize environmental harms”); Shapiro, *supra* note 31, *Administrative Law After the Counter-Reformation*, at 728–36 (the “reconciliation”).

⁵⁶ See, e.g., Shapiro, *Pragmatic Administrative Law*, *supra* note 22, at 18 (“new theorists”); Stewart, *supra* note 42, at 437, 448–49 (“new methods”).

⁵⁷ See, e.g., Mark Seidenfeld, *The Quixotic Quest for a “Unified” Theory of the Administrative State*, 5 ISSUES IN LEGAL SCHOLARSHIP, March 2005, at 14, available at <http://www.degruyter.com/view/j/ils.2005.5.issue-1/ils.2005.5.1.1056/ils.2005.5.1.1056.xml?format=INT> (“According to the analysis above, Richard Stewart’s belief that there is no unified theory of the administrative state seems to be holding up to attempts by scholars to come up with such a theory.”).

⁵⁸ See *supra* notes 53–55 and accompanying text.

has been directed toward forms of comprehensive rationality or various means of making administration more democratic or accountable to the public. Comprehensive rationality has been the focus of not just substantial scholarship, but also numerous legislative and executive-branch reform proposals.⁵⁹ Democratic participation or accountability, for its part, is the basis of a variety of proposals, including the interest representation model,⁶⁰ aspects of presidential administration proposals,⁶¹ and some of the “new” models of administration.⁶²

This Article focuses on democracy-based approaches. One reason is that they appear to hold more promise than comprehensive rationality as a path to enhanced legitimacy. Comprehensive rationality is a species of expertise model, which appeals to science as a source of authority to constrain administrative discretion.⁶³ Expertise models are sensible as far as they go, but their ability to legitimize administration is inherently limited because science cannot resolve all the judgments that agency officials must make. Comprehensive rationality’s form of analysis, largely economic, does not obviate the need for value judgments.⁶⁴ Additionally, if critics are

⁵⁹ For recent examples, see Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong.; Regulatory Accountability Act of 2011, S. 1606, 112th Cong.; Clearing Unnecessary Regulatory Burdens (CURB) Act, S. 602, 112th Cong. (2011); Regulations from the Executive in Need of Scrutiny (REINS) Act of 2011, H.R. 10, 112th Cong.; Exec. Order No. 13,579, 3 C.F.R. 256, 257 (2012) (encouraging independent agencies to comply with parts of Exec. Order No. 13,563); Exec. Order No. 13,563, 3 C.F.R. 215, 215 (2012) (reiterating requirements of Exec. Order No. 12,866). For older examples, see Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 201–53, 110 Stat. 847, 857–74 (codified as amended at 5 U.S.C. § 601 (2012)) (amending in part the RFA); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended at 2 U.S.C. §§ 1532–1538 (2012)); Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3520 (2006)); Regulatory Flexibility Act (“RFA”), Pub. L. No. 96-354, 94 Stat. 1164 (1980), *amended by* Pub. L. No. 104-121, 110 Stat. 864 (1996) (current version at 5 U.S.C. §§ 601–612 (2012)); Exec. Order No. 12,866, 3 C.F.R. 638, 638–39 (1993) (replacing Exec. Order No. 12,291 but maintaining similar cost-benefit analysis requirements); Exec. Order No. 12,291, 3 C.F.R. 127, 128–29 (1981) (directing agencies to refrain from rulemaking unless net benefits of a rule outweigh net costs, and to maximize benefits and minimize costs); Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1978) (requiring analysis examining cost-effectiveness of alternatives to proposed major rules); Memorandum from the Office of Mgmt. & Budget to the Heads of Executive Agencies and Establishments (Sept. 17, 2003), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf> (describing “best practices” for agencies to comply with Exec. Order No. 12,866 and refining OMB’s “best practices” document from 1996).

⁶⁰ See *supra* note 40 and accompanying text.

⁶¹ See *supra* note 45 and accompanying text.

⁶² See *supra* note 54–54.

⁶³ Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 616–17.

⁶⁴ See *id.* at 616–17; Stewart, *supra* note 1, at 1703 (“Because applied economics is an art that requires discretionary judgments to be made in selecting the proper universe for

correct that there is little evidence of legitimacy-reducing irrationality in regulatory policy in the first place,⁶⁵ then there will be similarly little benefit in reducing it further.

In contrast, improving regulatory democracy might substantially enhance legitimacy. The persistent perception of a democracy deficit in administration likely undermines legitimacy,⁶⁶ and successful efforts to ameliorate it should have the opposite effect. There is some reason to believe this has already happened. Despite the shortcomings of increased interest representation in the regulatory process,⁶⁷ some observers credit it with significant improvements that continue to bolster administrative legitimacy today,⁶⁸ a claim rarely advanced regarding other models.

Equally important, the most significant challenges for democracy in administration are not inherent limitations of its potential to enhance legitimacy, but questions regarding how best to harness democracy in administration. In other words, unlike the expertise models, the problem of democratizing administration is largely practical rather than conceptual.⁶⁹ Unlike science, democracy in theory can supply an authoritative, legitimating source of value judgments required for regulatory policymaking. Indeed, democracy is already viewed as a major source, if not the principal source, of legitimacy for administrative policy.⁷⁰ Public

analysis, defining and measuring the relevant variables, and resolving the complications of second, third, and fourth order effects generated by the possible policy choices, no single policy solution will generally be indicated to be clearly correct.”); *id.* at 1706 (“Economic analysis cannot ultimately resolve the question of which preferences to encourage or discourage, ignore or implement; but issues of just this sort are at the heart of many governmental choices.”).

⁶⁵ See, e.g., Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 618–19. The studies that once provided evidence of regulatory irrationality have been shown to suffer from serious errors. See, e.g., Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 *YALE L.J.* 1981, 1983–86 (1998) (critiquing a highly influential study by John Morrall). For brief reviews of the critiques, see Shapiro, *Administrative Law After the Counter-Reformation*, *supra* note 31, at 723–25, and Shapiro, *Pragmatic Administrative Law*, *supra* note 22, at 11–13.

⁶⁶ See Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 619–23; *infra* text accompanying notes 73–93, 219–225.

⁶⁷ See *infra* text accompanying notes 128–142.

⁶⁸ See, e.g., Shapiro, *Pragmatic Administrative Law*, *supra* note 22, at 5–10.

⁶⁹ Cf. Frug, *supra* note 2, at 572 (“The critical question, in my view, is not whether a system of popular governance is possible in modern society but how to implement it.”).

⁷⁰ Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 *RISK* 103, 103 (1990) (“During the years that have intervened since the consumer/environmental decade of 1967–1977, the basic principle that the ‘public’ ought to play a role in regulatory decisions involving health and environmental risks has not been seriously questioned.”); *id.* at 105 (deeming public participation “an essential ingredient of the policy making process”); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. CHI. L. REV.* 1, 8 (1995) (“The modern regulatory state should also be more democratic. Currently,

values are widely understood as necessary to resolve the policy questions inherent in *expert* analysis.⁷¹ This is not to say that democratic administration is free of potential problems; it certainly presents some, not least of which is the possibility of majoritarian tyranny. It is to say that, making administration more democratic might improve substantially on the present state of affairs and we are far from exhausting the range of possibilities. The challenge is to discern how best to bring public values into the administrative process and integrate them with agency expertise.⁷²

Below, this Part first discusses the most prominent legitimacy problem relevant to democracy in administration—the perception of industry capture of the regulatory process. It then briefly discusses one of the most important challenges facing democratic administration—how to balance agency expertise and public accountability or participation.

1. *The Perception of Industry Dominance*

One of the most persistent and acute problems for administrative legitimacy is the perception that regulated interests and their perspectives dominate the regulatory process. James Landis wrote in 1960 that “the daily machine-gun-like impact . . . of industry representation . . . makes for industry orientation on the part of many honest and capable agency members as well as agency staffs.”⁷³ Landis attributed much of industry’s

regulation is far too inaccessible to public control. Instead, it is enshrouded in technocratic complexities not subject to public debate, affected by misleading, sensationalist anecdotes, or, even worse, subject to the influence of well-organized private groups with personal stakes in the outcome.”); Stewart, *supra* note 1, at 1711–61 (describing emergence of interest representation model as an attempt to broaden the democratic base of agency decisions).

⁷¹ See, e.g., Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1674–75 (1995) (“Although some have questioned the benefit or cost-effectiveness of any public involvement in science-policy issues, most commentators conclude that the wide range of public values implicated in these complex problems can and must be ascertained only with the general public’s assistance.” (footnote omitted)).

⁷² See Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 612–13, 626–28; Arkush, *Situating Emotion*, *supra* note 21, at 1363–65. This effort dates back at least to the onset of the “interest representation” model of administrative law. See, e.g., Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 326 (1993) (“Although early public law analysts viewed administrative agencies as repositories of technical expertise and deemphasized the significance of value choices in administrative decisionmaking, once analysts recognized the central role of value choices in such decisionmaking, the debate became how to protect democratic ideals within the bureaucratic process.” (footnote omitted)); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361–62 (1972) (taking as given that the right and the value of public participation were already established and focusing on assisting “agencies in determining the proper role and scope of public participation in formal administrative hearings”).

⁷³ JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 51

disparate influence to its frequent, high-quality contacts with agency officials.⁷⁴ Over the following decade, a strong consensus developed across the political spectrum that agencies are too often “captured” by the entities they regulate.⁷⁵ Public choice theorists, using economic analysis, reasoned that agencies were inherently prone to capture by business interests and concluded that much regulation was not worth the trouble;⁷⁶ others agreed that capture was a problem but sought to remedy it, largely through the interest representation policies of the reformation.⁷⁷

The term “capture” has become shorthand for an array of subtle and complex ways in which industry might exercise disproportionate influence over regulators, or regulators might come to share industry’s perspective and values.⁷⁸ The potential causes are numerous. Agencies need industry cooperation for compliance and information.⁷⁹ Their limited budgets, often dwarfed by those of regulated interests, make it far more advantageous for agencies to seek compromise than conflict.⁸⁰ Regulated entities also enjoy considerable influence among congressional overseers and high-level executive-branch officials, and agencies may fear being blamed for problems in the industries they regulate, particularly economic dislocations.⁸¹ These factors may bias agencies toward inaction or increase

(1960), available at <http://bit.ly/landis1960report>; see also ROBERT C. FELLMETH, THE INTERSTATE COMMERCE OMISSION 15–16 (1970).

⁷⁴ See LANDIS, *supra* note 73, at 51 (“This tendency toward industry orientation is subtle and difficult to deal with. It arises primarily from the fact that of necessity contacts with the industry are frequent and generally productive of intelligent ideas. Contacts with the public, however, are rare and generally unproductive of anything except complaint. For example, the public that our security legislation is designed to protect is the ‘investor,’ but the investor rarely appears and when he does he is too rarely an investor and too frequently a speculator who deserves exactly what happened to him.”).

⁷⁵ See, e.g., Stewart, *supra* note 1, at 1684–85 (“Critics have repeatedly asserted . . . that . . . agencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor.” (footnotes omitted)); *id.* at 1713 (“It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.” (footnotes omitted)).

⁷⁶ See, e.g., Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 39–40 (1998).

⁷⁷ See, e.g., Stewart, *supra* note 1, at 1681–88, 1711–60.

⁷⁸ See *id.* at 1685–86; Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 286 (“[T]he notion of mechanical-reaction-to-pressure must sometimes be understood as a metaphor for a complex process in which administrators come to share the values of particular affected parties and their approaches to regulatory issues.”).

⁷⁹ Stewart, *supra* note 1, at 1685.

⁸⁰ *Id.* at 1686.

⁸¹ See *id.* at 1685.

their receptivity to industry arguments, which are often calculated to provoke fears of severely harming industry.⁸² Moreover, some agency employees have previously worked for regulated entities or may hope to do so in the future.⁸³ Political appointees may stymie the work of career staff, blocking the adoption of new rules or the enforcement of existing ones.⁸⁴

Empirical evidence confirms Landis's claim that industry participation overwhelms that of citizens or public interest groups, creating what Sidney Shapiro has termed "representational capture."⁸⁵ The principal cause is thought to be resource disparities between regulated industry and public interest groups,⁸⁶ as participation in the administrative process is expensive.⁸⁷ It is costly just to monitor administrative activity well enough to identify actions in which one might wish to participate.⁸⁸

Wendy Wagner recently identified another variant of capture that stems from resource disparities not just between interest groups, but between regulated entities and the agencies themselves: "information capture," meaning "the excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings."⁸⁹ The law prohibits an agency from "shield[ing] itself from . . . [a] flood of information and . . . developing its own expert conception" of a matter.⁹⁰ To the contrary, the agency is required to consider all input that it receives.⁹¹ A flood of

⁸² It is not uncommon for businesses, trade associations, think tanks, and opinion writers to make overwrought, even apocalyptic, claims about proposals they disfavor. *See, e.g.,* Jessica Matthews, *Clean Sweeps: Two Success Stories for the Environment*, WASH. POST, Dec. 18, 1995, at A23 (contrasting industry claims that compliance with EPA sulfur dioxide regulation would have exorbitant, perhaps impossibly high, costs with the actual costs, which were one-tenth as high).

⁸³ *See, e.g.,* PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 19–20 (1981).

⁸⁴ *Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 111th Cong. 2–3 (2010) (statement of Sidney A. Shapiro, University Distinguished Chair in Law, Associate Dean for Research and Development, Wake Forest School of Law and Member Scholar, Vice-President, Center for Progressive Reform).

⁸⁵ *Id.* at 2, 4; *see also* Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 620–23 (reviewing empirical evidence on capture).

⁸⁶ *See, e.g.,* Shapiro & Steinzor, *supra* note 44, at 1753–55; Stewart, *supra* note 1, at 1764 (citing Benjamin W. Heineman, Jr., *In Pursuit of the Public Interest*, 84 YALE L.J. 182, 188 (1974) (book review)).

⁸⁷ *See, e.g.,* Croley, *supra* note 76, at 120–25.

⁸⁸ *See id.* at 124–25.

⁸⁹ Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010).

⁹⁰ *Id.*

⁹¹ *Id.*

information from industry can cripple an agency as well as hamper the participation of less well-funded interest groups.⁹²

To be sure, the evidence of a causal relationship between increased representation and greater influence is scarce and, at best, mixed.⁹³ This is unsurprising, as influence is difficult to measure. But the ambiguity of evidence on capture has done little to diminish concerns among both students of administrative law and the broader public. As a result, reducing real or apparent agency capture should enhance administrative legitimacy.

2. *The Tension Between Expertise and Democracy*

Another commonly recognized challenge for democracy in administration is how to mediate between expertise and democratic values.⁹⁴ Congress often insulates regulators from excessive exposure to political processes with the goal that agencies will employ neutral expertise rather than pursue mistaken public preferences or partisan or private ends. But regulators must make value choices, not just technical assessments, and therefore agency officials must somehow incorporate public values into their decisions. The challenge is how to advance each goal without undermining the other.

Although expertise and democracy are sometimes framed as competing values,⁹⁵ there is broad agreement that sound administration requires both. The principal role of experts is to supply factual or legal analysis, whereas the role of citizens or their political representatives is to supply value judgments.⁹⁶ Accordingly, those who advocate insulating experts from the public or using technical modes of analysis do not favor shutting public values out of administration. They believe regulatory policy should reflect public values⁹⁷ and argue only that the public can

⁹² See *id.* at 1325–26.

⁹³ See, e.g., Shapiro & Steinzor, *supra* note 44, at 1754–55.

⁹⁴ See Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1279 (1994) (“Modern democracies need to strike a balance between popular control and expertise . . .”); Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 281 (“The debate over the respective roles of ‘expertise’ and ‘politics’ in agency decisionmaking has proved to be one of the most persistent in administrative law.”).

⁹⁵ See, e.g., Kagan, *supra* note 30, at 2338–39; Sargentich, *supra* note 1, at 425–26; Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 436 (1987).

⁹⁶ See, e.g., Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 627–28; Arkush, *Situating Emotion*, *supra* note 21, at 1363–65.

⁹⁷ See, e.g., Pildes & Sunstein, *supra* note 70, at 8, 62 (“The matter should be analyzed differently when the differences arise from clashes between the value frameworks of experts and laypeople. In such cases there is no reason to defer to experts; democracies should be responsive to the informed values of their citizens.”); see also Sunstein, *Factions*,

suffer from problems of “bounded rationality” due to sensationalism, mistaken perceptions, and arbitrary differences in the salience of various risks.⁹⁸ Likewise, those who emphasize increased public accountability or participation do not claim that administrative expertise is unimportant. Conceptually, the task is to incorporate and integrate both expertise and democracy, not to choose one at the expense of the other.

For this reason, the value placed on both expertise and democracy presents a set of practical, institutional design challenges more than a conceptual tension. One challenge is how to insulate agency officials from undue political or factional interference without sequestering them from public values. Members of the public have few channels for administrative oversight or participation that are not available to special interests as well.⁹⁹ Special interests, in contrast, have many opportunities for influence that the general public does not enjoy.¹⁰⁰ For this reason, attempts to insulate agencies from capture may stifle desirable public input as much as improper influence. A second challenge is similar, but runs in the opposite direction: how and when to convey public values affirmatively to agency officials in a manner that does not provide additional opportunities for capture.

A successful approach should satisfy the procedural and substantive imperatives of democratic legitimacy, meaning that policy decisions will be perceived as democratically generated and aligned with public values, as well as yield good policy outcomes by blending agency expertise and useful public input. To accomplish these goals, a model should harness agencies’ technical capacity in service of democratic direction that is, to the extent possible, broadly representative, well-informed, well-considered, and unbiased. This Article poses direct republicanism as a potential

Self-Interest, and the APA, *supra* note 2, at 282 (“[T]he purpose of the regulatory process is to select and implement the values that underlie the governing statute”); *id.* at 284 (“The principal question for administrative agencies and reviewing courts is how to define the relevant values.”). Cass Sunstein has advocated for a “deliberative conception of administration” in part on the basis of its “considerable promise for accommodating both expertise and politics in regulatory policy.” *Id.* at 287.

⁹⁸ See CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005); CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002); CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* (2007); Pildes & Sunstein, *supra* note 70, at 60; Sunstein, *Cognition and Cost-Benefit Analysis*, *supra* note 52, at 1078 (“[G]overnment’s task is to distinguish between lay judgments that are products of factual mistakes (produced, for example, by the availability heuristic) and lay judgments that are products of judgments of value (as in the view that voluntarily incurred risks deserve less attention than involuntarily incurred ones).”).

⁹⁹ To cite the most common type of input as an example, any “interested person” can submit comments on a proposed rule. 5 U.S.C. § 553(c) (2012).

¹⁰⁰ See *supra* notes 73–92 and accompanying text.

approach. Before discussing it, however, a review of other democracy-based models is in order.

II. EXISTING MODELS OF DEMOCRATIC ACCOUNTABILITY AND PARTICIPATION

A. *Traditional Representation-Based Models*

The most common means of serving democratic values in the administrative process are oversight and participation by elected officials, other government servants, or even other representatives of the public. This Section discusses models of oversight and participation through four such representation-based institutions—Congress, the White House, interest groups, and the courts.¹⁰¹

1. *Congressional Oversight*

When considering how to make the federal administrative process more democratically responsive, Congress is a natural starting point. Enhanced congressional oversight of the administrative process has been proposed frequently,¹⁰² most commonly by opponents of regulation in Congress itself,¹⁰³ and occasionally implemented.¹⁰⁴ Congressional oversight has obvious appeal because Congress is the representative institution principally responsible for setting national policy and negotiating American political values and interest. Congress is also the body that establishes administrative agencies, and there is little doubt that it has tools to make agencies sensitive to certain legislative preferences. It can reduce or increase budgets, investigate agencies, summon administrators into committee rooms for close questioning and, of course,

¹⁰¹ Inclusion of the courts in this group of institutions may seem anomalous, given the courts' typical cast as anti-majoritarian. They fit because they can be viewed as representing the public's interests in the regulatory process. Cf. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49–50 (1985) (arguing that judicial review for "rationality" amounts to a requirement that regulations not be mere "response[s] to political pressure," but rather serve "some independent 'public interest'").

¹⁰² See, e.g., Seidenfeld, *supra* note 1, at 1572–73 ("Congress as a whole can and should directly review agency policy to ensure that it comports with the polity's conception of the public good . . . Congress thus should play an important monitoring role, at the end of the deliberative policy-setting process, to ensure that the agency does not adopt a policy that conflicts with popular values.").

¹⁰³ See, e.g., Regulations from the Executive in Need of Scrutiny ("REINS") Act of 2011, H.R. 10, 112th Cong. § 3 (providing that final agency rules must be approved by Congress and the president before going into effect).

¹⁰⁴ See, e.g., Congressional Review Act, 5 U.S.C. §§ 801–808 (2006) (providing expedited procedures for congressional override of major agency rules).

restrict or expand agency authority or overturn specific rules.¹⁰⁵ There is good reason to believe that the existence and exercise of these congressional powers broadly influences agency action.¹⁰⁶

Broad influence is not the same as real oversight, however, and there are significant questions regarding Congress's fitness for the latter. First, congressional attention to agency matters is superficial or wholly lacking in all but a few instances, usually those that have garnered substantial public attention.¹⁰⁷ There, oversight is necessarily "complaint-driven" and "ad hoc."¹⁰⁸ In addition, the notion of "congressional" oversight, in the sense of the whole Congress watching over regulators, is rarely more than a metaphor. Legislative supervision typically takes the form of oversight by a small number of individuals in Congress, usually the heads of relevant committees¹⁰⁹ or, more specifically, their staffs,¹¹⁰ some of whom may be as removed from electoral accountability as agency officials. When committee jurisdictions overlap, a lack of coordination can cause even greater problems for oversight.¹¹¹ Congress also has been criticized as an overly political and factional environment in which to resolve not just technical questions, but also the value tradeoffs inherent in the administrative process.¹¹² These criticisms point to a circularity in aspirations for congressional oversight: Congress delegates broad authority to administrative agencies because it is unwilling or unfit to make all of the decisions required in various policy areas. If Congress were willing and able to evaluate agency performance on the relevant matters, then it need not have delegated the authority in the first place.¹¹³

¹⁰⁵ See Kagan, *supra* note 30, at 2256–57. Of course, some of these oversight powers require the enactment of legislation, and therefore require presidential involvement as well. See *INS v. Chadha*, 462 U.S. 919, 951–59 (1983).

¹⁰⁶ See, e.g., Kagan, *supra* note 30, at 2257–59 (reviewing claims of congressional "dominance" over agencies).

¹⁰⁷ Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1201 (1981) ("Agencies also escape the effects of nonstatutory constraints because the congressional review process overlooks many regulatory actions and often fails to subject the remainder to more than the most superficial scrutiny.").

¹⁰⁸ Kagan, *supra* note 30, at 2260.

¹⁰⁹ Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 483–84 (1985) [hereinafter Pierce, Jr., *Role of Constitutional and Political Theory*].

¹¹⁰ Pierce & Shapiro, *supra* note 107, at 1207–08 (citing MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT* 250–51 (1980)).

¹¹¹ *Id.* at 1201–02.

¹¹² See, e.g., Seidenfeld, *supra* note 1, at 1544–45.

¹¹³ See Pierce, Jr., *Role of Constitutional and Political Theory*, *supra* note 109, at 482–83 ("The same set of powerful institutional constraints that forced Congress to delegate a

An additional set of problems centers around imperfections in the public's ability to oversee Congress. Many members of Congress do not face a serious threat of electoral accountability.¹¹⁴ At the same time, members are subject to many of the factional influences that act on administrative agencies.¹¹⁵ For many members, these influences may be exacerbated by a factor that does not apply to agency officials—the need to campaign for office and engage in near-constant fundraising.¹¹⁶ Beyond the routine level of industry influence in Congress, members of a given committee tend to have close relationships to the industries within its jurisdiction.¹¹⁷ Regardless of whether one would argue that something akin to agency capture occurs in Congress itself,¹¹⁸ there are clear shortcomings in attempting to express public regulatory preferences and hold agencies democratically accountable through the medium of congressional representation.

2. Executive-Branch Oversight

A more widely supported model is presidential control of the regulatory process, or “presidentialism.” The president is the only official elected by the entire nation, and therefore the only one charged with representing the public at large in the administrative process.¹¹⁹ As a result, increased presidential control offers the prospect of making administrative action more visible and democratically accountable.¹²⁰

Notwithstanding its merits, however, presidentialism suffers from pitfalls similar to those of congressional oversight. The president can influence agency policy in broad brushstrokes¹²¹ but can attend closely to

high proportion of its policy-making power to agencies—a crowded agenda, technically complicated and politically controversial issues, and competing demands for constituent service—also inhibited any attempt to engage in systematic and intensive review of agency policy decisions.”).

¹¹⁴ See, e.g., COOK POLITICAL REPORT, PARTISAN VOTING INDEX DISTRICTS OF THE 113TH CONGRESS, ARRANGED BY STATE/DISTRICT (2013), available at <http://cookpolitical.com/file/2013-04-47.pdf>.

¹¹⁵ See, Seidenfeld, *supra* note 1, at 1544–45.

¹¹⁶ See, e.g., Jim Cooper, *Fixing Congress*, BOSTON REV., May–June 2011, at 12, 15–17.

¹¹⁷ See, e.g., Kagan, *supra* note 30, at 2259–60.

¹¹⁸ See Seidenfeld, *supra* note 1, at 1567 (“The crucial point is that special interest groups and regulated industries often use their influence over powerful members of Congress to affect regulatory policy.”).

¹¹⁹ See Kagan, *supra* note 30, at 2331–32.

¹²⁰ See generally *id.*; Pierce, Jr., *Presidential Control*, *supra* note 45; see also Pierce, Jr., *Democratizing*, *supra* note 45, at 562–65.

¹²¹ See Kagan, *supra* note 30, at 2290–99 (discussing the prospective use of agenda- or policy-setting memoranda or orders).

only a few significant matters, even with ample assistance from staff.¹²² For this reason, it has been argued that presidential management is largely “a fiction that merely disguises a different kind of bureaucratic management.”¹²³ Moreover, presidential management involves opportunities for outsized industry influence¹²⁴ and excessive politicization. To date, the principal means of White House engagement in rulemaking has been review of agency proposals by the Office of Information and Regulatory Affairs (“OIRA”), which has been criticized heavily as lacking transparency and tilting toward industry participation.¹²⁵ In addition, OIRA’s principal analytical tool is cost-benefit analysis, which has been criticized as masking important value choices behind objective-seeming analysis, thereby reducing transparency and democratic accountability.¹²⁶

The degree of democratic accountability that presidentialism offers may be overstated for other reasons as well. The public elects the president based on perceptions regarding general ideology or values.¹²⁷ Not only does the public lack the knowledge and inclination to hold the president accountable for particular agency decisions,¹²⁸ but voters cannot express their preferences perfectly in presidential elections.¹²⁹ Instead, they must

¹²² See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 668 (5th ed. 2010).

¹²³ Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 463 (2010). The President also can have difficulty asserting control over the bureaucracy, particularly in a timely fashion. See Pierce, Jr., *Democratizing*, *supra* note 45, at 564–65.

¹²⁴ Criddle, *supra* note 123, at 464.

¹²⁵ See, e.g., RENA STEINZOR ET AL., *CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT* 42, 53–54 (2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111es.pdf (discussing lack of transparency); *id.* at 21 (finding that seventy-three percent of OIRA meetings were exclusively with industry representatives, while only seven percent included public interest groups and no industry groups).

¹²⁶ See, e.g., Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 207 (2004).

¹²⁷ Seidenfeld, *supra* note 1, at 1568–69.

¹²⁸ See Criddle, *supra* note 123, at 458 (“Political scientists have long recognized that presidential elections can rarely, if ever, be construed as conferring genuine mandates for presidents to pursue particular regulatory policies.”); *id.* at 461 (“By all accounts, the vast majority of agency rulemaking actions simply fly under the public radar, eluding the attention of all but the most well-informed members of the electorate.”); Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 562–63 (“The success of government cannot be wholly dependent on able administrators because they may or may not be present. Nor can we depend on the romantic image of concerned voters regularly disciplining the political branches because political participation is anemic and awareness of public affairs pitiful.” (footnote omitted)).

¹²⁹ See Seidenfeld, *supra* note 1, at 1568–69.

compromise with themselves and accept aspects of candidates that they disfavor. There also can be broad discrepancies between a candidate's public image and his or her actual policies.¹³⁰ Finally, the president's lame-duck status during the second term—half of the presidency for a two-term president—sharply decreases accountability to voters.¹³¹

3. *Interest Representation*

Another means of increasing public accountability and participation has been to provide greater opportunities for representatives of various groups to participate in the administrative process. Richard Stewart famously identified this model, termed it “interest representation,”¹³² and pointed to several flaws. His principal concern was that the model could not ensure that all the relevant interests would be represented in a given proceeding.¹³³ Public interest groups lack the resources to participate in all relevant agency actions and, as a result, they and their financial supporters must choose the matters in which to engage.¹³⁴ In addition, the groups may have little accountability to their constituencies.¹³⁵ Others have added to Stewart's critique, noting that public interest groups are dramatically outmatched by regulated entities and have fallen far short of fulfilling their role in the interest representation model,¹³⁶ and that “traditionally powerful interests could take comparatively greater advantage of the new panoply of participatory rights.”¹³⁷ Stewart also argued that requiring an agency to consider more viewpoints and evidence can paradoxically diminish accountability and expand discretion by legitimizing a broader range of outcomes.¹³⁸

Another set of critiques parallels those of political pluralism more generally, as the interest representation model in administrative practice can be thought of as an exercise in pluralism.¹³⁹ There is no reason to

¹³⁰ See *id.* (briefly cataloguing this and other “market-type imperfections” of presidential elections).

¹³¹ See Pierce & Shapiro, *supra* note 107, at 1219.

¹³² See *supra* text accompanying notes 39–40.

¹³³ See Stewart, *supra* note 1, at 1764–66.

¹³⁴ See *id.*

¹³⁵ See *id.* at 1766–67.

¹³⁶ See, e.g., Steinzor & Shapiro, *supra* note 44, at 1745–46, 1751–56; see also *supra* text accompanying notes 85–88.

¹³⁷ Kagan, *supra* note 30, at 2266.

¹³⁸ See Stewart, *supra* note 1, at 1776–81.

¹³⁹ This Article uses “pluralism” to mean policymaking that results from the aggregation of, or competition between, the preferences of private groups. See Croley, *supra* note 76, at 31–33; Seidenfeld, *supra* note 1, at 1520–21 (characterizing the theory of “pluralistic democracy” as viewing “the constitutional scheme as a means of ensuring that

believe that interest group competition over policy yields coherent or good policy outcomes.¹⁴⁰ It may even produce affirmatively bad outcomes.¹⁴¹ In addition, a view known as “civic republicanism” holds that public policy should derive not from the mere aggregation of private preferences, but rather from a deliberative discourse that, to the extent possible, produces consensus regarding the public good.¹⁴²

Finally, the interest representation model has been criticized for burdening agency resources by making administrative proceedings more cumbersome.¹⁴³

4. *Judicial Review*

Judicial review of agency action has always been an important response to the problem of discretion,¹⁴⁴ featuring prominently in theoretical models and legal reform efforts. But there is little dispute that the substantive review of agency action by the judiciary is not a promising means of advancing democracy in administration. Federal courts are less democratically accountable than administrative agencies, and the propriety of courts reversing the decisions of the political branches is a matter of longstanding concern.¹⁴⁵ In the strongest articulation of this point, the resort to judicial review for legitimacy is little more than a venue transfer

political decisions distribute the benefits of regulation according to the pre-existing values and preferences of the citizenry”).

¹⁴⁰ See Kagan, *supra* note 30, at 2266; see also Stewart, *supra* note 1, at 1781; Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 283.

¹⁴¹ See, e.g., Seidenfeld, *supra* note 1, at 1533 (“Thus, under pluralistic democracy, the state may actually end up pursuing values that the political community, after deliberation, would universally consider repugnant.”).

¹⁴² See, e.g., Seidenfeld, *supra* note 1, at 1529–30.

¹⁴³ See Kagan, *supra* note 30, at 2266–67; Wagner, *supra* note 89, at 1324–26.

¹⁴⁴ See, e.g., Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 291 (“The uneasy position of the administrative agency has produced relatively strict judicial supervision, usually with the authorization of Congress. The fear is that the absence of the usual electoral safeguards renders agencies particularly susceptible to the pressures imposed by powerful private groups. In the context of reviewing agency conduct, the vices of the courts turn out to be virtues, and separation of powers concerns tend to argue in favor of an aggressive judicial role.” (footnote omitted)).

¹⁴⁵ See, e.g., Frank I. Michelman, Foreword, *Traces of Self-Government*, 100 HARV. L. REV. 4, 74 n.404 (1986) (“[T]he exercise of judicial review . . . is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way” (alterations in original) (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 106–07 (1901))); cf. Pierce, Jr., *Role of Constitutional and Political Theory*, *supra* note 109, at 506 (“The logic of *Chevron* is compelling. The Court recognized that policy choices should be made by the most politically accountable branch of government, and that the judiciary is the least politically accountable branch.” (footnote omitted)).

of the underlying problems, taking discretion from unelected agency officials and placing it in the hands of unelected judges.¹⁴⁶ Compounding this general critique of judicial review are more specific concerns about the courts' performance, such as politicized decisionmaking¹⁴⁷ and the failure to craft coherent review doctrines.¹⁴⁸

Aside from reviewing the substance of agency actions, the judiciary's principal function is to moderate the roles of other parties and institutions that seek to influence agency outcomes.¹⁴⁹ The courts require structures, procedures, and decisionmaking methods in what "amounts to an allocation of power to and among the different parties (internal and external) interested in controlling agency product."¹⁵⁰ For example, the judiciary was responsible for much of the "reformation," the mid-twentieth-century increase in participation rights for interest groups,¹⁵¹ as well as significant elements of the counterreformation.¹⁵² The judicial role regarding administrative democracy, then, should be largely indirect.

C. *More Direct Citizen Engagement*

Given the shortcomings of representation-based models, many observers and public officials have sought to increase direct citizen participation in administration, unmediated by interest groups or other branches of government. Most rulemakings are conducted using informal, "notice and comment" procedures, in which any member of the public can submit written comments to the agency,¹⁵³ but this has not been a

¹⁴⁶ See Edley, *supra* note 128, at 566–67.

¹⁴⁷ The ideological preferences of the presiding judges are more predictive of outcomes in appellate administrative law cases than any other factor that has been studied. A political ideology effect of thirty percent has been observed, with the effect halved when a panel is politically divided rather than unified. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 89 (2011) [hereinafter Pierce, Jr., *What Do the Studies Mean?*]; see also Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1062–63 (1995) (proposing a model that suggests administrative law may be particularly prone to indeterminacy and political decisionmaking).

¹⁴⁸ See, e.g., Pierce, Jr., *What Do the Studies Mean?*, *supra* note 147, at 95–96 (urging the replacement of six administrative review doctrines with the review for reasonableness); Shapiro & Levy, *supra* note 147, at 1064–72 (reviewing problems in *Chevron* and *State Farm* doctrine); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 186–87 (2010).

¹⁴⁹ See, e.g., Kagan, *supra* note 30, at 2269.

¹⁵⁰ *Id.* at 2269.

¹⁵¹ See Stewart, *supra* note 1. For more discussion on the reformation, see *supra* text accompanying notes 39–41.

¹⁵² See Shapiro, *Administrative Law After the Counter-Reformation*, *supra* note 31, at 697–720.

¹⁵³ See 5 U.S.C. § 553(c) (2012).

meaningful avenue for participation by ordinary citizens.¹⁵⁴ For this reason, several models attempt to foster direct participation in more substantial ways. This Section reviews the most prominent among them.

I. Deliberative Democracy

In deliberative democracy, citizens engage in informed, face-to-face conversation over a policy issue, attempting to come closer to a consensus view.¹⁵⁵ In contrast to pluralistic models of policy formation that aggregate or select among people's preexisting individual preferences, deliberative democracy is intended to reshape individual policy preferences by fostering consideration of others' interests or "public-spiritedness."¹⁵⁶ In addition to potential benefits for substantive regulatory policy, proponents view the deliberative process as valuable itself as a means of enhancing civic engagement.¹⁵⁷ There are two prominent examples of deliberative democracy in the regulatory process: an actual exercise by an administrative agency and a recent academic proposal.

The EPA's Asarco Experiment. In the early 1980s, the Environmental Protection Agency ("EPA") conducted a major experiment with deliberative democracy as it sought to protect the public from arsenic emissions.¹⁵⁸ A copper smelting plant owned by the American Smelting

¹⁵⁴ See, e.g., Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1359–67 (2011) (reviewing evidence that agencies tend to be influenced more by technical, sophisticated comments, which are usually filed by interest groups or regulated entities, than by value-laden or preference-based comments, which are typically filed by laypeople). Recognizing the shortcomings of public participation in notice and comment rulemaking, agencies traditionally have used other means to garner public input, such as field hearing and public forums. Some agencies have engaged in more innovative efforts. For example, the Consumer Financial Protection Bureau ("CFPB"), when creating a new mortgage disclosure form, published drafts on the Internet and asked the public for feedback. It not only collected users' written feedback, but analyzed "heatmaps" of where users clicked while reviewing the forms to see which parts garnered the most attention. See, e.g., *Know Before You Owe*, CONSUMER FIN. PROTECTION BOARD, <http://www.consumerfinance.gov/blog/mortgage-disclosure-is-heating-up/> (last visited Aug. 6, 2013). These efforts likely carry substantial benefits. But they have not satisfied the desire for more substantial and meaningful citizen participation; nor have they quelled concerns about democratic legitimacy. This Article focuses on attempts to foster more substantial citizen engagement in administration.

¹⁵⁵ See COHEN, *supra* note 50, at 16, 21–25.

¹⁵⁶ In this manner it is closely linked to civic republicanism. See Croley, *supra* note 76, at 76–79.

¹⁵⁷ See, e.g., Lobel, *supra* note 54, at 374 ("[T]he overall goal of participation is broader than simply ensuring the achievement of policy goals; it enhances the ability of citizens to participate in political and civic life.").

¹⁵⁸ Robert Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1632 (1985) (citing the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401–7642

and Refining Company (“Asarco”) in Tacoma, Washington was responsible for twenty-five percent of arsenic emissions nationwide.¹⁵⁹ The EPA calculated that Asarco’s emissions, if unchecked, would cause four new cases of lung cancer each year in the Tacoma area.¹⁶⁰ The best available pollution control technology could reduce the annual number of new cancer cases to one, but it was so costly that it would have required the plant to close.¹⁶¹ The decision appeared to require a tradeoff between four new cases of lung cancer each year and 570 jobs.¹⁶²

Under court order to establish standards, the EPA held three public workshops with citizens, environmental groups, and Asarco employees.¹⁶³ At each workshop, the agency explained the health risks from the smelter and the effects of various responses, then divided participants into three groups for discussion, with agency staff circulating among the groups.¹⁶⁴ The exercise ended inconclusively because declining copper prices put Asarco out of business before the workshops were completed.¹⁶⁵

Responses to the Asarco experiment have been mixed. Environmental activists,¹⁶⁶ news media,¹⁶⁷ and even some participants in the process¹⁶⁸ criticized the EPA for saddling the citizens of Tacoma with a morally and technically difficult decision, and it has been argued that the EPA’s staff was unprepared to administer and moderate the discussions properly.¹⁶⁹ A poll of participants, however, found that fifty-eight percent appreciated the deliberations.¹⁷⁰ Some scholars have lauded the process as a positive

(2006)).

¹⁵⁹ See Carmen Sirianni, *The Tacoma Smelter and EPA*, CIVIC PRACTICES NETWORK, <http://www.cpn.org/topics/environment/tacoma.html> (last visited Aug. 8, 2013).

¹⁶⁰ Reich, *supra* note 158, at 1632.

¹⁶¹ *Id.* at 1632–33.

¹⁶² *Id.*

¹⁶³ Sirianni, *supra* note 159.

¹⁶⁴ *Id.*

¹⁶⁵ Reich, *supra* note 158, at 1633–34.

¹⁶⁶ Sirianni, *supra* note 159 (quoting ESTHER SCOTT, JOHN F. KENNEDY SCH. OF GOV’T, *MANAGING ENVIRONMENTAL RISKS: THE CASE OF ASARCO 6* (1988) (quoting Ruth Weiner, head of the Cascade Chapter of the Sierra Club, as saying, “[I]t is up to the EPA to protect public health, not to ask the public what it is willing to sacrifice not to die from cancer.”)).

¹⁶⁷ Reich, *supra* note 158, at 1634 (“Mr. Ruckelshaus has it all upside down . . . What is inexcusable is for him to impose such an impossible choice on Tacomans.” (alteration in original) (quoting Editorial, *Mr. Ruckelshaus as Caesar*, N.Y. TIMES, July 16, 1983, at 22)).

¹⁶⁸ Reich, *supra* note 158, at 1634 (“These issues are very complex and the public is not sophisticated enough to make these decisions. This is not to say that EPA doesn’t have an obligation to inform the public, but information is one thing—defaulting its legal mandate is another.” (quoting SCOTT, *supra* note 166, at 8)).

¹⁶⁹ Sirianni, *supra* note 159.

¹⁷⁰ *Id.*

example,¹⁷¹ while others have been more skeptical.¹⁷² In any event, it appears that the EPA has never repeated the experiment.

Democracy Index Rulemaking. Another proposal would give administrative agencies the choice to engage in “deliberative notice and comment rulemaking” rather than ordinary informal rulemaking.¹⁷³ In a deliberative rulemaking, the agency would convene roughly 500 “jury” members, comprising stakeholders and randomly selected citizens.¹⁷⁴ Beforehand, participants would receive a briefing book of no more than ten pages.¹⁷⁵ They would watch an oral presentation jointly before being divided into roughly thirty-five groups of fifteen people for deliberations.¹⁷⁶ Each group would be staffed with a moderator and small-group counsel, each specially trained for the deliberations.¹⁷⁷ Once a majority of group members felt they were done discussing the proposal, they would vote on positions, and the counsel would draft a report to the agency based on the group’s views.¹⁷⁸ The agency would be required to consider the reports and respond to all relevant and non-repetitive views expressed.¹⁷⁹ An agency using deliberative notice and comment would be exempt from current analytical requirements and would receive deferential review only for “clear and manifest error.”¹⁸⁰ In addition, to encourage participation in ordinary notice and comment rulemaking, agencies would be permitted to engage in less rigorous analysis and would receive enhanced judicial deference in proportion to the number of relevant, non-repetitive comments received.¹⁸¹

Key Problems for Deliberative Models. The most significant challenge for each of these approaches is the resources they require. For example, the proposal for “deliberative notice and comment rulemaking” appears to require more than seventy agency staff members to administer a single deliberation on a single rule.¹⁸² At many agencies, that is likely

¹⁷¹ See Reich, *supra* note 158, at 1635 (“The Asarco example illustrates the potential for public administrators to enhance social learning in several ways.”).

¹⁷² See, e.g., Croley, *supra* note 76, at 85.

¹⁷³ David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81, 82 (2005).

¹⁷⁴ See *id.* at 91–93.

¹⁷⁵ *Id.* at 93–94.

¹⁷⁶ *Id.* at 94.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 94–95.

¹⁷⁹ *Id.* at 95.

¹⁸⁰ *Id.* at 96–97, 99.

¹⁸¹ *Id.* at 97, 99.

¹⁸² Each deliberation would involve thirty-five separate groups of jurors, each staffed by a facilitator and a counsel. *Id.* at 93–96.

more than the total number of rulemaking staff. Another drawback is that deliberation provides no assurance that public participation influences an agency's decision. There is nothing to stop an agency from going through the motions of a deliberative practice such as the Asarco forums or deliberative notice and comment rulemaking and then reaching a predetermined result.¹⁸³ Indeed, the latter might increase the potential for strategic behavior by offering agencies the prospect of more deferential judicial review in exchange for their use of a putatively deliberative process.¹⁸⁴

2. Citizen Boards

In a second form of citizen engagement, some jurisdictions have experimented with administrative agencies run by boards of citizens. One example is Minnesota's Pollution Control Agency.¹⁸⁵ With the exception of its chair, the agency's board is barred from including government employees.¹⁸⁶ Several strengths of such arrangements have been identified: (1) they require agency staff to become adept at conveying technical policy matters in a manner that is accessible to lay people;¹⁸⁷ (2) citizens may feel more comfortable expressing their views to citizen boards than other officials;¹⁸⁸ (3) citizen boards may keep an agency better focused on the "big picture" and assist agency policymaking with a basic "smell test" regarding likely public views;¹⁸⁹ and (4) agencies governed by citizen boards may be more politically independent and may potentially be viewed as more legitimate.¹⁹⁰

The approach also carries significant drawbacks. Part-time, lay supervisors may not be fit to make certain technical, legal, or policy decisions.¹⁹¹ They also may have difficulty asserting control over agency staff for a variety of reasons,¹⁹² including that staff may become adept at managing relations with the board so that they can pursue their own goals.¹⁹³ Additionally, board oversight may be largely reactive, limited to

¹⁸³ See *id.* at 95, 98.

¹⁸⁴ *Id.* at 96–97, 99.

¹⁸⁵ See Marcia R. Gelpe, *Citizen Boards as Regulatory Agencies*, 22 *URB. LAW.* 451, 451–54 (1990).

¹⁸⁶ MINN. STAT. § 116.02 (2012).

¹⁸⁷ Gelpe, *supra* note 185, at 457–58.

¹⁸⁸ *Id.* at 458–59.

¹⁸⁹ *Id.* at 459–60.

¹⁹⁰ *Id.* at 461–62 (citing James L. Price, *The Impact of Governing Boards on Organizational Effectiveness and Morale*, 8 *ADMIN. SCI. Q.* 361 (1963)).

¹⁹¹ *Id.* at 462–63.

¹⁹² *Id.* 479–81.

¹⁹³ *Id.*; see also *id.* at 464, 467–68.

granting or withholding final approval after the agency staff has set priorities and pursued actions.¹⁹⁴ A board can work to take a more active role in guiding agency decisions, but this requires significant time and effort from its members, and success is far from guaranteed.¹⁹⁵

Another set of problems involves the composition of the board itself. Board members, who are few in number, may not represent the breadth of public views adequately and may even fail to advance values on which there is broad public agreement.¹⁹⁶ They may pursue parochial interests, or even the interests of regulated industry.¹⁹⁷ In addition, they may be less democratically accountable than ordinary political appointees because they are less accountable than professional staff to the elected official who appoints them.¹⁹⁸

3. *Technology-Based Models: Transparency and “Web 2.0”*

Recent years have seen considerable efforts to improve legitimacy through technologies that facilitate information disclosure, interaction, or collaboration over the Internet.¹⁹⁹ Transparency approaches range from merely organizing information more clearly to making large databases available to the public in formats that can easily be downloaded and manipulated.²⁰⁰ Although the importance of government transparency to democracy is obvious, it would be a mistake to assume that better access to information alone will dramatically increase public engagement.²⁰¹

Many participation-based approaches allow users to suggest ideas or ask questions and some provide opportunities to vote on others' proposals

¹⁹⁴ *Id.* at 465.

¹⁹⁵ *Id.* at 467–68, 474.

¹⁹⁶ *Id.* at 459 n.34, 469.

¹⁹⁷ *See id.* at 469.

¹⁹⁸ *See id.* at 470–71.

¹⁹⁹ The term “Web 2.0” is commonly used to refer to technologies that enable more collaboration and interaction on web pages, such as web logs, forums, social-networking and media-sharing websites, and “wikis” that allow users to modify web content. *See Information Management: Challenges in Federal Agencies’ Use of Web 2.0 Technologies; Hearing Before the Subcomm. on Info. Policy, Census, & Nat’l Archives of the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 2 (2010) (statement of Gregory C. Wilshusen, Director, Information Security Issues, Government Accountability Office).

²⁰⁰ *See, e.g.,* CARY COGLIANESE, FEDERAL AGENCY USE OF ELECTRONIC MEDIA IN THE RULEMAKING PROCESS (2011).

²⁰¹ Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 420 (2011) (“The first cardinal sin of running an online community: ‘if I roll out a given technology set (blogs, forums, wikis, etc.), users will automatically appear and congregate, forming a robust community.’” (quoting Rob Howard, *How To: Manage a Sustainable Online Community*, MASHABLE (July 30, 2010), <http://mashable.com/2010/07/30/sustainable-online-community/>)).

or questions. These include “crowdsourcing” (the solicitation of ideas or solutions to problems),²⁰² holding contests or competitions,²⁰³ and conducting online town halls or chats.²⁰⁴ These efforts may influence agency policy, but agencies frequently have failed to make clear what, if anything, they do with the information received.²⁰⁵

Some have attempted to foster closer engagement through new technologies, particularly more substantive engagement in the rulemaking process. The most ambitious and innovative effort is the Regulation Room, a project of the Cornell eRulemaking Initiative that has used a specially designed website to foster and moderate public discussion and comment on two rulemakings.²⁰⁶ By the account of its own creators, the project has exposed “considerable challenges of Rulemaking 2.0,”²⁰⁷ leading them to believe that “rulemaking is in fact an extremely challenging process for e-government innovation.”²⁰⁸ The challenges include the following:

- Like other deliberative democracy efforts,²⁰⁹ the project is resource-intensive, requiring substantial staffing to prepare materials, recruit participants, and moderate online discussions.²¹⁰
- Attracting participants requires considerable effort, as well as some luck.²¹¹
- Participants are impatient. Internet users “expect to come to a site and do something almost immediately.”²¹² It is

²⁰² See CAROLYN J. LUKENSMAYER, JOE GOLDMAN & DAVID STERN, IBM CTR. FOR THE BUS. OF GOV'T, *ASSESSING PUBLIC PARTICIPATION IN AN OPEN GOVERNMENT ERA: A REVIEW OF FEDERAL AGENCY PLANS* 20 (2011).

²⁰³ *Id.* at 21.

²⁰⁴ *Id.* at 23.

²⁰⁵ *Id.* at 46.

²⁰⁶ Farina et al., *supra* note 201, at 397.

²⁰⁷ *Id.* at 399; *see also id.* at 447.

²⁰⁸ *Id.* at 447.

²⁰⁹ *See supra* text accompanying notes 156–184.

²¹⁰ *See* Farina et al., *supra* note 201, at 416–17 (“The team of students and supervising faculty—who work intensely before publication to prepare site content and identify stakeholders for outreach efforts, during the comment period to actively monitor and facilitate the discussion, and at the end of the period to develop summaries of hundreds, even thousands, of comments—is integral to Regulation Room. We did not set out to design a Rulemaking 2.0 system that involves such a high level of human resources. A system that requires *more* reliance on human effort seems in tension, at least, with the whole idea of technology-supported rulemaking.”); *see also id.* at 445.

²¹¹ *Id.* at 420–24.

²¹² *Id.* at 430. The Regulation Room has attempted to foster public deliberation and input on two rulemakings. Users spent an average of four minutes on the site for one rulemaking and three minutes for the other. *Id.* at 442.

unrealistic to expect people to read notices of proposed rulemaking.²¹³ Therefore, summaries must be provided, but it is hard to make even the summaries sufficiently brief and digestible.²¹⁴

- Many people want simply to vote, or to be presented with multiple-choice options, not to write comments.²¹⁵ One user wrote, “I am interested in this regulation but do not want to spend a lot of time reading or submitting comments. How can I just ‘voice my opinion’ in an easy way?”²¹⁶
- Even with intense moderation,²¹⁷ facilitators cannot ensure useful input. For example, 454 of 931 comments on a rule concerning airline passenger rights addressed a minor, tangential matter—a proposed ban on peanut service.²¹⁸

A compelling and illuminating experiment, the Regulation Room has revealed some of the difficulties in garnering high-quality input directly from the public on a rulemaking.

C. Navigating the Pitfalls of Representation and Direct Participation

Certain themes emerge from the above critiques. First, all of the models suffer from limitations inherent in representative systems, with the effect that they fail to respond adequately to the principal-agent problems at the heart of administrative legitimacy concerns. One limitation is that each model can be criticized for flaws in the quality of its own representation. A core critique of the interest representation model is that it might fail to ensure that all relevant interests are represented adequately.²¹⁹ Less often recognized is that direct engagement models may suffer from the same problem. They allow participants to select themselves and typically provide little, if any, financial support.²²⁰ As a result, they can be expected to involve only individuals who are not just interested in the proceeding, but who also have the time and other resources necessary to participate, and

²¹³ *Id.* at 436–37.

²¹⁴ *Id.* at 438–39.

²¹⁵ *See id.* at 427, 429–32.

²¹⁶ *Id.* at 446.

²¹⁷ *See id.* at 432–34.

²¹⁸ *Id.* at 428.

²¹⁹ *See supra* notes 142–148 and accompanying text.

²²⁰ *See generally, e.g.,* Farina et al., *supra* note 201 (participants in the Cornell study were not paid).

are therefore unlikely to represent the full range of public views adequately. An important critique of congressional oversight is that citizens already have difficulty holding Congress accountable when it sets broad national policy without the additional burden of monitoring its oversight of administrative agencies on countless narrower, more technical matters.²²¹ Presidential oversight is criticized on similar grounds, as well as for the additional reason that “analytic management” tools such as cost-benefit analysis may decrease the public accessibility of policy decisions.²²² Finally, judicial review is criticized for being, at best, no more democratic or accountable than agency action.²²³ In short, each model could be criticized for largely transferring the venue of the democratic legitimacy problem in administrative law from agencies to the institutions that monitor them and participate in their proceedings on behalf of the public.

Another representation related limitation is that none of the models does enough to reduce the appearance or reality of bias in the substance of agency decisions.²²⁴ Because each leaves all decisions in the hands of representatives—whether administrators, elected officials, judges, interest groups, or self-selected participants in a deliberative democracy exercise—none ensures that decisionmakers will act in the public’s interest rather than their own personal or private interests, or that genuinely public-minded decisions will be perceived as such by the public. Indeed, many of the models may exacerbate the perception or reality of agency capture because wealthy and well-organized special interests are usually better positioned than public interest groups or the general public to take advantage of additional rights, access, information, or opportunities for input into the regulatory process.²²⁵

²²¹ See *supra* text accompanying notes 114–118.

²²² See *supra* text accompanying notes 127–131.

²²³ See *supra* text accompanying notes 145–146.

²²⁴ Stewart made this point in his original critique of interest representation. See Stewart, *supra* note 1, at 1775 (“Although notice and comment rulemaking has been termed the ‘most democratic of procedures’ . . . public interest advocates have tended to scorn resort to rulemaking proceedings on the ground that participation in such proceedings may have little impact on agency policy determinations. In notice and comment rulemaking the agency is not bound by the comments filed with it, and many such comments may be ignored or given short shrift.”); *id.* at 1781 (“[W]here agencies exercise considerable discretion over policy choices, there is no a priori reason to believe that a more equitable policy will necessarily evolve out of an adversary proceeding in which all affected interests are effectively represented.” (internal quotes omitted)); *id.* at 1789–90 (“[A]gency solicitude for the interests of regulated or client firms is likely to persist. Since the procedural apparatus of interest representation does not in itself determine policy choices, significant changes in agency policy may require a degree of discretionary judicial control over social and economic decisions that is greater than our traditions would readily countenance.”).

²²⁵ Cf. Kagan, *supra* note 30, at 2266 (discussing critics who focus on “substantial

The citizen participation models introduce a further set of problems—the conceptual and practical difficulties in engaging citizens more directly in the administrative process. The models may over-assume the interest of ordinary citizens in the administrative process.²²⁶ They also fail to respond adequately to the resource constraints that stymie meaningful participation by many citizens (not just financial resources but also education and free time). Moreover, they provide little reward for those who overcome these barriers—only the opportunity to voice one’s opinion without guarantee that it will influence policy or even be taken seriously. In addition, the models may be too resource-intensive and administratively cumbersome to be implemented broadly in regulatory decisionmaking. These problems are all compounded when individuals are invited to participate on a matter as broad as an entire rulemaking, as is frequently proposed.²²⁷ At root, these are classic transaction costs and collective action problems that drive the establishment of representative, or republican, governance instead of direct democracy in the first place.²²⁸

This analysis suggests that attempts to improve administrative legitimacy through greater democracy face a circular dilemma. On the one hand, representation-based problems in administration drive a desire for more citizen engagement. On the other hand, direct engagement models suffer from the very flaws that recommend republican governance. In the next Part, this Article proposes “direct republicanism” as a partial response to this conceptual bind.

III. THE PROMISE OF DIRECT REPUBLICANISM

The Constitution is intended to guard against the possibility that powerful interests will commandeer public resources to their private gain or government officials will serve their own rather than the public’s interests.²²⁹ The potential for these harms is a principal-agent problem inherent in representative government, but it may be particularly acute in administrative law, where the public has delegated governing authority to elected representatives, who have further delegated it to administrative agencies.²³⁰ Moreover, Congress tasks agencies with certain work precisely because it is technical and difficult for non-experts. As a result,

disparities in interest group influence,” and find that “interests of a diffuse nature continued to lack any adequate representation,” while “traditionally powerful interests could take comparatively greater advantage of the new panoply of participatory rights”).

²²⁶ Croley, *supra* note 76, at 66.

²²⁷ See *supra* text accompanying notes 173–181, 206–218.

²²⁸ Croley, *supra* note 76, at 12–25; Stewart, *supra* note 1, at 1686.

²²⁹ Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 271.

²³⁰ See Croley, *supra* note 76, at 12–23.

the public and elected officials often have difficulty supervising or participating in agency decisions. At the same time, it is widely accepted that agency actions cannot be based purely on technocratic expertise, as they involve some of the most important value judgments made in government.²³¹ Despite decades of study and debate, the problem of apparent or real agency capture and the question how best to integrate agency expertise and democratic input persist.²³²

This Article proposes a novel solution: “direct republicanism,” in which large panels of randomly selected citizens decide narrow, discrete questions of regulatory policy. Direct republicanism attempts to answer the core principal-agent problem in administrative law by incorporating an element of direct democracy: citizens make actual decisions rather than relying on public representatives, meaning that principals can act as their own agents in part of the regulatory process. Similarly, the model attempts to diminish the problems of direct democracy by incorporating elements of republicanism. Rather than use referenda or invite citizens to participate in open-ended policymaking, it selects large but discrete groups of citizens whose composition matches that of the broader public and structures proceedings in which they can make meaningful choices between sound policy options. Finally, direct republicanism attempts to balance agency expertise and public values appropriately by tasking agency staff with interpreting technical evidence, presenting information, and framing questions while giving citizens authority to decide policy questions.

A. *The Administrative Jury*

1. *Taking Participation Seriously*

If we value participation, we must take it seriously enough to make it

²³¹ See, e.g., Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, *supra* note 109, at 472 (“In short, agencies are required to make intensely political decisions.”); *id.* at 520 (“Policy decisions should be made by the most politically accountable institution available.”); Pildes & Sunstein, *supra* note 70, at 8 (“The modern regulatory state should also be more democratic. Currently, regulation is far too inaccessible to public control A special goal is to incorporate public judgments about risk so long as they are appropriately informed and reasonable, even when those judgments diverge from expert understandings.”); Charles A. Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227, 1235–36, 1258–61 (1966) (advocating democratization of the administrative process, in large part in response to the “central myth” of administrative law that “decisions are not primarily choices between values”); Seidenfeld, *supra* note 1, at 1520 (“[E]xpertise rarely eliminates the need for the agency to choose among competing values—a choice that is the essence of political decisionmaking.”); Cass R. Sunstein, *Changing Conceptions of Administration*, 1987 *BYU L. REV.* 927, 941 (“[B]asic value judgments should be made by Congress.”).

²³² See *supra* Part II.

practical and meaningful for both citizens and legal institutions. This will likely require structuring and formalizing participation in ways that differ dramatically from existing models of direct participation in the regulatory process. A provisional list of design principles includes the following:

1. Representativeness. Participation should be mandatory, with panel members selected randomly, and the panels should be large enough to ensure a representative sample size (likely 1,000 or more participants in each).
2. Meaningful participation.
 - a. Participants should be provided with resources adequate to the task of making the decision presented. These include money, information, and time. In addition, people should be compensated well for their service.
 - b. Participants should be presented with narrow, discrete questions that have binary or multiple-choice answers, not complex or open-ended questions.²³³
 - c. Participants should have the authority to make binding decisions.²³⁴
3. Scalability and efficient use of resources. Proceedings should be designed so that they are not too burdensome or costly to be used broadly in the administrative process.

These features are intended to structure the proceeding in a manner that permits lay people to understand the subject matter and provide their informed, considered views; produces viewpoints representative of the public at large rather than only the interest groups or individuals that have the resources to participate; aids administrative agencies and administrative law generally; and is feasible on a large scale. We might call these bodies “citizen panels” or “administrative juries.”²³⁵

²³³ For examples of matters that could be presented to administrative juries, see *infra* text accompanying notes 261–274, 283–296.

²³⁴ Agencies could experiment with many aspects of this Article’s proposal without any new legislative enactment. But agencies likely could not treat administrative jury decisions as binding without legislation to that effect.

²³⁵ The use of the word “jury” here does not derive from formal similarities to trial juries. Administrative jury proceedings will differ from jury trials in many respects, including the juries’ composition, the ways in which evidence and arguments are presented, and possibly even features such as the presence or absence of deliberation. This Article uses the word “jury” because, when conceived as a political institution, the administrative jury could play roles similar to those we assign to the civil jury: providing checks on government and private power, injecting community norms into the legal system and legitimizing it, and fostering civic engagement. Cf. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1333–36 (2012) (identifying these purported benefits of the civil jury as a political institution and concluding that they are overstated).

Richard Stewart noted in his original critique of interest representation that, because of the transaction costs involved in ascertaining people's interests, the interest representation model was "a long way from [the] ideal" of reflecting public preferences perfectly²³⁶:

Public interest representation should ideally duplicate the representation that would be afforded if transactions (including arrangements to overcome the free-rider effect) were costless. But we are a long way from this ideal. It may be impossible to posit a person's interests apart from some procedure for eliciting preferences, such as market choices, voting choices, opinion polls, etc.²³⁷

These remarks were apt in 1975. Transaction costs are lower today, and we may be able to move closer to the "ideal."

2. *A Sketch of an Administrative Jury Proceeding*

A rough sketch of an administrative jury proceeding will help make this discussion more concrete. Let us say that an agency is considering limiting exposure to a toxic substance, and it plans to ask an administrative jury to make one or more policy judgments along the way. The hypothetical agency's statutory mandate requires it to prevent "significant risk of harm to humans to the extent feasible."²³⁸ First, the agency completes as much of the technical work as possible, considering potential regulatory responses, their likely health impacts, and their feasibility. It then narrows the issues, making whatever decisions it believes are compelled by its statutory mandate and the scientific evidence, as well as minor matters within its discretion, but it leaves one or more significant discretionary decisions unresolved. In this process, the agency separates, to the extent possible, matters that can be answered empirically from those that involve contestable policy judgments.²³⁹ The latter category may include questions that can be framed empirically, but that current science

²³⁶ Stewart, *supra* note 1, at 1766–67, 1767 n.461.

²³⁷ *Id.* at 1767 n.461; *see also id.* at 1715 ("If bias is attributable to imbalance in representation within the agency decisionmaking process . . . a seemingly more reliable antidote would be to provide more effective representation for unorganized 'public' interests. If such representation could be provided, policy choices would presumably reflect an appropriate consideration of all affected interests and the pluralist solution to the problem of agency discretion might prove both workable and convincing.").

²³⁸ This hypothetical "significant risk" standard is similar to the Supreme Court's reading of the standard in the Occupational Health and Safety Act. *See infra* text accompanying notes 275–279.

²³⁹ *Cf.* Wagner, *supra* note 70, at 1707–15 (proposing that agencies be required to separate science and policy in standard-setting, in part to facilitate public participation).

cannot resolve, and which therefore require value judgments.²⁴⁰

The agency then presents the jury with the question, relevant information and analysis, and a set of possible answers. The nature of the information depends on what the jury will decide. If the key source of agency discretion is the ambiguity of scientific evidence on the effects of various exposure levels—in other words, if the agency believes that its mandate and the available scientific evidence require it to set an exposure limit within a certain range, but an ultimate decision within that range requires it to adopt contestable value judgments regarding toxicology²⁴¹—then the agency presents information and perspectives that will enable lay jurors to supply the relevant judgments. Likewise, if the key issue is what is “feasible” for the industry, and a value judgment must be made regarding the economic evidence, or a decision must be made to err on the side of crediting one among multiple plausible perspectives (say, those of industry, unions, or public health advocates), then the agency presents evidence on those matters. Perhaps the agency makes a single, unified presentation, or perhaps two or more government advocates square off against one another to present competing perspectives.

After the presentation, the jurors choose among options provided by the agency. The agency might ask the jury to set the ultimate exposure limit, in which case it might offer a range, such as twenty to thirty parts per million. Or the agency might ask jurors to address a subordinate issue, such as which assumptions to adopt for the toxicology analysis, which the agency will incorporate into a final decision. Another possibility is to ask the jury to choose between courses of action more abstractly, with somewhat less technical detail. In essence, the agency might ask whether, in a particular situation, it should err on the side of the safety and cost trade-offs involved in potential responses.²⁴² Jurors might also be

²⁴⁰ See, e.g., *id.* at 1618–22. Separating policy judgments from scientific ones may be difficult in some cases, and the example provided is not meant to suggest it will always be easy. The point here is to outline a stylized model of how administrative juries could work in principle, not to engage with the details or challenges of using them in any particular context. At the same time, it is possible that questions can be framed properly for a jury even where science and policy are entangled. For example, imagine an agency that is setting an upper boundary of protection in the face of steeply rising compliance costs and diminishing scientific certainty regarding health benefits. Jurors may not need to understand or resolve the technical questions to resolve the trade-off between cost and safety in the face of scientific uncertainty.

²⁴¹ See, e.g., *id.* at 1618–27.

²⁴² One value of this approach is that it might enable agencies to garner useful jury input without the need to present jurors directly with highly technical policy questions. But there is also a risk of providing too little information on the underlying science. Jurors in some cases might harbor preexisting biases that could, and should, be overcome by a skillful presentation rather than permitted to undermine the result of the proceeding. For example,

permitted to choose “none of the above” and given the opportunity to provide open-ended suggestions, questions, or comments. These options could offer jurors an escape valve in proceedings they believe are flawed, as well as provide the agency useful feedback about the proceedings.²⁴³ In any event, jury members would vote on a decision, likely online, and potentially without deliberating with one another.

To be sure, this initial sketch may require substantial modification, and one certainly should not assume that all agencies would use a single model of proceeding. If administrative juries are actually used in regulatory decisionmaking, one should expect to see a variety of proceedings, reflecting the broad variation in existing agencies and procedures for action. The illustration here is meant only to give a general sense of how administrative juries could fit into agency rulemaking.

3. *Judicial Review*

How should a court review a rulemaking in which a jury made a binding decision on some aspect of the rule?²⁴⁴ This Article is not the place for full consideration of that question, but an initial response is in order. Foremost, judicial review might not differ dramatically from its ordinary course—review for compliance with procedural requirements of the Administrative Procedure Act (“APA”) or the agency’s organic statute, and review of the agency’s decisions for whether they are arbitrary and capricious or otherwise not in accordance with the law.²⁴⁵ Administrative jury decisions themselves should rarely, if ever, be disturbed by the courts. Unlike trial juries, an administrative jury’s task should be structured so that

imagine that an agency is considering a standard to protect children from lead poisoning, and a juror enters the proceeding with the belief that lead poisoning is a myth. There is little value in asking whether the agency should err on the side of more or less safety regarding lead without first educating the juror adequately on the problem.

²⁴³ These safety valves may be critical in the context of administrative decisionmaking, which is based on rational analysis and transparent reason-giving. To omit them might leave frustrated jurors to engage in strategic voting or attempt forms of nullification. Careful crafting of questions present should avoid most of these possibilities. But to the extent that an agency might omit something important, or make a mistake in framing the proceeding, it would be far better for the agency to receive feedback to that effect rather than a jury decision that it has difficulty understanding, explaining, or justifying. Such results would undermine the legitimacy of administrative proceedings and invite otherwise unnecessary judicial intervention.

²⁴⁴ If a citizen panel’s decision incident to an informal rulemaking is only advisory, then a court should review the agency’s action as it would any other informal rulemaking. The advice of a citizen panel would be somewhat similar to that of existing advisory panels and small business review panels, or participants in a field hearing: it would provide one more means by which the agency gains information to consider without altering rulemaking requirements or judicial review.

²⁴⁵ See 5 U.S.C. § 706 (2012).

any decision it might reach is well within the range of acceptability. It should be difficult for a jury to reach an unlawful or unreasonable conclusion—much less arbitrary or capricious one—unless the agency offered it options that meet those characterizations, a problem that can be remedied through judicial review of the agency’s decisions.²⁴⁶ For these reasons, the principal focus of review should be the agency’s actions. If courts review administrative jury decisions at all, that review should be exceedingly deferential.

If judicial review focuses on the agency rather than the jury, then existing review doctrines for informal rulemaking will apply largely unaltered. Recall that in deciding what to present to a jury, the agency will decide questions for which it believes the law or the evidence compels particular answers, reserving discretionary policy judgments for the jury. Regarding the former set of decisions, ordinary review under the APA applies, and it should function largely the same as ordinary review of agency decisions regarding law and factual evidence. One might expect higher rates of affirmance on those matters once they are clearly separated from major policy judgments, but that is a separate question.

The agency’s choices of evidence and perspectives to present to a jury might also be reviewed for whether they are arbitrary or capricious. The agency would create a record adequate for judicial review,²⁴⁷ delineating which materials it is choosing to present to the jury, which it is not, and why. One difference, however, is that this review likely ought to be more deferential than current review of agency policy choices. It would be all too easy for courts to devolve into taking a “hard look” at whether an agency has presented all relevant viewpoints adequately to an administrative jury,²⁴⁸ thereby undoing many potential benefits of jury proceedings. Agencies will need discretion to craft proceedings so that they are suited to lay jurors. For example, an agency might view certain

²⁴⁶ Although a trial jury has the opportunity to return a verdict for one side or the other regardless of how overwhelmingly the evidence might contradict its decision, an administrative jury probably should not be given options that fly in the face of the evidence. In addition, the large size of administrative juries should make it difficult for a court to reject a jury decision on the basis that it lacks sufficient support in the record or that no reasonable person could have reached the jury’s conclusion. Simply put, it is unlikely that so many people could be so grossly mistaken—unless the mistake is the agency’s.

²⁴⁷ Cf. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971).

²⁴⁸ Cf. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut’l Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

evidence as important but not appropriate or useful for a lay jury. Or it might decide that certain materials must be omitted simply for the sake of crafting a sufficiently brief and focused presentation. Courts will likely need to permit agencies to make these types of decisions, even regarding materials for which the court would require careful consideration if the agency itself were the decisionmaker. In short, a reviewing court may need to accept a dramatically different depth of analysis from a jury—and therefore from an agency’s presentation to a jury—than it would accept from an agency.

One might require courts to defer more heavily to agency actions that employ administrative juries for other reasons as well. For example, perhaps public participation would serve a useful monitoring function and diminish the need for judicial scrutiny. Or perhaps juries would be valued for other reasons and we would offer agencies the prospect of heightened deference as an incentive to use them.²⁴⁹

Another question is whether courts should review agencies’ actual presentations to juries. It is initially tempting to say that courts should review the proceedings themselves to guard against bias. But the proper approach may depend on the form of the proceeding. In proceedings that follow the model sketched above, in which an agency offers the jury a narrow range of outcomes from which to choose and a court will review the agency’s decisions regarding what to ask the jury and what to present, there may be little to gain and much to lose from additional review of the presentation itself. Indeed, in that context, it is not obvious what impermissible bias would look like or why an agency would engage in it. Even less clear is whether courts could be relied on to police bias while resisting the temptation to meddle excessively in policymaking—or whether reasonable minds could consistently agree on the difference between the two. Moreover, if the entire range of options presented is well within the range of what is lawful and reasonable, an agency bias toward a particular result becomes somewhat less offensive; after all, at present the agency makes the choice outright by itself. If proceedings take a different form, however, then judicial review of agency presentations may be more warranted. Open-ended proceedings or binary votes on broad policies such as an entire proposed rule may be more likely to give rise to concerns of bias.

If a means must be found to provide a check against serious errors or outright misconduct while restraining the courts from engaging in overly searching review, then perhaps courts could employ a version of Thomas

²⁴⁹ Cf. *infra* note 369 and text accompanying notes 250–254.

McGarity's proposal for deferential, "pass/fail" review.²⁵⁰ Other possibilities exist as well, including ones that would not rely on courts as the first line of defense against impropriety. For example, triggers or flags for review might be built into the jury process itself. Jurors could be surveyed on whether they believe information was presented to them in a balanced manner and whether any significant viewpoint was omitted. As mentioned above, perhaps providing a "none of the above" option would serve as a useful escape valve for jurors, as well as an important signal to agencies. Another possibility is to provide agency staff with something akin to whistleblower protections and incentives to call attention to problems within the agency, attempt to remediate them, and, failing that, report them publicly.

4. *The Feasibility of Administrative Juries*

A few points on the practicality of administrative juries are also in order. Foremost, they may be surprisingly inexpensive and feasible. If proceedings can be conducted over the Internet, that would obviate the costs and burdens of travel and facilitate the convening of large, representative groups. Perhaps computer terminals or tablet computers could be provided for jurors in federal courthouses, local post offices, or libraries. Public terminals might always be necessary, but it would also be worth attempting to develop a way for people to participate from anywhere, without the need for in-person monitoring. Permitting jurors to participate from their home computers, for example, would be much more convenient for them and might reduce the costs of proceedings substantially. This could be feasible through a number of means, including monitoring participation with webcams, requiring feedback at regular intervals to ensure adequate attention, or testing jurors' knowledge or comprehension before accepting their responses. Another important point is that the proceedings should be as brief as possible, although careful study will be necessary to determine how brief they can be without compromising the values they are intended to advance.

To illustrate how reasonable the costs might be, let us use the cost of state trial juries as a starting point, then make some conservative assumptions. A conservative estimate of per-juror cost is \$125 per day.²⁵¹ At that price, a 1000-person jury would cost \$125,000. Let us arbitrarily

²⁵⁰ See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1452 (1992).

²⁵¹ See PAULA HANNAFORD-AGOR, NAT'L CTR. FOR STATE COURTS, *SAVING MONEY FOR EVERYONE: THE CURRENT ECONOMIC CRISIS IS AN OPPORTUNITY TO GET SERIOUS ABOUT IMPROVING JUROR UTILIZATION* 52 (2009), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/juries/id/237>.

quintuple that number for a cost of \$625,000 per jury per day.²⁵² Then let us take the EPA as an example agency. The EPA finalized thirty-two major rules in the last ten fiscal years.²⁵³ Let us say three major rules per year. An agency should be able to conduct an administrative jury proceeding in less than a day, but let us assume it takes five whole days. With these conservative assumptions, it would cost the EPA \$9.38 million annually—\$3.125 million per rule—to conduct jury proceedings for all of its major rules. That is 0.108% of the EPA's 2011 budget of \$8.7 billion.²⁵⁴

One key question is whether jurors must engage in discussion with one another. For reasons of cost and feasibility, we should attempt first to craft a successful model that does not include deliberation, if it can be done without losing too much in the bargain. Deliberative democracy seeks to foster public-mindedness in decisionmaking, alter people's preferences through the deliberative process, provide a sense of civic engagement and satisfaction, and enhance the democratic legitimacy of policy decisions.²⁵⁵ Perhaps a citizen panel engaging in informed voting after a skillful presentation rather than person-to-person deliberation cannot meet these goals, but perhaps it can. To answer this question will require further study, both conceptual and empirical.

Other important questions involve who would present information to juries and how it would be presented. The most promising approach may be for agency staff to present material, even if multiple viewpoints are required. To rely on private advocates would import the resource disparities among interest groups into administration even more directly than the interest representation model does, as well as give rise to difficult questions such as how the private advocates would be selected for a given proceeding. Finally, reliance on private advocates might render the agency

²⁵² There is no obvious reason why administrative juries should be more expensive on a per-juror basis than trial juries. Indeed, certain features of administrative juries suggest that they might cost less. For example, the large size of administrative juries should obviate the need to examine and eliminate prospective jurors. Also, as discussed above, it should be possible to craft proceedings that are shorter than a typical jury trial and perhaps even proceedings that do not require any physical convening. Moreover, some of the costs of administrative juries might be offset by other savings to agencies. See *infra* text accompanying notes 330–339. Of course, we might make choices that increase the expense of administrative juries, such as compensating participants well for their time.

²⁵³ OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 13 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

²⁵⁴ See *EPA's Budget and Spending*, EPA, <http://www2.epa.gov/planandbudget/budget> (last updated June 27, 2013).

²⁵⁵ See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564–76, 1589–90 (1988).

too passive a player in resolving technical questions and making policy.²⁵⁶ A single agency staff member or a group of staff might be charged with presenting multiple perspectives on an issue in a neutral manner, or perhaps each viewpoint would be offered by a different staffer. In the latter instance, one can envision a small corps of professional agency advocates, randomly assigned to argue positions before administrative juries.

For the government officials to present arguments to a jury would consume additional resources, to be sure. But preparation for the proceeding would consist largely of identifying the most important arguments and evidence and discerning how to present them succinctly and clearly to a lay audience, tasks in which agencies already should engage to some extent, and which should have additional benefits for agency accountability to the public and elected officials. Moreover, interest groups might be permitted to give suggestions, thereby redirecting regulated entities from flooding agencies with information²⁵⁷ to helping identify the most cogent points to present to juries.

Many design questions remain to be resolved, and some of them should be informed by empirical study. For present purposes, it suffices to say that there is reason to believe administrative juries can be made feasible, meaning available at reasonable cost and without undue burden on either citizen participants or agencies.

B. Potential Matters for Administrative Juries to Decide

A critical question is what matters administrative juries might decide. There are two categories of inquiry: the types of agency proceedings and the types of substantive questions.

1. Types of Agency Proceedings

Administrative juries could play a useful role in a variety of agency proceedings. The easiest place to insert them is in traditional enforcement adjudications. There, administrative juries could function much like their counterparts in the judicial branch, deciding similar types of questions. They also could play a role in informal adjudications, deciding matters such as whether to grant or deny a permit or license.

Administrative juries can have a role in rulemakings—indeed, rulemakings are one of the most important places to achieve meaningful

²⁵⁶ Cf. FREEDMAN, *supra* note 1, at 29 (“[W]hen an administrative hearing involves issues essentially legislative in nature . . . trial-type proceedings . . . distort the administrative process by which the agency is striving to reach a sound result, substituting the passive impartiality of judicial procedures for a vigorous administrative exploration of the public interest.”).

²⁵⁷ See *supra* text accompanying notes 89–92.

citizen participation—so long as they are given narrow, discrete matters to decide. Some rulemakings are highly complex, with notices of proposed rulemaking spanning more than 100 pages in the Federal Register and presenting several issues to be decided. A jury need not be presented with every policy question in this type of rulemaking; it should be presented with one or more discrete matters, preferably ones that can be framed as binary choices, multiple-choice questions, or a range of possibilities. Examples of binary choices include an up-or-down vote on an agency proposal or, preferably, an important element within it. As in the sketch above,²⁵⁸ an example of choosing from a range of options is setting the permissible level of a substance in the workplace or the environment. A focus on discrete questions should make it possible to provide jurors the information they need to make informed, meaningful decisions about matters of regulatory policy, without overwhelming them or burdening agencies excessively.

Ronald Wright has proposed “administrative grand juries” that might perform broad, agenda-setting functions, such as reviewing agency proposals or regulatory agendas and approving, disapproving, or making recommendations.²⁵⁹ The proposal is intriguing and should be studied further along with the type of jury proposed by this Article. An administrative grand jury, however, might suffer from problems common to direct models of participation. Proceedings on broad questions such as an entire regulatory agenda or proposed rule appear to be impractical for citizen participants, who may lack the time, information, or expertise to engage fruitfully. They also may be impractical for agencies, which would face the task of attempting to educate jurors on the agency’s entire agenda or all aspects of a proposed rule, with uncertain prospects for meaningful feedback. Still, the potential value of public input into agency agendas should not be discounted lightly, and it would be worth attempting to find some means of realizing that aspect of Wright’s proposal.²⁶⁰

2. *Types of Questions: Fact, Policy, and Law*

A somewhat more complex matter is what types of questions jurors

²⁵⁸ See *supra* text accompanying notes 238–243.

²⁵⁹ See Wright, *supra* note 21, at 512–14. Wright also proposed that administrative grand jurors might serve as ombudsmen, with individual jurors spending several months at a time in the role, *id.* at 510–11, or granting or denying the administrative enforcement equivalent of indictments, *id.* at 511–12.

²⁶⁰ As another example, Sid Shapiro and Rena Steinzor have proposed the development of agency metrics that could spur more useful public debate on agency priorities and budgets. See Shapiro & Steinzor, *supra* note 44, at 1744–45. Perhaps some of the questions raised or framed by those metrics could be presented to administrative grand juries.

should answer—fact, policy, or law. The boundaries within this typology are often fuzzy. Many questions present a mix of two, or even all three, categories.²⁶¹ This Section places questions into relatively neat categories for the sake of organizational simplicity.

Factual questions. Perhaps surprisingly, given the role of trial juries in fact-finding, certain factual questions might be a relatively poor fit for administrative juries. For example, lay jurors may be less fit than agency staff to interpret scientific data on matters like the health effects of exposure to a toxin. Those matters are the core of administrative expertise and are a principal justification for having administrative agencies in the first place.²⁶² Moreover, a jury's resolution of this type of factual dispute may do little to advance the goals of citizen participation—providing better policy decisions that are more reflective of public values and, if possible, enhancing civic life generally. To be sure, juries might play a useful role in deciding technical factual matters, particularly if moral or political judgments are entangled with them,²⁶³ but technical questions are not the most natural starting point.

Other types of factual questions are a more obvious fit, such as questions regarding past conduct that could arise in an administrative enforcement hearing. This could be extended to questions that require the jury to anticipate or predict future behavior. For example, the Consumer Product Safety Commission (“CPSC”) cannot issue a product safety standard when an existing voluntary industry standard adequately addresses the same problem unless “it is unlikely that there will be substantial compliance with” the voluntary standard.²⁶⁴ A jury might be fit to determine the likelihood of compliance with a voluntary rule, a decision that may have less to do with understanding technical matters than assessing the credibility of various arguments and interrogating one's own understanding of human nature and organizational behavior.

Mixed Questions of Law-and-Fact or Policy Questions. Another set of questions commonly presented to judicial branch juries should be a good fit for administrative juries: questions about what is reasonable.²⁶⁵ Similar

²⁶¹ Edley, *supra* note 128, at 570–71. Edley points out that we have difficulty separating not just questions of law, fact, and policy, but also the conceptual categories in which they are grounded—adjudicatory fairness, science, and politics, respectively. *Id.* at 573.

²⁶² See *supra* Part I.C.2.

²⁶³ See *id.* at 571; Wagner, *supra* note 71, at 1717–18.

²⁶⁴ 15 U.S.C. § 2058(f)(3)(D)(ii) (2006).

²⁶⁵ See, e.g., JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 91–92 (2000). When asked in individual cases—for example when a jury decides whether someone's conduct was “reasonable”—we often think of these as mixed questions of law and fact. See *id.* In the context of establishing a prospective rule of

inquiries ask what is adequate, feasible, significant, or necessary, and these should be good fits as well. To continue the example of the CPSC, its organic statute is littered with these types of inquiries. The agency:

- may promulgate a product safety standard only if the “rule . . . is *reasonably necessary* to eliminate or reduce an *unreasonable risk of injury*;²⁶⁶
- may ban a substance only if “no *feasible* consumer product safety standard . . . would adequately protect the public from the *unreasonable risk* of injury associated with such product;²⁶⁷
- must defer to a voluntary industry standard (assuming adequate compliance with the standard) unless it “is not likely to result in the elimination or *adequate reduction* of such risk of injury;²⁶⁸
- must ensure a “*reasonable* relationship” between benefits and costs of a rule;²⁶⁹ and
- must ensure that a rule imposes the “least burdensome requirement which prevents or *adequately reduces* the risk of injury” to be addressed.²⁷⁰

Other examples abound. The Federal Insecticide, Fungicide, and Rodenticide Act²⁷¹ permits the EPA to restrict the use of a pesticide if it “may generally cause . . . unreasonable adverse effects on the environment, including injury to the applicator.”²⁷² The Occupational Health and Safety Act requires the Occupational Safety and Health Administration (“OSHA”) to reduce toxic workplace exposures to the level that “most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity.”²⁷³ A jury could be presented with evidence and arguments on both sides of any of these questions, then

general applicability, they may seem more like “policy” questions.

²⁶⁶ 15 U.S.C. § 2058(f)(3)(A) (emphasis added).

²⁶⁷ *Id.* § 2058(f)(3)(C) (emphasis added).

²⁶⁸ *Id.* § 2058(f)(3)(D)(i) (emphasis added).

²⁶⁹ *Id.* § 2058(f)(3)(E).

²⁷⁰ *Id.* § 2058(f)(3)(F) (emphasis added).

²⁷¹ Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136–136y (2012).

²⁷² *Id.* § 136a(d)(1)(C). “Unreasonable adverse effects on the environment” is further defined as “(1) any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food.” *Id.* § 136(bb).

²⁷³ 29 U.S.C. § 655(b)(5) (2006).

asked to make a choice.²⁷⁴

Contrasting judicial treatment of these types of questions with the prospect of administrative jury decisions reveals some of judicial review's relative limitations for increasing administrative legitimacy. Another OSHA example is instructive. OSHA may promulgate an occupational health and safety standard if "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."²⁷⁵ In the *Benzene Case*,²⁷⁶ the Supreme Court interpreted this provision to mean that OSHA must find a "significant risk" before promulgating a standard.²⁷⁷ The Court reached this conclusion by reasoning that a workplace must be unsafe before regulation could be necessary to make it "safe" and that "unsafe" implies a significant risk of harm.²⁷⁸ This type of attempt to constrain agency discretion necessarily involves judicial policymaking: why must a risk be "significant" to render a workplace unsafe? Moreover, it is not clear that the Court's standard, on its face, accomplishes much. The determination whether a risk is "significant" requires a policy judgment similar to that required by the statute's text, which asks whether a regulation is "reasonably necessary or appropriate."²⁷⁹ Indeed, the Court noted that OSHA had discretion to decide which risks are "significant."²⁸⁰

The *Benzene Case* either constrains OSHA or it does not. What is interesting is that neither outcome offers much for administrative legitimacy. The less the Court's "significant risk" standard constrains OSHA's future action, the less the Court has accomplished beyond substituting its judgment for the Agency's in one particular dispute. The more the standard constrains OSHA, the more the Court has usurped the political branches in setting national policy regarding what constitutes a "significant risk" or, in the statute's words, what is "reasonably necessary or appropriate to provide safe or healthful employment and places of

²⁷⁴ Cf. FREEDMAN, *supra* note 1, at 50 ("Many Americans . . . believe . . . that the responsibility of ascertaining just where the public interest lies often calls more properly upon the generalist qualities of the citizen—and of those electorally responsible to him—than it does upon the expert judgment of the administrator, whether he be a lawyer, an economist, or an engineer." (internal quotation marks omitted)).

²⁷⁵ 29 U.S.C. § 652(8). This provision provides the "risk trigger" for OSHA to write a rule, whereas the command that OSHA must provide the maximum protection feasible is the statutory standard that governs OSHA's choice of rule. See, e.g., Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 476 (2008).

²⁷⁶ *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst. (Benzene Case)*, 448 U.S. 607 (1980).

²⁷⁷ *Id.* at 642–43.

²⁷⁸ *Id.* at 642.

²⁷⁹ See *id.*

²⁸⁰ *Id.* at 655.

employment.”²⁸¹ Either of these policy questions could be given to a jury. For example, a jury might be asked whether a feature of a workplace presents a “significant risk” that OSHA should regulate in some manner. Or jurors might be charged with casting an up-or-down vote on an OSHA proposal based on whether they view it as “reasonably necessary or appropriate.”²⁸² Resolving certain questions in this manner might enhance legitimacy more than leaving them to administrative agencies or the courts.

Legal Questions. The *Benzene Case* points in the direction of a final type of question that might be presented to administrative juries: those that appear legal but actually involve core matters of policy. The Supreme Court most famously addressed this type of question in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.²⁸³ Recognizing that the decision of how to construe a statute within a range of reasonable possibilities can be a matter of policy, the Court held that such choices are best left to the political branches.²⁸⁴ This Article proposes that we might enhance legitimacy even more by putting policy choices in the hands of representative groups of citizens.

Another staple of administrative law casebooks provides a useful illustration. In *MCI Telecommunications Corp. v. AT&T Co.*,²⁸⁵ the Justices engaged in spirited debate over the meaning of the word “modify” in the Communications Act of 1934.²⁸⁶ The relevant provisions stated that “[e]very common carrier . . . shall . . . file” rates with the Commission²⁸⁷ and also provided the Federal Communications Commission (“FCC”) discretion to “modify any requirement in the section.”²⁸⁸ The FCC first relaxed the rate-filing requirement for non-dominant carriers, then forbade them to file altogether.²⁸⁹

The *MCI* majority relied heavily on dictionaries to reach the

²⁸¹ 29 U.S.C. § 652(8) (2006).

²⁸² *Id.*

²⁸³ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

²⁸⁴ *Id.* at 866 (“When a challenge to an agency construction of a statutory provision fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”); see also Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 1000 (2011) (“Finding the law is closer to making policy than finding the facts, at least most of the time. And agencies, for reasons both of expertise and democratic accountability, are today generally regarded as the preferred policymaker.”).

²⁸⁵ *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218 (1994).

²⁸⁶ See Communications Act of 1934, 47 U.S.C. § 151 (2006); *MCI Telecomm. Corp.*, 512 U.S. at 220.

²⁸⁷ *MCI Telecomm. Corp.*, 512 U.S. at 221 (citing 47 U.S.C. § 203(a)).

²⁸⁸ *Id.* (citing 47 U.S.C. § 203(b)).

²⁸⁹ *Id.* at 221.

purportedly unambiguous conclusion that the word “modify” did not embrace changes as significant as that made by the FCC, which reversed the statute’s principal requirement for a large segment of the market.²⁹⁰ The dissent argued that textual materials led to the opposite result.²⁹¹ In doing so, it implicitly made a strong case that, at a minimum, the statute’s use of the term “modify” was not unambiguous. More important to the present discussion, however, is the dissent’s discussion of the policies, purposes, and history of the Communications Act. The dissent argued that the Communications Act grants the FCC “unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate,” which is to make wire and radio communications available to all Americans with adequate service at reasonable cost.²⁹² It also argued that the Court had consistently “afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities.”²⁹³

Regardless of which position one finds persuasive, the dissent reveals what underlies the Justices’ competing views on the meaning of “modify”: competing visions of the Communications Act of 1934 and the FCC’s role under the Act. Either the Act gives the FCC such broad discretion that the permission to “modify” its requirements includes the authority to deregulate many firms outright, or the Act puts somewhat tighter reins on the agency. This question is unanswerable as a matter of law,²⁹⁴ and therefore it devolves into a matter of policy: *should* the FCC have discretion to deregulate in this manner? A jury might be able to answer that question, and its resolution might be more legitimacy-enhancing than resolution by either the FCC or the Supreme Court.

One interesting question is whether the issue should be presented to the administrative jury purely as a matter of policy or, at least in part, as a legal matter. Under the former approach, presenters would offer evidence solely on the potential consequences of the agency’s action and ask for approval or disapproval as a matter of policy: should the agency be allowed to deregulate in *x* fashion? Under the latter approach, the jury would be asked to decide what Congress meant by the term “modify,” as applied to the agency’s proposed action, in light of the overall statutory scheme and the relevant facts and predictions regarding policy consequences. The decision of which approach to follow might depend on the degree of

²⁹⁰ *See id.* at 225–26, 228.

²⁹¹ *Id.* at 240–41 (Stevens, J. dissenting).

²⁹² *Id.* at 235.

²⁹³ *Id.*

²⁹⁴ This Article assumes for the sake of argument that when the Supreme Court splits 5–3 (Justice O’Connor did not take part in *MCI*, *see id.* at 234) over the meaning of a term, it is not unambiguous.

ambiguity in the statute—the more ambiguous the text, the more the question might be treated as one of pure policy—although line-drawing of that sort could prove too difficult in practice. Other considerations are the relative fitness of juries to answer each type of question and whether one particular approach carries greater benefits for administrative legitimacy. These are matters for future study.

MCI is useful for another reason: despite three Justices having reached the opposite conclusion regarding the term “modify,” the majority held that the statute was unambiguous.²⁹⁵ An important limitation of administrative juries is that, even if the FCC had asked a jury to decide the meaning of the term, the Supreme Court could have overruled the result. Indeed, even if the Congress were to legislate that certain statutory ambiguities are to be resolved by administrative juries, nothing would stop the Court from holding in a given case that, as a matter of law, no ambiguity existed. The possibility of undue judicial second-guessing is a challenge for jury decisions not just on legal questions, but also on policy and even factual questions.

One response is that the problem may be no worse with administrative juries than without them. As discussed above, judicial review of agency action is already politicized, and courts overturn agency decisions with surprising frequency given the deferential standards of review that the APA prescribes.²⁹⁶ Indeed, it is possible that administrative juries would fare better than agencies alone. If we assume the existence of a world in which large-scale administrative juries are commonly used, many people have participated in them, and they are broadly appreciated and viewed as important instruments of democratic policymaking, then in that world the courts might choose to grant them more deference, or Congress might require it.

C. *The Potential Benefits of Direct Republicanism*

The previous discussion touched on one way in which direct republicanism might prove useful to agencies themselves. If administrative juries legitimize agency action, then they might help insulate agencies from undue interference by other branches of government. This applies not only to the courts, but also to Congress and the White House. Consider for example OSHA’s ergonomics standard, the sole instance in which

²⁹⁵ *Id.* at 228.

²⁹⁶ See *supra* text accompanying notes 139–147; see also Pierce, Jr., *What Do the Studies Mean?*, *supra* note 147, at 83–86 (reviewing studies that found affirmance rates ranging from 55.1% to 70.9%).

Congress and the president have used the Congressional Review Act²⁹⁷ to void an agency rule.²⁹⁸ The political opportunity to veto the rule arose because of President George W. Bush's victory in the 2000 election, a development that gave opponents of the rule control of both Congress and the presidency, but probably had little to do with public views on the regulation of musculoskeletal disorders in the workplace.²⁹⁹ Had an administrative jury of 1000 or more citizens played an official role in producing the rule, perhaps even simply by approving the agency's final product, the new Congress and the president might have had more difficulty overturning it. Conversely, if a citizen jury had not approved the rule, veto by the political branches would have been unnecessary. In either event, a jury's involvement would have provided more assurance of democratic legitimacy.

Consider also the EPA's recent proposed rule on ground-level ozone, commonly known as smog. Over the strong objection of the Clean Air Scientific Advisory Committee ("CASAC") of the EPA's Science Advisory Board,³⁰⁰ the Bush Administration set a limit of seventy-five parts per billion ("ppb") in 2008, well above CASAC's recommended range of sixty to seventy ppb.³⁰¹ Several state governments and environmental, public health, and industry groups sued.³⁰² In early 2009, the EPA withdrew the 2008 standard, which Administrator Lisa Jackson viewed as "not legally defensible given the scientific evidence in the

²⁹⁷ Congressional Review Act, 5 U.S.C. §§ 801–08 (2012).

²⁹⁸ See *OSHA 35-Year Milestones*, U.S. DEP'T OF LAB., <http://www.osha.gov/as/opa/osha35yearmilestones.html> (last visited Aug. 8, 2013).

²⁹⁹ One might argue that members of the Republican Party controlled the Congress and the White House in January 2001 because of broad public support for their traditionally deregulatory views, and infer from that a mandate for repeal of the ergonomics rule. Even if we assume that the latter inference is valid, the 2000 election is a poor basis on which to claim a popular mandate for anything. Democrats gained one seat in the House and six seats in the Senate, bringing the latter body to a tie but for the Vice President's vote as president of the Senate. The presidential race was also famously close, with Al Gore winning the popular vote by more than 500,000 votes but Bush winning the Electoral College after the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000).

³⁰⁰ See, e.g., Letter from Dr. Rogene F. Henderson, Chair, Clean Air Scientific Advisory Comm., to Stephen L. Johnson, Adm'r, U.S. Env't. Prot. Agency (Apr. 7, 2008), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf).

³⁰¹ See National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008); see also Letter from Lisa P. Jackson, Adm'r, U.S. Ent'l. Prot. Agency, to Sen. Thomas R. Carper (July 13, 2011) [hereinafter Jackson Letter], *available at* http://www.eenews.net/assets/2011/07/14/document_gw_03.pdf.

³⁰² National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2944 (Jan. 19, 2010).

record,”³⁰³ ending the litigation with a promise to update the standard by August 2010.³⁰⁴ The EPA issued a notice of proposed rulemaking in January 2010,³⁰⁵ and in December 2010 sought CASAC’s recommendations again and announced its intent to issue a standard by July 2011.³⁰⁶ In September 2011, the White House rejected the EPA’s proposal for what struck most observers as political reasons—namely, pressure from business interests.³⁰⁷

The EPA had undergone an extensive process to produce the smog rule, conducting a number of field hearings, providing multiple public comment periods, and following recommendations that an independent panel of scientists provided twice.³⁰⁸ In the view of many environmentalists, these steps were insufficient to overcome special-interest influence over the White House in both the Bush and Obama administrations.³⁰⁹ It is possible that the decision of a large citizen jury would have proved more difficult for the White House to ignore. And if the jury’s decision were binding, ignoring it would have been impossible.

The following sections explore a number of other potential benefits of direct republicanism in the administrative process.

1. *Better Public Representation and Checks Against Capture*

One of the most important benefits of administrative juries is that they would provide automatic, publicly funded representation for citizens in regulatory decisions. This representation would be provided not just by the jury itself, but also by the agency in its effort to argue multiple perspectives to the jurors. This increase in public representation would be of critical value given the vast disparities in current participation between regulated entities and public interest representatives.³¹⁰ Many important

³⁰³ See Jackson Letter, *supra* note 301.

³⁰⁴ See National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. at 2942–43 (describing the background that led to reconsideration of the 2008 standard).

³⁰⁵ National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. at 2938.

³⁰⁶ See *Ground-Level Ozone: Regulatory Actions*, EPA, <http://www.epa.gov/glo/actions.html#stand> (last updated July 30, 2013).

³⁰⁷ See John M. Broder, *Obama Abandons A Stricter Limit on Air Pollution*, N.Y. TIMES, Sept. 3, 2011, at A1; Leslie Kaufman, *Stung by the President on Air Quality, Environmentalists Weigh Their Options*, N.Y. TIMES, Sept. 4, 2011, at A21; Letter from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Lisa P. Jackson, Adm’r, Env’tl. Prot. Agency (Sept. 2, 2011), *available at* http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf.

³⁰⁸ See generally National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. at 2938; National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. at 16,436.

³⁰⁹ See Kaufman, *supra* note 307.

³¹⁰ See *supra* text accompanying notes 85–92.

administrative matters involve no citizen or public interest representation at all.³¹¹ And even when public interest groups participate, they still may fail to adequately represent public views.³¹²

Juries could also help agency staff maintain focus on their public service mission. Presenting to citizen juries, preparing materials for them, administering their proceedings, or merely observing or being aware of them should focus the minds of staff more frequently on service to the public. In addition, unlike agency staff, juries could not suffer from “revolving door” problems or become too cozy with interest groups over time. For these reasons, administrative juries would not only improve representation, but function as a strong check against perceived or actual agency capture.

Administrative juries also could help remedy the potential problem of “information capture.”³¹³ Information capture results from the inability of agencies to stop interest groups from flooding them with information, a phenomenon Wendy Wagner has termed “filter failure.”³¹⁴ The use of administrative juries could help solve this problem because information presented to juries would necessarily be filtered heavily. Wagner may be right that the “the historic myth of agencies as experts” has given courts an “unrealistic expectation with regard to the unlimited capacity of agencies to resolve any question put to them.”³¹⁵ Courts are not likely to expect the same of citizen juries, and the necessities of structuring jury proceedings would give agencies a persuasive justification for disciplining the flow of information.

2. Moderation of Policy Changes and Better Alignment of Regulatory Policy with Public Values

As both the ergonomics and smog examples demonstrate, one major problem in administrative law is the frequency of dramatic, politically driven shifts in regulatory policy, usually based on changes in the presidency or the composition of Congress.³¹⁶ Consider for example the rule on passive restraints (most commonly seatbelts and airbags) at issue in

³¹¹ See *supra* text accompanying notes 85–92.

³¹² See *supra* text accompanying notes 132–138.

³¹³ See Wagner, *supra* note 89, at 1329.

³¹⁴ *Id.*

³¹⁵ *Id.* at 1331.

³¹⁶ Cf. FREEDMAN, *supra* note 1, at 50 (“[T]he fact that rapid turnover in agency membership has caused frequent changes in the direction of major agency policies, often in the wake of election returns, has created considerable public doubt that agency members are impartial and disinterested experts, rather than value-oriented individuals addressing value-laden questions.”).

*Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*³¹⁷ At the outset of the Ford Administration, a passive restraint rule had been in place for years, and the compliance deadline was roughly one year away.³¹⁸ Under Ford, the National Highway Traffic Safety Administration (“NHTSA”) extended the rule’s compliance deadline, then suspended the rule indefinitely in June 1976, proposing a demonstration project instead.³¹⁹ In July 1977, the first year of the Carter Administration, NHTSA reissued the rule.³²⁰ The passive restraint requirement would now be phased in beginning in 1982 and finishing by 1984.³²¹ Over the next several years, manufacturers began to comply again. In 1981, however, the newly arrived Reagan Administration delayed the rule, then rescinded it.³²² Insurers sued. “Over the course of approximately 60 rulemaking notices,” the Supreme Court observed in *State Farm*, “the requirement has been imposed, amended, rescinded, reimposed, and now rescinded again.”³²³ Itself divided along political lines, the Court adopted the “hard look” doctrine,³²⁴ vacated, and ordered a remand to the agency.³²⁵

Another example is the experience of the Federal Trade Commission (“FTC”) from the late 1960s to the early 1980s. In 1969, a group of “Nader’s Raiders” and the American Bar Association each published reports sharply criticizing the agency for failing to serve consumers.³²⁶ The FTC turned itself around quickly and, in 1975, Congress expanded its powers.³²⁷ By 1980, however, the agency had lost favor again, and Congress “prohibited it from continuing several pending rulemaking proceedings, forced it to reconsider many others, and placed all future FTC

³¹⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

³¹⁸ *Id.* at 34–37.

³¹⁹ *Id.* at 36–37.

³²⁰ *Id.* at 37.

³²¹ *Id.* at 37–38.

³²² *Id.* at 38.

³²³ *Id.* at 34.

³²⁴ *See id.* at 46. The APA prescribes that courts review agency action for whether it is “arbitrary, capricious, [or] an abuse of discretion,” 5 U.S.C. § 706(2)(A) (2012), a highly deferential standard on its face. The “hard look” doctrine heightens judicial scrutiny by requiring that agencies “address all significant issues, take into account all relevant data, consider all feasible alternatives, develop an extensive evidentiary record, and provide a detailed explanation of . . . [their] conclusions.” Kagan, *supra* note 30, at 2270.

³²⁵ *State Farm*, 462 U.S. at 44, 57.

³²⁶ AMERICAN BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, ‘THE NADER REPORT’ ON THE FEDERAL TRADE COMMISSION (1969).

³²⁷ *See Pierce & Shapiro, supra* note 107, at 1202.

rules under the shadow of its legislative veto authority.”³²⁸ Let us assume that most Americans would have agreed in the late 1960s that the FTC should have been more vigorous and active. Let us also assume that, by 1980, most thought the agency had gone too far. It is still unlikely that the public wanted the outcome that Congress produced: an agency severely damaged and demoralized for years to come.

Political changes in major regulatory policies abound,³²⁹ and they present serious problems. They suggest a delegitimizing degree of politicization of regulatory policy. They also signal that the political branches may have difficulty delivering the policies that the public demands and, in particular, reflecting shifts in public values accurately. The political process appears to over-express changes in public opinion when they are translated into regulatory policy, generating wild swings rather than gradual modifications.

Putting some decisions in the hands of juries might help ameliorate these problems. Juries presented with the necessary factual or scientific material and asked to make a decision may be less likely to shift their views as dramatically as, for example, NHTSA’s policy on seatbelts and airbags shifted under Presidents Ford, Carter, and Reagan. They also may be more likely to reflect public values accurately, regardless of whether those values are static or dynamic.

3. Conservation of Agency Resources and “Deossification” of Rulemakings

Administrative juries could also help conserve agency resources in several ways. First, juries could help remedy ossification of the rulemaking process through more deferential judicial review of the substance of agency decisions.³³⁰ The change might be initiated by either the courts or the Congress. More deferential review should lessen the unwarranted analytical burdens that agencies currently face.³³¹ Other commentators have recommended that courts give greater deference to rulemakings that reflect better public participation.³³² For example, David Fontana has

³²⁸ *Id.* at 1202–03.

³²⁹ Another example is the dispute over the meaning of “modification” in the Clean Air Act. See Pierce, Jr., *Democratizing*, *supra* note 45, at 586–610.

³³⁰ The concept of “ossification” refers to an effect of judicial review in which the rulemaking process is bogged down by agency efforts to anticipate and satisfy a wide range of potential judicial responses. See McGarity, *supra* note 244. Ossification is also attributed to the analytical burdens now placed on agencies. See *id.* at 1385.

³³¹ See *supra* text accompanying notes 246–249.

³³² In accordance with her model of increased public accountability through presidential management, Justice Kagan has proposed more deferential judicial review when “demonstrable evidence shows that the President has taken an active role in, and by so doing

suggested creating an incentive for agencies to solicit better information with a rule that, “the greater the number of relevant and non-repetitive comments the agency received, the more deference its actions would receive.”³³³ Wendy Wagner has similarly proposed that an agency rule should receive the equivalent of “soft glance” review if “a diverse and balanced group of affected parties is involved throughout the rulemaking.”³³⁴ In instances of imbalance, Wagner further proposes that courts defer more to the agency in challenges by a party that “dominate[d]” the rulemaking process and less in challenges by an “underrepresented group[.]”³³⁵

These proposals point in the right direction, but they may not be workable in practice. It would be unreasonably burdensome for a court to review an entire rulemaking record and assess the number of relevant, non-repetitive comments, or the degree of balance between various interest groups, merely to determine its standard of review. Nor would a court necessarily find those assessments easy to make. In addition, it is doubtful that a court could calibrate the degree of deference it gives an agency as finely as either proposal would require. Furthermore, multiple parties can contest the same agency action, which renders it problematic to base the standard of review on the identity of the challenger.

Administrative juries could offer a means of achieving similar goals with fewer complications. Courts might choose, or be required, to defer more heavily to an agency where it has employed a jury. And if a court were to review the jury decision itself, that review should be highly deferential. This brings us to one of the most fundamental ways in which juries could deossify rulemaking: by allowing agencies to focus on what they do best, technical analysis, and letting someone else make difficult, controversial policy decisions. Agencies could proceed with less fear of rejection by unpredictable courts or anger from the public or congressional overseers.

Administrative juries also could help “deossify” the rulemaking process by justifying the relaxation of statutory and executive branch analytic requirements. A common type of requirement is that agencies must consider particular perspectives that otherwise might go underrepresented, such as the concerns of small businesses.³³⁶ These are attempts to improve the quality of administrative decisionmaking, premised

has accepted responsibility for,” an administrative decision. Kagan, *supra* note 30, at 2380.

³³³ Fontana, *supra* note 173, at 82.

³³⁴ Wagner, *supra* note 89, at 1407–08.

³³⁵ *Id.* at 1409.

³³⁶ See, e.g., 5 U.S.C. § 601–612 (2012) (requiring agencies to consider impacts on and input from “small entities” such as businesses, other organizations, and local governments).

on the notion that there is something missing from the deliberation of agency officials. By its nature, however, a large, representative sample of the American public ought to be capable of representing many if not most significant perspectives. For example, the jury would include small business owners in proportion to their occurrence in the population, and their views would figure into the jury's decision just that much. To be sure, the owners of small businesses often would not determine the outcome of a proceeding even if they were to vote as a bloc. But the purpose of requiring an agency to consider small business interests is not to give the owners of small businesses outsized influence, much less the power to shape outcomes. It is to cure a perceived deficiency in the representation of those individuals. In some cases that deficiency could be cured by random selection of an adequately large jury. Where that response is inadequate, perhaps a jury could be presented squarely with the relevant considerations. It is also possible that in some cases, juries could be designed to over-represent certain segments of the population, although the merits and potential harms of proceeding in that manner ought to be weighed carefully.

Similarly, administrative juries could relax the need for cost-benefit analysis in the regulatory process. The goal of cost-benefit analysis is to discern public preferences by reducing the costs and benefits of a proposal to monetary terms and comparing them with one another.³³⁷ It is widely used, but remains difficult to conduct and highly controversial despite decades of debate, study, and refinement.³³⁸ Administrative juries might offer relief from the burdens of cost-benefit analysis because if a representative panel of citizens can answer the question of public preferences directly, then there should be less need to engage in complicated and controversial efforts to discern these preferences through economic analysis. For similar reasons, we might insulate jury decisions from OIRA review, or require OIRA to give juries more deference. There should be less need for political review of individual regulatory decisions

³³⁷ See, e.g., MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 12–13 (2006).

³³⁸ Given the large volume of criticism and defense of cost-benefit analysis, it is surprisingly difficult to find a single document that provides a thorough account of the critiques. A few particularly useful recent sources are RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 9–20, 55–150 (2008); Winston Harrington, Lisa Heinzerling & Richard D. Morgenstern, *Controversies Surrounding Regulatory Impact Analysis*, in *REFORMING REGULATORY IMPACT ANALYSIS* 14–17 (Winston Harrington, Lisa Heinzerling & Richard D. Morgenstern eds., 2009); Amy Sinden, Douglas A. Kysar & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 *REGULATION & GOVERNANCE* 48 (2009) (book review).

made directly by panels of citizens.

A final way administrative juries might conserve agency resources is by motivating parties to behave more reasonably, in effect deterring wasteful conduct and creating incentives to act constructively. For example, the prospect of going before a jury in an administrative enforcement action might lead firms to settle more quickly and on more reasonable terms rather than fight vigorously within the confines of a cozy, well-known system. Or it might deter them from seeking to cripple agency enforcement with thousands of frivolous appeals to an administrative review panel, as some suspect that mine operators have attempted in recent years.³³⁹ And jury proceedings in rulemakings might redirect interest groups toward helping to identify important points and effective ways to present them rather than flooding agencies with materials.³⁴⁰

4. Civic Benefits

Administrative juries also could have a number of beneficial civic effects. One simple benefit is that they are likely to educate citizens about regulatory agencies and the regulatory process. If administrative juries are like their judicial counterparts, they might have much more substantial effects on civic engagement as well, possibly enhancing jurors' political self-confidence, increasing faith in regulatory agencies, and even making participants more likely to vote.³⁴¹ Juries also might increase levels of satisfaction with agency rules, which could be perceived as more aligned with public values, and they might reduce alienation from federal policymaking, contributing to a greater sense of legitimacy.³⁴² One can imagine that individuals who disagree with a given rule might be more likely to accept it as legitimate, viewing it as the product of honest effort by competent professionals and other citizens who made a difficult decision on which reasonable people can disagree. Finally, if citizens were to become more knowledgeable about regulatory policy and the administrative process, we might see improvements in the quality of public

³³⁹ See, e.g., Aaron Albright, *Report: Mine Safety Backlog Reduction Strategy Working Despite Continued Flood of Appeals*, COMMITTEE ON EDUC. & WORKFORCE: DEMOCRATS, (Nov. 21, 2011), <http://democrats.edworkforce.house.gov/blog/report-mine-safety-backlog-reduction-strategy-working-despite-continued-flood-appeals>.

³⁴⁰ See *supra* text accompanying notes 84–87, 248.

³⁴¹ See, e.g., JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 70–71, 129–53 (2010).

³⁴² This is a longstanding view in administrative law. See, e.g., Gellhorn, *supra* note 72, at 361 (“If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced.”).

debate.

D. Questions for Further Study

This Article's proposal for administrative juries raises a number of questions for further study. Many are empirical. Foremost, one could run mock proceedings to test what types of questions can be presented to administrative juries, potentially using matters actually decided by agencies or courts and assessing jurors' comparative performance. Similar studies could be conducted regarding choices of procedure and how best to present information or arguments. This Article has suggested that jurors be presented only with narrow, discrete matters that can be framed as binary or multiple-choice questions, or ranges of possibility,³⁴³ but more study is necessary to determine whether that approach is advisable.

Feasibility and scalability concerns counsel in favor of making proceedings as simple and inexpensive as possible. This means an important area for study will be how brief and inexpensive jury proceedings can be made without sacrificing quality of outcomes or other values underlying their use. Related to this question is that of the importance of deliberation. In recent decades, a vast amount of scholarship has emerged regarding deliberative democracy, most of which is premised on the notion that deliberation is a key component of enhanced citizen participation in governance.³⁴⁴ This Article's starting point is to eschew traditional deliberation if possible to make administrative jury proceedings more feasible and scalable. Nevertheless, the importance of deliberation must be explored both conceptually and empirically, and if it proves critical, then it must be incorporated. Another set of empirical questions involves whether administrative juries provide the potential civic benefits identified above.

Less empirical questions exist as well. Would jurors merely vote on outcomes, or would they be able to provide feedback or express minority viewpoints? Could those viewpoints be conveyed to other jury members before they vote? Would it be possible to assimilate certain types of feedback quickly enough to modify the question under consideration or permit revoting without holding a new proceeding? Other questions involve how matters would be assigned to juries, such as whether agencies should have discretion to decide when juries are used, or whether certain events or types of questions should trigger jury proceedings automatically.

Finally, important questions remain around judicial review. This Article has suggested preliminarily that courts might give greater deference

³⁴³ See *supra* Part III.C.1.

³⁴⁴ See *supra* text accompanying notes 156–157.

to agency actions that employ juries and that jury decisions should be either unreviewable or given exceedingly high deference.³⁴⁵ The question of agency impropriety and methods of policing it, judicial or otherwise, will require further consideration.

IV. RESPONSES TO POSSIBLE OBJECTIONS

A. *Juror Competence*

One possible set of objections to this Article's proposal concerns jurors' fitness to decide important regulatory policy questions.³⁴⁶ First is the argument that citizens lack the competence to make regulatory decisions—for example, the technical competence necessary to decide matters related to science. The literature on trial juries features arguments on both sides of technical competence. Some argue that empirical evidence demonstrates that jurors do not understand technical matters.³⁴⁷ Others dispute this evidence and point out that judges, who have the most experience with juries, generally believe jurors are competent, and that juries usually decide matters as judges would.³⁴⁸

There are several responses. First, this Article does not suggest that juries are fit to play a role in every type of administrative decision. Rather, it proposes that we discern areas of competence through further study. For example, we can study how mock juries answer various questions, presented in various ways. If juror responses fall within a range of reasonable views—particularly if they fall within the range of conclusions contemplated or reached by agencies or courts—then it will be difficult to sustain the argument that jurors are not competent.

Another response is that an agency conducting a real proceeding would likely structure the choices available to juries, thereby precluding outlier results. Indeed, a critical distinction between administrative juries and their judicial counterparts is the degree of flexibility in deciding which questions the jury will decide and how best to pose them. Let us assume for the sake of argument that trial juries lack an adequate understanding of scientific evidence. One potential cause might be that the evidence isn't presented in a manner that lay jurors can understand easily. The presentation of evidence in trials is governed by an elaborate set of procedural rules, limited by the rights and interests of formal parties to the

³⁴⁵ See *supra* Part III.B.3.

³⁴⁶ Administrative feasibility is perhaps an equally important concern. This Article discusses that question provisionally in Part III.B.4 *supra*.

³⁴⁷ See, e.g., Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 52–54 (1995).

³⁴⁸ See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 16 (2007).

adjudication, and shaped by the parties' vigorous trial advocacy. Without disputing that these arrangements are appropriate for jury trials in the courts, there is no reason why all the same factors must be present in an administrative jury proceeding on a rulemaking. When designing a new proceeding, we might find more effective ways of presenting scientific evidence. If it turns out that administrative juries are not competent to decide complex scientific matters, no matter how well they are presented, then those matters should not be given to juries. Indeed, this Article has suggested that technical factual inquiries are perhaps the least useful place to insert juries into the administrative process. Better are matters of policy.³⁴⁹

Other jury-fitness concerns involve the rule of law. For example, judicial branch juries are sometimes criticized for failing to decide like cases alike.³⁵⁰ What if two administrative juries hear different but related regulatory matters and reach conclusions that do not accord with one another? There are two responses. First, much of the concern regarding trial juries is driven by their small size—typically twelve or fewer members.³⁵¹ Larger juries like those proposed by this Article should be far more likely to treat like cases alike because they are less likely to be composed of a non-representative subpopulation that holds anomalous views. Regarding coordination between rules, an additional response is that similar problems already arise in ordinary rulemaking, and agencies can handle them largely the same way if in the context of administrative juries. If, in the process of ordinary rulemaking, an agency envisions a possible rule that would conflict with a prior rule, it can either dismiss the conflicting approach and propose something different, or it can reconsider the original rule as well. Similarly, if it were using an administrative jury, the agency could decline to present the conflicting approach to the jury, or it could present a revision to the original rule as well.

A related but distinct objection is that administrative juries might lack adequate perspective to consider potential tradeoffs or prioritize policies properly. For example, a jury faced with only one regulatory decision might err on the side of overprotection because members will not be considering the aggregate costs or other effects that might result when the proposal at hand is combined with other policies. One response is that, as with other objections, the agency's ability to structure the proceeding may

³⁴⁹ See *supra* text accompanying notes 281–296.

³⁵⁰ See VIDMAR & HANS, *supra* note 348, at 16–17.

³⁵¹ See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 497–98 (1997). The U.S. Supreme Court has approved criminal juries with as few as six members. See *Williams v. Florida*, 399 U.S. 78, 86 (1970).

mitigate the problem substantially. Perhaps information regarding broader agency priorities, budgets, or compliance costs could be presented to juries. Another response is that, as with other objections, these problems can arise without administrative juries as well. Indeed, a robust literature associated with the counterreformation contends that poor coordination and priority-setting are already common.³⁵² There is no reason to assume that juries will perform worse, especially if their choices are structured by agency officials. Indeed, they may perform better in certain circumstances. Some agency rules likely reflect compromises and are not motivated exclusively by the desire to reach the best policy outcome. They might reflect agency officials' attempts to mediate between competing interest group demands, to insulate themselves from certain types of criticism or judicial review, or to please elected officials who may or may not be representing the public effectively. If these types of factors can motivate rulemaking decisions, then there is little doubt that agencies may produce suboptimal rules by any number of metrics. Perhaps jurors attempting to reach the best policy outcomes would do better.

B. Persistent Representation Problems

Another important objection is that administrative juries may merely transfer representation problems to a different place in the administrative process. Even when administrative juries are used, important decisions will remain in the hands of agency officials, particularly the questions of which issues to present to a jury and how. Each decision presents the possibility of inadequate agency representation of the public interest and perceptions of bias or capture. Likewise, courts necessarily will review jury decisions, or agency actions based in part on jury decisions, leaving room for judicial usurpation.

A few initial responses are in order. As discussed above, there is likely a role for judicial review in rooting out the worst instances of impropriety, and it may be possible to craft review standards that achieve that goal without inviting undue judicial interference with policymaking.³⁵³ It also might be possible to build into the jury process indicators of potential bias that would trigger additional review or scrutiny, obviating the need for courts to serve as the first line of defense against impropriety.³⁵⁴ Furthermore, certain aspects of jury proceedings might enhance rather than diminish agency transparency and accountability. For example, the requirement that agencies delineate clearly which decisions they are

³⁵² See *supra* text accompanying note 41.

³⁵³ See *supra* text accompanying notes 248–249.

³⁵⁴ See *supra* text accompanying notes 250.

making and which they are presenting to a jury—and in particular the requirement that they separate truly technical questions (for the agency to decide) from matters of policy (to be presented to a jury)—should make agency actions more understandable and accountable to the public, the Congress, and the courts.³⁵⁵

Finally, without minimizing the importance of the representation-based criticism, it suggests at most that administrative juries cannot provide full assurance of administrative legitimacy, not that juries would fail to improve on the present state of affairs. We should be mindful of the concern, explore it through further study, and work to find the best possible design responses.

C. *Deliberative or Civic Republican Objections*

Finally, one might object that administrative juries would fail to meet the goals of the civic republican or deliberative conceptions of administration.³⁵⁶ Under these models, policymaking should derive from deliberative processes that foster public-spiritedness and reform participants' preexisting desires to produce more truly "public" preferences.³⁵⁷ They contrast with pluralism, in which policy derives from competition among, or the mere aggregation of, private preferences.³⁵⁸ Pluralism has been heavily criticized on the grounds that: (1) there is no reason to believe that the competition between or aggregation of private preferences results in good, or even coherent, policies; and (2) it undervalues minority views and arguably authorizes majoritarian tyranny.³⁵⁹ The civic republican objection to administrative juries would accuse them of these shortcomings.

The first set of responses accepts for the sake of argument that direct republicanism is a species of pluralism. The criticism that direct

³⁵⁵ Cf. Wagner, *supra* note 71, at 1706–08 (arguing that agencies should be required to separate scientific and policy decisions in toxics regulation, in large part to improve transparency and accountability).

³⁵⁶ For discussions of civic republican or deliberative administration in the legal literature, see generally Seidenfeld, *supra* note 1; Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2. Although calls for "civic republicanism," a "deliberative conception of administration," or "deliberative democracy" in the administrative process are not identical, they share a common set of core values and aspirations, rooted in a Madisonian conception of republicanism, among other influences. See KLOPPENBERG, *supra* note 36, at 103–05; Sunstein, *Factions, Self-Interest, and the APA*, *supra* note 2, at 281–82; Sunstein, *Beyond the Republican Revival*, *supra* note 255, at 1562. The present discussion does not distinguish between the various theories or models, and it uses the terms interchangeably.

³⁵⁷ See KLOPPENBERG, *supra* note 36, at 103–05.

³⁵⁸ Sunstein, *Beyond the Republican Revival*, *supra* note 255, at 1542–43.

³⁵⁹ Seidenfeld, *supra* note 1, at 1514, 1575.

republicanism (or pluralism) might not produce good or coherent policy can be leveled at any model of policymaking. Indeed, civic republicanism itself has been criticized on the grounds that the aspiration to generate “public interest” policies through deliberation is under-theorized and potentially unrealistic. Critics have raised serious doubts about the assumption that there is such a thing as the “public interest,” as opposed to competing interests or competing conceptions of the public interest, and they have pointed out that “there is no reason to believe that deliberation alone is sufficient to generate desirable regulatory outcomes.”³⁶⁰ Deliberative democracy also has no inherent means of ensuring coherence within a particular policy or among a set of policies. There is no reason why the products of individual deliberations must be compatible with one another or form a coherent whole. Moreover, the reference to good policy, in the abstract, begs the question. We have no settled means of evaluating the quality of policies.³⁶¹ This Article presumes that one critical measure of a policy’s merit in a democracy is what the voting public thinks, and that the public is more likely to look favorably on policies generated through democratic means.

The point regarding majoritarian tyranny has more force. If direct republicanism is implemented through majority votes, then it runs the risk of underserving or even harming minority interests. This Article is limited to economic regulation rather than the rights-enforcement or service-provision functions of agencies in part because the former may be less likely to give rise to concerns about majoritarian excesses.³⁶² Although views on matters such as risk regulation are sometimes correlated with individual characteristics such as race and sex,³⁶³ it is possible that economic regulation involves fewer significant differences of opinion between the majority and protected minority groups. Also, in the context of economic regulation, the minority groups opposed to a given majoritarian policy will often be commercial interests, not constitutionally protected classes. Regardless of the presence or absence of disagreement, the nation has a long tradition, embodied in constitutional doctrine, of affording less protection to the interests of economic minorities in the

³⁶⁰ See Croley, *supra* note 76, at 82. In addition, there is some evidence that deliberations increase polarization rather than foster a unified conception of the public interest. See, e.g., Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000). Administrative juries might be able to avoid this pitfall in a manner that traditionally deliberative proceedings cannot.

³⁶¹ Arkush, *Democracy and Administrative Legitimacy*, *supra* note 15, at 616–19.

³⁶² See *supra* note 23.

³⁶³ See, e.g., Dan Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007).

context of commercial regulation.³⁶⁴

That the Constitution does not protect a particular minority interest does not mean it should never be protected. The question remains, then, whether direct republicanism, and in particular administrative juries, can accommodate the need to protect minority interests or at least give voice to minority opinions where desired. Perhaps the information provided to the jury could highlight certain concerns,³⁶⁵ or its decision could be structured or limited in ways that protect certain interests. A final possibility, of course, is that direct republicanism is not a good fit for some issues, even if it is appropriate for others.³⁶⁶

Another set of responses to civic republican objections rejects the characterization of direct republicanism as mere pluralism and instead emphasizes its similarities to civic republicanism. Foremost, juries might advance the goals of civic republicanism reasonably well in the context of administrative proceedings. The question is in part empirical. For example, mock proceedings can be used to assess whether administrative jurors merely vote their preexisting preferences or develop new views over the course of a proceeding, as well as whether they assume a spirit of public-interestedness. Moreover, a variety of different procedures could be tested to see which best fulfill the aspirations of civic republicanism, or for that matter any other relevant goals.

A related point is that even stark differences between deliberative models and direct republicanism might be less significant in effect than expected. For example, deliberative models usually involve discussion among participants, and deliberation is usually viewed as a necessary element of the exercise. In contrast, this Article proposes an attempt to craft administrative juries without traditional deliberations and then consider what is lost in the bargain. Perhaps non-deliberative bodies will fare poorly, but perhaps they can yield many of the benefits that deliberative models provide. If that is the case, then objections based on

³⁶⁴ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54, 152 n.4 (1938) (holding that regulation of commercial transactions need only have a rational basis to be constitutional, unless it runs afoul of a more specific constitutional limitation, interferes with the political process, or is directed at discrete and insular minorities that are afforded special constitutional protection).

³⁶⁵ See *supra* text accompanying notes 246–249.

³⁶⁶ Some might object to this Article's assumption that the purpose of political accountability in the administrative process is to ensure that agencies serve the majority will. For example, Rebecca Brown has argued in the context of constitutional theory that political accountability is a means of protecting individual liberty rather than advancing majoritarianism. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998). The question is worth considering in the administrative law context, but it is beyond the scope of this Article.

superficial design differences will have less force. Moreover, some features of administrative juries that might be viewed as shortcomings by civic republican theory are in fact shared by real-world deliberative exercises. For example, civic republican theory disfavors the pluralistic exercise of voting, preferring the development of consensus when possible.³⁶⁷ But when deliberators need to reach actual conclusions, they typically must resort to majoritarian voting. And that is what deliberative models ultimately prescribe.³⁶⁸

Administrative juries might even outperform traditional deliberative models at serving deliberative goals. For example, there is evidence that trial juries advance some of the same goals,³⁶⁹ but it is not known whether the cause is deliberation or something else. The most important factor may be the act of partaking in an official government proceeding, or the fact that jurors are entrusted with real decisionmaking responsibility. If these are the causes, then administrative juries might do more to advance civic republican goals than many deliberative models would, for few if any of the latter place actual decisionmaking authority in the hands of citizen deliberators.

Finally, no feasible, scalable model of traditional deliberative democracy has emerged despite decades of interest and effort. This means that the real-world alternative to administrative juries at present is the status quo, not a practicable deliberative process. Direct republicanism has aspirations similar to those of civic republicanism, and administrative juries are an attempt to realize those goals in a manner that is feasible within the current structure of American governance.³⁷⁰

CONCLUSION

Perhaps the most important contemporary question for enhancing administrative legitimacy is how better to insert public values into the administrative process. A promising approach would help ameliorate real or apparent capture of administrative agencies, as well as provide a better blend of agency expertise and democratic responsiveness in regulatory decisionmaking. This Article has suggested that direct republicanism might produce advances on both fronts.

There is no shortage of outstanding questions regarding administrative

³⁶⁷ See, e.g., Croley, *supra* note 76, at 76–77; Seidenfeld, *supra* note 1, at 1514, 1575.

³⁶⁸ See, e.g., Fontana, *supra* note 173, at 82.

³⁶⁹ See *supra* text accompanying notes 341–342.

³⁷⁰ One interesting deliberative democracy proposal would create a fourth branch of the United States government, modeled on James Fishkin's Deliberative Polls. See generally ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 12–13, 23–27 (2004).

juries that are worth the effort of serious study. Direct republicanism offers the possibility of infusing democracy into some of the most important and least publicly accessible policy decisions in government and, as a result, improving public policy, enhancing civic life, and bolstering the legitimacy of the “administrative state.”