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PARTICIPATION IN RULEMAKING

Because we are a representative democracy and because lawmaking is the ultimate power granted our government under the Constitution, rulemaking presents us with a profound dilemma. On one hand, we have established that in order for government to be truly responsive to the incessant demands of the American people for public programs to solve private problems, rulemaking by government agencies is essential. It frees Congress to attend to many more problems than it would otherwise have time to deal with. It relieves Congress of the burden of maintaining and managing enormous staffs that possess the expertise essential to refining the operating standards and procedures for myriad programs. Finally, it is the best means yet found to break legislative deadlocks and to avoid difficult political decisions, while still taking serious actions. On the other hand, as an indispensable surrogate to the legislative process, rulemaking has a fundamental flaw that violates basic democratic principles. Those who write the law embodied in rules are not elected; they are accountable to the American people only through indirect means. Our elected representatives have confronted this dilemma on numerous occasions and decided that one answer is direct participation by the public in rulemaking.

Implicit in the various discussions of participation in rulemaking is a fundamental debate analogous to the trustee/delegate dialectic in the political science literature regarding the proper role of elected officials. With rulemaking, however, the arguments for each archetype are actually more pointed. Those who would dismiss either the value or constitutional need for public participation point to the fact that a statute is written by duly elected representatives. Furthermore, the legislature's decision to entrust subsequent lawmaking needed to implement the goals of the statute contains a delegation of authority to agency-based experts who are fully capable of developing the information they need for a given rule without the input of the public, who are less well informed, technically competent, and objective. And, given the grave implications of decisions made during the development of rules, do we truly wish to have the opinions and demands of an interested but inept public delay or, worse, color the decisions of those charged with protecting our health, safety, wealth, and general quality of life?

The opposing argument notes that lawmaking is the seminal power granted in our Constitution, and whether laws are written by elected representatives or unelected bureaucratic experts, the voice of the people must be heard to confer legitimacy on the mandates these laws contain. Why, they would ask, should the will of the people be confined to the enactment of legislation when it is widely accepted that the most specific statements of Americans' rights and responsibilities are to be found in rules and regulations? Advocates for participation would note that whatever the levels of expertise in government agencies, none are omniscient, and all face profound challenges in the face of growing responsibilities and expectations arising from new statutes or simply changing conditions. The "people" have access to vast expertise in the form of interest groups they constitute and support. Public participation is not, in their eyes, a trivial symbolic exercise but one often essential if agencies are going to function with the best and most current information when writing rules.

We will see in the pages that follow that the extreme versions of both arguments have little to commend them, and the truth, while lying somewhere in the middle, also varies dramatically from case to case. We begin with a review of the development of public participation over time and then turn to a review of actual patterns of involvement.

The legitimacy of the rulemaking process is clearly linked to public participation. Phillip Harter, a prominent observer of rulemaking, noted, "To the extent that rule-making has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision." Harter is also a staunch advocate for using more consensual techniques for developing rules, arguing that their most important benefit is enhancement of public participation and "the added legitimacy a rule would acquire if all parties viewed [it] as reasonable and endorsed it without a fight."¹

THE PURPOSES OF PARTICIPATION

Harter's remarks imply, correctly, that participation contributes more than legitimacy to the rulemaking process. By referring to "rationality," he is suggesting that participation can also enhance the authority of the rule. The credibility and standing a rule enjoys with those who will be regulated by it or enjoy the benefits it bestows depend heavily on the accuracy and completeness of the information on which it is based.² Agencies rely on the public for much of the information they need to formulate rules. Therefore, if participation is hampered by hostility, intransigence, secrecy, or incompetence on the part of the agency, the rule will be deprived of information that is crucial in establishing its authority with the affected community. Bluntly, stupid rules do not beget respect.

Another reason for participation is less frequently cited but potentially important nonetheless. The content and tone of expressions from the public can help rulemaking agencies plan for the circumstances they will confront when the rule is written, and the next phase, implementation, begins. If one remembers that

rulemaking is not an end in itself but the critical bridge between the aspirations articulated in law and the reality expressed in program operations, one can comprehend the special significance of participation.

The contribution of public participation to the content of a rule is easy enough to understand. Agencies are not omniscient, and they are not sufficiently funded to conduct the research needed for all the rules they are expected to write. Comments from the public alert agencies to gaps in their knowledge and provide them with an understanding of the conditions in the private sector they are attempting to ameliorate or regulate. Such comments are especially useful if the agency is dealing with a sector of the population it has not dealt with in the past or with an otherwise unfamiliar activity. Agencies can also begin to understand how much learning will be required of regulated and benefiting parties and how much teaching will be required of implementing officials.

Public comments help agencies determine the degrees of acceptance and resistance in the affected communities to the rule under development. This information can be crucial in many ways. In regulatory programs the results of public participation help agencies design monitoring and enforcement systems. If the affected parties appear from comments to be generally in favor of the new rules, the enforcement program might rely on self-reporting or some other nonintrusive, low-key means of guaranteeing compliance. If, however, the response of the affected public suggests significant opposition to the rule, hostility, and evidence that compliance will be difficult, a more aggressive and expensive enforcement program may be unavoidable. Comments from the public also help the agency gauge the likelihood of a lawsuit challenging the rule before its implementation. Litigation of this sort has a profound effect on the rulemaking programs of many agencies. Because of public participation, a lawsuit need not come as a surprise.

William West, a prominent scholar of rulemaking and administrative procedures, summarizes the major rationales for rulemaking participation a bit differently. One that mirrors the above is that the participation provides meaningful opportunities for interested parties to influence administrative policy. Furthermore, these procedures “promote responsiveness” and aid political actors in overseeing the bureaucracy.³ This argument flows from the writings of Mathew D. McCubbins and Thomas Schwartz and of McCubbins, Roger Noll, and Barry Weingast, which state that procedures are used by political principals to guard against policy that may vary from legislative intent.⁴ Finally, some have argued that these procedures are little more than symbolic efforts that hide the fact that public participation rarely has any major effect on administrative rules.⁵

In this chapter we will examine the efforts by government agencies to broaden and diversify the mechanisms for public participation in rulemaking. Then we will turn to the actual patterns of public participation that occur in rulemaking to determine how those interested in rules under development take advantage of the opportunities to contribute afforded by the agencies.

Although public participation can contribute much to the quality, acceptability, and ultimate success of the rule, it can also complicate rulemaking and place the agency squarely between powerful contending forces. It is therefore important to get some historical perspective on how the current mechanisms and practices of public participation in rulemaking came into being.

THE ORIGINS AND HISTORY OF PARTICIPATION

It stands to reason that there was some kind of participation by persons outside of agencies from the very start of rulemaking. The number of areas in which rulemaking occurred was initially quite small, but those who wrote rules were no more omniscient than they are now. Often, as now, those who knew the most about the subject of the rulemaking were those it would affect. It is likely that the public did participate in these early years, but we have no record that they did so. With the coming of the twentieth century, scholars started to focus on rulemaking more systematically. The record of participation by the public in the development of rules then began to change.

Early Inattention

The Attorney General's Committee on Administrative Procedure noted in 1941 that until the early years of the twentieth century Congress paid virtually no attention to how executive branch officials were conducting rulemaking. Public participation in the act of creating law was effectively ignored. When Congress began to take an interest in rulemaking, it was more because of the growing prominence of groups representing business and professional interests than any sense of concern for the constitutional ramifications of lawmaking by unelected surrogates in administrative agencies. Interest groups are deeply and aggressively involved in the development of rules, and their impact is great. But success begins with opportunity, and it is the opportunities for participation in rulemaking and the ways they developed over time that must first be considered.

Participation at the Turn of the Twentieth Century

The earliest systematic research into the process of rulemaking was concerned in part with what, if any, legal status Congress conferred on those affected by rules. Thanks again to the work of the Attorney General's Committee, we know of statutes at the turn of the twentieth century that encouraged or required executive branch officials to consult with various groups before issuing rules. These laws are quite important because they begin to form the basis for patterns of public participation that persist to this very day. For example, the committee discovered an appropriation statute enacted in 1902 that provided funds "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products."⁶ Although often not required by law, this type of interaction occurred between rulemakers and interested groups at a variety of agencies, including the Federal Reserve Board (now called the Federal Reserve System), the Federal Communications Commission, and the Maritime Commission. From these informal communications between agencies and their clients, participation grew and diversified.

The Situation at the End of the New Deal

After its survey of agency practices, the Attorney General's Committee concluded that five basic forms of participation were in wide use by the close of the 1930s: oral or written communication and consultation; investigations; specially summoned conferences; advisory committees; and hearings, of which there were two general types.

An investigation was any systematic collection of information to determine whether a rulemaking was necessary and the general content that such a rule might contain. Many agencies worked closely with outside groups and individuals at this crucial early stage in rulemaking. The committee noted, for example, that the Bureau of Biological Survey in the Department of the Interior "has always been in close touch with state officials, conservationists and sportsmen."⁷ This precursor to the Fish and Wildlife Agency used these contacts as the basis for all its rulemaking. The interaction was formalized to some extent when the bureau submitted its findings and conclusions relevant to the new rules to the International Association of State Game, Fish and Conservation Commissioners. A similar approach was used by the Food and Drug Administration (FDA). According to the Attorney General's Committee, it "employs a Food Standards Committee which collects information on products for which standards are to be proposed."⁸ The Food Standards Committee consisted of members from industry. We see that at these earliest stages of rulemaking, the decision to act and the initial consideration of options, the public was actively involved.

Oral and written communications and consultations need little further elaboration. They were the oldest and perhaps most common form of participation at the time the committee conducted its research, and in all likelihood they remain so today. Even when statutes, then and now, require other forms of participation, informal contacts of this type will occur. They may be the most preferred and effective mode of participation for both the public and private sectors. Examples of this type of consultation were numerous by the late 1930s. The Attorney General's Committee noted, for example, that the "Securities and Exchange Commission. . . has rarely failed to submit its proposals to those regulated before promulgating rules." Similarly, "the Federal Communications Commission. . . has found it possible to dispose of a large portion of its rulemaking problems by consultation with the industry it regulates."⁹

Conferences were a more structured and focused form of participation and, in the opinion of the Attorney General's Committee, "[introduce] an element of give and take on the part of those present."¹⁰ This type of interaction is not possible when consultation is essentially a set of bilateral contacts between an agency and an interested or affected party. The Federal Reserve Board's practices were "particularly noteworthy because of the Board's virtually complete reliance on conferences. . . as a means of enabling affected parties to participate in the rulemaking process." The Federal Reserve Board conducted conferences "with the public directly and through the American Bankers' Association."¹¹

Advisory committees were as common as conferences and proved to be a more resilient and popular mode of participation. The Attorney General's Committee found

advisory committees at work in a wide variety of agencies, and in some instances these bodies were far more than a resource from which the agency could draw information, expertise, and opinion based on experience. Several examples demonstrate the degree of influence exerted by advisory committees during the course of rulemaking. The Bureau of Marine Inspection and Navigation used an advisory committee composed of “consultants drawn from the industries affected who met continuously with the Bureau’s officers and participated in the drafting of particular sets of regulations governing the construction of vessels.”¹² The most extraordinary influence of any of the advisory committee arrangements was exerted under the mandates of the Fair Labor Standards Act: “Wage orders of the Administrator varying the statutory minimum wage rates in particular industries shall originate with committees of the employers, employees and public representatives.”¹³ This is remarkable in several ways. First, the law effectively transforms the agency into a ratifier of decisions made by a group of external parties. Second, it includes on the advisory committee a “public” member, a feature notably absent in other advisory committee schemes of the time.¹⁴ Third, it establishes a structure for rules to be developed through negotiation by parties with contending interests. This form of participation, called for in the Fair Labor Standards Act, was a precursor of negotiated rulemaking, an important reform that is discussed in more detail later in the chapter.

Hearings, as a form of participation, come in two types: informal and formal. Informal hearings are patterned after the familiar legislative sessions. Witnesses are summoned, sworn in, asked to present testimony, and questioned by the representatives of the agencies who are presiding. Informal hearings are decidedly one-sided. Their clear purpose is the collection of information that the agency will use in developing the rule. It is not to answer questions or challenges from those who are testifying. In this sense informal hearings would appear to offer little substantive or procedural advantage to potential participants over the even less formal conferences mentioned earlier. In fact, it is easy to see how the limited formalities of legislative hearings might significantly reduce the give-and-take that is so important if public participation is to provide all it can to rulemakers. Nevertheless, these types of hearings were popular when the committee conducted its study and remain so today.

Legislative hearings can be mandatory or voluntary. For example, the Interstate Commerce Commission was required to conduct hearings as a condition of its rulemaking authority. Hearing requirements can be found in statutes written as early as 1903. The Attorney General’s Committee found mandatory hearings common in transportation statutes generally and in agencies dealing with certain types of wages, trade and tariffs, prices, and marketing. Voluntary use of hearings was adopted by many business-related regulatory agencies, including the Federal Power Commission, the Federal Communications Commission, and the Department of Agriculture.¹⁵

Formal hearings are adversarial proceedings based on the model of a civil trial conducted in a court of law. At the time the Attorney General’s Committee conducted its research, this type of hearing was required for certain rules or rulemaking situations, usually when there were disputes over matters of material fact. The Fair Labor Standards Act, the Bituminous Coal Act, and the Food, Drug, and Cosmetic

Act all carried provisions for what has come to be called formal rulemaking. Many other agencies voluntarily used this type of proceeding for individual rules.¹⁶

Then, as now, formal rulemaking was a cumbersome, difficult, time-consuming, and expensive process. For example, a coal price order by the Bituminous Coal Board was issued only after generating “a record and exhibits. . . total[ing] over 50,000 pages; the trial examiner’s report of approximately 2,800 pages in addition to exhibits and a Director’s report of 545 single-spaced legal sized pages.”¹⁷ Although formal rulemaking was more common in the 1930s than it is today, when formal procedures are undertaken in contemporary rulemaking, the supporting paper and elapsed time dwarf those of the former years.

Today we live with a persistent concern that agencies will be captured by those they regulate or who serve as beneficiaries. The apparent coziness between rulemaking agencies and the industries or groups they regulate that emerges from the work of the Attorney General’s Committee is striking. Contacts between public officials and representatives or consultants from industry were the norm. In several instances the influence of the latter over the decisions of the former was substantial. Involvement of members of the general public, if it occurred at all, was certainly not prominent in the report of the committee. In no small part the system of participation, so skewed in favor of regulated or benefiting interests, was due to the nature of the programs being managed by federal agencies at that time and the fact that professional and industrial interests were comparatively well organized. Their counterparts, representing broader social interests, were not. Read in a contemporary context, public participation in the 1930s had all the earmarks of capture by powerful private interests. Indeed, this became a common criticism of government programs in later years.

Aside from the imbalance in the population of participants, what may be most striking about the findings of the Attorney General’s Committee is the rich diversity of participatory forms and practices in place more than seventy-five years ago. One would be hard pressed to find a mechanism of participation in rulemaking currently in force that cannot be traced back to this period.

The Attorney General’s Committee conducted its work at a time when rulemaking and the behavior of administrative entities were receiving considerable attention from Congress, the courts, and the White House. The Walter-Logan bill, vetoed by President Franklin Delano Roosevelt, would have required much of the administrative process to adopt the adversary model mentioned earlier.¹⁸ And New Deal programs and activities, including rulemaking, were being challenged in the courts. Shortly after the completion of the committee’s work, the nation was thrust into a war effort that put consideration of administrative reform on hold. But soon after the Second World War, Congress returned to the subject and enacted a landmark statute, the Administrative Procedure Act of 1946 (APA).

The APA

The rulemaking provisions of the APA may seem curious in light of the information about participation that was available to Congress. The Attorney General’s Committee found many different forms and models of participation in its study of agency procedures, but Congress chose to adopt a minimalist approach to public

involvement embodied in section 553 of the act. These “notice and comment” provisions codify a limited form of what the committee termed “consultation” as the basic mode of participation the public could expect from rulemaking agencies. Congress also provided for formal rulemaking but restricted it to situations in which an individual statute mandated its use. At the same time the act ignored the other forms of participation the committee uncovered. Furthermore, it allowed agencies to write rules without benefit of any participation in emergency situations or when it was deemed, by the agency, to be in the public interest.

It would be wrong, however, to view the APA as a repudiation of the diverse forms of public participation already operating in most agencies. The act is a general framework, bounded by notice-and-comment provisions at one end and trial-type procedures at the other. Within those boundaries, existing statutes, future legislation, and the exercise of agency discretion define administrative procedures more specifically, allowing systems of participation to develop that make the most sense for particular programs. By establishing notice and written comment as the minimum, Congress rationalized the rulemaking procedure that critics had found so badly lacking during the New Deal era. In retrospect, this action appears to be of greater symbolic than substantive importance. Unless the Attorney General’s Committee conducted woefully inadequate research, by the late 1930s most agencies with any appreciable program of rulemaking were reaching out and interacting with the public, albeit the well-organized public. The real significance of the APA was its statement that participation in rulemaking would henceforth be open to anyone who wished to become involved. It gave those who were interested the minimum information and access needed to get involved.¹⁹ Effective participation, however, still would require organization, resources, and political sophistication. Not until the 1960s and 1970s would the voices heard by the rulemaking agencies become more numerous and diverse.

Converging Forces: The “Participation Revolution” and the Rise of Social Regulation

Although their origins are difficult to date with precision, two developments in the 1960s and 1970s altered dramatically the status and process of rulemaking. The first was a movement to involve citizens in government decision making in ways that were more direct, and intended to be more effective, than the ballot. The second, discussed in detail in Chapter 1, was the vast expansion of social regulation that extended the reach of government in such a way that previously unorganized interests now had more than ample incentive to come together for collective action. The convergence of these two forces, once in motion, was both inevitable and important.

The revolution in participation was not a single, coherent movement. It included many disparate initiatives with widely variable effects. The driving force of the revolution, however, was a lack of faith in the ability of established government institutions to understand the popular will and respond appropriately. In the 1960s and 1970s the American people witnessed a violent struggle for civil rights, unsatisfactorily explained assassinations of revered public figures, an unpopular war,

shocking political scandals, and a growing disaffection with government, which appeared unable to accomplish ambitious social objectives. The motives of those seeking to expand public participation ranged from a near-paranoid mistrust of the government's own motives to a simple belief that direct input from citizens would improve the quality of the government's decisions. Also prominent was a faith in participation as a means of empowering and involving the disenfranchised and unrepresented among the population.

Congressional Action to Promote Participation

To open government decision making, Congress passed a variety of laws. The Freedom of Information Act allowed private citizens to review the way agency officials made their decisions. The Privacy Act allowed individuals to gain access to the information the government might have about them, to learn the uses to which the information was being put, and to correct errors in those records while requiring the responsible agency to take steps to prevent unauthorized disclosures. The Government in the Sunshine Act opened many agency meetings and deliberations to the public. The Federal Advisory Committee Act (FACA) required that membership on those potentially powerful groups be balanced with regard to affected interests, and it opened their deliberations to public scrutiny as well.

Other efforts sought to provide for more direct participation of the public in government decision making. The Great Society programs of Lyndon Johnson adopted this approach, and the movement for direct citizen action continued through the 1970s. By one estimate, hundreds of programs required "some form of citizen participation" by the end of that decade.²⁰ In some instances there was a displacement of existing government institutions and processes. The Model Cities Program, a crown jewel of the Great Society, mandated a governance structure consisting of separately elected citizen boards that completely bypassed local executive and legislative officials. Alternative governments, often competing with establishment officials for power and influence, were rapidly becoming the order of the day.

Expansion of Scope, Diversification of Forms

The citizen participation movement was in full flower when the era of social regulation dawned. The National Environmental Policy Act of 1969 (NEPA), which many see as the symbolic start of that era, embraced fully the participation ethic of the time. Both elements of the movement, full disclosure of the information on which government bases its decisions and direct public involvement, provide the cornerstones of NEPA. Government agencies were required to develop detailed statements on the environmental impact of their contemplated actions. The statements were to be prepared only after a public "scoping session" at which citizens could voice their concerns and opinions about likely environmental effects. Once completed, the statement was subjected to another round of public participation before it could be declared final. Although opinions concerning the effects of the NEPA provisions vary considerably, there is evidence that the act contributed to significant changes in many federal agencies.²¹

The hundreds of statutes establishing and amending programs of social regulation embraced the concept of expanded public participation as well. But in each instance Congress tailored participation provisions to the program in question. Some statutes expanded on the basic provisions of the APA. For example, laws establishing programs of social regulation called for extended periods of public comment. The 1977 amendments to the Clean Water Act allowed sixty days for public comment on effluent guidelines for toxic water pollutants.²² One motive for this type of provision was to give organizations and individuals new to the rule-making process additional time to analyze and respond to the frequently complex proposed regulations needed to implement programs of social regulation. But other motives may have been at work as well. The extended periods delay the issuance of rules and give opponents more time to alert congressional, administration, and private sector allies who might help in blocking or altering the new rules.

Other statutes expanded the APA's notice requirements by calling on agencies to release to the public analyses on which they were relying for the content of their proposed rules. Such disclosure requirements can be found in the Federal Trade Commission Improvements Act of 1980 and the Consumer Product Safety Act amendments of 1981.²³ Again, the motives behind these provisions were mixed. Certainly, additional information can assist members of the public in determining whether to participate and help them focus their comments or stated opinions. It also can delay the issuance of the proposal and exposes the agency to challenge. The studies and reports disclosed in this manner may be criticized from many different perspectives, and if their reliability or validity is called into question, the entire rule may be in jeopardy.

Several of the general models of participation that the Attorney General's Committee observed in the 1930s reappeared in statutes of social regulation in the 1970s. Especially popular were provisions requiring agencies to go beyond the written comments called for in the APA and allow interested parties to present information and views orally. These legislative-type hearings were included in the Occupational Safety and Health Act, the Consumer Product Safety Act, the Safe Drinking Water Act, the 1977 amendments to the Clean Water Act, and the 1978 revisions of the Endangered Species Act.²⁴ A few statutes, notably the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act and the Toxic Substances Control Act, went well beyond the legislative model by allowing cross-examination of witnesses by participating interests.²⁵ It is thought that hearings provide a compelling form of participation because they put agency personnel in direct contact with those members of the public who will be affected by their rules. But hearings are also time-consuming and expensive to manage. Although hearings can generate a wealth of information and views, this is not an unequivocal benefit to those writing the rules. The agency must subsequently take this information into consideration when finalizing the rule. In addition, because the transcripts of hearings become part of this material “record” of the rulemaking, they can be used to mobilize political support or opposition and thus may figure prominently in subsequent litigation attacking the rule.

Innovations in participation were not confined to the latter stages of the rule-making process. Some legislation, like the Federal Trade Commission Improvements Act and the Energy Policy and Conservation Act, required advance notices of proposed rulemaking.²⁶ At least two statutes—the Consumer Product Safety

Act and the Medical Device amendments to the Food, Drug and Cosmetic Act—contained “offerer provisions.”²⁷ These provisions authorized nongovernment groups and organizations to develop and propose rules to agencies, which would then decide whether to issue the rule in the form proposed.

Overall, Congress was a major force in promoting greater participation in rule-making proceedings. Legislation was an important element in the “participation revolution” that swept government in general and in the larger “procedural revolution” that has altered rulemaking in recent decades. Other institutions also were heavily involved in opening rulemaking to direct influence by the public.

Throughout the 1980s Congress continued to tinker with participation provisions in new authorizing statutes as well as in amendments to existing legislation. These provisions added few new vehicles for expression of the public will. During the 1990s, however, two notable legislative innovations occurred. In the Negotiated Rulemaking Act of 1990, Congress authorized direct bargaining with affected and interested parties as an approved means for developing regulations, and it established operating principles for these negotiations.²⁸ The theory and performance of some of the techniques endorsed by the act will be discussed later. Congress made an equally dramatic statement about public participation with the passage of the Small Business Regulatory Enforcement Fairness Act of 1996, an amendment to the Regulatory Flexibility Act.²⁹

This legislation reflected Congress’s long-standing concern about how small businesses were affected by new rules, in particular those issued by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). If a regulation under development has substantial implications for a significant number of small businesses, OSHA or the EPA are now required to convene a panel whose task is to develop information and secure recommendations from affected interests. The panel then reports these findings to the officials responsible for the rule in question; they are expected to incorporate the information in the regulation or its supporting analyses. The first panel convened as the EPA developed information on a rule concerning air pollution by nonroad diesel engines. In 1997 the panel issued a report that clearly indicates the potential effectiveness of this new form of participation.³⁰ The report offered five recommendations for reducing the rule’s impact on small businesses, and it charged the EPA with giving them serious consideration.

The current decade brought the Information Quality Act, discussed in an earlier chapter. While its purpose was ostensibly framed in its title, the legislation opened yet another door for participation by allowing the public to challenge the “quality, objectivity, utility and integrity” of information used in rulemaking.³¹

Presidents and Participation

Jimmy Carter’s Reforms. President Jimmy Carter assumed office in 1977 determined to improve the operation of regulatory programs. Enhanced public involvement, he firmly believed, would produce the desired change. While Carter’s presidency was forty years ago, we linger on it here because it was a renewal period for participation in rulemaking. Much of what has since occurred has its roots in this brief period.

The means of increasing public participation took many forms in the Carter administration. One simple means was to increase the period for public comment on proposed rules from the usual thirty days to sixty days or longer. Better and earlier information on agencies' plans for rulemaking was to be supplied through the publication of a regulatory agenda and calendars. These would provide early warning to the public of rulemaking projects being contemplated or in the beginning stages of development. A more ambitious approach to achieving the same objectives is the *advance notice of proposed rulemaking*, also instituted during Carter's presidency under Executive Order 12044. This is a device that involves the public in the development of individual rules at a very early stage. The advance notice announces the agency's intent to write a regulation or its concern that an issue or problem may require a rule. The agency solicits the views of the public on the need for the regulation or its ideas on how the issue or problem that will be addressed in the rule might be resolved. In effect, the advance notice is an invitation to join the agency at the start of the rulemaking process.

President Carter charged the Office of Management and Budget (OMB) with evaluating agencies' progress in implementing the provisions of the executive order. In this task the OMB relied on the agencies' own reports, its independent inquiries, and responses from a survey of interest groups who were asked to comment on the performance of the agencies they dealt with in the area of participation. The summary assessment in 1979, roughly one year after the executive order was promulgated, was "mixed" in most areas.³²

That most agencies were producing semiannual agendas was generally viewed as a positive development by the external groups surveyed. In some instances the agendas were produced on something less than a semiannual schedule. In others the descriptions of problems, and the rules that were being developed to deal with them, were skimpy or vague. Groups complained that the schedules announced in the agendas were frequently inaccurate, tending to be overly optimistic about how quickly the work would be completed.³³

Since its inception during the Carter administration, the regulatory agenda program has continued to develop, and the quality of agency submissions is more uniform. The descriptions clear and sufficiently informative that external parties can understand why an action is being undertaken and how the agency is thinking about the problem. The program has been retained by the presidents who followed Carter, but its primary focus has shifted from rulemaking participation by the public to agency accountability to the White House.

Carter's OMB evaluators found that several agencies that had not used advance notices of proposed rulemaking in the past were experimenting with them. The response from the public was generally positive but not unanimous. Surprisingly, some groups appeared to resent agencies' reliance on advance notices, viewing it as "a 'cop-out' to have the public do the [agencies'] work for them."³⁴

The sixty-day period for comments was usually observed by agencies, but the effect on the public was marginal. The sixty-day period afforded only a modest amount of additional time. Sometimes the agencies were more generous, allowing as much as a half a year or more for comments. The OMB found these extensive periods of public comment to be particularly useful.³⁵

The OMB study did report on agencies' innovative approaches to outreach during rulemaking. These initiatives fall into two general categories. The first includes efforts to diversify the ways agencies communicate with the public on actions they are planning to take. However improved, notices that appear only in the *Federal Register* or in a semiannual agenda will have limited circulation. Agencies experimented with a variety of techniques and media more familiar, accessible, and understandable to the general public (e.g., notices in newspapers, television and radio announcements, and mass mailings). The second category includes efforts to make public involvement in rulemaking more personal and less antiseptic than the submission of written comments. To give citizens a sense that rulemaking agencies cared about their views, various forms of public hearings were conducted around the country.³⁶

Case studies done in conjunction with the OMB evaluation provide important insights into public participation in individual departments and agencies during the late 1970s. These studies review participation in five departments—Agriculture; Health, Education and Welfare; Labor; Interior; and the EPA. We provide some examples from a few of these studies.

The Department of Agriculture's rulemaking program that established agricultural marketing orders for commodities provides a particularly interesting case study. The program came into being as part of the New Deal. Its intent was to stabilize the markets for agricultural products through many different means, the primary device being rules that established quality standards and limited the amounts of various commodities that could be shipped to market. For most of its history it was a classic example of a "captured" regulatory program. The hearings associated with the marketing order rulemakings were rarely attended by consumer interests, nor did those interests actively oppose the program, which, it would appear, was not designed to benefit them.³⁷ The inactivity of consumers is explained by conventional theories of regulation that underscore the advantage that a highly specialized and small group, producers in this case, enjoys over a group that is large, diverse, and difficult to organize, such as consumers.³⁸

The Department of Agriculture "discovered a significant amount of outside interest in the marketing order programs that was not being accommodated through the formal hearing process" during the Carter years.³⁹ In response, the department established a "prenotice public participation requirement." In effect, this was a preliminary investigation of public attitudes and views on a planned marketing order through a solicitation of comments mailed directly to affected groups.

Participation in rulemaking was an area of major change for the Department of Health, Education and Welfare (HEW), now the Department of Health and Human Services (HHS). The issues facing the department involved reaching and listening to enormous numbers of potential participants. The initiative undertaken in response to the Carter program suggests the magnitude of the task. In an effort to bring the rulemaking process to the people, HEW conducted a series of public meetings outside of Washington and sent out special mailings about rules that were under way. In 1978 alone the department reported that more than 3,100 persons attended the public meetings and that it had sent more than 110,000 individual letters.

To get the public to participate in the development of rules concerning food labels, the FDA sent out more than “40,000 letters,” distributed “500,000 pieces of literature,” and did an “experimental television survey” in Columbus, Ohio. These efforts were both successful and sobering. The good news was that more than 10,000 public comments were received on the labeling regulations.⁴⁰ The sobering fact was that each one had to be read and a response prepared; decisions then had to be made about possible changes in the final regulations. The experience of the FDA and HEW reminds us that the price of public participation in terms of staff time, delay, and opportunity costs can be high.

The efforts of the Department of the Interior to implement Carter’s executive order demonstrate some of the benefits and costs of early participation by the public in rulemaking. Among other things, it appeared to be particularly useful in weeding out unnecessary provisions in regulations. In one case the number of eligibility criteria for a grant program was reduced from 100 to just 6, and the number of items included in an application for right of way on public lands went from 20 to 5.⁴¹ As was noted earlier, strategies to involve the public early on are not without their critics. In the case of the Department of the Interior, the unhappiness centered on advance notices of “technical or complex” rules. The OMB evaluation concluded that these did not result in “substantive, useful comments.” According to the OMB report, the EPA “had a tradition of effective public participation.”⁴² For years the agency had used advance notices and distributed supplemental information to the public on rules under development. But these notices and supplements were frequently not as informative as they might have been. New regulations required the EPA to use various forms of public participation when developing rules for its solid and hazardous waste, drinking water, and clean water programs. It received more than five hundred comments on these procedural regulations, a significant percentage of which were received over a special toll-free long-distance telephone system. The new regulations established public meetings, hearings, and advisory groups as the major means for obtaining the public’s input on these three important programs.⁴³

Some groups accused the EPA of circumventing requirements for public participation by using devices other than rules and regulations for setting regulatory policy. The devices took numerous forms, including “policy circulars,” “guidelines,” and “technical corrections.” They were issued by the agency without any of the procedural steps normally associated with rulemaking. Confusion arose as to the status of these devices. Were they equal in legal terms to an actual rule or regulation? If so, should not normal rulemaking procedures, including public participation, apply to their development? One who criticized their use reflected a widely held view: “Where these. . . have major effects the public should have an opportunity for comment.”⁴⁴ As it happens, the EPA was not the only department that may have been avoiding public participation requirements.

Use of these instruments of public policy as alternatives to rules has increased, and so has the controversy associated with them. The courts have insisted that when agencies take actions that create or alter obligations borne by the public, they must use appropriate procedures. Yet in 1992, thirteen years after the OMB study,

use of guidelines, advisories, and the like were still very popular with rulemaking agencies, according to a study conducted by the Administrative Conference of the United States. This study, drawing on prevailing cases, called on agencies to engage in rulemaking whenever there is a question about the actions they are taking. The study concluded that agencies are likely to continue using these devices in marginal cases, and the evidence accumulated since confirm this prediction.⁴⁵ First, there will always be instances when agencies do not perceive the action they are taking as any more than a clarification of existing rules or policy. Of course, any clarification will have the effect of transforming a gray area into one that is black and white, and this change alone may be enough to trigger a protest. Second, as noted in Chapter 1, what Thomas McGarrity called the “ossification” of rulemaking under the weight of multiple, complex procedures creates incentives for agencies to find quicker, easier ways to manage their programs. While the effects of ossification have been disputed in one study,⁴⁶ it is also true that the use of devices other than rules to set or elaborate on policy became widespread. As noted in a previous chapter, it became sufficiently prominent that George W. Bush issued an executive order to rein in the practice.⁴⁷

The last years of the Carter administration represent a high-water mark for participation in rulemaking as a public policy concern. Although there was not enough time for the program to be fully implemented, government agencies took Carter’s public participation initiative seriously, and it produced results because it had the force of the presidency behind it. By the end of his presidency, most of the major avenues for public involvement in rulemaking had been explored. The strengths and weaknesses of each were well understood. Ultimately, programs of public participation in rulemaking must be tailored to the subject matter and constituencies of the programs for which the rules are being written. In many of the departments and agencies such a tailoring process had been in use for more than fifty years and would reappear twenty years later.

Ronald Reagan and George H. W. Bush: Participation of a Different Sort. The transition from Carter to Reagan brought dramatic change. The new administration took a very different view of public participation. Jeffrey Berry, Kent Portney, and Ken Thomson, experts in the field of citizen participation in government, summarize President Reagan’s position in the following way:

In rather sweeping fashion, the Reagan administration pursued its policies under the belief that federally mandated citizen participation caused the bureaucracy to become unresponsive to officials elected by the people and that citizen participation therefore actually became antidemocratic. In a call for the return to the orthodox view of administrative responsiveness, the Reagan administration suggested that agencies had become responsive to clients and special interests in a way that was inconsistent with what the general citizenry wanted. In contrast, advocates of citizen participation argued that there is nothing antidemocratic about citizens working with agencies to fulfill the spirit and intent of the programs enacted by Congress.⁴⁸

The Reagan administration did not disdain all participation, only that which sought expansion of certain government benefits and most regulations. The Reaganites viewed most of the initiatives of the 1960s and 1970s as empowering organizations and groups that had a strong vested interest in big government. They were correct. Reagan succeeded in rolling back a few of the mechanisms for public participation in rulemaking, notably public funding. But his major accomplishments were halting further expansion of participation opportunities and installing counterweights to the influence exerted by advocates of big government.

The main offsetting mechanism was review of all proposed and final rules by the OMB. What is significant here is the new form of participation that the OMB review program stimulated. The OMB staff members who reviewed proposed regulations became another point of decision making for organizations and groups to influence. Again, if it is true, as Theodore Lowi has stated, that politics flows to the point of discretion, the Reagan program created just such a point.⁴⁹ Certainly, the various review programs previous presidents instituted created similar opportunities, but none was so sweeping as the charge given the OMB under Executive Order 12291. The authority of OMB officials was not confined to particular types of rules, or rules with particular types of potential effects, or rules already on the books. Here, for the first time, was a comprehensive program to review all rules with the implicit charge to alter those whose content contradicted, or failed to promote, the policy goals that President Reagan took as his mandate. In short, the president known as a skeptic of public participation had created one of the most inviting opportunities for involvement in rulemaking in American history. But in the opinion of many, the invitation was extended only to a privileged few.

Theoretically, important changes in a rule, valuable delay, and even complete defeat of a proposed regulation could be achieved through effective lobbying of the right officials in the OMB. If a given interest group was confident about securing a sympathetic ear, it could pursue a strategy of nominal involvement during the agency phase of rulemaking while putting heavy pressure on the OMB staff and officials responsible for the review of the rule. In this way the interest group could attain its goal at a comparatively low cost.

Given the general policies of the Reagan administration, the willingness of the OMB staff to listen to those with concerns about proposed and final regulations depended very heavily on who was speaking. Critics of the OMB program accused the Reagan administration of creating a backdoor through which influence peddlers representing big business and antiregulation forces could slip; once inside they could change or block outright those rules they failed to influence satisfactorily by dealing directly with the responsible agencies. In addition, critics charged that contacts between lobbyists and OMB staff members constituted an illegal violation of the long-standing principle that all information used to determine the content of a rule be known and subject to review by the courts and the public in general.

The charges were vehemently denied by those in the administration, but their protestations were not sufficient to silence the critics. Several years after the OMB program was instituted, the head of the Office of Information and Regulatory Affairs (OIRA), the office that conducted the reviews, issued a set of binding

guidelines that established standards for contact with the public and for recording the results of meetings or other forms of communication. Restrictions were placed on the communication between the staff and external interests, and that which occurred was to be consistent with the principle of a rulemaking record; that is, it had to be open to public review and, during litigation, to judicial scrutiny.⁵⁰

President George H. W. Bush, having headed the Task Force on Regulatory Relief in the Reagan administration, continued this forum for those critical of proposed and existing rules. Its new name was the Council on Competitiveness, chaired by Vice President Dan Quayle. The council had authority to review any rule it deemed sufficiently important to the operation of the American economy. Its review criteria were vague, and the council operated without benefit of the procedural restrictions that were imposed on the OMB. Provided with ample staff support from the same unit in the OMB that conducted reviews of rules, the council aggressively altered regulations it considered unnecessarily burdensome on the economy. The same, albeit more intense, criticism was leveled at the council as had greeted OMB review a decade earlier. Now, however, there were direct claims that preferential treatment was being given to those who supported the president's 1988 campaign and to those whose support the administration coveted for 1992. It became common to refer to the operation of the council as a form of regulatory pork barrel politics in which the White House doled out economic benefits in the form of reduced compliance costs. Nonetheless, the council won major battles with intransigent agencies that persisted in their views. In a highly publicized struggle with the leadership of the EPA, the council succeeded in rolling back proposed notification requirements in rules developed under the 1990 Clean Air Act. The action meant that polluting firms would not have to notify the public when incidents of excess emissions occurred, and thus it relieved affected businesses from potentially high costs and public scrutiny. Critics issued withering assessments of these council practices and the secrecy with which it conducted its business.⁵¹

Bill Clinton and George W. Bush's Approaches. President Bill Clinton elevated public participation in rulemaking to the level of a major theme in his National Performance Review (NPR). The creation of partnerships between the public and private sectors became the preferred method of decision making, characterized by negotiation rather than adversarial relations and dictates from Washington. In some instances these collaborative relationships generated projects and programs that displaced conventional rulemaking altogether. One example was the Common Sense Initiative of the EPA, which focused on six industries—automobile manufacturing, iron and steel, metal finishing, electronics and computers, petroleum refining, and printing—in an effort to bring together representatives of business, government, community organizations, labor, and environmental groups. These groups were charged with finding ways to “change complicated, inconsistent and costly regulations”; new rules were to replace those found to be dysfunctional.⁵²

The Bush II administration confined its efforts to broad statements and initiatives regarding participation sensitive to criticisms of the earlier Bush administration. Its approach stressed an openness that “responds to past complaints that OMB decision making was secretive and more rooted in interest group politics

than professional analysis.⁵³ It focused on the OMB and the OIRA by ensuring transparency in all its rulemaking-related interactions with the public and by inviting widespread public participation in decisions to review existing rules.⁵⁴ Still, there are a few participation tools that this administration used as it relates to participation efforts. As noted in Chapter 3, the Information Quality Act, passed in 2000, allows interest groups to challenge the quality of information used in the development of rules. In 2004 the OMB published a notice in the *Federal Register* soliciting nominations for regulatory reforms that may affect the manufacturing industry.⁵⁵ A January 2007 amendment to Executive Order 12866 brought guidance documents into the purview of OMB review and generally ensured they be treated more like regulations.

Barack Obama and Donald Trump: Diverging Approaches. President Barack Obama maintained the importance of public participation in his rulemaking management program. Indeed, unlike his predecessors, he invited the public to offer its views on how his rulemaking management program should be structured. Several hundred groups and individuals responded to his invitation.⁵⁶ Nearly two hundred comments were received on how to structure the rulemaking management program and the role of cost-benefit analysis in regulatory review. In 2011, the Obama administration issued Executive Order 13563 and within this order included elements regarding public participation. These included a “comment period that should generally be at least 60 days,” and all rule information including “relevant scientific and technical findings” to be made available through the online rulemaking docket “regulations.gov,” and an additional push to ensure that the views of those likely to be affected are sought by the agencies.⁵⁷

The first year of the Trump administration provided little evidence that it would use formal vehicles, such as executive orders or presidential memoranda, to offer new approaches to public participation or simply reinforce principles that had been articulated previously. None of his official documents or statements directed to the entire executive branch spoke explicitly to public participation. Unlike Obama’s approach, Trump did not ask in advance for input from the public when he announced his startling “two for one” approach to new rules, nor did he do so when he called for the appointment of regulatory reform officials and committees in departments and agencies. However, President Trump did ask for that input from affected parties on actions affecting individual rules.

We should also note that numerous reports of meetings between key agency officials and various interests that in turn led to favorable regulatory actions, including rulemaking, can be found in the media. President Trump’s executive order mandating reconsideration of an existing regulation dealing with “waters of the United States” was unmistakably linked to promises candidate Trump made to development interests during the campaign. That meetings with key constituencies occur and actions related to their interests follow can hardly be surprising and are not limited to the current administration. However, the Trump administration has generated significant concerns about the lack of transparency. Former director of OIRA Cass Sunstein criticized the lack of information about rulemaking and related issues being made publicly available by his old office and others expressed

concerns about the administration's unwillingness to even share the names of those advising agencies on the regulatory reform initiatives called for in Trump's executive order. Whether the Trump administration eventually follows the path of earlier administrations with regard to public participation or carves out a new path is a question that is not yet ripe for answer.

ACTUAL PATTERNS OF PARTICIPATION

Opportunities to participate do not ensure that participation will actually occur, and the act of participation does not guarantee the participant success. Therefore, it is important to discover who participates in rulemaking, why they do it, the devices they use, and the successes they achieve.

Participation in rulemaking has prerequisites. A participant must be aware that a rule is being developed, understand how it will affect particular interests, be familiar with the opportunities for participation, possess the resources and technical expertise needed to respond, and, when necessary, have the ability to mobilize others in the effort to influence agency decision makers. These requirements suggest that in most instances participants in rulemaking will be groups, organizations, firms, and other governments. Single individuals will become involved, but they will be less prominent than institutional participants, although we do note that there has been an increase in individual participation with the growth of e-rulemaking. Nevertheless, we focus on interest groups, broadly defined, in this examination of the participants in rulemaking. For our purposes, interest groups are defined as organizations that attempt to influence public policy. They include companies, business and trade associations, unions, other levels of government, and public interest groups.

Most of what is known about participation in rulemaking comes from three sources: case studies of individual rulemakings and rulemaking programs, analyses of official records of government agencies, and surveys of interest groups. There are numerous case studies of rulemaking and a growing number of systematic studies of agency rulemaking and the interest groups involved in efforts to influence this process. Earlier editions of this book relied extensively on our own research regarding rulemaking participation, which included surveys administered nearly ten years apart. The results provided a view of rulemaking's importance over time, as well as the salience of related issues and the perceived effectiveness of tactics, techniques, and devices. Importantly, rulemaking research has taken on greater prominence in recent years as more and more scholars recognize this critical policy arena and the role participation plays in developing rules.

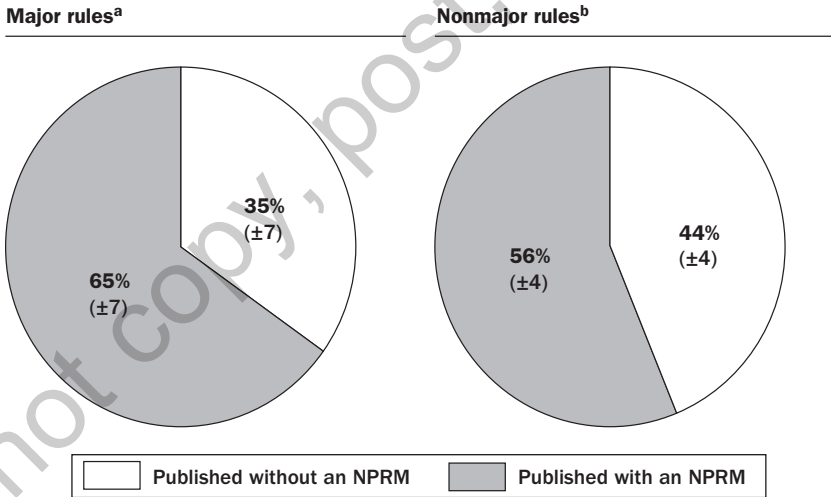
Does Participation Actually Happen?

It is clear from numerous studies that interest groups are often a prominent part of rulemaking. In his classic study of the rule that mandated warning labels on cigarette packages, *Smoking and Politics*, A. Lee Fritschler recounts the efforts of the tobacco industry, the advertising industry, health groups, and consumer groups to influence the Federal Trade Commission. Ross Cheit's case studies of four separate

rulemakings that established safety standards found participation to be common, as has research into the development of agricultural marketing orders and the setting of health-related workplace rules. William West analyzed rulemaking at the Federal Trade Commission and also found participation by groups, albeit those who were well organized and had ample resources.⁵⁸

However, according to other scholars and the Government Accountability Office (GAO), agencies failed with some regularity to comply with the notice requirements.⁵⁹ One 2012 GAO study found that 35 percent of all major rules were published without prior notice between 2003 and 2010. For nonmajor rules, this percentage increased to 44 percent (see Figure 5.1). This same study found that HHS issued the largest percentage of final major rules without a notice of proposed rulemaking (NPRM) (38 percent) and that DOT issued the largest percentage of final nonmajor rules without an NPRM (22 percent).⁶⁰ Many rules are exempted from prior notice requirements under one of the APA provisions mentioned in Chapter 2, and agencies may simply neglect to mention the prior notice in the final rule. Figure 5.2 provides information regarding which reasons for not issuing an NPRM are most cited by agencies.

FIGURE 5.1 ■ Percentages of Major and Nonmajor Rules That Were Published without an NPRM from 2003 to 2010



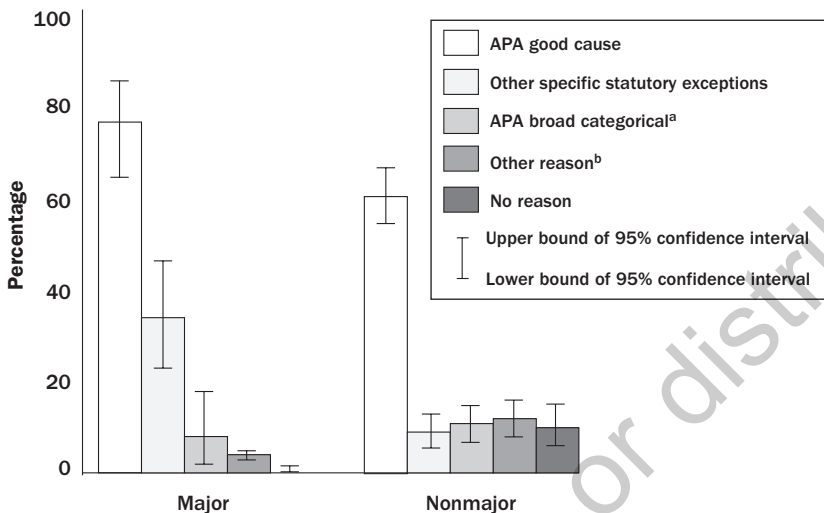
Source: Government Accountability Office, "Agencies Could Take Additional Steps to Respond to Public Comments," GAO-13-21 (<https://www.gao.gov/assets/660/651052.pdf>).

Note: Margins of error for the percentage estimates are shown in parenthesis. For example, an estimated 56 percent of nonmajor rules were published without an NPRM, and we are 95 percent confident that the actual value is within plus or minus 4 percentage of this estimate.

^aAgencies published 568 major rules during calendar years 2003 through 2010. All of the variance in this estimate for major rule is attributable to the sample of major rules reviewed 100 percent of major rules issued from 2007 on, so results for those years have no variance.

^bAgencies published about 30,000 nonmajor rules during calendar years 2003 through 2010.

FIGURE 5.2 ■ **Reasons Agencies Cited for Not Issuing an NPRM from 2003 to 2010**



Source: Government Accountability Office, “Agencies Could Take Additional Steps to Respond to Public Comments,” GAO-13-21 (<https://www.gao.gov/assets/660/651052.pdf>).

Note: Agencies can cite more than one exception for a given rule.

Additional participation can occur if agencies choose to go through an advanced NPRM (ANPRM) process. ANPRMs can increase earlier public participation but are typically used to gather factual and general data to help inform the development of a proposed rule an agency is considering. Once a proposal is issued, the public could then comment more specifically on the agency’s policy suggestions. A recent study found limited use of ANPRMs by regulatory agencies from 2005 to 2015, with an average of about 54 per year compared with a total of 2,403 proposed rules in a given year. These ANPRMs also were rarely used for “major” rules, representing 8 percent of the total.⁶¹ Clearly while ANPRMs can create additional participation opportunities, they are not a tool used very often by agencies.

Case studies, quantitative research, as well as cursory reviews of the *Federal Register* show that participation in rulemaking occurs frequently. Clearly, the type of rules and rulemaking programs that scholars study, including the case studies cited earlier, are prominent with large potential effects and controversial issues. They were highly likely to attract serious attention from interest groups. Minor, routine, and noncontroversial rules are not likely to attract much notice from interest groups because their individual effects are small. And frankly, many rules appearing in the *Federal Register* are of this type. For rules that are issued routinely or in serial fashion, groups try to influence the general standards and procedures that structure the entire program rather than each individual rule. There are other means by which groups can affect rules that do not appear in the preambles of rules. The responses to

formal notices of proposed rulemaking provide an incomplete picture of the forms and frequency of interest group participation.

Empirical research by Marissa Golden suggests wide variation in participation. The number of comments filed on eleven rules she studied ranged from 1 (income eligibility for Department of Housing and Urban Development programs) to 268 (elderly and disabled programs).⁶² This is almost certainly true of rulemaking in general. It is characterized by large numbers of rules that generate little interest and a substantial number in which interest is very high. But there is little question that as a function of government, rulemaking commands the attention of interest groups.

Our original surveys found that roughly 80 percent of the interest groups reported that they participate in rulemaking, and there is no reason to believe that these percentages have changed. Groups attached a high level of importance to this activity on par with, or of greater importance than, lobbying Congress.

Earlier research by Furlong examined the differences that occur between legislative and executive branch lobbying. Drawing on compliance data required by the Lobbying Disclosure Act of 1995, he found efforts to influence Congress far more numerous than efforts to influence executive branch agencies in their development of rules.⁶³ This research focuses only on written comments—just one form of lobbying, and prior to advent of much more extensive and accessible online tools to facilitate rulemaking participation. So, while the results provide a contrast to the survey data, they do not tell the full story.

Overall, evidence from case studies, the *Federal Register*, and the survey provide support for the notion that active public participation in rulemaking is real. Although it is not universal and its occurrence depends on the characteristics of the rule being developed, participation is taken seriously by the interest group community. Opportunities to participate that have been developing for nearly one hundred years are being exploited, but by whom?

Who Participates?

Conventional wisdom and some scholarship would lead one to hypothesize that groups representing business interests participate in rulemaking more often than other types of groups. There are at least two reasons why this imbalance in participation is a reasonable expectation. First, business organizations have long been thought to have superior political resources and skills and are thus better positioned to influence a process that requires sophistication and staying power. Second, in an era of big government, the business community has more to lose than other groups—the poor, the elderly, environmentalists, consumers—who are often perceived to be the primary clients of the agencies writing rules. As James Q. Wilson has noted, people are more likely to get involved in politics and government decision making to save something that is threatened than to gain something new.⁶⁴ Rules and regulations often restrict the discretion businesses enjoy and impose costs for compliance. Businesses often have something real at stake that affects their profits and bottom lines when rulemaking is undertaken.

However, there is an alternative view. Progress was made in the 1960s and 1970s to facilitate participation by groups that might otherwise lack the money or resources to get involved. These efforts, as noted earlier, were enhanced during the

Clinton and Obama administrations. In this way Congress, the White House, and the courts moved to offset the traditional advantages enjoyed by business in the rulemaking process. Following these initial efforts and during the Reagan-Bush years, probusiness policies hostile to the traditional clients of many rulemaking agencies gained presidential support, giving nonbusiness groups plenty of good, defensive reasons to participate in rulemaking. Suddenly, they too had a lot at stake. The available evidence, once again, presents a mixed view on who participates.

As noted earlier, Fritschler's study of smoking and politics found evidence of involvement by many types of groups. Business was active in rulemaking, but so too were health and consumer interests. Another study, one that examined effluent guidelines by the EPA, found rulemaking participation by regulated industries far more common than participation by environmental groups. The authors of this study attribute the apparent imbalance to a combination of ingrained bias and tactics. They note that environmental groups perceived the rulemakers in the EPA as kindred spirits who could be trusted to protect their interests.⁶⁵ In effect, a different form of "capture" occurred that ensured environmental groups the results they wanted without the burdens of direct participation. Or environmental groups may have concluded that their lack of comment and involvement would expedite the rulemaking process and ultimately lead to more and quicker pollution control than if the EPA had to respond to both industry and environmentalists.⁶⁶

Growing empirical research seems to support the idea of business interests dominating rulemaking participation. Golden's research lends support to the argument that business interests dominate rulemaking participation. Her study of comments filed in eleven rules in three agencies finds businesses the most frequent participants by far in rules developed by the EPA and the National Highway Traffic Safety Administration, and a mixed pattern in the Department of Housing and Urban Development.⁶⁷ Furlong's studies also find that businesses and trade associations are more frequent participants in rulemaking.⁶⁸ Sheldon Kamieniecki finds that business interests are more active by percentage in EPA rulemaking compared with natural resource rulemaking, which has more input from citizen organizations.⁶⁹ Jason Webb Yackee and Susan Webb Yackee, in a study examining over thirty regulations from four different agencies, find that over 57 percent of the public comments came from business interests.⁷⁰

The *Federal Register* reports on participation in such a way that patterns in participation by certain groups are difficult to discern, and many of the studies above had to rely on docket information in order to determine what types of groups are participating. Frequently, the agencies publishing the final rules focus on the substance of comments rather than the type of group submitting them. When groups are identified, it is often a single, generic reference. Our survey of interest groups provided evidence that participation in rulemaking is not the sole province of business interests, but they are heavily represented.

Data we have collected in our previous surveys suggest that businesses, and the trade associations that represent businesses and professions, are involved in rulemaking more often than are other groups, and they devote to it greater slices of their likely larger budgets and staffs. A strong case can be made that their superior resources and experience lead to a degree of influence in rulemaking that others

cannot match. But the data from our surveys are not sufficient to establish such a case. It could be that fewer citizen organizations, a category that includes environmental and consumer groups, are involved in rulemaking because these types of groups specialize more than business groups. But, again, the participation gap appears to have narrowed. Perhaps business and trade associations are so frequently threatened by rulemaking that comparatively few can afford to devote their attention elsewhere. In his study of safety standards, Cheit also found more frequent and more intense involvement by the regulated industries than by workers and consumers. But he, too, cautions against drawing conclusions from his observations. In several instances consumers were represented in rulemaking proceedings by those acting effectively as surrogates, such as the National Academy of Sciences. Cheit's work also makes it plain that business interests were not monolithic and sometimes disagreed with each other.⁷¹ Golden found the same phenomenon in her study. She notes, "I did not find undue business influence in rules. . . in part because businesses did not present a united front."⁷² The study of the agricultural marketing order program found substantial participation by producers and handlers of the affected commodities. These groups did not always see eye to eye, either. However, the involvement of the ultimate consumers of the products regulated by the program was nominal at best.⁷³

In short, business and nonbusiness organizations have good reasons to invest their time and energy in rulemaking.

Monitoring Rulemaking, Influencing Rules

To succeed in the rulemaking process, interest groups must know what the agency is preparing to do and use the mechanisms at their disposal to influence it. Neither the case study literature nor material found in the *Federal Register* is particularly instructive on the question of how interest groups monitor rulemaking agencies. In the case study literature, authors are generally concerned with the substance of the rulemaking in question rather than the details of how interest groups go about their work. And one would not expect to read about the monitoring behavior of interest groups in the preambles of final rules published in the *Federal Register*.

In our surveys we asked respondents how frequently they used various devices for monitoring rulemaking. It is evident that interest groups use a host of different devices, some more than others. The *Federal Register*, professional newsletters, and networks of colleagues are used often; consultants are relied on infrequently. Of course, it is also important to note that changes and improvements in technology and the ease of access to documents such as the *Federal Register* make it easier for all to monitor rulemaking activity. It is also easier from the agencies perspective to push such information out to stakeholders through a variety of mechanisms. Obama's Executive Order 13653 would seem to support this type of intentional reaching out to organizations affected by rules.

Another potential way to monitor agency activities is through the use of the unified regulatory agenda, which tends to focus on significant regulatory actions. The Obama administration tried to make the rulemaking process more transparent and open, and, as stated in a report by the Congressional Research Service,

the unified agenda provided such an opportunity. Importantly, it could alert the public of potential regulatory action prior to the publication of a proposed rule.⁷⁴

Of course, a key issue in participation is the ability of groups to influence rule-making and how they go about it. Our survey results on these issues were quite interesting for a number of reasons. It is evident that interest groups did not rely on a single method of monitoring; they used several devices on a regular basis. The same is true of tactics used to influence rulemaking, and, as with monitoring devices, some techniques are more popular than others. Written comments, coalition formation, and contact with the agency both before and after the notice of proposed rulemaking were used often. Our survey also asked the interest groups to rate the effectiveness of the various tactics.

Our survey showed that informal contacts before the notice of proposed rule-making is issued is perceived to be the most effective. Rinfret and Furlong note a need for scholars to pay more attention to the rule development phase as it relates to influence. This is confirmed by William West in multiple studies as well as others in a growing area of interest regarding policymaking. Yackee's study that finds that stakeholders provide technical and political information prior to proposal. Wagner, Barnes, and Peters similarly find that interest groups are most influential during the preproposal stage of rulemaking, and others have explored this area as well.⁷⁵ On reflection, these results should not be surprising. Contact with an agency before it has committed itself to a particular proposal allows the interest group to influence the earliest thinking about the content of the rule.⁷⁶ Comments in the *Federal Register* and grassroots mobilization are also viewed as effective. However effective informal contacts may be, groups can ill afford not to put their views on the public record by providing written comments. Our survey found at the time that attendance at hearings was ranked nearly as high as providing written comments and more effective informal contact with agencies after notice of proposed rulemaking. But the more recent research and literature would suggest that this is not the case.

Research by Susan Webb Yackee suggests influence occurs through the traditional notice-and-comment process. Using content analysis to examine what changes occurred between the proposed and final rules, she examines the types of changes requested by different forms of interest groups and whether comments caused the rule changes. The studies found strong support that comments on proposed rules lead to changes in the final rule. She found that comments lead to the degree of government regulation embodied in a rule, and the agencies adopt specific recommendations made by commenters. Yackee notes that agencies are sensitive to the degree of consensus in public comments and are willing to make significant changes in the final rules to respond to interest group comments. In a separate study, Susan and Jason Webb Yackee found evidence to suggest the type of interest matters. Business commenters appear to have more sway over rule content, and as the proportion of their comments increases, so too does their influence.⁷⁷ This second study specifically examines more "typical" rules, not highly visible or controversial ones. Examining prominent rules may show more participation from nonbusiness interests.

But there is another, different theme in participation research. Kamieniecki states that group input has a minimal influence on shaping a final rule regardless of the organizational type. He comments that the content of the proposed rule is “probably a better indicator of the amount of influence business has in the rule-making process.”⁷⁸ By this he means the different policy postures of presidential administrations and Congresses (e.g., probusiness, proenvironmental) drive the content of rules and both the opportunities and challenges of interest groups. Success is easier when a group is supporting an existing agency proposal than when it is attempting to secure change in a proposal that has emerged after months or years of work. This raises important questions about access to the executive branch and in particular the issue of informal communication that occurs between groups and regulatory agencies.⁷⁹ As noted earlier, studies conducted by William West focus specifically on the role of preproposal participation in rulemaking. The results of interviews conducted for this study suggest that communication between interest groups and agencies prior to the proposed rulemaking is quite common. Consistent with other research findings, West suggests that business interests participate more actively and effectively during the important early stage of rule development. There is substantial variation among agencies West studied in terms of how this participation happens and who it may include, but it is clear that it can have an important effect on rule development.⁸⁰ Similarly, in recent case study research Sara Rinfret also finds preproposal participation to be an important aspect of interest group participation and potential influence. As she notes from respondents in her interviews, “We have less wiggle room after an NPRM and we make influence when talking to the agency during rule development.”⁸¹

The West findings, and the others noted earlier, lend additional support and substance to our survey findings regarding the frequency and importance of informal contacts during the proposal development stage of rulemaking. And these informal communications between interest groups and the agencies do not flow in only one direction. Respondents in our survey noted that agencies often initiated contact with them during the course of rulemaking. The East West Research Group study cited earlier also finds that agencies will often initiate such contacts in order to collect information and improve their rule development.⁸² These results suggest that public participation occurs on a regular basis in rulemaking even when interest groups do not initiate the involvement. It is not surprising that a common reason for these contacts is to get information for the rule under development. Agencies need this kind of help, especially when dealing, as they often do, with production processes and technology or business practices. Some legislation contains specific provisions empowering agencies to collect this type of information. But the data collected in our survey suggest that agencies are attentive to politics, possible legal challenges, and the conditions they are likely to confront when they attempt to implement and enforce the rule under development. Getting a group’s reaction enables an agency to predict the degree of difficulty it will confront if it chooses to move forward with its proposals. Interest groups are not shy about telling agencies when they are unhappy, nor are they loath to threaten political and legal action should the agency proceed on an unacceptable course.

Seeking a group's support is grounded in obvious motives. But what do agencies think of methods used by interest groups to monitor and influence them? In separate research, Furlong tested the same techniques explored in the our survey with a sample of officials from federal agencies. He found that the most common techniques and their perceived effectiveness were written comments, public meetings and hearings, informal communication, and grassroots activity.⁸³ It is important to note that one means of influence not studied in our surveys—communicating with congressional committees or staff—rated highly on both frequency of use and effectiveness with agency respondents. Furlong's respondents considered the use of Congress more frequently used than all techniques other than written comments, participation in public meetings, and informal contacts with agency officials. And they found it more influential than all techniques other than written comments and public meetings.⁸⁴ We will note in the next chapter how Congress exercises oversight of rulemaking, but the subject of Congress as a direct participant in rulemaking and its ability to exert political influence is a ripe territory for future research.

The multidimensional nature of groups' monitoring and influencing behaviors is striking. Although the frequency of use and perceived effectiveness vary widely, no source of information or technique of influence has been abandoned entirely by interest groups or dismissed by agencies. The overall approach appears to be sophisticated, broadly based, and likely expanding given the nature of changing technology and the increased ease of participating in the rulemaking process. Data on the relative effectiveness of influence mechanisms from our initial study are compelling and align with the more current research regarding rulemaking participation. Informal mechanisms and difficult-to-observe mechanisms for communicating views to agencies are used a great deal and are thought to be as or more effective than the traditional means—such as written comment—that figure so prominently in the procedural law and academic literature on rulemaking. Research also suggests that written comments play an important role in influencing rulemakings. It is evident that existing research is not of one voice on the frequency and efficiency of participation, though there is no question it is a force in rulemaking and a major priority of those seeking to influence law and policy. Whatever else, participation is a method for those seeking to influence the rulemaking process, and it can be exercised to full advantage using available technology.

Technology-Enabled Participation

President Clinton's NPR supported, and in some instances stimulated, increased use of information technology in all appropriate facets of government activity. It was a cornerstone of his management reform program. In its 1996 report on implementation of the NPR, the White House noted specifically the increasing use of information technology in regulatory programs and processes.⁸⁵

A significant example of early electronic rulemaking (or e-rulemaking) can be found in the work of the Nuclear Regulatory Commission (NRC). The NRC began using electronic bulletin boards to collect and supply information on proposed rules to the public in the mid-1990s. Its goal was to make all rulemaking documents, including relevant studies and the text of written comments, available to anyone with access to the database.⁸⁶

Other agencies conducted similar experiments using information technology. Also beginning in the mid-1990s the EPA began accepting public comments on rules using e-mail. It also developed listservs, similar to the interest and expertise caucuses at the NRC, to distribute proposed and final rules and to solicit comments. In another example, the Bureau of Land Management focused its energy on managing rules that prompted voluminous public comments. The bureau used scanning and network database capabilities “to manage the receipt, distribution, and analysis of some 30,000 comments on a rangelands proposed rule and [environmental impact statement].”⁸⁷

With electronic communications spreading so rapidly, controversy over electronic rulemaking was inevitable. Responding to both the pace of change and substantive issues, the Administrative Conference of the United States published a study in 1995 on the use of information technology that focused, in part, on rulemaking. The author, Harry Perritt, concluded that “running a . . . rulemaking proceeding electronically” would not violate “the basic requirements of the Administrative Procedure Act.” If “electronic notices and opportunities to comment electronically . . . enhance the opportunity for broader segments of the public to know about agency rulemaking proposals and submit their views,” Perritt believed, “the purpose of Section 553 will be enhanced by automation.”⁸⁸ He also recommended that steps be taken to assist those who were not currently able to participate electronically, that care be taken with copyrighted materials that “are provided and shared electronically” and that the equivalents of a rulemaking “chat room” be free of the requirements of the FACA.⁸⁹ His overall assessment was positive, and he urged agencies to accelerate the use of the Internet and the World Wide Web in rulemaking.

Agency-based efforts to establish electronic dimensions to rulemaking continued through the later 1990s, but the launch of a broader e-government initiative by President George W. Bush accelerated matters considerably. Contained in the OMB’s “E-Government Strategy,” published in the *Federal Register* on February 27, 2002, Bush’s vision emphasized that “government needs to reform its operations—how it goes about its business and how it treats the people it serves.”⁹⁰ The Bush administration viewed e-government as a means to make the business of government more “citizen-centered” and efficient. It also led inexorably to a new and more centralized phase for e-rulemaking efforts.

The current state of e-rulemaking was summarized in a report to the president and Congress prepared by the Committee on the Status and Future of e-Rulemaking that operated under the auspices of the American Bar Association. It was endorsed by a wide variety of groups concerned in one way or another with rulemaking. The committee noted that by 2008 e-rulemaking at the federal level consisted of three interrelated elements:

1. the FDMS (Federal Docket Management System) e-docket, an electronic repository for digitized versions of rulemaking documents organized in electronic dockets, with associated document management capabilities;
2. FDMS.gov, a password-protected interface through which agencies access the repository; and
3. Regulations.gov, the public interface through which those outside the federal government access publicly available materials in FDMS and can submit comments on proposed rules.

The committee concluded that “the federal government’s eRulemaking Initiative has had significant success. More than 170 different rulemaking entities in 15 Cabinet Departments and some independent regulatory commissions are now using a common database for rulemaking documents, a universal docket management interface, and a single public website for viewing proposed rules and accepting on-line comments.”⁹¹

But the committee also cautioned, “At the same time, much work remains to be done. So far, the Initiative’s focus has been largely limited to putting existing notice-and-comment processes online. Even this has not been entirely successful. A number of significant structural and policy issues must be addressed before the full potential of federal e-rulemaking can be realized.”⁹²

The committee issued recommendations in a number of key areas, including the architecture of the system, funding, decision-making authority, the ability of the public to use the system, and the capacity for diversification and innovation. Among the more notable were calls for a multileveled system of governance committee that included representatives of the various users, a number of actions that could improve the quality and accessibility of information in the system, steps to improve ease and frequency of public use, and ideas for promoting the development and use of best practices while exploring promising innovative techniques. The value of deeper involvement with the issues involved in a given rulemaking concerned the committee as well, and it endorsed exploration of a variety of interactive techniques that would promote the extensive give-and-take between and among agencies and participants.⁹³ Skepticism lingered on a very fundamental point. To paraphrase a very familiar line, if they build it, will the public come?

The committee’s strong endorsement of the potential of e-rulemaking notwithstanding, at least one of its members cautioned against excessive exuberance. In 2006 University of Pennsylvania professor Cary Coglianese wrote that the fundamental obstacles in the path of a robust and heavily used e-rulemaking system have little to do with the system itself. Reflecting on the body of scholarship reviewed earlier in this chapter, he finds little evidence that the common man or woman is anything other than a rare participant in rulemaking. He makes the important point that what stands in the way of broader and deeper participation is not so much inadequate technology or opportunity, but knowledge of the importance, content, and process of rulemaking, and a strong motivation to get involved. He notes that while participation may increase due to e-rulemaking, it will be selective.⁹⁴ This, again, underscores the role of organized interests and the inevitability that whatever else e-rulemaking does, it will strengthen the already influential players.

We would be remiss if we did not note that there is also a strain in literature that views e-rulemaking as a threat to the ability of agencies to do their work effectively. E-rulemaking raises the specter of vast expansion of the electronic equivalents of form letters and postcard comment campaigns by savvy interest groups. Scholars have cautioned that electronic participation in rulemaking, taken to extremes by groups with narrow agendas, can immobilize rulemakers with huge volumes of comment.⁹⁵ Agencies are bound by law to read and respond to the comments they receive. But the advocates for e-rulemaking see hope even here in the development

of pattern recognition software that will enable agencies to scan, organize, and respond to large numbers of public comments in an effective and efficient manner.

All of these issues came to the forefront with the Federal Communications Commission's (FCC) net neutrality rule proposed in 2014. As a result of the e-rulemaking process, nearly four million comments were submitted to the FCC regarding this proposal. Many of these were a result of a segment done by comedian John Oliver, who begged listeners to submit comments to the FCC to preserve net neutrality. It probably goes without saying that many of the viewers of the show had no idea what rulemaking was and how these activities affect the daily lives of people. But Oliver's comments spurred thousands to submit comments. Interestingly, based on research conducted by Lauren Moxley, it appears that the FCC did their due diligence in taking all of these comments into consideration as part of their review. This showcases the potential of an open rulemaking system and with the implementation of e-rulemaking, the ability for significant participation and perhaps true democracy. As noted by FCC commissioner Jessica Rosenworcel, "They lit up phone lines, clogged our email in-boxes, and jammed our online comment system. That might be messy, but whatever our disagreements on network neutrality, I hope we can agree that's democracy in action."⁹⁶

In research specifically addressing the quality of comments as a result of the Rulemaking.gov site, Thomas Bryer finds in his analysis of comments that they "tend to be emotional, illogical, and lacking in credibility." Bryer looks at three rules (one from HHS, one from EPA, and a third from the National Oceanic and Atmospheric Administration [NOAA]). He hypothesizes that the level of complexity and saliency of the rules will partially predict the quality and type of comments (as shown in Figure 5.3). In general, Bryer finds that a large percentage of the comments had "no credibility," "low or some logic," and were "emotionally-based." The sample of comments that he examined for the NOAA rule were "unaltered form letters." So, while the quantity and ease of participation is clear, one needs to also ask about the quality of such participation. Bryer raises the question of whether such democratization might be more harmful than beneficial (see Table 5.1).⁹⁷

FIGURE 5.3 ■ Relationship between Saliency, Complexity, and Comment Quality and Type

High saliency + Low complexity =	<i>Low-quality public comments, high personalization</i>
High saliency + High complexity =	<i>Mixed-quality public comments, blended personalization</i>
Low saliency + High complexity =	<i>High-quality public comments, low personalization</i>

Source: Thomas A. Bryer, "Public Participation in Regulatory Decision-Making: Cases from Regulations.gov," *Public Performance & Management Review*, Vol. 37, No. 2, December 2013, pp. 263–279. p. 269.

TABLE 5.1 ■ Comment Characteristics for High-Salience Issues: Quality

Comment characteristics	HHS rule (high salience, low complexity): Percentage comments	EPA rule (high salience, high complexity); Percentage comments
Relevance		
High relevance	6%	64%
Some relevance	91%	33%
Low relevance	3%	3%
Credibility		
Clear credibility	16%	28%
No credibility	84%	72%
Logic		
High logic	8%	21%
Some logic	37%	51%
No logic	55%	28%
Objectivity		
Fact-based	3%	8%
Fact- and emotion-based	26%	49%
Emotion-based	72%	44%

Source: Thomas A. Bryer, "Public Participation in Regulatory Decision-Making: Cases from Regulations.gov," *Public Performance & Management Review*, Vol. 37, No. 2, December 2013, pp. 263–279. p. 271.

Note: Percentages might not equal 100% because of rounding.

E-rulemaking is a reality, and there is no question that it will be a very prominent, if not dominant, force in the mechanics of public participation. But, as Coglianesse and others have noted, e-rulemaking in itself will not bring people and interests to the table who should be present but are not when agencies write rules. Another innovation in rulemaking seeks to do just those things.

Negotiated Rulemaking and Other Outreach Processes: Participation at Its Most Intense

Negotiated rulemaking, or *reg neg*, as it has come to be called, offers the public the most direct and influential role in rulemaking of any reform of the process ever devised. Its origins can be traced back more than seventy years to the Fair Labor Standards Act, which established committees of management, labor, and

other interested parties to work cooperatively to make rules that affected wages and other important conditions of work in a variety of sectors and industries. John Dunlop, a Harvard professor of economics and later secretary of labor, proposed in 1975 that rules and regulations affecting the workplace be determined by a consensual process that involved in a direct and substantial way those interested parties that held a stake in their content. Long a prominent theoretician and practitioner of mediation, Dunlop believed that the same general principles that guided collective bargaining for wages and other conditions of employment could be profitably applied to the process of rulemaking.

This fundamental idea began to take more specific shape in the early 1980s as scholars and practitioners began to write about the topic. They set out the rationale for regulatory negotiation, its likely benefits, the conditions for success, and the obstacles to its implementation. The most influential of these writers was Phillip Harter, whose article “Negotiating Regulations,” which appeared in the *Georgetown Law Journal* in 1982, is perhaps the most frequently cited and influential exposition of the case for regulatory negotiation.

Harter’s argument proceeds from a withering critique of the methods of rulemaking that it would supplant. His survey of contemporary rulemaking found it to be a fundamentally adversarial process in which affected parties jockeyed with one another and with the agency for influence and advantage. The process of developing the information for the content of the rule had become a ritual dance in which the participants staked out extreme positions and offered what they knew selectively to bolster their particular position. Information became distorted, and some participants used the comment process simply as a means of establishing in the rulemaking record a basis for a subsequent lawsuit. A profound “malaise” had settled over this most crucial instrument of government. Much of the blame, Harter believed, could be attributed to a design that separated the interested parties in a rulemaking from one another and the agency through an antiseptic process of written comment or the limited exchanges of a legislative-type hearing or the stylized adversariness of formal rulemaking. Issuance of rules was frequently delayed, their quality often poor. Rules enjoyed little support from key constituencies, implementation was difficult, and compliance was anything but automatic. Involved only remotely in the development of rules, affected parties and interest groups had no stake in their success. Put simply, the legitimacy and authority of rules were undermined because the process used to develop them was flawed.

Harter offered an alternative process, one in which conflict was acknowledged but resolved through face-to-face negotiations. As he put it, “the parties participate directly and immediately in the decision. They share in its development and concur with it rather than ‘participate’ by submitting information.”⁹⁸ This approach explicitly altered the role of agency officials by reducing them to the status of participants in the group that would negotiate the content of the regulation.

Harter and other advocates of regulatory negotiation were quick to point out that it was neither feasible nor necessary for many rules. It is unnecessary when there is little controversy associated with the development of a rule. When the course of action is clear and undisputed, or when there is little interest in the result, investment in regulatory negotiation would be frivolous. But even when the rule

and the conflict surrounding it are substantial, there are criteria by which to determine whether regulatory negotiation has a reasonable chance to succeed.

The criteria were drawn from well-developed principles of mediation and bargaining and from Harter's own experience with the technique. Rules that present conflict over deeply held values are not candidates for negotiation. Sufficient information about the likely effects of a rule is needed so that those who might participate in the negotiation can be identified. Potential parties to the negotiation must be able to perceive gain from the process and must be sure that, with or without their participation, a decision on the rule will be made. The success of negotiated rulemaking depends in large part on the ability to identify and invite to the table all the substantially affected interests. Leaving a critical actor behind exposes the negotiation to legal challenges, undercuts its legitimacy, and reduces the likelihood that the result will be of high quality. Conversely, the list of invited parties should not be too long. As Harter puts it, "Negotiations will clearly not work among an auditorium full of people."⁹⁹ The give-and-take of issues and positions can occur only with a limited number of people.

Negotiations must have deadlines. Without them they are subject to manipulation by parties more interested in delay than in results. The parties must agree on what constitutes consensus and, when it occurs, accept the results. Here the role of the agency is critical. In a negotiated rulemaking the agency must maintain a delicate balance. On the one hand, the agency cannot accept a consensus agreement that is illegal, bad public policy, or simply infeasible. On the other hand, the agency cannot walk away from such an agreement solely because it did not achieve all of its preferences. Doing so would alter the negotiation, transforming it into a glorified public hearing or policy dialogue. Finally, negotiated rulemaking requires ground rules that the group will observe during the bargaining session and a neutral, competent convener, preferably skilled in the techniques of mediation. These are essential if the process is to move smoothly and fairly.

What would an agency gain by using negotiated rulemaking instead of conventional rulemaking? In negotiated rulemaking, according to Harter and others, the freer flow of information in the possession of the parties leads to higher quality results produced in less time than is possible with conventional rulemaking. Even when negotiations do not proceed to a complete and full agreement, the information developed during the bargaining sessions can be put to good use should the rulemaking revert to a more conventional process. The parties, because they have become stakeholders in the rule, will not litigate after the rule is completed, and the perceived legitimacy of the regulation will increase in the eyes of those affected by it. This increase in legitimacy and the understanding of the rule's requirements engendered during the negotiations will speed implementation of its provisions and ostensibly the flow of benefits. The public sector will save money on enforcement costs because the participants in the negotiations will comply with the rule voluntarily and knowledgeably.

These arguments were sufficiently convincing that Congress, prodded by the Administrative Conference of the United States, enacted legislation that endorsed the technique and established principles for its use. It stopped short of mandating the process, but subsequent, more narrowly focused statutes did require agencies to

use it. Several programs in the Department of Education and NRC contained such provisions.¹⁰⁰ The Clinton administration also boosted the program. Bargaining is implicit in the partnerships that President Clinton hoped would drive or replace rulemaking. The administration promoted bargaining between the public and private sectors by means other than general admonitions in the NPR. In 1993, before many of the NPR projects got under way, the president issued a memorandum to all agency heads expressing his support for negotiated rulemaking.¹⁰¹ More than an expression of support, the memorandum required each agency to select at least one rule scheduled for development that could be written using this device. It also required a detailed explanation if the agency could not come up with such a rule. By the beginning of Clinton's second term, most cabinet-level departments and several independent regulatory commissions had launched one or more negotiated rulemakings.

The theory of negotiated rulemaking is clear, but what has been the actual practice? The Administrative Conference of the United States issued a report in 1990 that described the subject matter of the negotiated rules in eight agencies and summarized how the proceedings were concluded. Of the nineteen negotiations discussed, ten reached final consensus and two did not conclude with an agreement.¹⁰² The remaining were still in process at that time. The agencies reported that despite the lack of consensus, the information developed during negotiations contributed substantially to the rule that was ultimately produced, providing some supporting evidence for at least one claim of the advocates.

Cary Coglianese, writing in the *Duke Law Journal* in 1997, examined the timeliness and litigation experience of rules developed using negotiation. He found that negotiated rulemaking fared poorly on both counts. His data did not support the arguments of proponents that negotiated rules are produced more quickly than are rules developed using conventional procedures.¹⁰³ His results challenge those of an earlier and more limited study of four negotiated rulemakings at the EPA by Kerwin and Furlong.¹⁰⁴ He has also questioned the soundness of a process that may compromise the constitutional functions of government and that elevates consensus above other, more fundamental values.

The most rigorous study of negotiated rulemaking was sponsored by the Administrative Conference of the United States. Laura Langbein and Kerwin examined rules developed using reg neg and compared them with roughly equivalent rules developed using conventional techniques.¹⁰⁵ Negotiated rulemaking fared quite well. Compared with participants in conventional rulemaking, negotiated rulemaking participants gave the process higher marks for the quality of information it generated and the amount they learned. Participants in negotiated rulemaking also reported that their influence on the final rule was greater than that of those who engaged in conventional rulemaking. On a wide range of criteria (economic efficiency, cost-effectiveness, compliance, legality, the quality of the overall process, net benefits for the participants' organization, and the participants' personal experience with the rulemaking), negotiated rulemaking received higher ratings than did conventional proceedings. Langbein, in a follow-up to this study, also found that negotiated rules tended to be more responsive than conventional rulemaking. Of course, the question of responsiveness to which interest group must also be addressed.¹⁰⁶

In another study Langbein and Jody Freeman argue that negotiated rulemaking may also yield what they call a “legitimacy benefit.”¹⁰⁷ Interviewees for the Administrative Conference study did note that they had developed a deeper appreciation for the complexities of government decision making and a better understanding of positions taken by persons with different interests. There is no dispute about costs. Negotiated rulemaking is expensive, and the time and resource costs are disproportionately high for small businesses.

Although the Langbein-Kerwin study is based on a survey technique that asked respondents for obviously subjective judgments, it is the most compelling evidence to date that negotiated rulemaking produces, on many fronts, results that are superior to conventional rulemaking and consistent with the theory outlined earlier. While the later Langbein study raises possible concerns of inequity of results between small and big businesses, it is unclear if inequities that occur in negotiated rules are any greater than conventional rulemaking. The arguments for and against negotiated rulemaking are both important and interesting, but the compelling fact is that the actual use of the technique has fallen on very hard times. Even its most ardent supporters must admit that in recent years it has been used far less often than they would have predicted or preferred. Writing recently, Jeffrey Lubbers, a prominent expert on rulemaking, notes its decline in use, which he attributes to a confluence of powerful forces. He cites the demise of the Administrative Conference of the United States (an early and strong institutional supporter), tight agency budgets, opposition or indifference by the leaders of the OIRA, the use of somewhat similar but less burdensome methods known collectively as “reg neg lite,”¹⁰⁸ skepticism by some scholars, and the constraints of the FACA as combining for what amounts to a perfect storm. Lubbers concludes that without reversal on several of these fronts and a strong boost from Congress, whatever its potential, negotiated rulemaking will have a limited role at best.¹⁰⁹

The Administrative Conference issued new, and in some cases ongoing, recommendations regarding negotiated rulemaking in 2017. While recognizing the possibilities of the process, they also note that there are significant limits placed upon agencies in finding the appropriate rule to negotiate and procedural limitations imposed by FACA. The Administrative Conference suggests other forms of public participation (e.g., dialogue session, meetings) as alternative ways to gather information without necessarily seeking a “consensus position.” They also suggest that Congress may want to “exempt negotiated rulemaking committees from FACA’s chartering and reporting requirements” as a way of making “reg neg” easier, as long as there is a change to the Negotiated Rulemaking Act that ensures transparency.¹¹⁰

Few important rules in the future will be developed without the use of one or more of the features of formal negotiations. Although Harter cautions against undisciplined and uninformed uses of negotiation and mediation in rulemaking, he remains, after twenty-five years, convinced of its value. He views it as an important form of deliberative democracy that transforms but does not diminish the role of agencies. This form of rulemaking is, to Harter and others, a middle course between a system dominated by political power and one that relies ultimately on agencies to make the right decision, even when conditions of great uncertainty prevail.

DOES PARTICIPATION MATTER?

In his influential *Harvard Law Review* article titled “The Reformation of American Administrative Law,” Richard Stewart argued that “interest representation” was the primary function of our contemporary bureaucracy and the administrative procedures it uses to make decisions.¹¹¹ If his analysis is correct, we would expect participation to be the single most important element in rulemaking, for it is through this device that bureaucrats learn what these varied interests want. It is important, then, to learn how agencies act when the preferences of interest groups are revealed. When interests are at odds, some must win and some must lose.

Determining whether interest groups that participate get what they want is an analytical task as difficult as it is important. Much must be known about the law that established the boundaries of the rulemaking, the true preferences of the groups affected, the accuracy of the communication of those preferences to the agency decision makers, and the benefits the rule bestows and the costs it imposes. For each of these dimensions, questions arise: How does the authorizing statute increase or limit the prospects for those who want to participate in the rulemaking? If the law requires agencies to base their rules on rigorous assessments of risk to human health and safety, some of the information needed to conduct such studies will be in the possession of the regulated community. How does this affect interest groups’ ability to participate? Harter has argued that the current rulemaking process often leads interests to distort their true positions for strategic purposes.¹¹²

At the most basic level it is important to learn whether agencies take public participation as seriously as interest groups do. Evidence from all sources, including the research already reviewed earlier in this chapter, indicates clearly that agencies take public comments very seriously indeed. As noted earlier, interest groups believe that their comments, whether in writing or delivered less formally, are effective and that agencies frequently seek out their views and change rules in response to comments. An examination of the *Federal Register* confirms that comments are carefully recorded and agencies respond to their contents in the preambles of final rules. While a review of the *Federal Register* will not answer questions such as the importance of a particular comment to an interest group, or even who is making the comment, it does show that agencies take the comments seriously.

Case studies provide yet another view on the matter. Most case studies deal with rules that have substantial consequences for businesses of one kind or another. Thus, the question they are most likely to address is whether business interests dominate or succeed disproportionately in their efforts to influence rulemaking. The case study literature is instructive, not because it yields an unequivocal answer to this important question but because it demonstrates the complexity of the issue. There are examples of programs that are seemingly dominated by what we would call business interests. One example is the agricultural marketing order program. The analysis of that rulemaking program made it quite clear that the producers and handlers of the regulated agricultural commodities dominated the committees from which the rules originated. But, at the same time, a degree of conflict between these two business interests effectively prevented either of them from

dominating the process. Although representatives of consumers were rather few and far between, the Department of Agriculture, which holds the ultimate authority for issuing the marketing orders, served, at least on occasion, as an effective check on those business interests. The dominance of decision-making processes and rulemaking outcomes by business is not apparent in other studies, however. The cigarette labeling case is a prominent example of strong opposition by a powerful industry that was ultimately unsuccessful. Cheit's case studies provide additional examples of business interests faring poorly at the hands of rulemakers. He found that the safety standards that OSHA set for grain elevators were opposed by operators "with vigor."¹¹³ Three different trade associations became involved with the Consumer Product Safety Commission's rule relating to woodstoves, but Cheit found that collectively "they were barely more effective than no association at all."¹¹⁴ When that same commission issued a rule related to ventilation for gas-fired space heaters, the Gas Appliance Manufacturers' Association immediately petitioned to have it revoked.¹¹⁵ When the Federal Aviation Administration, reacting to a fire that killed passengers on an Air Canada flight, issued regulations governing fire extinguishers, congressional pressure for action completely eclipsed any influence of the industry.¹¹⁶ In their study of water pollution rules by the EPA, Wesley Magat and his colleagues at Resources for the Future found that affected industries commented on the standards far more often than did environmental and other nonbusiness groups. Their comments were usually critical of the rules, but Magat and his colleagues found that they had, at best, limited success in obtaining the changes they desired.¹¹⁷ In nine of the eleven rules Golden studied, changes occurred between draft and final rules, presumably because of comments.¹¹⁸ But only one rule "changed a great deal," whereas others had "some" or "minimal" change. Finally, Rinfret's case research did not find significant differences between how industry groups framed issues in their attempt to influence rules preproposal compared with other organization types.¹¹⁹

Should we conclude from these cases that business lacks influence in the rulemaking process? Certainly not. No easy generalizations about the overall influence of business interests can be drawn from this handful of cases. Case studies, as noted earlier, are often done on rules selected because of their prominence and the controversy that attended their development. In more recent studies discussed earlier, a number of scholars do find not only an increased level of participation at all levels by business but also a bias toward business influence. Business interests may be powerful, but they are not politically omnipotent. More important, the case studies demonstrate that business interests do gain important concessions in rulemaking even when they are not able to achieve all they wanted. The cigarette labeling rule did not, at least when it was first issued, make the warning to consumers as strong as it might have been. The grain elevator rule contained a standard that, although opposed by industry, was eight times less stringent than the most demanding alternative that OSHA had considered. In the matters of the unvented gas space heaters, the trade association representing the manufacturers was ultimately successful in getting the commission's rule revoked, but the manufacturers then faced the uncertainty of regulation at the state and local levels. The gas space heater rule is also interesting because industry itself was split on it. Although the trade association clearly opposed it, "some major retailers saw a clear advantage in

federal regulation.”¹²⁰ What prompted this unexpected support was the fear of what might happen if state or local governments began acting on the issue. Finally, in the case of water quality regulations, the analysts found evidence of success for a portion of the companies studied. It appears from their data that companies represented by large trade associations with plentiful resources obtain somewhat less stringent standards than do other types of firms.¹²¹

The relationship between rulemaking agencies and business groups differs from program to program and from rule to rule. The variable factors include the discretion the statute being implemented allows; the pressure on the agency from Congress, the White House, and the courts; the quality of information at the agency's disposal and who controls it; the degree to which business groups perceive benefits or costs; the ability of the business community to organize a response to the agency's initiative; and the opposition to the business position from other organized interests.

Our own survey data and research suggest a level of success by rulemaking participants. Groups that participate in rulemaking do so to get what they want. Success, or the lack of it, will certainly affect future participation. Accordingly, it should be interesting to determine what groups think about their ability to influence the content of rules when they get involved in rulemaking. Respondents were asked how often they achieved what they had set out to achieve. Virtually no group characterized itself as completely successful or unsuccessful. Over 80 percent of the respondents considered themselves able to influence rulemaking on a regular basis. This optimistic assessment may suggest that organizations have clear incentives to present themselves as successful in their efforts. Research by Furlong provides an alternative set of views on the effectiveness of interest group participation in rulemaking from the perspective of the rulemaking agencies. The rulemakers were somewhat less sanguine about the ability of interest groups to influence their decisions than are the groups themselves. Of course, the rulemakers' numbers must be considered in light of another kind of potential bias. Agency rulemakers are by now quite sensitive to charges of “unresponsiveness” and “capture” by special interests. Very low or very high scores on Furlong's question could be interpreted as unwillingness to listen to the public or, alternatively, as willingness to serve as a doormat. Curiously, the responses cluster around a midpoint of behavior by agencies, somewhere between turning a deaf ear to regulated entities and doing whatever it is that they are told. The evenhandedness suggested in the survey has been observed in other studies of regulatory decision making as well.¹²² Examining agency responsiveness from another perspective, it is clear that agencies are definitely interested in what the public has to say prior to the proposal, as discussed earlier. We also see a level of responsiveness in the reg neg studies. So is there any reason to believe that agencies would not also take public comments seriously when crafting a regulation?

The evidence on participation in rulemaking lends support to Stewart's concept of “interest representation.” During the past several decades, the opportunities to participate have grown and diversified, creating a rulemaking process in which interest groups are major forces. Interest groups are aware of the importance of rulemaking. They devote resources to it and use a variety of devices to monitor what rulemakers are doing. Groups use numerous tactics to influence the course and outcomes of rulemaking. They consider themselves quite successful in achieving

their objectives. The rulemakers acknowledge their presence, listen attentively to what they have to say, and are convinced by their arguments with some degree of regularity. Many variables influence the outcome of each rulemaking. Public participation is clearly one of those variables.¹²³

The success of this participation occurs during both the formal elements of the rulemaking process (e.g., providing comments to proposed rules) as well as activities that occur prior to the formal notices. Our initial research as well as subsequent work done by other rulemaking scholars continue to confirm this.¹²⁴ As an example, Yackee finds that *ex parte* contacts affect “regulatory policy outputs,” and that such contacts tend to provide technical and political information. . . . at a higher rate than those participants not employing informal lobbying.”¹²⁵ In addition to these findings, we have evidence to suggest that those that are doing the participating believe that it matters. Susan Webb Yackee finds in a study of the Wisconsin rulemaking process that survey respondents had “high levels of internal efficacy” and had “a lot of say” in the rulemaking process. In another finding, her results also show a “perceived advantage” for business organizations compared to citizens supporting other research discussed in this chapter.¹²⁶ These findings of efficacy matter in a process that espouses such public participation.

Beyond whether participation in the process leads to changes to a rule lies the issues of compliance with these agency rules. As noted, much of the “reg neg” research suggest that organizations comply better when they are actively part of the process. Recent research by Malesky and Taussig finds that firms are more likely to “comply with regulation after participating in its design by government.” As they note, these experience can shape “the firm’s view of government legitimacy, but only if the firm views government as responsive to its input.”¹²⁷

Other influences have not yet been discussed. Each of the major branches of government—Congress, the president, and the judiciary—has compelling reasons to take an interest in the development of rules. Their review of rules both during and after they are developed by agencies constitutes another major influence on the rulemaking process. It is to the review of these three branches that we now turn.

Notes

1. Phillip Harter, “Negotiating Regulations: A Cure for the Malaise,” *Georgetown Law Journal* 71 (1982): 17, 31.
2. *Ibid.*, p. 14. See also Glen O. Robinson, *American Bureaucracy* (Ann Arbor: University of Michigan Press, 1991), pp. 128–129.
3. William F. West, “Formal Procedures, Informal Process, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis,” *Public Administration Review* 64, no. 1 (2004): 66–88.
4. Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked,” *American Political Science Review* 78 (1987): 165; Mathew

- D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3 (1987): 243.
5. West, op. cit.
 6. Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. 8, 77th Cong., 1st sess., 1941, p. 103 (hereafter cited as Attorney General's Committee).
 7. *Ibid.*, pt. 7, Department of the Interior, p. 66.
 8. *Ibid.*, p. 114.
 9. *Ibid.*, p. 104.
 10. *Ibid.*
 11. *Ibid.*
 12. *Ibid.*, p. 105.
 13. *Ibid.*, p. 104.
 14. *Ibid.*
 15. *Ibid.*, pp. 105–108.
 16. *Ibid.*, pp. 108–111.
 17. *Ibid.*, p. 110.
 18. David Rosenbloom, "Public Law and Regulation," in *Handbook of Public Administration*, ed. Jack Rubin, W. Bartley Hildreth, and Gerald Miller (New York: Marcel Dekker, 1989), p. 556.
 19. For interesting perspectives on the notice-and-comment provisions of the APA by two men who were deeply involved in the Attorney General's Committee, see Kenneth Culp Davis and Walter Gellhorn, "Present at the Creation: Regulatory Reform before 1946," *Administrative Law Review* 38 (1986): 511–533.
 20. Jeffrey Berry, Kent Portney, and Ken Thomson, "Empowering and Involving Citizens," in *Handbook of Public Administration*, ed. James Perry (San Francisco: Jossey-Bass, 1989), p. 209.
 21. See, for example, David Mazmanian and Jeanne Neubauer, *Can Organizations Change? Environmental Protection, Citizen Participation, and the Corps of Engineers* (Washington, D.C.: Brookings Institution, 1979).
 22. Benjamin Mintz and Nancy Miller, *A Guide to Federal Agency Rulemaking*, 2nd ed. (Washington, D.C.: Administrative Conference of the United States, 1991), pp. 172–173, n. 12.

23. Office of the Chairman, *A Guide to Federal Agency Rulemaking* (Washington, D.C.: Administrative Conference of the United States, 1983), pp. 67–70.
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. 5 United States Code 561–670 (hereafter cited as U.S.C.).
29. Public Law 104-121.
30. Thomas Kelly et al., *Final Report of the SBREFA Small Business Advocacy Review Panel for Control of Emissions from Non-Road Diesel Engines* (Washington, D.C.: Environmental Protection Agency, 1997).
31. Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, 4th ed. (Chicago: American Bar Association, 2006), p. 181.
32. Office of Management and Budget, *Improving Government Regulations: A Progress Report* (Washington, D.C.: Executive Office of the President, 1979), p. 9.
33. *Ibid.*, pp. 13–15.
34. *Ibid.*, p. 15.
35. *Ibid.*, pp. 15–16.
36. *Ibid.*, p. 16.
37. James Anderson, "Agricultural Marketing Orders and the Process and Politics of Self-Regulation," *Policy Studies Review* 2 (1982): 97–111.
38. Mancur Olson, *The Logic of Collective Action* (New York: Schocken Books, 1965); James Q. Wilson, "The Politics of Regulation," in *The Political Economy*, ed. Thomas Ferguson and Joel Rogers (New York: Sharpe, 1987), pp. 84–88.
39. Office of Management and Budget, *Improving Government Regulations*, p. A6.
40. *Ibid.*, pp. A29–A30.
41. *Ibid.*, p. A45.
42. *Ibid.*, p. A78.
43. *Ibid.*, pp. A78–A79.
44. *Ibid.*, p. A79.
45. Robert Anthony, "Interpretive Rules, Policy Statements, Guidelines, Manuals and the Like—Should Agencies Use Them to Bind the Public?" *Duke Law Journal* 41 (1992): 1131–1384. See also Jeffrey Lubbers, *A Guide to Federal*

- Agency Rulemaking*, 3rd ed. (Chicago: American Bar Association, 1998), pp. 69–74.
46. Jason Webb Yackee and Susan Webb Yackee, "Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making 'Ossified'?" *Journal of Public Administration Research and Theory Advance Access*, June 10, 2009.
 47. See U.S. Government, Executive Order 13422, *Federal Register*, January 23, 2007.
 48. Berry, Portney, and Thomson, "Empowering and Involving Citizens," pp. 209–210.
 49. Theodore Lowi, "Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power," *American University Law Review* 36 (1987): 295–322.
 50. Executive Office of the President, *Regulatory Program of the United States Government* (Washington, D.C.: Government Printing Office, 1991), app. 3.
 51. Christine Triano and Nancy Watzman, *All the Vice President's Men: How the Quayle Council on Competitiveness Secretly Undermines Health, Safety, and Environmental Programs* (Washington, D.C.: OMB Watch/Public Citizen, 1991), p. i.
 52. Al Gore, *Common Sense Government Works Better and Costs Less: Third Report of the National Performance Review* (Washington, D.C.: National Performance Review, 1996), p. 45.
 53. Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Regulation," *Federal Register*, March 20, 2002, p. 15017.
 54. *Ibid.*, p. 15022.
 55. Scott Furlong, "Businesses and the Environment: Influencing Agency Policymaking," in *Business and Environmental Policy*, ed. Michael E. Kraft and Sheldon Kamieniecki (Cambridge, Mass.: MIT Press, 2007).
 56. "Federal Regulatory Review" Request for Comments, *Federal Register*, February 26, 2009, p. 8819.
 57. Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, 3 CFR 13563.
 58. A. Lee Fritschler, *Smoking and Politics*, 4th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1989); Wesley Magat, Alan Krupnick, and Winston Harrington, *Rules in the Making* (Washington, D.C.: Resources for the Future, 1986); Ross Cheit, *Setting Safety Standards: Regulation in the Private and Public Sectors* (Berkeley: University of California Press, 1990); Anderson, "Agricultural Marketing Orders"; Mark Rothstein, "Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example," *Boston College Environmental Affairs Law Review* 12 (1985): 627; William F. West, *Administrative Rulemaking: Politics and Processes* (New York: Greenwood Press, 1985).

59. Juan Lavilla, "The Good Cause Exemption to Notice and Comment Rulemaking Requirements under the Administrative Procedure Act," *Administrative Law Review* 3 (1989): 317; Christopher Mihm, "Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiative Reveal Opportunities for Improvements," GAO-05-939T (Washington, D.C.: July 2005), p. 5.
60. "Federal Rulemaking Agencies Could Take Additional Steps to Respond to Public Comments," GAO-13-21 (Washington, D.C.: December 2012).
61. Sofie E. Miller and Saayee Arumugam, "Notice & Comment: How Agencies Use Advance Notices of Proposed Rulemaking," *Regulatory Insight*, Regulatory Studies Center (The George Washington University), June 23, 2015.
62. Marissa Golden, "Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?" *Journal of Public Administration Research and Theory* 8 (April 1998): 252–253.
63. Scott Furlong, "Lobbying the Executive Branch: Exploring Interest Group Participation in Executive Policymaking," in *The Interest Group Connection*, 2nd ed., ed. Paul Herrnson, Clyde Wilcox, and Ron Shaiko (Washington, D.C.: CQ Press, 2004).
64. Wilson, "Politics of Regulation," p. 85.
65. One might wonder if environmental groups would still consider the EPA to be kindred spirits in times when presidential appointments appear to be particularly hostile to environmental regulation, such as the appointment of Scott Pruitt by President Trump.
66. Magat, Krupnick, and Harrington, *Rules in the Making*, p. 40.
67. Golden, "Interest Groups in the Rule-Making Process," pp. 252–253.
68. Furlong, "Lobbying the Executive Branch," and "Businesses and the Environment: Influencing Agency Policymaking," in *Business and Environmental Policy*, ed. Michael E. Kraft and Sheldon Kamieniecki (Boston: MIT Press, 2007).
69. Sheldon Kamieniecki, *Corporate America and Environmental Policy: How Often Does Business Get Its Way?* (Palo Alto, Calif.: Stanford University Press, 2006).
70. Jason Webb Yackee and Susan Webb Yackee, "A Bias toward Business? Assessing Interest Group Influence on the Bureaucracy," *Journal of Politics* 68, no. 1 (2006): 128–139.
71. Cheit, *Setting Safety Standards*, p. 141.
72. Golden, "Interest Groups in the Rule-Making Process," p. 262.

73. Anderson, "Agricultural Marketing Orders."
74. Curtis W. Copeland, "Using the Regulatory Agenda to Improve Rulemaking Transparency and Participation," Congressional Research Service (June 29, 2009).
75. Sara Rinfret and Scott Furlong, "Defining Environmental Rulemaking," in *Oxford Handbook of U.S. Environmental Policy*, ed. Michael Kraft and Sheldon Kamieniecki (Oxford: Oxford University Press, 2012), pp. 372–393; William West, "Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls," *Administration and Society* 41, no. 5 (2009): 576–599; West, "Formal Procedures, Informal Process, Accountability, and Responsiveness in Bureaucratic Policy Making"; Susan Yackee, "The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking," *Journal of Public Administration Research and Theory* 22 (2012): 373–393; Wendy Wagner, Katherine Barnes, Lisa Peters, "Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Regulations," *Administrative Law Review* 63 (2011): 99–158; Jeffrey Cook and Sara Rinfret, "The EPA Regulates GHG Emissions: Is Anyone Paying Attention?" *Review of Policy Research* 30, no. 3 (2013): 263–280.
76. Stephen Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard University Press, 1982), p. 107.
77. Susan Webb Yackee, "Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking," *Journal of Public Administration Research and Theory* 16 (January 2006): 103; Yackee and Yackee, "A Bias toward Business," p. 128. For the second study, it is important to note that the authors select rules to study that are purposely considered "everyday business." Rules with a large number of comments that may signify increased levels of controversy or prominence were excluded.
78. Kamieniecki, *Corporate America and Environmental Policy*, p. 133.
79. *Ibid.*
80. The East West Research Group, George Bush School of Government and Public Service, Texas A&M University, *Outside Participation in the Development of Proposed Rules*, September 26, 2006. See also William West, "Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls," *Administration and Society* 41 (September 2009): 576. A later study by West and Raso also shows that groups as part of their subgovernment relationships, particularly economic groups, help frame the decisions regarding which rules agencies choose to initiate. See William F. West and Connor Raso, "Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control," *Journal of Public Administration Research and Theory* 23 (July 2013): 495.

81. Sara Rinfret, "Behind the Shadows: Interest Groups and the U.S. Fish and Wildlife Service," *Human Dimensions of Wildlife: An International Journal* 16 (January 2011): 1, p. 11. See also Richard Hoefer and Kristen Ferguson, "Controlling the Levers of Power: How Advocacy Organizations Affect the Regulation Writing Process," *Journal of Sociology and Social Welfare* 34 (March): 83.
82. The East West Research Group, *Outside Participation in the Development of Proposed Rules*.
83. Scott Furlong, "Political Influence on the Bureaucracy: The Bureaucracy Speaks," *Journal of Public Administration Research and Theory* 8 (January 1998): 55.
84. One might ask how these result may change given the past twenty years of congressional decision making and the increased level of partisanship between the parties.
85. Office of Information and Regulatory Affairs, *More Benefits, Fewer Burdens: Creating a Regulatory System That Works for the American People* (Washington, D.C.: Office of Management and Budget, 1996), pp. 35–38.
86. Office of Nuclear Regulatory Research, *Improvement of the Rulemaking Process* (Rockville, Md.: Nuclear Regulatory Commission, 1998).
87. R. Kelly, "Electronic Rulemaking at Several Agencies," e-mail, December 9, 1994.
88. Harry H. Perritt, *Electronic Dockets: The Use of Information Technology in Rulemaking and Adjudication* (Washington, D.C.: Administrative Conference of the United States, 1995), p. 1.
89. *Ibid.*, p. 2.
90. Executive Office of the President, *E-Government Strategy: Simplified Delivery of Services to Citizens* (Washington, D.C.: Executive Office of the President, 2002), pp. 1–37, available at <http://www.whitehouse.gov/omb/inforeg/egovstrategy>.
91. Committee on the Status and Future of Federal e-Rulemaking, "Achieving the Potential: The Future of Federal e-Rulemaking" (Washington, D.C.: Section of Administrative Law and Regulatory Practice, American Bar Association, 2008), p. 3.
92. *Ibid.*
93. *Ibid.*, pp. 33–61.
94. Cary Coglianese, "The Internet and Citizen Participation in Rulemaking," *I/S: A Journal of Law and Policy for the Information Society* 1, no. 1 (2004/2005).
95. Jim Rossi, "Participation Run Amok: The Cost of Mass Participation for Deliberative Agency Decision-Making," *Northwestern University Law Review* 92 (1997): 173.

96. Lauren Moxley, "E-Rulemaking and Democracy," *Administrative Law Review* 68, no. 4 (December 2016).
97. Thomas A. Bryer. "Public Participation in Regulatory Decision-Making: Cases from Regulations.gov," *Public Performance & Management Review*, 37 (December 2013): 263–279.
98. Harter, "Negotiating Regulations," p. 28.
99. *Ibid.*, p. 30.
100. David Pritzker and Deborah Dalton, eds., *Negotiated Rulemaking Sourcebook* (Washington, D.C.: Administrative Conference of the United States, 1990), p. 346.
101. *Public Papers of the Presidents of the United States: William J. Clinton, 1993–2001*, vol. 1 (Washington, D.C.: Government Printing Office, 1995).
102. David Pritzer and Deborah Dalton, eds., "Agency Experience with Negotiated Rulemaking," in *Negotiated Rulemaking Sourcebook* (Washington, D.C.: Administrative Conference of the United States, 1990), pp. 327–344.
103. Cary Coglianese, "Assessing Consensus: The Pressure and Performance of Negotiated Rulemaking," *Duke Law Journal* 6 (1997): 1255–1349.
104. Cornelius M. Kerwin and Scott Furlong, "Time and Rulemaking: An Empirical Test of Theory," *Journal of Public Administration Research and Theory* 2 (1992): 118.
105. Laura Langbein and Cornelius Kerwin, "Regulatory Negotiation: Claims, Counter Claims, and Empirical Evidence," *Journal of Public Administration Research and Theory* 10 (July 2000): 599–632.
106. This study uses the same data as Kerwin and Langbein (1997) and Langbein and Kerwin (2000) and attempts to address some methodological issues of these studies and also examine the issue of inequity that may occur in conventional and negotiated rulemaking process: Laura Langbein, "Responsive Bureaus, Equity, and Regulatory Negotiation: An Empirical View," *Journal of Policy Analysis and Management* 21 (summer 2002): 449.
107. Laura Langbein and Jody Freeman, "Regulatory Negotiation and the Legitimacy Benefit," *New York University Environmental Law Journal* 9 (2000): 60–151.
108. Sara Rinfret, "Cleaning Up the Air: The EPA and Shuttle Diplomacy," *Environmental Practice*, 13 (2011): 1–8; and Sara Rinfret and Jeffrey Cook, "Inside EPA Rulemaking: The Realty of Reg Neg Lite," *Environmental Policy and Governance* 24 (2014): 122–133.
109. Jeffrey Lubbers, "Achieving Policymaking Consensus: The Unfortunate Waning of Negotiated Rulemaking," *South Texas Law Review* 49 (2008): 987.

110. Administrative Conference of the United States, "Negotiated Rulemaking and Other Options for Public Engagement," June 16, 2017, available at <http://www.acus.gov/recommendation/negotiated-rulemaking-and-other-options-public-engagement>.
111. Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1667–1711.
112. Harter, "Negotiating Regulations," pp. 449–450.
113. Cheit, *Setting Safety Standards*, p. 58.
114. *Ibid.*, p. 110.
115. *Ibid.*, p. 141.
116. *Ibid.*, pp. 71–72.
117. Magat, Krupnick, and Harrington, *Rules in the Making*, pp. 39, 147–148, 157.
118. Golden, "Interest Groups in the Rule-Making Process," pp. 259, 260.
119. Rinfret, "Changing the Rules."
120. Cheit, *Setting Safety Standards*, p. 141.
121. Magat, Krupnick, and Harrington, *Rules in the Making*, p. 157.
122. Terry Moe, "Control and Feedback in Economic Regulation: The Case of the NLRB," *American Political Science Review* 79 (1985): 1094–1116.
123. The East West Research Group, *Outside Participation in the Development of Proposed Rules*; Langbein, "Responsive Bureaus, Equity, and Regulatory Negotiation: An Empirical View."
124. See various citations in this chapter to research conducted by Golden, Rinfret, West, and Yackee. In addition, similar results are suggested at the state level. See research by Neil D. Woods, "Regulatory Democracy Reconsidered: The Policy Impact of Public Participation Requirements," *Journal of Public Administration Research and Theory* 25 (2013): 571–596.
125. Yackee, "The Politics of Ex Parte Lobbying."
126. Susan Webb Yackee, "Participant Voice in the Bureaucratic Policymaking Process," *Journal of Public Administration Research and Theory* 25 (April 2015): 427–449.
127. Edmund Malesky and Markus Taussig, "The Danger of Not Listening to Firms: Government Responsiveness and the Goal of Regulatory Compliance," *Academy of Management Journal* 60 (2017): 1741–1770.