

Spring 2013

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Recommended Citation

Sidney Shapiro and Richard Murphy, *Public Participation without a Public: The Challenge for Administrative Policymaking*, 78 Mo. L. Rev. (2013)

Available at: <http://scholarship.law.missouri.edu/mlr/vol78/iss2/7>

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Public Participation Without a Public: The Challenge for Administrative Policymaking

Sidney Shapiro*
Richard Murphy**

To promote accountability, the order provides a mechanism for the White House working group to engage directly with the public, *including the business community*, by establishing a process to solicit input on how best to eliminate unnecessary costs.¹
Eighty percent of success is showing up.²

I. INTRODUCTION

The first quote above comes from an op-ed that Cass Sunstein, then Administrator of the Office of Information and Regulatory Affairs (OIRA),³ published on May 1, 2012, in that bastion of deregulatory zeal, the *Wall Street Journal*.⁴ In his op-ed, Sunstein extolled the virtues of a new executive order issued by President Obama designed to promote international harmonization of regulations.⁵ The goal of such harmonization is to adopt common regulatory standards with other countries in order to facilitate international

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1. Cass Sunstein, *The White House vs. Red Tape*, WALL ST. J. (Apr. 30, 2012), <http://online.wsj.com/article/SB10001424052702304811304577369934135888006.html> (emphasis added).

2. William Safire, *On Language; Marry-o? Mahr-yo?*, N.Y. TIMES (July 23, 1989), <http://www.nytimes.com/1989/07/23/magazine/on-language-marry-o-mahr-yo.html> (quoting Woody Allen).

3. For those less familiar with the American administrative law landscape, OIRA is a division of the Office of Management & Budget, which is housed in the White House. As an arm of the White House that exercises a measure of supervisory authority over agency rulemaking, OIRA has been at the center of a longstanding debate over the degree to which the President can direct rulemaking by agencies. It has been characterized as “the single most powerful office most people have never heard of.” Stephanie Young, *OIRA Chief Sunstein: We Can Humanize, Democratize Regulation*, HARV. L. REC. (Mar. 12, 2010), <http://hlrecord.org/?p=9714> (quoting Harvard Law School Dean Martha Minow’s introduction of Administrator Sunstein).

4. See Sunstein, *supra* note 1.

5. *Id.*; see Promoting International Regulatory Cooperation, Exec. Order No. 13,609, 77 Fed. Reg. 26413 (May 1, 2012).

trade.⁶ But harmonization efforts, conducted by unelected bureaucrats from different countries, naturally raise concerns regarding accountability. To assuage such concerns, Administrator Sunstein offered administrative law's usual response: We promise to let the "public" participate somehow in the rulemaking process.⁷

But what if the only members of the "public" who show up are readers of the *Wall Street Journal*? This concern is far from hypothetical: corporate interests dominate participation in the legislative rulemaking process in the United States.⁸ As such, we might expect Woody Allen's observation (our second opening quote) to come into play. If eighty percent of success is indeed just a matter of showing up, then public participation schemes designed to promote accountability or to "democratize" rulemaking have the potential to distort rulemaking into favoring private, special interests. Determining the extent of such distortion presents a terrifically difficult problem—in part because there is no consensus baseline with which to measure departures from the public interest. Still, it seems safe to presume that profit-oriented, corporate interests perceive that they get *something* worthwhile from their large investments in regulatory proceedings—and we are inclined to trust this perception.⁹

As Isaac Newton taught us long ago, for every action there is an equal and opposite reaction. To the degree that unelected, unaccountable mandarins rule, the people do not. Regulatory agencies, headed by unelected administrators, can thus create a "democracy deficit" and, at least for those who believe government derives its legitimacy from democracy, a legitimacy deficit, too. Various polities have addressed this democracy deficit by embedding public administration in "accountability network[s] of rules and procedures[.]"¹⁰ A requirement of public participation is one such procedure common to many countries and many situations. Whether public participation serves the public, however, depends on many factors, including the par-

6. See, e.g., Sidney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435, 436 (2002) (describing "harmonization" as "the adoption of an international standard that adjusts the regulatory standards or procedures of two or more countries until they are the same").

7. See 77 Fed. Reg. 26413 (noting that the Administrator of OIRA, who doubles as the Chair of the Regulatory Working Group charged with fostering harmonization, "may solicit input, from time to time, from representatives of business, nongovernmental organizations, and the public").

8. See *infra* Part III.B (discussing participation by corporate interests and public interest groups in the rulemaking process).

9. See *infra* Part III.C (concluding that the evidence is suggestive that corporate dominance of regulatory participation biases outcomes in favor of special interests but conceding the difficulty of definitive measurement).

10. Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 861 (2011).

particulars of the public participation scheme, the agency's regulatory tasks, the agency's resources and competence to fulfill those tasks, and the resources and leverage of all those persons who may be affected by the agency's actions.

Bearing the preceding points in mind, this brief Article raises three broad concerns relating to public participation in rulemaking. *First*, to assess whether public participation serves the public, it is important to understand why such participation is desirable in the first place. In recent decades, two answers in particular have dominated discourse. Following pluralistic conceptions of democracy, one might say that democracy is the way that multifarious private interests that constitute the "public" cut a deal among themselves. Insofar as agency policymaking amounts to coordination of such dealmaking, it is legitimized by its democratic nature.¹¹ A deliberative democracy conception, by contrast, sees public participation as an integral part of a process that requires agencies to consider all relevant interests before acting and to publicly justify their actions with reasoned explanations.¹² The debate over which of these conceptions is better remains unresolved, and the word "democracy" is certainly fuzzy enough to allow for both. But, as this Article will develop, these conceptions can lead to very different understandings of what public administration ought to be about, and, given a choice, we will take deliberation over deals.

Second, under either conception, there is an elephant in the room in the United States: corporate clout. Empirical work demonstrates that public interest groups only participate in some rulemakings, and when they do participate, their efforts are overwhelmed by the participation of corporate interests.¹³ While less certain as an empirical matter, the evidence also suggests that this domination biases the rulemaking process under either conception of public participation.¹⁴

Third, bearing these lessons from the American experience in mind, we hope that participants at this international forum of administrative law scholars can shed light on how clout affects (or distorts) the operation of public participation in administrative policymaking, both in their own home polities and in international or global settings. We are especially interested in hearing assessments of how well "new governance" initiatives that hope to "let

11. See generally Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 32 (1998) (describing the pluralistic account of agency policymaking and discussing how leading accounts of regulation can all be traced back to it).

12. See, e.g., Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 857-58 (2012) (describing deliberative democracy theory).

13. See, e.g., Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128 (2011); see also *infra* notes 60-63 and accompanying text.

14. See *infra* § III.B-C.

stakeholders develop concrete solutions” seem to play out in practice.¹⁵ Do these initiatives enable especially powerful stakeholders to distort outcomes in their favor? Why or why not? Also, circling back to the opening of this Article, the potential for harmonization of regulatory requirements to enhance economic efficiency is obvious. However, this process also poses a danger of adopting least-common-denominator regulations that fail to protect public health and safety sufficiently. To the degree the “public” (*i.e.*, interested parties with sufficient resources) participates in developing international or global standards, how big a problem is clout?

Carrying scars from the American experience, the authors suspect these developments may well enhance the clout of powerful special interests, suggesting to us that we should be careful about our enthusiasm for them. Of course, if these developments do enhance clout, then backing away from them may prove easier said than done. We expect that corporate interests would use their clout to pursue reliance on new governance and global standards precisely when they stand to benefit from these moves. But perhaps we are unduly pessimistic. It may be, as some academic literature indicates, that the forces that may counterbalance corporate influence have greater strength in other countries.¹⁶

But in the United States, at least, it is past time to think about how to address the problem of clout. This Article views this problem from the perspective of those who see public participation primarily as a means of fostering democratic deliberation designed to promote wise, expert, public-regarding policy choices. One path to improving the capacity of public participation to foster such deliberation might be to strengthen public interest groups so that they have the means to respond to corporate participation.¹⁷ Notwithstanding its attractions, this approach must confront some rather obvious problems—*e.g.*, in the unlikely event that Congress ever chose to fund public interest groups’ efforts to challenge government action, it would have to determine which entities are worthy of its largess.

This Article therefore closes by suggesting an alternative path for exploration: the government should strengthen the most important public interest group of all—the government itself. Deliberative democracy can only work where the rulemaker has the resources necessary to assess independently the

15. David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 542 (2007).

16. See, *e.g.*, Bignami, *supra* note 10, at 886-88 (noting that the role of labor, industrial, and newer advocacy groups in policymaking “still stands out when contrasted with the public-private divide in American administrative law”).

17. For efforts along these lines, see, *e.g.*, Sidney Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741 (2008); Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221 (2012) [hereinafter Shapiro, *Complexity of Regulatory Capture*].

efforts of special interests to push regulations in their favor. Thus, the chief bulwark against industry biasing of rulemaking must be an expert civil service. Of course, this path, too, may not be that realistic. No American politician can go wrong bashing the bureaucracy. Since the record of the civil service does not justify this demonization, we see the problem of clout once again. In a *post-Citizens United* world,¹⁸ it will be difficult, perhaps impossible at least in the short-run, to overcome the campaign against government by political interests that benefit from a lack of government regulation. But as impractical academics, we press on.

II. PUBLIC PARTICIPATION LEGITIMIZES, BUT WHY?

Public participation is commonly said to legitimize government either because it creates a pluralistic interest group process or because it results in deliberative democracy.¹⁹ For reasons explored below, as believers in both “expertise” and the “public interest,” we prefer that public administration and law aspire to the latter model.²⁰

In the 1950s, political scientists, reacting to the embarrassingly low voting rates in the United States, offered a pluralistic account of the legitimacy of American government. This account sees governmental decision making as the product of conflict and compromise among interest groups.²¹ Ultimately, this bargaining legitimates government, because in the long run, it leads to a fair and equitable division of benefits and burdens as long as sufficient groups participate to represent the diverse interests of the public. Policy outcomes that “reflect an equilibrium among all interests” are therefore more desirable than outcomes that advantage a particular interest or interests.²²

In his seminal article, *The Reformation of American Administrative Law*, Professor Richard Stewart suggested that federal courts in the 1960s and 70s sought to embed this pluralistic model into administrative law.²³ According

18. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that statutory ban on independent corporate expenditures to support or oppose candidates for political office violated the First Amendment).

19. See, e.g., Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 445-46 (2003) (discussing the “complementary” role that the interest representation and analytic management models play in responding to the democracy deficit – notwithstanding “serious tensions” between the two).

20. We are mostly unembarrassed by our inability to identify what we mean by “public interest” with precision. We may not always know it when we see it, but we often know it when we don’t see it. See generally Shapiro, *Complexity of Regulatory Capture*, *supra* note 17, at 223-25 (discussing the difficulty of defining the “public interest” and offering a definition of regulatory capture).

21. See Croley, *supra* note 11, at 31-34.

22. *Id.* at 32.

23. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1712 (1975).

to this view, agency policymaking should be a product of bargaining among interested parties who may engage in political horse-trading to come to some mutually acceptable result. Legitimacy of agency policymaking has the same ultimate source as legislative policymaking – politics.²⁴ The agency aspires to be something like an honest broker between interested parties.

By contrast, the deliberative-democratic model understands public participation as a means of fostering broadly democratic, reasoned conversations among agencies and outsiders that ultimately lead to better policymaking in the public interest.²⁵ Requiring agencies to listen to the voice of the people – or at least the voices of those people who show up – treats the governed with the respect that citizens deserve. It also provides agencies with more information upon which to base their policy decisions. Requiring agencies to give public justifications for their actions enhances transparency and accountability to the public. While agencies must also offer a justification for choosing policy solutions based on a deal among competing interests, the reasons are after-the-fact justifications, rather than an effort to work through conflicting evidence and arguments in a genuine effort to choose the most appropriate regulation. The agency in the deliberative model aspires to be a kind of democratically-informed mandarin.

The reader may be forgiven for asking whether the choice between the theories is just a matter of “You like tomato and I like tomahto.”²⁶ After all, might not public participation serve both functions, fostering democratic deliberation and forcing agency policymaking to accommodate the interests of stakeholders, in some mixture that may not be readily discernible but is broadly acceptable?

In one important negative sense, our hypothetical reader is right, and the choice does not matter. Both theories fail if there is not a fair balance of stakeholders who participate in the process. As Part III explains, this lack of a fair balance is a real problem – the proverbial elephant in the room mentioned earlier. To our minds, however, the choice matters because it concerns the degree of politics that is appropriate in administrative policymaking.

These days, almost no one who thinks about the problem for more than a moment believes that significant administrative policymaking is merely a matter of adding expert knowledge of the facts to correct construction of the law.²⁷ Perfect knowledge of every effect of a toxic pollutant at every level of

24. *Id.*

25. See Staszewski, *supra* note 12, at 885-86 (noting that in the deliberative democratic model “political decisions should reflect the preferences that emerge from a process of reasoned deliberation, rather than the pre-political preferences of a majority of citizens or the strength of competing interest group pressures.”).

26. ELLA FITZGERALD & LOUIS ARMSTRONG, *Let’s Call the Whole Thing Off, on THE BEST OF ELLA FITZGERALD AND LOUIS ARMSTRONG* (Verve 1997).

27. Some defenders of the New Deal insisted that agency discretion was not problematic because it would be exercised based on apolitical, scientific expertise. See William Funk, *Public Participation and Transparency in Administrative Law* –

exposure on everyone in the world cannot determine what level is low enough to be “safe.” Administrative policymaking demands that agencies make value choices, and in a democracy, the agency should be politically accountable for its choices. But accepting these facts of administrative life does not settle the question of how the agency should make its choices in the first place. Some bargaining is an inescapable part of regulating a complex and political world through complex and political bureaucracies; politics must bracket the discretion that an agency can exercise. Still, within this policy space, we prefer that agencies implement *their* best judgments about how to proceed. To put the matter another way, some agency rules, as appropriate as they may be, simply will not fly as a political matter. So be it. But, for the reasons we take up next, we prefer agencies to reach decisions without bargaining over the result with stakeholders.

Our definition of expertise is broad. We recognize that scientific and social scientific methodologies, in practice, cannot make complex policymaking into a completely objective affair. These methodologies, particularly cost-benefit analysis, have not displaced the operation of politics, often lack accuracy, and are subject to being manipulated according to an analyst’s policy preferences.²⁸ Moreover, claims about objectivity are simply “untenable in light of post-empiricism.”²⁹ “[E]conomics (and other social sciences) [at best are] a mixture of empirical data and social construction.”³⁰ Following on from this, experts are not limited to persons trained in scientific methodologies but include other professionals, particularly lawyers and public administrators, who rely on qualitative analysis to identify and justify regulatory solutions.

Our preference for public administration over political bargaining is rooted in a stubborn insistence that both details and aspirations matter. Choosing the “best” rule may, in many cases, prove to be a fearsomely complex, uncertain, value-laden task. Still, we contend that administrative exper-

Three Examples as an Object Lesson, 61 ADMIN. L. REV. 171, 177 (2009) [hereinafter Funk, *Public Participation*] (discussing the “[e]xperts . . . would know what to do” defense of the New Deal). Some New Dealers, however, saw professionalism, not expertise, as the protection against abuse of discretion. See Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 486-88 (2012) [hereinafter Shapiro, Fisher & Wagner, *The Enlightenment of Administrative Law*] (discussing how Progressives modified their original claim for objectivity).

28. See Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 450-59 (2008); see also Funk, *Public Participation*, *supra* note 27, at 182 (noting that the Reagan administration used cost-benefit analysis to push a deregulatory agenda and that the Clinton administration, rather than abandon this tool, instead used it to push its own agenda).

29. See Shapiro & Schroeder, *supra* note 28, at 460-62.

30. *Id.* at 461.

tise located in a discursive process of consultation with the public is the process most likely to serve the public interest. We support democratically informed expert judgment over political trade-offs because we believe the former is more likely, generally speaking, to lead agencies to choose better, public-regarding outcomes than the latter, which encourages lowest common denominator policymaking and distortion in favor of powerful, parochial interests.

Why, however, think that an agency can determine the public interest better than other stakeholders? This query goes back to the point that expertise, *sans* values, cannot justify policy choices, or at least the type of policy choices that agencies must make. For instance, we know that ingesting too much arsenic is very bad for people. We do not have perfect information about this problem – *i.e.*, we cannot track the dose response curve down to zero. Also, this information does not tell us how much to spend to address any problems of arsenic ingestion – *e.g.*, it does not tell us how much to spend to limit arsenic levels in drinking water in the American Southwest, where relatively high levels are naturally occurring. Nonetheless, it should be easy for everyone to agree on a ban on adding arsenic to soft drinks for children.

Suppose, however, that an agency, after excluding such extreme possibilities, concludes that “reasonable” people might accept an upper limit of arsenic in drinking water at somewhere between X and Y parts per million. Given that we are now within the regulatory range where contestable values come into play, what could be more sensible than allowing interested parties to strike a deal somewhere between these two levels?

One problem with this approach is that it underestimates both the degree to which values and facts intertwine and the power of motivated reasoning (*i.e.*, politics) to distort expert judgment. Senator Patrick Moynihan famously remarked, “[e]veryone is entitled to his own opinion, but not to his own facts.”³¹ He may have been correct as a matter of principle, but, in practice, people find the facts they want.³² We therefore should not be surprised if a regulatory system that aspires to deal-making finds that the political aims of its strongest actors distort expertise more than in a system that aspires to expert identification and implementation by public servants of a broad public interest.³³

31. DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY 2 (Steven R. Weisman, ed., 1st ed. 2010).

32. As Upton Sinclair put the point, “[i]t is difficult to get a man to understand something, when his salary depends upon his not understanding it!” UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (1935).

33. Cf. William Funk, *When Smoke Gets in your Eyes: Regulatory Negotiation and the Public Interest – EPA’s Woodstove Standards*, 18 ENVTL. L. 55, 95 (1987) (criticizing negotiated rulemaking (also known as “reg-neg”) on the ground that it excludes diffuse, disorganized interests from negotiations).

It also bears noting that maximizing the role of expert judgment (informed by public participation) and minimizing pluralistic bargaining is broadly consistent with the kind of democracy we learned about in grammar school. We've conducted no surveys on this point but nonetheless will hazard that people expect agencies to use their authority to create the best policies they can rather than to coordinate deals among interest groups.

Realistically, agencies operate in the pluralistic world of politics, requiring them to accommodate pressures from all directions, be they from the White House, Congress, agencies themselves, or outside stakeholders with political influence. Nonetheless, we submit that the aspiration of regulators should be to create rules based on their best judgments of the broad public interest, minimizing the distorting effect of special interests. The democratic-deliberation model embraces this aspiration, and it is therefore preferable to the interest-group representation model with its aspiration of deal making.

III. THE SOME-ARE-MORE-EQUAL-THAN-OTHERS PROBLEM OF PUBLIC PARTICIPATION IN AMERICAN RULEMAKING

To an American legal mind, the most prominent example of public participation legitimizing administrative policymaking is the notice-and-comment rulemaking process of the United States' Administrative Procedure Act (APA).³⁴ The American experience with this process demonstrates that public participation schemes designed to democratize and improve the substance of administrative policymaking may distort outcomes in favor of powerful special interests and away from expert, public-regarding results. The short of the matter is that an even playing field cannot guarantee a competitive game among players of unequal strength. In aggregate, regulated parties have far more information and resources to bring to bear to affect administrative policymaking than do public-interest organizations with no direct profit motive in a particular regulatory fight. Agencies, often starved for resources themselves, may rely on regulated parties for information that, in the usual case, public-interest groups cannot be expected to review or correct. Notice-and-comment procedures create multiple pressure points that enable outsiders to distort agency judgment – the threat of judicial review being the most obvious example.³⁵ Regulated parties, as profit-motivated entities with direct, bottom-line stakes in rulemaking, have greater resources than public interest groups to manipulate these pressure points. The upshot of this power imbalance is that special interests can often manipulate the rulemaking process to favor their interests.³⁶

34. See 5 U.S.C. §§ 551-59 (2006).

35. See, e.g., *id.* §§ 701-06 (2006) (establishing judicial review procedures for agency decisions).

36. This concern is not, of course, new. See Stewart, *supra* note 23, at 1713 ("It has become widely accepted, not only by public interest lawyers, but by academic

In this section, we discuss the evolution of rulemaking doctrines to allow and encourage the participation of regulatory beneficiaries, usually represented by public interest groups, and the failure of these efforts to achieve a balanced rulemaking process. We cannot measure the precise degree to which this imbalance causes agencies to adopt regulations that are more favorable to regulated entities than they would be with greater public interest participation, but there is evidence that this is the result.

A. *Cliff Notes History of Notice-and-Comment Rulemaking*

As originally contemplated back in 1946 when the APA was enacted, the notice-and-comment process was quite simple.³⁷ In essence, the agency had to explain what it was thinking about regulating, give others a chance to say what they thought about the agency's thoughts, and then wrap things up by justifying the agency's ultimate regulatory choice.³⁸ At the end of this process, a proper party who disliked the agency's choice could challenge it on judicial review, where federal courts would test the rule's legality.³⁹

This process remained a simple one until the "public interest" era of 1965-75. During this time, to the lasting puzzlement of public choice scholars, there was an explosion of legislation addressing widely publicized health, safety and environmental disasters.⁴⁰ Afraid that what they had won in Congress would be "lost in the halls of administrative agencies," public interest advocates turned to the courts to head off capture.⁴¹ Judges responded by creating "a strong presumption that agency action and inaction were subject to judicial review," by adopting liberalized standing requirements that permitted public interest groups to sue agencies on behalf of regulatory beneficiaries and by requiring agencies to take a "hard look" at the evidence in the rule-making record and to justify a rule in light of that evidence.⁴² This last re-

critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.").

37. Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 551-59).

38. 5 U.S.C. § 553(b), (c).

39. *Id.* §§ 701-06.

40. See MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* 5 (1982) (noting Congress passed 25 laws regulating the business community between 1967 and 1973).

41. Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 100 (1996).

42. Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 694-95 (2000) [hereinafter Shapiro, *Counter-Reformation*].

form was intended to ensure that agencies paid attention to the evidence that public interest groups had submitted.⁴³

These changes were manifestations in the rulemaking context of Professor Stewart's "reformation" of American administrative law noted above.⁴⁴ Whereas the preceding administrative regime applied procedural requirements to protect private property and ensure "due process" for property owners, the reformation sought to give all "affected interests" (*i.e.*, regulatory beneficiaries) rights to participate in and influence agency proceedings.⁴⁵ The assumption of the reformation leaders was that this change would produce a pluralistic administrative process, one in which public interest groups could use their power to do battle with industry interests to shape administrative outcomes.⁴⁶ On a more than incidental note, Professor Stewart was dubious about the reformation's chances for full success, predicting that inadequate resources and collective action problems would prevent adequate representation of all interests significantly affected by a decision.⁴⁷ It turns out that he was right.⁴⁸

In the decades since Professor Stewart's article, notice-and-comment rulemaking in the United States has become much more complex and is now festooned with requirements for impact statements and cost-benefit analysis.⁴⁹ It is tempting to regard this increase in deliberative requirements as reflecting increasing prominence of the deliberative democracy account of agency legitimacy. Ironically, they might be better understood as reflecting political efforts to control agency policymaking – either by slowing it down (paralysis-by-analysis) or by centralizing control in the White House via cost-benefit analysis conducted by OIRA.⁵⁰

As notice-and-comment rulemaking increased in complexity and difficulty, critics charged that the system was breaking down or becoming "ossi-

43. *See id.*

44. *See* Stewart, *supra* note 23, at 1669; *supra* note 23 and accompanying text.

45. *See* Stewart, *supra* note 23, at 1760-61.

46. *See id.* at 1790.

47. *See id.* at 1763. Professor Stewart was especially dubious of the prospects of notice-and-comment rulemaking as a means to enable participation of all affected interests. *Id.* at 1775 (noting that public interest groups "have tended to scorn resort to rulemaking proceedings[,]” observing that “the content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence”).

48. *See infra* Part III.B.

49. Shapiro, *Counter-Reformation*, *supra* note 42, at 706-08 (briefly describing the requirements of cost-benefit analysis and impact statements for rulemaking).

50. *See* Funk, *Public Participation*, *supra* note 27, at 182 (observing that the Reagan order requiring cost-benefit analysis by agencies, Exec. Order No. 12,291, “on its face . . . appeared to be a retreat to the Landis model of administrative expertise,” but “in reality . . . was an attempt to assert presidential political control over an administrative state that had grown increasingly complex”).

fied.”⁵¹ In response to such problems, Professor Philip Harter led the charge for negotiated rulemaking or “reg-neg.”⁵² On this pluralistic approach, interested parties – including both regulated parties and beneficiaries – negotiate the terms of a rule.⁵³ After these parties reach a consensus, the agency runs the rule through notice-and-comment, which, in theory, should prove straight forward as all the relevant interests have already worked out their differences.⁵⁴ Congress provided express authorization for agencies to pursue this type of rulemaking process in the Negotiated Rulemaking Act of 1990.⁵⁵ Yet, reg-neg has been controversial since its inception. Its supporters, led by Professor Harter, claim that it provides an efficient means to develop better rules with greater “buy-in” from interested parties.⁵⁶ Its critics worry that it can lead to illegal rules that sell out the public interest.⁵⁷ Perhaps most notably, notwithstanding all the fanfare, agencies very rarely use reg-neg, which has not lived up to whatever potential it may have had to move rulemaking in the direction of the pluralistic model.⁵⁸

51. Some twenty years on, we are still debating whether rulemaking has ossified or not. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1179 (2008) (reviewing ossification debate and concluding that “the ossification concern is genuine even if indeterminate”).

52. See generally Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

53. Funk, *Public Participation*, *supra* note 27, at 175.

54. *Id.*

55. Pub. L. No. 101-648, 104 Stat. 4970 (1990) (codified as amended at 5 U.S.C. §§ 561-70 (2006)).

56. See, e.g., Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 38-39 (2000) (“Negotiated rulemaking has proven enormously successful in developing agreements in highly polarized situations and has enabled the parties to address the best, most effective, or most efficient way of solving a regulatory controversy.”); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 63 (2000) (contending that reg-neg confers added legitimacy to rules).

57. See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1373-74 (1997) (contending that reg-neg provides too much power to private parties at the expense of agencies); Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, 34 VAL. U. L. REV. 423, 434 (2000) (contending that “[t]urning over the power of government to collaboratives is misguided and a departure from democratic ideals”); see also Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1257-59 (1997) (concluding, based on empirical study, that reg-neg does not attain its “instrumental goals . . . of saving [rulemaking] time or reducing litigation”).

58. See, e.g., Dorit Rubinstein Reiss, *Account Me In: Agencies in Quest of Accountability*, 19 J.L. & POL’Y 611, 675-76 (2011) (noting the rarity of negotiated rulemaking and suggesting this rarity may be due to agency incentives).

B. The Asymmetry

A number of empirical studies have found that business interests dominate rulemaking, as measured by the number of rulemakings in which various interests filed comments or by the relative number of comments that were filed in rulemakings.⁵⁹ The latest and most comprehensive study, by Professor Wendy Wagner and her coauthors, confirmed these results in a study of ninety hazardous air pollutant rulemakings at the Environmental Protection Agency (EPA).⁶⁰ On average, industry filed over 81% of the comments submitted concerning a proposed rule;⁶¹ public interest groups filed comments in less than 50% of the rulemakings;⁶² and industry interests had an average of at least 170 times more information communications with EPA staff (meetings, phone calls, letters, etc.) than did public interest groups during the period before the Notice of Proposed Rulemaking (pre-NPRM period).⁶³

White House review of significant rules, which occurs at OIRA, reinforces or even exacerbates existing pluralistic imbalances.⁶⁴ Professor Rena Steinzor and her coauthors from the Center of Progressive Reform (CPR) found that 65% of the participants in 1,080 meetings at ORIA were from industry interests, which was 5 times the number of attendees who represented public interest groups.⁶⁵ Of the lawyers, consultants and lobbyists who attended these meetings, nearly 95% represented business interests, as compared to 2.5% who represented public interest groups.⁶⁶ Corporate interests

59. See Shapiro, *Complexity of Regulatory Capture*, *supra* note 20, at 237-38 (describing studies of industry dominance).

60. Wagner, Barnes & Peters, *supra* note 13, at 128.

61. *Id.* The number of industry comments also greatly outnumbered public interest comments for those rules where there were public interest comments. Industry filed an average of 35 comments per rule, while public interest groups filed an average of 2.4 comments per rule. *Id.* at 128-29.

62. *Id.* at 128.

63. *Id.* at 125. Industry interests had an average of 84 contacts per rule as compared to an average of 0.7 contacts for public interest groups. *Id.*

64. For a recent anecdote on this point, consider John M. Broder, *New Proposal on Fracking Gives Ground to Industry*, N.Y. TIMES (May 4, 2012), <http://www.nytimes.com/2012/05/05/us/new-fracking-rule-is-issued-by-obama-administration.html> (explaining that proposed rule requiring oil and natural gas companies to disclose the cocktail of chemicals they inject into the ground as part of “fracking” was “sharp[ly] changed” to allow disclosure after rather than before drilling after oil industry lobbyists “met with officials of the Office of Management and Budget, who reworked the rule to address industry concerns about overlapping state regulations and the cost of compliance”).

65. RENA STEINZOR, CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 18-19 (2011), http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

66. *Id.*

also met alone with OIRA far more often. Seventy percent (70%) of the more than 1,000 meetings involved only industry interests, while only 7% involved only public interests.⁶⁷

While the evidence is not conclusive, the evidence we have shows an imbalance between public interest and private interest representation in the rulemaking process. This imbalance occurs both at agencies and at OIRA concerning its review of proposed and final rules.

C. *The Consequences*

On either an interest-representation or a deliberative-democratic model, severe asymmetry in public participation is not a good thing. If agencies (and OIRA) are bargaining with stakeholders, industry interests have a greater opportunity to influence the rulemaking process. If agencies are relying on public comments for rulemaking information, the potential exists for “filter failure,” which Professor Wagner has identified as an ironic result of the reformer’s efforts to expand public participation. Because the courts expect an agency to respond to all significant comments,⁶⁸ it cannot “shield itself from this flood of information and focus on developing its own expert conception of the project.”⁶⁹ This expectation presents a problem in which asymmetrical information overwhelms the agency and influences the outcome.⁷⁰

Still, to what extent do we know for sure that asymmetric corporate participation in the rulemaking process bends rules toward industry concerns and preferences and away from the public interest?⁷¹ Most observers assume this overwhelming asymmetry produces outcomes that favor industry interests,⁷² and the evidence is supportive, but not conclusive, that the assumption is

67. *Id.* at 21.

68. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 245 (2d Cir. 1977) (reversing an FDA regulation governing good practices for whitefish in part because the FDA failed to respond to an important technical comment in its final rule); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an “agency must examine the relevant data and articulate a satisfactory explanation for its action”).

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

70. *Id.* at 1342.

71. The famous quote from Charles Erwin Wilson, former Secretary of Defense and CEO of General Motors comes to mind – “for years I thought what was good for our country was good for General Motors and vice versa.” See Justin Hyde, *GM’s “Engine Charlie” Wilson Learned to Live with a Misquote*, DETROIT FREE PRESS (Sept. 14, 2008), <http://www.freep.com/article/20080914/BUSINESS01/809140308/GM-s-Engine-Charlie-Wilson-learned-live-misquote>.

72. See Shapiro, *Complexity of Regulatory Capture*, *supra* note 20, at 234-41 (noting comments of observers).

accurate. The Wagner study found EPA mostly changed rules in the direction favored by industry.⁷³ Other studies have found a similar result,⁷⁴ but there are also studies that have not found a connection between industry dominance and changes favorable to industry.⁷⁵

There is less empirical evidence regarding the impact of the representational asymmetry on OIRA. We do know that it is OIRA's habit to oppose stringent regulation,⁷⁶ but analysts have failed to link the greater industry presence to changes in rules in favor of industry.⁷⁷ The absence of this connection leads some analysts to doubt that the White House uses the review process to deliver benefits to powerful interests,⁷⁸ but we are not so sure. First, OIRA often leaves no fingerprints, making it difficult to verify empirically a bias in favor of industry.

It is supposed to operate under transparency rules, but it has found ways to avoid these rules.⁷⁹ Second, the many meetings between industry interests and OIRA undoubtedly are about regulatory costs, and the public interest community lacks an equal opportunity to focus OIRA on regulatory benefits.⁸⁰

73. Wagner, Barnes & Peters, *supra* note 13, at 130 (noting comments raised an average of 22 significant issues in each rulemaking, and EPA on average made changes to the final rule concerning about one-half of these issues. Of the changes made, 83 percent of them weakened the rule in some manner).

74. See Shapiro, *Complexity of Regulatory Capture*, *supra* note 20, at 239 n.82 (describing the studies).

75. *Id.* at 240 n.85 (describing the studies).

76. See Shapiro & Schroeder, *supra* note 28, at 450-51 (discussing evidence of OMB bias).

77. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 858-60, 877 (2003) (finding that OIRA sought changes in politically controversial rules, but finding that the type of interest group that attended a meeting with OIRA officials did not predict whether OIRA would change the rule or accept it as is).

78. See, e.g., *id.* at 858-60.

79. See U.S. GEN. ACCOUNTABILITY OFFICE, NO. GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 7 (2003), <http://www.gao.gov/new.items/d03929.pdf> (finding "neither OIRA nor the agencies are required to disclose why rules are withdrawn from review, and the descriptions that OIRA discloses about its contacts with outside parties is often not very helpful" and that "neither [OIRA] nor the rulemaking agencies are required to disclose the changes made to rules while they are under informal review – the period in which OIRA said it can have its greatest effect").

80. See Shapiro, *Complexity of Regulatory Capture*, *supra* note 20, at 241 (noting that industry lobbying tends to confirm an overemphasis on costs among OIRA analysts).

IV. NEW NETWORKS, SIMILAR PROBLEM?

One lesson of the preceding discussion of American rulemaking is that procedures designed to increase the influence of a broad range of interest groups can have the unhappy effect of empowering those already most powerful. We are interested in learning whether this lesson transposes to international and global developments in administrative law. Along these lines, this section briefly considers how two noteworthy developments, new governance initiatives and increasing reliance on global administrative agencies, might impact public participation and mitigate or worsen the problem of clout.

A. *New Governance Networks*

The new governance movement is complex and multifaceted,⁸¹ and we cannot begin to do it justice in this short Article. But, we can raise a cautionary note or two about the project in light of our concerns about clout. New governance scholars seek to create new regulatory networks that foster ongoing dialogue among stakeholders to develop and continually improve “governance.” Professor Orly Lobel, for example, notes new governance reforms are “based on engaging multiple actors and shifting citizens from passive to active roles,” thereby pluralizing the “exercise of normative authority.”⁸² This effort to empower a range of interests naturally calls to mind the great administrative law “reformation” of the 1960s and 70s.⁸³ It calls to mind even more directly the debates over reg-neg that followed.⁸⁴

Given this American experience, two points seem especially salient. *First*, the evidence we reviewed earlier suggests that systems that rely on voluntary participation by varied interests to inform and legitimize regulation (or “governance,” as the case may be) will often be dominated, just as public choice scholars would predict, by special interests with profits on the line.⁸⁵

Second, and on a very closely related point, we see some new governance scholars veering towards the bargaining paradigm and away from the deliberation model we prefer. For those scholars, the job of the bureaucracy is to “steer” policy networks towards solutions to regulatory problems,⁸⁶ mak-

81. We sympathize with Professor David Zaring’s remark on New Governance that “[i]t is often difficult to understand what this means, amid all the iterative processes and dialogic benchmarking.” David Zaring, *Fateful Bankers*, 159 U. PA. L. REV. PENNUMBRA 303, 307 (2011).

82. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373 (2004).

83. See *supra* notes 44-48 and accompanying text.

84. See *supra* notes 51-59-and accompanying text.

85. See *supra* Part III.B.

86. See Bignami, *supra* note 10, at 869-70 (noting that in the new governance understanding, “the task of public administration has been scaled back considerably – from commanding, to persuading and steering”).

ing it an alternative version of the administrative pluralism endorsed by the reformation. To be fair, the intention of these reforms is to create institutional locations for decision making that focus on problem solving.⁸⁷ But we are not clear how these arrangements will not degenerate into a bargaining process.

Concerning this objection, we note the endorsement by new governance scholars of regulatory negotiation as preferable to traditional rulemaking.⁸⁸ In one sense we agree. If reg-neg employs a procedure requiring that all participants agree to the outcome and all interests are fully represented, it addresses the clout problem about which we are concerned. But, even with full representation, we still have the problem that regulatory negotiation, after all, is based on negotiation. Perhaps participants regard the endeavor as seeking a solution to the problem at hand, but at the end of the day they are there representing *their own* interests, a problem that can be avoided if the agency, not the participants, designs a rule. This concern over bargaining seems especially problematic because there is no reason to expect that the asymmetry in power relationships that affects rulemaking will not also impact new governance initiatives.⁸⁹

We have neither the information nor the inclination to condemn the new governance project. If, as promised, all stakeholders are represented, and if all participants must agree to the outcome (thereby negating clout), it may be a second-best approach to having an agency write a rule. We suspect that, as has been the case with reg-neg, new governance techniques probably can work well in some contexts but not so well in many others. Determining how well new governance is “working” in a given context is likely to be a time-consuming, value-laden affair. We understand that this approach is more common in Europe,⁹⁰ and perhaps Europe can therefore provide evidence as to how well new governance addresses the problem of clout.

87. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 23-27 (1997).

88. See, e.g., *id.* at 33-66 (describing and endorsing negotiated-rulemaking as a good example of new governance techniques).

89. See John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 33 (2005) (“If it is economic power which ground[s] the capacity of non-state actors to govern or coerce, there is no reason to believe that those actors’ motive or opportunity would diminish in a post-regulatory environment.”) (internal quotation marks omitted).

90. The following anecdote seems worth sharing for whatever it may be worth. During a conversation with a highly able and well-informed agency official with substantial responsibilities for rulemaking, Murphy inquired whether the official’s agency was experimenting with any “new governance” techniques. With complete candor, the agency official responded, “What’s ‘new governance’?”

B. Global Networks

Globalized administrative law embeds agencies in international networks for the identification of, if not the choice of, regulatory policies. As with new governance initiatives, these developments are complex and multifaceted, and we do not expect that we can do an adequate job of capturing these nuances in a few pages of this short Article. But we can once again raise the issue of whether reliance on global networks reduces or increases the problem of clout.

1. International Standard Setting Organizations

The United States is required by its international agreements to base its sanitary and phytosanitary regulations on international standards, guidelines, or recommendations,⁹¹ and to use international standards (or parts of a standard) as a basis for technical regulations.⁹² Consistent with these obligations, the National Technology Transfer and Advancement Act of 1995 promotes the use of voluntary standards,⁹³ which can be the basis of harmonization efforts, and the 1997 Food and Drug Administration (FDA) Modernization Act encourages FDA to participate in international harmonization efforts.⁹⁴ An OMB circular requires all agencies to “use voluntary consensus standards, both domestic and international, in [their] regulatory and procurement activities” as a means of carrying out policy objectives.⁹⁵

Reliance on international standards may reduce the impact of clout in the rulemaking process. To the extent that the international standards constitute expert judgments reached without undue political influence, such standards offer a way for agencies to fend off industry clout by utilizing the international work product. But we know from domestic experience with voluntary standards that the product often reflects the lowest common denominator

91. See WORLD TRADE ORG., *Agreement on the Application of Sanitary and Phytosanitary Measures*, art. 3.1, in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59, 60 (1999) [hereinafter THE LEGAL TEXTS].

92. See WORLD TRADE ORG., *Agreement on Technical Barriers to Trade*, art. 2.4, in THE LEGAL TEXTS, *supra* note 91, at 121, 122.

93. 15 U.S.C. § 3701 (2006) (calling on Federal agencies to consult and participate with voluntary, private sector businesses to develop technical standards).

94. 21 U.S.C. § 383(c)(3) (requiring the Secretary of Health and Human Services (HHS), in which FDA is located, to work with other foreign governments to reach an agreement on regulations).

95. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES, *reprinted in* 63 Fed. Reg. 8546-01 (Feb. 19, 1998) (listing policies of the OMB Circular A-119).

about which agreement can be reached, usually because industry is involved in the standard-setting process and it operates according to consensus.⁹⁶ Industry involvement robs the standard of a precautionary tilt that may be appropriate according to an agency's mandate. This effect would seem to be less of a problem if the international standard is only technical – such as how cell phones talk to each other – but it would seem to be more of a problem regarding health, safety, and environmental standards.⁹⁷

So, once again, more information is needed. Are some processes more likely to lead to public-regarding results than others? Do multinational companies have clout in the process? Is global harmonization a plot by multinational companies to adopt international, neoliberal governance regimes, as many of the left believe? (Okay, that was a bit provocative, but the appearance of a lack of public participation appears to be at the core of this distrust.)

2. Bilateral and Multilateral Negotiations

The beginning of this Article refers to an executive order entitled, “Promoting International Regulatory Cooperation.”⁹⁸ Among other things, this order charges a Regulatory Working Group chaired by the Administrator of OIRA with the task of developing and issuing guidelines on international harmonization of regulation.⁹⁹ Of course, international harmonization of regulations is not a new idea,¹⁰⁰ and it has obvious capacity to create efficiency. Also, if we start from the premise that American health and safety regulation is too lax, then harmonization with stronger regulators at least poses the possibility of improving American regulations.

Still, harmonization raises obvious concerns as well. Once the United States has negotiated a harmonized standard, domestic regulatory agencies, such as EPA and OSHA, will comply with the APA rulemaking procedures. Literal compliance with the APA procedures may be ineffective, however, in the harmonization context. The APA does not require an agency to seek pub-

96. Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 137 (2000) (finding “private standard-setting organizations tend to be ‘business-oriented’ and ‘industry-dominated,’ and private standards therefore reflect ‘the lowest common denominator of acceptance by interested private groups’”).

97. See, e.g., Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 838 (2002) (stating “[a] significant number of Codex standards are weaker than food standards in the United States” and giving examples).

98. Promoting International Regulatory Cooperation, Exec. Order No. 1,360,977, 77 Fed. Reg. 26413 (May 1, 2012).

99. *Id.* § 2(e), at 26413.

100. See, e.g., Shapiro, *supra* note 6, at 438-39 (describing efforts to develop a harmonized system of chemical classification and labeling, known as the “globally harmonized system” (GHS)).

lic input in advance of agreeing to a harmonized standard, and once such a standard exists there is an international commitment by the United States to adopt it.¹⁰¹ It seems logical to infer that such commitments magnify further the tendency of agencies to avoid changes to their proposed rules during the public rulemaking process.

This *fait accompli* problem raises the issue of influence and balance among stakeholders during the international harmonization process that precedes the domestic rulemaking process. To the extent that public participation is allowed as part of harmonization, moving to an international or global context would seem, as a general matter, to make both monitoring and participating in a regulatory process more expensive. Speaking from an American perspective, regulated entities, or their trade associations, will have the wherewithal to participate in public harmonization activities, even if they are located across the world from Washington, D.C. Many, if not most, public interest groups will lack this capacity. We have already seen that public interest groups are disadvantaged concerning domestic rulemaking,¹⁰² and it is likely that the foreign location of harmonization activity would worsen this imbalance still more.

All of this suggests that work needs to be done in creating an administrative process for harmonization efforts, one that at least gives public interest groups the opportunity to weigh in on such activities even if resource issues hinder their participation. So, we say to scholars working on global administrative law, is this an issue on your agenda? Should it be? What are the opportunities for corporate interests to influence international harmonization activities? Should we expect asymmetries in participation to be even worse than in domestic rulemaking? If so, what should be done about it?

V. A CLOSING THOUGHT: BECOMING PROGRESSIVE AGAIN

As students of American administrative law, we are concerned that American notice-and-comment rulemaking is distorted by (mostly corporate)

101. The newly revived Administrative Conference of the United States (ACUS), a small federal agency charged with studying administrative processes to recommend improvements, recently addressed this problem. See ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-6: INTERNATIONAL REGULATORY COOPERATION ¶ 7, at 8 (2011), <http://www.acus.gov/recommendation/international-regulatory-cooperation>. More specifically, ACUS recommended that an agency “engaged in such [international harmonization] consultations should describe those consultations in its notices of proposed rulemaking, rulemaking records, and statements of basis and purpose under the Administrative Procedure Act.” *Id.* Agencies should also “seek input and participation from interested parties as appropriate, through either formal means such as Federal Register notices and requests for comments or informal means such as outreach to regulated industries, consumers, and other stakeholders.” *Id.*

102. See *supra* Part III.B.

clout, and we are curious to learn how clout may be affecting new governance initiatives as well as international and global policymaking. But what then is to be done?

We certainly do not mean to suggest as a general matter that agencies forgo public participation because of potential imbalances in usage. Public participation certainly can enable a fuller range of interests to be represented during rulemaking – as the interest-representation model of legitimacy contemplates. Properly structured public participation can also foster dialogue among interested parties and greater deliberation, especially by the agency – just as the democratic deliberation model contemplates.

Notwithstanding these advantages, however, it stands to reason that, where effective public participation requires resources, it will tend to tilt the playing field in favor of those who begin the process already powerful. One type of answer to this problem might be to remove the resource problem – e.g., through government funding of public advocacy groups.¹⁰³ In the United States, the likelihood of a wholehearted embrace of such an approach seems vanishingly remote.

Another older solution that we favor is perhaps almost as unlikely. The Progressives saw government, and an expert bureaucracy, as a countervailing power to corporate influence.¹⁰⁴ Insofar as this vision was premised on technocratic experts finding value-neutral responses to regulatory problems, it has long been rejected.¹⁰⁵ Nonetheless, the Progressives were right that we need experts in the public employ to play a lead role in determining policies that implicate technical and scientific facts. Moreover, decision making based on professionalism, discursive public input, and reason giving has the potential to contribute to the legitimization of public administration, although this point tends to be overlooked in the administrative law literature.¹⁰⁶

But for an agency to play this role, which requires more than mere coordination of a result among participating interest groups dominated by industry, it must have sufficient resources. With sufficient resources, many of the deformities associated with public participation in rulemaking (at least in its dominant American incarnation) become less important. For instance, reliance on corporations for information becomes less of a problem where an

103. See NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 53-54 (1989) (documenting substantial decline in government funding for public interest advocacy).

104. See *supra* notes 27-30 and accompanying text.

105. See *supra* Part III.A (documenting the transformation of political theories to administrative law).

106. See Shapiro, Fisher & Wagner, *The Enlightenment of Administrative Law*, *supra* note 27, at 465 (discussing a “discursive” model of public administration as an overlooked supplement to traditional administrative sources of legitimacy); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 587-90 (2010) (discussing the potential that professionalism can legitimize administrative action).

agency has the power, resources, and competence to confirm this information. Also, an agency with sufficient resources will be less likely to “give in” to some corporate complaints in the comment process as a matter of triage rather than merits. In sum, earlier in this Article, we expressed our preference for a deliberative democratic model of agency policymaking; for such a model to work, agencies need the resources to deliberate right.

This situation does not exist in the United States today. Generally speaking, Congress refuses to give agencies the resources they need to discharge their responsibilities. Over the last several decades, the civil service has been “hollowed out” by budget cuts and retirements.¹⁰⁷ Many insist that Congress, the White House, and the judiciary have made this problem worse by larding the rulemaking process with impact statements and cost-benefit analysis.¹⁰⁸ The increasing number of political appointees who staff their higher ranks rather than career public servants has further undermined the ability of agencies to function as experts.¹⁰⁹ This last shift might be broadly acceptable if an agency’s job were to coordinate interest groups to develop policy in a faux legislative manner. It is in obvious tension with the exercise of “neutral” expertise, however.

Public participation in rulemaking does not occur in an institutional vacuum. For it to work as best it can, it requires the complement of an expert agency with sufficient resources. In the United States, “fixing” public participation in rulemaking thus requires revitalization of the civil service. This result does not seem likely in today’s political and economic climate, with its budget cutting and slashing of government. But we leave the problem of implementing our prescription for another day.

107. See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY AND THE ENVIRONMENT* 54-71 (2010) (discussing hollow government and its impact on protecting the public).

108. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1400-13 (1992).

109. See Shapiro & Wright, *supra* note 106, at 583, 608-16 (discussing the increase in the number of political appointees and the adverse impact on public administration).