**The Missing Link in Citizen Participation in U.S. Administrative Process**

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The participatory process that lies at the heart of U.S. administrative law is hailed by some to be among the most comprehensive in the world. Agencies promulgate rules under elaborate procedures that are designed to place public participants as important collaborators and watchdogs at virtually every step in the agency’s decision. Indeed, in this process, citizens are guaranteed – by legislation -- important rights of participation, which include commenting, accessing information, and ultimately challenging agency rules in court.[[2]](#footnote-2)

In practice, however, the work of the US agencies has become increasingly inaccessible to many of the individuals and groups that their rules affect. Rulemaking records are often very large and can run into the thousands of pages.[[3]](#footnote-3) Comments submitted on agency proposals, standing alone, can include thousands of submissions, many of which are dozens of pages each.[[4]](#footnote-4) The agency’s own explanations, proposals, and rule text can be opaque and gratuitously complicated in ways that even experts cannot follow.[[5]](#footnote-5) The net result, in the US, is an administrative process that -- despite its promises otherwise -- is becoming increasingly inhospitable to meaningful engagement by stakeholders in general and citizens in particular, including their self-appointed experts and advocates.[[6]](#footnote-6)

This paper explores the growing gap between the legally protected “right” to participate in administrative process and the practical ability to act on that right in US administrative law. The basic argument is a simple one. If a legal process depends on public participation, then the process should be designed to ensure that meaningful participation takes place. Merely providing opportunities for citizens to inform and hold agencies accountable is futile if the agency is allowed or even encouraged to develop policies and rules that are voluminous, analytically opaque, and effectively incomprehensible to all but the most well-funded expert. Yet this seemingly obvious and important feature of administrative process – namely the failure to require that the decisions be reasonable comprehensible to the diverse set of interests (even assuming the public is properly and adequately represented by elite NGOs) – has gradually slipped through the cracks in the design of administrative process. There is no overarching requirement in the US that legalized participatory rights be meaningful.

This paper argues that the growing gap between the accessibility of the rulemaking process and the procedures that attempt to ensure vigorous deliberations occurs as a result of a disconnect between the procedural means of ensuring participation and the end goal of engaging affected groups in US administrative process.[[7]](#footnote-7) The goal of participation is, quite obviously, to engage the public. But as the US legal system has become increasingly proceduralized and, more recently, supplemented with rational measures for assessing regulations,[[8]](#footnote-8) the practical barriers to participation by those with limited resources make these legal guarantees illusive. By decoupling the measures or means for ensuring participation (opportunities to comment; transparent processes; right to review) from the actual goal of vigorous participation, the primary object of the entire exercise becomes lost.[[9]](#footnote-9) In fact, under the current design, a rational-acting agency will find it legally and politically preferable to prepare rules that are effectively incomprehensible rather than reach out and engage affected parties. The law, in other words, points agency incentives for participation in precisely the wrong direction.

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

1. **Agency Incentives for Meaningful Citizen Participation in US Administrative Law**

The design of US administrative government is premised on vigorous engagement and oversight from all affected parties, including citizens.[[10]](#footnote-10) Since agencies sit outside the electoral process as the fourth branch of government, agency accountability is ensured in significant part through public rights to participate and judicial review.

U.S. processes impose on the agencies three distinct requirements for the promulgation of binding rules. First, agencies must solicit comments from all persons on a proposed rule.[[11]](#footnote-11) Second, in doing so, agencies are required to explain the purpose of their rule and show their analysis – virtually all of these records are public and most can now be accessed on the internet. And finally, if a person alerts the agency to flaws in the logic, facts, or interpretation of their mandate, the party can sue the agency in court.[[12]](#footnote-12) The courts are deferential and will reverse an agency only if the rule is “arbitrary and capricious”; still, this is not at all uncommon and some courts give agency rules a hard look.[[13]](#footnote-13) Through this institutional design, the US seeks to ensure that the work of the agencies is accountable to the public they serve.

Over the last few decades, additional requirements have been imposed on agencies by Congress and the President that purport to further enhance the accountability of agencies to the public. These requirements demand that agencies conduct additional analyses – cost/benefit and small business related analyses among them – to provide even better information regarding the implications of a rule. These added measures are touted as not only increasing the agency’s own self-awareness of the impact of its rules on regulated parties, but providing simple metrics for the larger public to understand the alternatives to and consequences of a proposed rule.[[14]](#footnote-14) As such, these added measures are portrayed as only further enhancing the accessibility of the agency’s work to the general public.

*The Missing Link in the Theoretical Design*

One of the basic elements in the design of US administrative law is meaningful public participation in agency rules. The procedural requirements just described do not supplant this goal; instead they are supposed to provide a means of ensuring or accomplishing this end goal.

Accordingly, the agency, in theory, is successful when it has communicated with its audience and educated them as accurately and effectively as possible.[[15]](#footnote-15) Thus beyond the opportunities for input and review, a participatory process should include strong incentives for the speaker, here the agency, to engage in meaningful communications with the audience*.* Given the wide variations in regulatory contexts – the issues, the framing, the affected parties – there is no formulaic checklist for these meaningful communications. The primary assurance is that the process is designed so that effective communication with all affected groups (rather than just the litigious ones) is foremost among the agency’s incentives. While opportunities to comment, access to information, and opportunities to hold agencies legally accountable may be a necessary ingredient to satisfying this end goal, they are not alone sufficient. It is essential that the dialogue take place so that communication actually occurs; so that the “message” reaches the intended recipient.[[16]](#footnote-16)

Encouraging agencies to engage in meaningful communication with affected parties provides the best means of providing participation. But there are secondary indicators that can also help gauge whether the agency is succeeding at its communication effort. For example, outsiders should be able to assess, however roughly, that the agency’s message is comprehensible – the agency’s explanation should provide a succinct but detailed summary, clear evidence to support its decision, and it should identify important consequences that flow from its choice.[[17]](#footnote-17) The more visible the options, framing, assumptions, and methods embedded within the agency’s regulatory decision, the better.[[18]](#footnote-18)

1. **The Missing Link in US Process in Practice**

An examination of the requirements and incentives placed on agencies under the Administrative Procedure Act (APA) reveals that this important link in the participatory process –encouraging meaningful participation by affected groups – is generally missing in US administrative law. There are two overlapping indications of this blind spot.

First, there is no accounting or tracking system to gauge whether an agency is reaching it audience. If commenters are few or badly lopsided in favor of well-financed groups, this is not relevant to assessing how well the agency has complied with administrative process requirements. Second, the elaborate proceduralization of administrative law – however unintentionally – provides more disincentives than incentives for agencies to communicate meaningfully with those affected by their decisions. Thus while in theory U.S. process purports to be oriented towards ensuring public participation and oversight, both the requirements and the incentives built into the design of US administrative procedure point agencies in the opposite direction.

Each problem is discussed in turn.

1. *No Measures to Track Participation and Successful Communication*

While the APA calls on agencies to produce a “concise general statement” of their proposals and rules,[[19]](#footnote-19) the elaborate system of US process places no meaningful requirements to back up this requirement. Richard Pierce notes that in the US, “[t]he courts have replaced the statutory adjectives, ‘concise’ and ‘general’ with the judicial adjectives ‘detailed’ and ‘encyclopedic.’”[[20]](#footnote-20) Hypothetically, in fact, if an agency produced a rule and accompanying explanation that was, by all accounts, incomprehensible, this feature does not serve as a grounds for upsetting the rule under U.S. administrative law. There are no page limits on rules, criteria for the understandability of the agency explanations, or expectations that an agency actively reach out to affected parties.

Not only does US administrative law lack direct incentives for meaningful communications, there is also a lack of secondary measures to assess whether participation is ultimately occurring. More specifically, under US law:

* Agencies are not required nor do they provide simply tallies of the nature of the participant who weigh in at various stages of their processes. Early empirical studies in fact reveal that not only are citizens and their advocates missing from roughly half of the rules promulgated to protect their interests, but in the rules in which they do engage, they are badly outnumbered.[[21]](#footnote-21)
* Agencies are not required to actively solicit participation from affected groups, even when it is clear that those who are affected by or benefiting from a rule are likely to lack expertise or resources to participate effectively.
* For the citizen representatives who do engage (typically a few NGOs), there is no inquiry or analysis by the agency to determine whether or how well their advocacy positions map against the broader interests or whether NGO procedures are in place to communicate and ensure that the perspectives are largely in accord with the citizens they purport to represent.[[22]](#footnote-22)
* Added analytical assessments, like cost-benefit and small business assessments, need not be comprehensible to the public. The technical and large size of these assessments (regularly more than 500 pages) in fact may serve to undermine their accessibility.[[23]](#footnote-23)

In the US, the procedural inattention to the necessity of a meaningful connection between agency rules and engagement by the public leads to a passive or market-based model for public participation – an “if you build it, they will come” approach. Agencies must publish proposed rules; but if there is no engagement by affected parties, this feature is a reflection only of the participants and not of the quality of the agency’s rule. In highly salient and publicized rules where all interests are engaged and active, the APA’s passive approach can work well.[[24]](#footnote-24) But in rules where some affected groups cannot afford to participate, their absence will not necessarily be noted, much less addressed by the US administrative process. Moreover, this indifference occurs as a matter of procedural design.

1. *Missing Incentives to Encourage Effective Communication*

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

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

However, if the end goal is primarily framed in this way, how would a rational agency behave with respect to engaging the public – even defined most narrowly as diverse experts who represent broader sets of interests? Rules that are in fact voluminous and incomprehensible, while at the same time covered in technicalities would seem to provide the surest means of navigating controversial rules through the political and legal processes.[[25]](#footnote-25) The fewer the comments, the less chance that the agency will be sued, and the fewer criticisms the agency must address in its revision process. The agency also faces a much better chance of dodging both congressional and presidential oversight with long, technical rules.[[26]](#footnote-26) It logically follows, then, that rules that are incomprehensible are more likely going to survive precisely because most of the audience will not know what to make of them.

Case law emerging through judicial review of agencies only serves to reinforce rather than counteract these incentives for agencies to promulgate detailed, complex, and even inscrutable rules. For their part, the courts require commenters to raise each and every concern “with specificity” during notice and comment to preserve their ability to challenge the issue in a subsequent appeal.[[27]](#footnote-27) Long, detailed, and often multiple rounds of comments are the most responsible way for commenters to protect their interests.[[28]](#footnote-28)

Agencies’ incentives for excessive detail and technicality, at the sake of comprehensibility, run in parallel to those of interested parties. Courts review challenges to an agency’s rule based in part on how well the agency responds to facts and related arguments raised by commenters. Like interested parties, then, agencies are encouraged to be overly thorough, exhaustive, and to leave no stone unturned.[[29]](#footnote-29) Prof. Melnick observes: “Since agencies do not like losing big court cases, they react[] defensively, accumulating more and more information, responding to all comments, and covering their bets. The rulemaking record grew enormously, far beyond any judge’s ability to review it.”[[30]](#footnote-30) And “[t]hus began a vicious cycle: the more effort agencies put into rulemaking, the more they feared losing, and the more defensive rulemaking became.”[[31]](#footnote-31)

Courts have also invented a “logical outgrowth test” that encourages agencies to develop a proposed rule that is effectively complete.[[32]](#footnote-32) Under this test, any material changes made to final rules that are not presaged in the agency’s proposal require a new proposed rulemaking, with its own separate notice and comment period. Agencies thus again face legally-backed incentives to develop a proposed rule that is as complete as possible.[[33]](#footnote-33)

In response to these incentives, some agencies seek out the most litigious participants early in the development of their proposed rule to work out the details in advance, outside the formal notice and comment period.[[34]](#footnote-34) These contacts are not regulated by the APA and in fact are implicitly encouraged by the court’s logical outgrowth rule since the proposal will be endorsed by the most litigious and well-funded groups before it is published, minimizing the need to revise the rule again. As one agency staff remarked “We help them; they help us.”[[35]](#footnote-35) Yet these negotiation-styled discussions, occurring before the agency’s proposal is published, can lead to an elaborate, complex, and contract-like rule proposal that is even more inaccessible to the parties not present during the negotiation.[[36]](#footnote-36)

Rationality requirements – laid atop the notice and comment process – may serve to only further aggravate, rather than correct the problem of inaccessible rules, despite their justification as increasing agency accountability. These rationality requirements include requirements that agencies prepare a full cost-benefit analysis on significant rules, assess impacts on small businesses, and conduct various other related assessments.[[37]](#footnote-37) Beyond the need for commenters to invest still more expertise and resources examining these additional analyses, the agency itself might have incentives to use the analyses strategically to further insulate its decision from meaningful scrutiny. Indeed, the most rational course for the agency is to produce these analyses in end-oriented ways that support the agency’s preferred rule, a possibility that enjoys some support from empirical studies of agency practice.[[38]](#footnote-38)

In fact, rationality requirements that operate in this way – alienating rather than educating participants – appear to be fundamentally incompatible with deliberative-based processes.[[39]](#footnote-39) To the extent that rationality measures implies that there are objective measures can be used to identify “good” or “public benefitting regulation,” then in cases where deliberation and rationality diverge, the correct outcome is presumably the rational one. In this case, public deliberation, then, operates more as a paper weight; reinforcing rational outcomes in cases where the two converge and sidelined in cases where public comment leads to a different result.

1. *US Administrative Process up-close*

This conceptual argument that US agencies are generally rewarded for promulgating rules that are long, technical, and effectively inaccessible is supported by at least some practical evidence.[[40]](#footnote-40) As one illustration, consider a relatively typical EPA rule promulgated in the mid-1990’s regulating the emissions of toxic air pollutants from chemical storage tanks in tank farms at large petrochemical plants.[[41]](#footnote-41) The proposed rule, which included three other subparts, was over 187 pages long. Just on the storage tank rule alone, EPA met with industry groups at least three times before publishing the proposed rule, communicated with them through letters, and prepared at least 15 background documents. After publication of the proposed rule, 22 industries and industry associations and a smattering of public interest advocates engaged first in formal notice and comment and then presented their concerns at a public hearing. EPA’s final rule that responded to comments identified more than 100 significant issues in contention.

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

One would imagine that with all of this input and deliberation, the agency ultimately devised a standard that ensured that significant quantities of hazardous chemicals would not volatilize from large open tanks without detection. Yet the EPA’s resulting standard, while requiring sealed lids on chemical storage tanks, requires little of owners in ensuring that these lids are intact and operating effectively. Rather than periodic monitoring or “sniffing” for chemicals from tanks, owners need only conduct a visual inspection of the lids. And rather than require this inspection weekly or regularly, the rules require only an annual inspection – with another 3 ½ months of grace period to rectify leaks once discovered.

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

Courts have noticed the general inaccessibility of agency decisions as well. As a federal court of appeals judge remarked in a case with a record that spanned more than 10,000 pages:

[T]he record presented to us on appeal or petition for review is a sump in which the parties have deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation. . . The lack of discipline in such a record, coupled with its sheer mass . . . makes the record of information rulemaking a less than fertile ground for judicial review.[[42]](#footnote-42)

Other judges reiterate this core concern, but they too appear to view themselves as hapless observers and even victims rather than watchdogs over agency incomprehensibility.[[43]](#footnote-43)

1. **Getting to Better**

If the diagnosis is correct thus far – namely that citizen participation in governance requires incentives for effective “communication” between the agents and the citizens and these incentives are currently missing in US institutional design -- then what kind of changes could be made to US process to come closer to matching this ideal?

At least in the US, there is not much literature available to help gain traction on this question. Thus the thoughts offered here are preliminary and offered primarily to spark conversation rather than attempt to resolve the problem.

1. *Learning more about the Status Quo*

In the short term, it is imperative to learn more about the level and nature of general citizen engagement in current administrative decision-making the US. Recommending or requiring that agencies tally up the nature and types of public engagement in rules – even preliminary – could provide valuable information that is currently unavailable. Additionally, tracking the extent to which citizen comments ultimately influence the rules or lead to changes, ideally relative to comments from regulated parties and commercial commenters, could provide a finer grained view of the status quo levels of meaningful citizen and NGO participation in agency rules that affect their interests.[[44]](#footnote-44)

Case studies, surveys, and other targeted non-quantitative studies would also provide valuable information of how participatory practices in the US currently work. For example, sets of rules could be followed with respect to how well citizens were alerted to the issues; how well the agency communicated the substance of the rule; and the ultimate citizen engagement. Anecdotes of particularly successful citizen engagement could also be developed with an eye to extracting the mechanisms that sparked broader citizen engagement.[[45]](#footnote-45)

1. *Intermediate and Longer Term Reforms*

To reorient the agency to the importance of citizen engagement, the incentive system for administrative process needs to include rewards for broader and more meaningful engagement by all affected parties. Some possibilities for increasing the incentives in US administrative process include the following:

* Rather than bracket any measures or assessments of vigorous public engagement, the “output” of the agency’s rule would need to satisfy some measure of quality with respect to generating meaningful citizen engagement. At the simplest level, this could be done by ensuring that citizens are offering rigorous comments on each and every decision that affects their interests in material ways that can be backed by the threat of credible litigation. When citizen and related NGO groups are absent, the agency’s rule would be deficient as a matter of process.[[46]](#footnote-46)
* Since the general public is most at risk as the regulatory system becomes increasingly complex, their views of accountability of administrative process should be solicited. Crowd-sourcing of at least the major public interest groups with regard to primary variables that impact on the comprehensibility and accessibility of the agency’s decision may provide some useful indicia of how well the agency is doing. Thus, beyond advocating the substantive position on behalf of the general public, these groups would be enlisted to also speak to process – whether their clients or more diffuse groups are being adequately informed and engaged.
* An advisory committee could be empaneled to review the accessibility and comprehensibility of an agency’s explanations and decisions. Science advisory panels are becoming a staple in the promulgation of science-intensive rules. One could thus imagine a similar type of oversight system that scrutinizes the agency’s rules with regard to the effectiveness of the agency’s communication of the core messages, assumptions, framing and implications. This type of oversight operates in a way that helps the agency come to terms with its own blind spots and communication difficulties.

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

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

**Conclusion**

There is a critical missing link in the design of U.S. administrative process; incentives for an agency to communicate effectively with its audience. Rather than encourage and enable this outreach, the design of US administrative process leads to the opposite result. Agencies are more successful under the current legal and political process when their rules are voluminous, overly technical, and effectively incomprehensible. Although it may not be possible to rebuild the process from ground up, there is still a great deal of progress that can be made to better ensure that the end goal – vigorous public participation – is fed back into the central incentives for agency action.

1. \* Joe A. Worsham Centennial Professor, University of Texas School of Law. Contact: WWagner@law.utexas.edu [↑](#footnote-ref-1)
2. See Administrative Procedure Act, 5 U.S.C. 553(c) and 706(2); The Freedom of Information Act, 5 U.S.C. § 552 [↑](#footnote-ref-2)
3. Go to regulations.gov and search the rulemaking docket for a rule. For a current rule governing a workplace standard for silica, go to <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=SR%252BO%252BN%252BPR%252BFR%252BPS;D=OSHA-2010-0034> [↑](#footnote-ref-3)
4. See, e.g., Kimberly D. Krawiec, *Don’t ‘Screw Joe the Plummer’: The Sausage-Making of Financial Reform*, 55 Arizona Law Review 53-103 (2013) (examining over 8000 comments on the proposed Volker rule and raising questions about the quality of citizen participants as opposed to the engagement by the financial industry). [↑](#footnote-ref-4)
5. See, e.g., COMM. TO Review EPA's DRAFT IRIS ASSESSMENT OF FORMALDEHYDE, NAT'L RESEARCH COUNCIL, REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE 4 (2011) (noting in the course of their review “[p]roblems with clarity and transparency of the [EPA’s] methods [for assessing the risks of formaldehyde] appear to be a repeating theme over the years, even though the documents appear to have grown considerably in length. In the roughly 1,000page draft reviewed by the present committee, little beyond a brief introductory chapter could be found on the methods for conducting the assessment”) [↑](#footnote-ref-5)
6. See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L. J. 1321, 1331-34 (2010) (making this general argument). [↑](#footnote-ref-6)
7. Needless to say, since the focus is exclusively on administrative process the scope of this analysis does not consider many other important forms of citizen participation – in the political process, in reinforcing enforcement cases, in impacting agency priorities and framing of priorities and decisions, and in local or nonlegal community decision processes or collective action. [↑](#footnote-ref-7)
8. *See, e.g*., Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. State. U. L. Rev. 533 (2000). [↑](#footnote-ref-8)
9. *See, e.g.,* Ralph L. Keeney, Value-Focused Thinking vii-ix, 29-30, 44-51 (1992) (highlighting the benefits of value-focused thinking and discussing how neglecting a universal map of the goals, problems, and possible solutions can result in wrongheaded decisions). [↑](#footnote-ref-9)
10. *See, e.g*., Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003); FINAL REPORT OF THE ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE 103 (1941). [↑](#footnote-ref-10)
11. 5 U.S.C. 553(c). [↑](#footnote-ref-11)
12. Id. at 706(2). [↑](#footnote-ref-12)
13. see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 593-97 (5th ed. 2010). [↑](#footnote-ref-13)
14. Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern, *Controversies Surrounding Regulatory Impact Analysis, in* Reforming Regulatory Impact Analysis 12-13 (Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern eds. 2009) (touting these advantages of the RIA process). [↑](#footnote-ref-14)
15. Effective communication is difficult, of course. Rhetoric scholars alert us to the fact that there is no neutral speech – all communications have a valence. *See, e.g*., James A. Herrick, The History and theory of Rhetoric: An Introduction (2005). But there are also methods to correct for the worst pathologies. Moreover, a process in which the “speaker” has incentives to be incomprehensible would seem to lead to a broader range of communication challenges than one in which the speaker is at least encouraged to engage the audience. [↑](#footnote-ref-15)
16. *See, e.g*., Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 Stanford L. Rev. 1105, 1157 (2003) (taking care to avoid the goal of “optimizing” information but instead attempting to highlight how the law sometimes is attentive to trade off the costs of communication shouldered by the communicator and those that are imposed on the audience); see generally Claude E. Shannon & Warren Weaver, the Mathematical Theory of Communication (1949). [↑](#footnote-ref-16)
17. See, e.g., NRC, *supra* note 4, at chpt 9 (making this point). [↑](#footnote-ref-17)
18. See, e.g., Pasky Pascual et al, *Making Method Visible: Improving the Quality of Science-based Regulation*, 2 Michigan Journal of Administrative and Environmental Law (2013). [↑](#footnote-ref-18)
19. 5 U.S.C. § 553(c). [↑](#footnote-ref-19)
20. Pierce, *supra* note 12, §7.4 at 445. [↑](#footnote-ref-20)
21. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. Pol. 128, 128 (2006) (identifying a “bias towards business”); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 3 Admin. L. Rev. 99, 125 (2011). [↑](#footnote-ref-21)
22. *See, e.g.,* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA Law Rev. (forthcoming 2016) [↑](#footnote-ref-22)
23. Morgenstern et al., *supra* note 13, at chpt. 9. [↑](#footnote-ref-23)
24. *See, e.g.*, STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 125-33 (2008). [↑](#footnote-ref-24)
25. The more elaborate version of this argument is developed in Wagner, *supra* note 5. [↑](#footnote-ref-25)
26. For discussions of the large role that both the President and Congress play in the substance of agency rulemakings in the US see Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137 (2014) (discussing the important role of the President in intervening in regulations); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) (describing the same for Congress). [↑](#footnote-ref-26)
27. *See generally* McKart v. United States, 395 U.S. 185 (1969); s*ee generally* Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 George Washington L. Rev. 1 (1985). [↑](#footnote-ref-27)
28. Andrea Bear Field and Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 Natural Resources and Environment, Summer 5, 9-10 (1995) (recounting the following advice from regulatory attorneys; “Make sure that you submit to the Agency *all* relevant information supporting your concerns in the rulemaking. This is the best way to convince the Agency to responds favorably to your concerns.”). [↑](#footnote-ref-28)
29. Prof. Pierce describes what the lengths agencies must go to show they have adequately considered all comments. *See* Pierce, *supra* note 19, §7.1 at 413, [↑](#footnote-ref-29)
30. R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 Admin. L. Rev. 245, 247 (1992). [↑](#footnote-ref-30)
31. *Id*. [↑](#footnote-ref-31)
32. #  *See, e.g*., [Shell Oil Co. v. EPA, 950 F.2d 741, 757-63 (D.C. Cir. 1991)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1991198116&ReferencePosition=757) (holding that agency failed to provide meaningful notice and comment opportunities on issues in the final rule; the issues were raised by commenters during the notice and comment process); Gabriel Markoff, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*,90 Tex. L. Rev. \_\_ (2012).

 [↑](#footnote-ref-32)
33. *See, e.g*., E. Donald Elliott, *Reinventing Rulemaking*, 41 Duke L.J. 1490, 1495 (1992). [↑](#footnote-ref-33)
34. *See, e.g*., William F. West, *Formal Procedures, Informal Processes, Accountability and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 Public Administration Review 66 (2004). [↑](#footnote-ref-34)
35. *See* Cary Coglianese, “Challenging the Rules: Litigation and Bargaining in the Administrative Process,” U. of Michigan Dissertation unpublished, at 14 (1994). [↑](#footnote-ref-35)
36. *See, e.g.,* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical*

*Study of EPA’s Air Toxic Emission Standards*, 3 ADMIN. L. REV. 99 (2011). [↑](#footnote-ref-36)
37. *See, e.g*., Seidenfeld, *supra* note 7. [↑](#footnote-ref-37)
38. *See, e.g*., Morgenstern et al., *supra* note 13, at 221-25. [↑](#footnote-ref-38)
39. *See, e.g*., Martin Shapiro, *On Predicting the Future of Administrative Law*, 6 Regulation 18 (1982). [↑](#footnote-ref-39)
40. For a more extended discussion supporting this point, see Wagner, *supra* note 5. [↑](#footnote-ref-40)
41. 40 C.F.R. § 63.100-.183. [↑](#footnote-ref-41)
42. Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1052 (D.C. Cir. 1979). [↑](#footnote-ref-42)
43. *See, e.g*., Florida Peach Growers Ass’n v. Department of Labor, 489 F.2d 120, 129 (5th Cir. 1974) (lamenting that the record is “some 238 documents occupying approximately two and one half feet of shelf space” that contains a mix of technical information); Aqua Slide ‘N’ Dive Corp. v. CPSC, 569 F.2d 831, 837 (5th Cir. 1978) (observing that judicial review was complicated by the record that consisted of a “jumble of letters, advertisements, comments, drafts, reports and publications . . . run[ning] for almost 2,000 pages . . . [with] no index”). [↑](#footnote-ref-43)
44. *See, e.g.,* Krawiec, *supra* note 3 (providing this type of initial, valuable data on one important rulemaking). To lessen burdens on agencies, this data could also be conducted voluntarily by those offering comments. Commenters could offer an assessment of the extent to which they believe their comments were taken seriously. While this input may be self-serving, it will still provide a helpful indication of the effectiveness of participation from the participants’ standpoint. Of course when issues are litigated precisely because the agency did ignore them, this too could be easily recorded in a score sheet that identifies that petitions for rehearing and appeals were taken on individual rules. The crowdsourcing literature may provide some insights on how these various participant-based assessments could be conducted. [↑](#footnote-ref-44)
45. Agencies like the EPA sometimes hold numerous location-specific meetings with communities that are currently impacted by a type of industrial emission, for example. Some, including from the NGO community (e.g., EarthJustice), have suggested that the resulting citizen input does inform the agency in important ways. These anecdotes and experiments are vital, but to make the best use of them there needs to be a mechanism for collecting their findings and feeding them back into process design. [↑](#footnote-ref-45)
46. This deficiency could simply be recorded – e.g., via an Executive Order – as a shaming device. Alternatively, Congress could include this process feature as a fundamental basis for judicial review or adjusting standing requirements, most of which have developed through common law interpretations of the APA. [↑](#footnote-ref-46)