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## The Right To Be Taken Seriously

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# The Right to be Taken Seriously

JONATHAN WEINBERG\*

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American law—in particular, American administrative law—grants citizens extensive rights to participate in government decision-making. Those rights kick in (subject to exceptions I’ll talk about later) whenever a government entity engages in “rule-making” as defined in the Administrative Procedure Act. That happens a lot: Rule-making takes place whenever an entity of the U.S. government (other than Congress or the courts) engages in the formulation, amendment, or repeal of a document with “future [legal] effect designed to implement . . . or prescribe law or policy.”<sup>1</sup> The category of rule-making covers almost all non-adjudicative government action; the Administrative Procedure Act defines the categories of rule-making and adjudication so that nearly all federal government decisions fall into one category or the other.<sup>2</sup>

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\* Professor of Law, Wayne State University. I’m grateful for the comments and suggestions of Jessica Litman, Steven Winter, Kirsten Nussbaumer, A. Michael Froomkin, Noah Hall, Gregory Fox, Brandon Hofmeister, Justin Long, Christopher Lund, John Rothchild, Alan Schenk, and Robert Sedler.

1. 5 U.S.C. § 551(4)–(5) (2006). Other U.S. government entities whose actions do not constitute APA rule-making include territorial governments, the government of the District of Columbia, certain military authorities, and the president. *Id.* at § 551(1); *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

2. *See* 5 U.S.C. § 551 (6)–(7) (defining “adjudication” as agency process for the formulation of the “disposition . . . of an agency in a matter other than rule making”).

American law also mandates important participation rights outside of rule-making. *See infra* notes 54–58 and accompanying text (participation rights under the Due Process Clause). For an extensive discussion of the idea that fairness in civil adjudication demands participation by those who are to be bound, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181,183 (2004).

When the federal government engages in rule-making, as a general matter it must engage in a series of procedural steps.<sup>3</sup> It must give the public advance notice of its intended action.<sup>4</sup> It must give members of the public “an opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>5</sup> And it must issue a written opinion articulating reasoned responses to any significant points that those public comments raise. As the D.C. Circuit put it, “a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”<sup>6</sup> Indeed, even when an agency has not proposed to do anything, should an interested person request that it issue a rule, the agency is legally obliged to respond to that request on the merits.<sup>7</sup>

American law, in other words, imposes two requirements on government in connection with public participation in rule-making (the so-called notice-and-comment process). First, government must make it possible for members of the public to express their views, submitting argument and information, in advance of government action. This opportunity for citizen involvement in the decision-making process is notable. But the second requirement is equally important: Government decision-makers are obligated to attend to that public input, to consider it on the merits, and to respond. The public’s engagement with government in rule-making is thus marked by a two-way dialogic commitment, in which government decision-makers may not simply ignore the arguments raised by citizens. Rather, they must engage with them and respond. I’ll refer to citizens’ entitlement to such consideration as the “right to be taken seriously.”

The Administrative Procedure Act is only one source of American law reflecting a right to be taken seriously. Environmental law provides other examples. Before a federal government agency takes action that will significantly affect the environment, it must distribute a draft environmental statement; citizens can then submit responses to that statement, and the government is barred from taking action until it issues a revised document responding to all “responsible” opposing viewpoints.<sup>8</sup>

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3. Again, there are exceptions. See *infra* notes 22–27 and accompanying text.

4. 5 U.S.C. § 553(b) (“General notice of proposed rule making shall be published in the Federal Register . . .”).

5. *Id.* at § 553(c).

6. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). The D.C. Circuit has repeatedly reaffirmed this holding. See, e.g., *Interstate Natural Gas Ass’n v. FERC*, 494 F.3d 1092, 1096 (D.C. Cir. 2007).

7. See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115–16 (D.D.C. 1995); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 414 (D.C. Cir. 2004).

8. See 40 C.F.R. §§ 1502.9, 1503.1, 1503.4 (2011); *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971); Jim Rossi, *Participation Run Amok: The Costs of*

Before an agency can issue a major source permit under the Clean Air Act, it must seek public comment, and it has “an obligation to respond to significant public comments.”<sup>9</sup> Here too, we see the same two-way exchange of citizen comment and government response.<sup>10</sup>

This sort of interaction has been getting a lot of academic attention lately, as internet communication has begun to transform agencies’ rule-making processes.<sup>11</sup> Today, agencies can solicit online, and citizens can file and read online, comments on proposed agency action. Some have urged that internet communication can enable fundamental changes to the way that agencies make law.<sup>12</sup> To a significant extent, scholars have approached this matter on a nuts-and-bolts level, asking about the effects of internet communication on the mechanics of the notice-and-comment process.<sup>13</sup>

In this article, I’ll engage in a more theoretical examination. After setting out the legal basis of the right to be taken seriously, I’ll pose the question why we might value it. The first part of the answer is the easiest: Mechanisms such as notice-and-comment help agencies make better decisions. The next part, though, is harder: Does the presence of a right to be taken seriously make our government institutions more democratic? Commentators assume that it does. But standard theories of democracy and administrative law, I will argue, don’t provide satisfying basis for that conclusion.

I argue nonetheless that a more satisfying basis exists, and that to see it, we should focus less on the individual’s ability to comment than on the government’s obligation to hear, engage, and respond. That requirement puts governors and governed in a discursive relationship. It

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*Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173, 190–91 (1997).

9. Onyx Envtl. Servs., CAAPP No. 163121AAP (EPA Feb. 1, 2006), available at [http://yosemite.epa.gov/r5/r5ard.nsf/8a853ab744d510c68625745800533fd5/06b0e9b20649a123862574c8006fd1d7/\\$FILE/Onyx%20final.2-1-06.pdf](http://yosemite.epa.gov/r5/r5ard.nsf/8a853ab744d510c68625745800533fd5/06b0e9b20649a123862574c8006fd1d7/$FILE/Onyx%20final.2-1-06.pdf).

10. For other examples, see *infra* note 74 (consumer protection law); 47 U.S.C. § 160 (2006) (telecommunications law).

11. See, e.g., ABA COMM. ON THE STATUS AND FUTURE OF FED. E-RULE-MAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULE-MAKING 1* (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf>; CARY COGLIANESE, *FEDERAL AGENCY USE OF ELECTRONIC MEDIA IN THE RULEMAKING PROCESS 1–2* (2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/08/Coglianesse-Report.pdf>; Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 399–400 (2011); CAROLYN J. LUKENSMEYER ET AL., *ASSESSING PUBLIC PARTICIPATION IN AN OPEN GOVERNMENT ERA: A REVIEW OF FEDERAL AGENCY PLANS 46* (IBM Center for the Business of Government ed., 2011), available at <http://www.govexec.com/pdfs/082211jm1.pdf>; Nina A. Mendelson, *Rule-making, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1344–45 (2011).

12. See e.g., Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 473 (2004).

13. See, e.g., LUKENSMEYER ET AL., *supra* note 11, at 46.

compels the state to engage in communicative, reason-based discourse rather than the mere exercise of power. The government's obligation to show respect, to treat commenters as democratic citizens rather than as objects of paternalistic control, is at the heart of the right to be taken seriously and its democratic bona fides.

But there is a catch. This article grounds the democratic function of the right to be taken seriously in a theoretical understanding of democracy (in part, in Habermas's conception of communicative rationality). Is that theory reflected in the everyday practice of notice-and-comment? The answer is no, not really. In practice, agencies are often swamped by comments and pay serious attention to only some of them. They attend to those comments filed by repeat players with instrumental power and may send the rest off to outside contractors to be ignored. While the institution of notice-and-comment, even in this limited form, has value in bringing information to the eyes of the agency, it's harder to argue that it's meaningfully democratic or democratizing.

I think there's more to understand in this gap between theory and practice. To help illuminate it, I'll turn to some history. The right to be taken seriously isn't really new; it isn't just a product of post-WWII environmental and administrative law statutes. It echoes, rather, a striking and neglected precedent: the historic understanding of the right of the people, guaranteed by the First Amendment, "to petition the Government for a redress of grievances."<sup>14</sup> This historic petition right was initially understood to incorporate the same dialogic commitment as the modern right to be taken seriously: citizen expression of policy views coupled with a government obligation to attend to that input, to consider it on the merits, and to respond. That understanding of the Petition Clause has been almost entirely forgotten today, but it underlay a wealth of petitioning activity in the early United States.

The demise of that older understanding of the Petition Clause related in part to conflict over whether the 1840s Congress was obliged to receive and respond to petitions relating to the abolition of slavery. More importantly, the old understanding of petition died because it emerged from a pre-liberal political culture marked by an unmediated politics of "public faith" and reciprocal obligation. It was rootless and unenforceable in the new nineteenth century world of mass politics, in which voting came to be the key link between citizen and government.

The right to be taken seriously, though, spoke to a need encoded in our political DNA. It reappeared in modern administrative law, accompanied by a new enforcement mechanism: the courts' authority to

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14. U.S. CONST. amend. I.

reverse agency decisions where the agency had not adequately addressed facts and arguments raised in public comments. Commenters didn't have to rely on the agency's listening to them as a matter of grace or social role. Yet that enforcement mechanism turned out to be too blunt an instrument. Courts cannot compel agencies to attend to all comments; those that best reflect mass public sentiment are in one respect the most easily ignored.

The right to be taken seriously is appealing because it forces government to respond to citizens dialogically—that is, to respond as if the relationship between government and citizen were the same sort of human relationship we have in those aspects of everyday life not driven by marketplace or government authority. Yet it has always strained beyond the limits of legal enforceability. Its lack of an effective enforcement mechanism doomed it in the mid-nineteenth century. Modern administrative law provides judicial enforcement, but we face a contradiction in using judicial review to make government act in non-instrumental ways.

The institution of notice-and-comment does a notable job of simulating a dialogic, discursive relationship in which government must show the citizenry the respect of explaining itself—of hearing public comments and responding to them directly. That sort of relationship builds connection because it creates a sense that governors and governed are part of a shared community. But it's not really true. The point of judicial review is to compel agency staffers to write responses to the substance of public comments by threatening that otherwise they'll be reversed. There is no way to avoid the instrumental nature of that mechanism. In the end, that undercuts the democratic connection that the right to be taken seriously might otherwise make.

In Part I of this article, I will describe the legal basis for the right to be taken seriously in current law. In Part II, I will discuss the doctrine's role in promoting more accurate agency decision-making. In Part III, I will briefly consider its role in advancing perceived government legitimacy, and in Parts IV, V, and VI, I will speak more deeply to the connection of the right, in theory, with democratic practices and values. In Part VII, I will turn to the question of whether these theoretical goods are advanced in practice. In Part VIII, I will turn to the historical petition right. In Part IX, I will describe the inherent limitations of a dialogic conception of the right.

## I. THE APA AND THE MODERN RIGHT TO BE TAKEN SERIOUSLY

The Administrative Procedure Act was enacted in 1946, a compromise end to a long-fought battle over regulation of the American admin-

istrative process. “[D]esigned to set forth minimum procedural essentials” for certain agency functions,<sup>15</sup> it imposed relatively few strictures on policy-makers.<sup>16</sup> It did introduce a new concept into the law: that of “informal rulemaking.”<sup>17</sup> Under § 553 of the Act, certain agency rule-making activities were subject to congressionally-imposed procedural requirements, designed to ensure that “the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice.”<sup>18</sup> These requirements were characterized as “informal,” more forgiving than those of the trial-type hearing.<sup>19</sup>

Which activities are subject to § 553 requirements? The APA defines § 553 “rule making” to mean the “agency process for formulating, amending or repealing a rule,” and defines “rule” to include “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>20</sup> That’s a broad category: Since the APA goes on to describe “adjudication” as “agency process for the formulation of . . . a final disposition . . . in a matter other than rule making,”<sup>21</sup> it appears that essentially all agency action can be divided into the categories of (generalized, forward-looking, policy-oriented) rule-making and (individualized, backward-looking) adjudication.

Only some of that rule-making is subject to the APA’s procedural requirements. The statute exempts from those requirements all rule-making that relates to “a military or foreign affairs function of the United States,” or to “agency management or personnel” or to “public property, loans, grants, benefits or contracts.”<sup>22</sup> That last exception looks potentially huge, but courts have construed it narrowly, and agencies commonly decline to invoke it, following § 553 requirements even where it would otherwise apply.<sup>23</sup>

The statute also exempts “interpretive rules,” “general statements of policy,” and “rules of agency organization, procedure, or practice.”<sup>24</sup>

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15. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 313 (1946).

16. See Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 277 (1978).

17. See *id.*

18. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, *supra* note 15, at 257.

19. See Verkuil, *supra* note 16, at 277-78 & n.103.

20. 5 U.S.C. § 551(4)-(5) (2006).

21. *Id.* at § 551(6)-(7).

22. *Id.* at § 553(a).

23. See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 555 (6th ed. 2009); Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 551 (1970); see, e.g., *Vigil v. Andrus*, 667 F.2d 931, 937 (10th Cir. 1982).

24. 5 U.S.C. § 553(b)(3)(A).

Courts trying to figure out where those exceptions apply have described them as “enshrouded in considerable smog”<sup>25</sup>— the distinctions are “tenuous,” “fuzzy,” “blurred,” and “baffling.”<sup>26</sup> Their gist is that APA notice-and-comment requirements apply when an agency creates new law, rights, or duties but not when it merely notifies the public about its intentions or its understanding of the law.<sup>27</sup> But the bottom line for our purposes is that even taking these exceptions into account, § 553 requirements apply to a broad sweep of agency activity. And those activities are important. 2010’s Dodd-Frank Wall Street Reform and Consumer Protection Act, for example, required for its implementation 240 separate rule-makings establishing new legal requirements on the part of eleven agencies.<sup>28</sup>

Next, what does § 553 require? As set out in the statute, its demands don’t seem onerous. The agency must publish notice of its proposed rule-making, describing the substance of the proposed rule or the subjects and issues involved.<sup>29</sup> It must give interested persons “an opportunity to participate in the rulemaking through submission of written data, views, or arguments.”<sup>30</sup> It must consider that material and must incorporate in the ultimate rule “a concise general statement of [the rule’s] basis and purpose.”<sup>31</sup>

The statutory text, thus, requires the agency to allow members of the public to comment on proposed rules. And the courts, in a series of cases, have required agencies to describe proposed rules with sufficient accuracy and in sufficient detail and to provide sufficient background materials to enable members of the public to file informed, on-point comments and objections.<sup>32</sup> But what about the second component of the right to be taken seriously—the government’s obligation to attend to that input, to consider it on the merits, and to respond? I can imagine the reader pointing out at this point that *that’s* not in the statute. The statute requires the agency to consider the material but apparently not to respond, and there’s no indication in the text of the statute of how a member of the public could seek to enforce her right to the “considera-

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25. *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (quoting *Am. Bus. Ass’n v. ICC*, 627 F.2d 525, 529 (D.C. Cir. 1980)).

26. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted).

27. *See Ruckelshaus*, 742 F.2d at 1565; *see generally* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 *DUKE L.J.* 381.

28. *See Farina et al.*, *supra* note 11, at 401.

29. 5 U.S.C. § 553(b).

30. *Id.* at 553(c).

31. *Id.*

32. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 449–54 (3d Cir. 2011), *cert. denied*, 80 U.S.L.W. 3716 (U.S. June 29, 2012); *see also infra* notes 177–178 and accompanying text.



tion” that the statute mandates. So where do I get my asserted “right to be taken seriously”?

The answer lies in the courts’ interpretation of the Act. It begins with the APA’s empowering courts to overturn agency decisions on the ground that those decisions are “arbitrary” or “capricious.”<sup>33</sup> Imagine that a challenger attacks a particular agency action in court as “arbitrary.” What does that mean, exactly? The Supreme Court has explained that arbitrariness is a function of the agency’s reasoning process. A decision is arbitrary, for example, if the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before” it.<sup>34</sup> The reviewing court is required to look at the agency’s reasoning in reaching its decision. And how is the court to know what the agency’s reasoning was? The Court has required agencies to prepare written, contemporaneous rationales setting out “adequate explanation” for their actions.<sup>35</sup>

In the context of a challenge to an agency rule, the agency’s contemporaneous rationale must make clear “what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”<sup>36</sup> Based on the information in that document, the court is positioned to decide whether the agency has rationally considered the objections made in the comments to its proposal and has reasonably disposed of them—otherwise, it could not know that the agency had avoided arbitrariness.<sup>37</sup> The result is that an agency that wishes to avoid having its rule vacated as arbitrary needs not only to solicit comments from the public but also to consider them and to respond to them on the merits.<sup>38</sup>

This judicial understanding didn’t fall into place all at once. Before the late 1960s, the extent of judicial review of agency rules was unclear, and agencies could generally invoke justiciability claims to avoid direct challenges.<sup>39</sup> Agency attention to public comments was haphazard at

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33. 5 U.S.C. § 706(2)(A).

34. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

35. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also* *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

36. *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

37. *See id.* at 341.

38. *See Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1215–16 (D.C. Cir. 1983).

39. The Court shifted that status quo in cases beginning with *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997).

best.<sup>40</sup> But by the mid to late 1970s, as judicial review of agency action became more widespread and far-reaching, it became uncontroversial that an agency promulgating a rule was required to “refer to relevant submissions by interested parties and . . . rebut or accept these submissions in an orderly fashion.”<sup>41</sup> As one commentator then put it, the agency is obligated “to answer cogent comment, and . . . to do so in terms of the particulars of the record.”<sup>42</sup> The agency must explain how it resolved the questions comments posed, for “[a]rbitrary decisionmaking cannot be prevented if an administrator is allowed simply to ignore serious objections.”<sup>43</sup> Indeed, the D.C. Circuit urged, without an obligation that the agency respond to significant comments, the opportunity to comment would be “meaningless.”<sup>44</sup>

The courts have repeatedly reaffirmed this obligation.<sup>45</sup> To be sure, an agency need not respond to insignificant arguments.<sup>46</sup> But if an agency does not respond to significant comments, its decision-making cannot be deemed rational.<sup>47</sup> The agency’s obligation is to “respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.”<sup>48</sup> Its obligation to solicit and receive comments is “inextricably intertwined” with its statutory obligation to issue an explanatory statement with each rule.<sup>49</sup>

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40. See MASHAW ET AL., *supra* note 23, at 529.

41. J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381 (1974).

42. James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 271 (1979).

43. *Id.* DeLong described this requirement as part of a then-current “hybrid rule-making” model. *Id.* The Supreme Court rejected aspects of hybrid rule-making in *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550 (1978) but never stepped back from the requirement that agencies respond to comments.

44. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). See also *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985) (quoting *Home Box Office, Inc.*, 567 F.2d at 35–36).

45. See, e.g., *Interstate Natural Gas Ass’n of Am. v. FERC*, 494 F.3d 1092, 1096 (D.C. Cir. 2007); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994); *Heckler*, 760 F.2d 1470; see also Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 421 (2005).

46. See *Interstate Natural Gas Ass’n*, 494 F.3d at 1096; *NRDC v. EPA*, 859 F.2d 156, 188–89 (D.C. Cir. 1988); *Portland Cement Ass’n v. Ruckleshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973); Cuéllar, *supra* note 45, at 421 n.37.

47. See *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000).

48. *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (quoting *Rodway v. U.S. Dep’t of Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975)) (internal quotation marks omitted); see William N. Eskridge, Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. ADVANCE ACCESS, 14 (Apr. 19, 2012), available at <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.full.pdfhtml>.

49. *Action on Smoking & Health*, 699 F.2d at 1216. But see Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 114–15 (2003)

This right to be taken seriously is not constitutionally grounded.<sup>50</sup> Yet the idea that rule-making is a “dialogue”<sup>51</sup>—a “two-way street”<sup>52</sup> in which government must not only solicit public comment, but indeed consider it and respond on the merits—has become fundamental to post-1970s administrative law and has expanded beyond the APA.<sup>53</sup> In the next few sections of this article, I will explore the bases for its appeal. In the very next section, I’ll cover the most straightforward and noncontroversial argument for the right to be taken seriously: that it increases the accuracy of agency decision-making.

## II. ACCURACY

One goal underlying the right to be taken seriously is accuracy. The case law sounds this theme not only with regard to rule-making, but even more strongly in the adjudicatory context. Whenever the government seeks to deprive a person of a liberty or property interest, in a context where her legal entitlement rests on consideration of her individualized facts, the Due Process Clauses of the Fifth and Fourteenth Amendments require that she be able to participate in the decision by taking part in a hearing before a government arbiter. At that hearing, she must be allowed to present her own evidence and arguments relating to those facts and to rebut the evidence provided by the government.<sup>54</sup>

What drives that constitutionally mandated requirement of procedural due process? According to the Supreme Court in *Mathews v. Eldridge*, it’s accuracy.<sup>55</sup> Whether process is “due,” the Court has told us, depends on a balancing test in which a key factor is the extent to which allowing the contested procedural rights will increase the accuracy of the government’s determination.<sup>56</sup>

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(arguing that because the obligation to respond is not explicit in the APA’s text, “there may thus be good reason” to conclude that it does not exist; that an obligation to respond to every comment would be “cumbersome” and “conceptually unstable”; and that as a result, the control of informal rule-making through the adjudication-inspired idea of private comments is a weak formality).

50. *See* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *see infra* notes 359–361 and accompanying text.

51. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977))

52. *Id.*

53. *See supra* notes 8–10 and accompanying text.

54. *See* *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

55. 424 U.S. 319, 344 (1976).

56. The other factors relate to the *importance* of accurate decision-making in the particular setting, as measured by the degree of hardship that an incorrect choice would impose, and the financial *cost* of providing the procedural right. *See id.* at 334–35; Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976); Solum, *supra* note 2, at 252–53.

It's entirely sensible to believe that this sort of citizen participation in government decision-making will increase accuracy; that, after all, is what the adversary process is about. The Anglo-American system of justice is based on the notion that legal fact-finders are more likely to reach correct results when the persons immediately affected by the decisions and most knowledgeable about the facts are made familiar with the evidence that their adversaries will present to the fact-finders and are allowed to rebut it and to present their own cases. That right is at the heart of due process; it is particularized in the rights of confrontation and cross-examination.<sup>57</sup> It is "immutable in our jurisprudence" that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings," the individual must have a full and fair opportunity to show that "the evidence used to prove the Government's case . . . is untrue."<sup>58</sup>

Turning to government rule-making, it's reasonable there too to believe that broad public involvement will increase the substantive quality of decisions. One can go back to Aristotle for the proposition that broader participation in decision-making makes for better decisions.<sup>59</sup> While any individual alone will have imperfect judgment, Aristotle stressed, a larger, more broad-based body will have superior perspective, for it can draw from the understanding of the collectivity and can bring to bear important perspectives that decision-makers would otherwise lack. "[A] feast to which many contribute is better than a dinner provided out of a single purse."<sup>60</sup> In particular, the broad-based body will bring to the problem a more useful range of views: "[T]he knowledge of the house is not limited to the builder only; the user . . . of the house will even be a better judge than the builder, just as . . . the guest will judge better of a feast than the cook."<sup>61</sup> Or as John Dewey put it, "[t]he man who wears the shoe," not the shoemaker, "knows best that it pinches and where it pinches."<sup>62</sup>

Today, this insight is a commonplace. Various forms of "many-

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57. The Court at one point traced these rights back at least as far as the Christian Bible. *See* *Greene v. McElroy*, 360 U.S. 474, 497 n.25 (1959) (quoting *Acts* 25:16: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.").

58. *Goldberg*, 397 U.S. at 270 (quoting *Greene*, 360 U.S. at 496-97 (1959)) (internal quotation marks omitted).

59. *See* Jonathan Weinberg, *Geeks and Greeks*, 3 INFO 313, 329 (2001); *see also* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 18 (2009).

60. ARISTOTLE, *POLITICS* bk.III, at 121 (Benjamin Jowett trans., Oxford Univ. Press 1945).

61. *Id.* at 124.

62. JOHN DEWEY, *The Problem of Method*, in *THE POLITICAL WRITINGS* 187 (Debra Morris & Ian Shapiro eds., 1993).

minds argument”<sup>63</sup> (of which this is one) constitute the basis for prediction markets such as Intrade<sup>64</sup> and such phrases as the “wisdom of crowds.”<sup>65</sup> In particular, this understanding is foundational in the development of open-source software. One of the key insights of open-source development, after all, is the one that Eric Raymond dubbed “Linus’s law”: “Given enough eyeballs, all bugs are shallow.”<sup>66</sup>

There’s good reason to believe that a right to be taken seriously in government decision-making will increase the quality of that decision-making in a wide variety of contexts. Decision-makers routinely start the day with incomplete information, unexamined biases, and a limited sense of the possible. It’s common, for example, for government agencies to be most responsive to large market players whose economic interests are rooted in the status quo; an agency in the course of its everyday operations is likely to seek feedback from those well-established and respectable players, but not from less established firms with new business models. In that context, broad-based participation, bringing insights from the guest as well as the cook,<sup>67</sup> together with a mechanism for ensuring that the decision-maker takes the broad-based input seriously, will push in the direction of better decision-making.<sup>68</sup> A rule requiring the agency to consider the comments of new entrants, as well as those of established players, will contribute to an environment of greater openness to pro-competitive policies.<sup>69</sup>

None of this is earth-shattering. Sixty years after the U.S. first put the APA notice-and-comment process in place, few would dispute that

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63. See Vermeule, *supra* note 59, at 2.

64. See INTRADE, <http://www.intrade.com> (last visited Aug. 2, 2012). Prediction markets rely on Condorcet’s Jury Theorem, which tells us that larger, less-informed groups can, by aggregating members’ independent views, reach more accurate results than smaller, better-informed ones. See generally Vermeule, *supra* note 59, at 2–6. I don’t rely on Condorcet’s theorem in this article. The understanding of openness I’ve set forth does not involve decisions made directly through aggregating the views of members of a broad-based group, but merely the ability of broad-based groups to provide input to the ultimate decision-makers. See *infra* note 71 and accompanying text. The relevant insight there is Aristotle’s, not Condorcet’s.

65. See JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (2004); see also, e.g., CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 21 (2006).

66. Eric Raymond, *Release Early, Release Often*, in *THE CATHEDRAL AND THE BAZAAR* (2000), available at <http://catb.org/~esr/writings/homesteading/cathedral-bazaar/ar01s04.html> (last modified Sept. 11 2000).

67. See *supra* note 60 and accompanying text.

68. See Beryl A. Radin & Terry L. Cooper, *From Public Action to Public Administration: Where Does It Lead?*, 49 PUB. ADMIN. REV. 167, 167–68 (1989). See also Hilary Bok, *They Should Have Read Their Hayek . . .*, *OBSIDIAN WINGS* (May 15, 2008), [http://obsidianwings.blogs.com/obsidian\\_wings/2008/05/they-should-hav.html](http://obsidianwings.blogs.com/obsidian_wings/2008/05/they-should-hav.html) (noting the challenges to upward information flow in top-down hierarchical organizations).

69. See Rossi, *supra* note 8, at 185.

it's epistemically helpful for government agencies to solicit public comments.<sup>70</sup> At this point, though, I have two caveats to offer. First, I am not suggesting that broad-based input will *guarantee* good decision-making. For one thing, in a governance model characterized by openness as I've described it, the broad-based public is not making decisions directly, but is merely providing input to an ultimate decision-maker. Governance rules may require the decision-maker to articulate reasons when it rejects elements of that input, but that is the extent of the decision-maker's constraint. The fact that the decision-maker may not take the advice generated by broad-based participation (so that even good advice is for naught) presents what Adrian Vermeule has referred to as an "epistemic bottleneck."<sup>71</sup> My argument here, though, is that broad-based participation both makes better decision-making possible and, on the margin, makes it more likely.

Second, increased broad-based participation will not always have a helpful effect; it may have a negative one. Some, for example, have warned that electronic filing of comments may "flood agencies with vast quantities of public commentary" and "undermine or dilute the voice of the public."<sup>72</sup> Processing public inputs will demand agency resources.<sup>73</sup> An agency may find itself devoting so much time and attention to outsider-initiated tasks that it is hampered in developing and pursuing its own agenda.<sup>74</sup>

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70. *But see* Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 246 (1973); *infra* Part VI. And to say that agencies should consider comments is not to say that there should be *judicial enforcement* of that requirement; some argue that such a rule will routinely frustrate legitimate agency action. *See* Thomas O. McGarity, Response, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 550 (1997); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 69 (1995). The agency's obligation to consider public comment, according to those scholars, is part of the red tape that is said to have "ossified" rule-making. For a recent skeptical view of the ossification thesis, see Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rulemaking "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 261 (2010). *See also* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 931-32 (2008).

71. *See* Vermeule, *supra* note 59, at 25.

72. Stuart W. Shulman, *E-Rulemaking: Issues in Current Research and Practice*, 28 INT'L J. PUB. ADMIN. 621, 623 (2005).

73. *See* JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 29 (1985).

74. Thus, for example, the Consumer Product Safety Act as initially drafted contained a provision allowing any person to petition for a rule setting product safety standards, requiring the agency to respond within 120 days, and providing that a decision not to initiate a rule-making process would be reviewed *de novo* in district court. *See* Consumer Product Safety Act, Pub. L. No. 92-573, § 10, 86 Stat. 1217 (1972) (repealed 1981). If the agency agreed to initiate a rule-making, then it was bound to a complicated "offeror" process in which an industry entity, consumer group, or private standards-writing organization would develop an initial proposed rule for the agency to take as its starting point. *See id.* at § 7; Carl Tobias, *Early Alternative Dispute Resolution in a Federal Administrative Agency Context: Experimentation with the Offeror Process*

## III. LEGITIMACY

What other goods does the right to be taken seriously serve? A further answer is that it promotes government legitimacy. When I say that, I'm not speaking to the normative or moral characteristics of government systems marked by notice-and-comment mechanisms. Rather, I'm speaking descriptively about the attitudes citizens of such governments have: whether they perceive government institutions as legitimate and therefore are willing to comply with legal commands. This is sometimes referred to as "sociological legitimacy."<sup>75</sup>

Such legitimacy understandings derive from overlapping sources. To some extent, the very fact that the right to be taken seriously promotes higher-quality decision-making will contribute to government legitimacy: People are more likely to deem an institution legitimate if it generates rules that work well.<sup>76</sup> Beyond that, the legitimacy of an institution and its decisions depends on the extent to which the institution fits within established cultural accounts explaining its exercise of authority. In our modern political culture, the legitimacy of a government decision is often seen to rest on whether the decision was the product of meaningfully representative democratic procedures.<sup>77</sup>

The right to be taken seriously contributes to government legitimacy in the sense that a citizenry accustomed to such a right is more likely to view its government as democratically responsive. As Will Kymlicka has put it, "citizens will accept the legitimacy of collective decisions that go against them, but only if they think their arguments and reasons have been given a fair hearing, and that others have taken seri-

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at the Consumer Product Safety Commission, 44 WASH. & LEE L. REV. 409, 411-12 (1987). The result, according to one informed observer, was "disaster"; the agency was "swamped in . . . unproductive investigations of useless subjects," plagued by delay, and deprived of the ability to set its own agenda. See MASHAW, *supra* note 73, at 262-63 (footnotes omitted).

For more on electronic rule-making, see *infra* notes 228-249 and accompanying text.

75. See Jonathan Weinberg, *Non-State Actors and Global Informal Governance: The Case of ICANN*, in INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE (Thomas Christiansen & Christine Neuhold eds., 2012) 292, 293. On sociological conceptions of legitimacy, see generally THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); JOHN W. MEYER & W. RICHARD SCOTT, ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY (1983); Robin Stryker, *Legitimacy Processes as Institutional Politics: Implications for Theory and Research in the Sociology of Organizations*, in ORGANIZATIONAL POLITICS (Samuel B. Bacharach & Edward J. Lawler eds., 2000).

76. See Thomas Christiansen et al., *Informal Governance in the European Union: An Introduction*, in INFORMAL GOVERNANCE IN THE EUROPEAN UNION 1, 12-15 (Thomas Christiansen & Simona Piattoni eds., 2003).

77. See WEINBERG, *supra* note 75, at 293; MEYER & SCOTT, *supra* note 75. The literature on legitimacy is extensive and reflects competing schools of thought; I do not pretend to do it justice here. For a somewhat different approach, see THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

ously what they have to say.”<sup>78</sup> Theorists such as Kymlicka, who condemn aggregative or “vote-centric” conceptions of democracy and urge that democracy must incorporate the deliberative generation of collective preferences, do so in part on the ground that voting without deliberation denies citizens the opportunity to persuade others of the merits of their views, to shape consensus, or compromise. They also emphasize, though, that voting without deliberation deprives those in the minority of the sense of legitimacy that comes with the belief that those in the majority at least considered their arguments seriously.<sup>79</sup>

It makes sense to think that a citizen expressing her views in advance of government action, on the understanding that government decision-makers are obligated to attend and respond, should feel greater connection with that government. Her involvement is not limited to voting in infrequent elections; she can actually tell the government what to do, and though the government is not required to follow her advice, it is required on some level to pay attention to it. That creates a thicker fabric of connection between members of the public and government decision-makers. In that sense, her participation is, like voting, an “affirmation of belonging.”<sup>80</sup> Where people can participate in the government’s decisional process and the government is obliged to attend to that participation, then, on the margin, the resulting sense of democratic responsiveness should contribute to legitimacy.<sup>81</sup>

#### IV. DEMOCRACY

That the right to be taken seriously contributes to government legitimacy, fostering a psychological sense of democratic connection, isn’t too challenging a proposition. But that’s a sociological judgment. Can we go beyond that, and say that a right to be taken seriously makes government structure more “democratic”?

Administrative law scholars seem to think so; they persistently

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78. WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 291 (2d ed. 2002).

79. *See id.* at 290–91; *see also* Rossi, *supra* note 8, at 187–88.

80. The language is from JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 26 (1991). Shklar herself would not group this sort of participation with voting; her theme in *American Citizenship* is that the franchise and economic independence hold a special and singular status in American society as the key rights denied to antebellum slaves.

81. I have not yet taken up the disconnect between my discussion of notice-and-comment and its reality. To the extent that the right to be taken seriously contributes to democratic legitimacy, it is by virtue of its meaning for human beings seeking connection with their government. Yet the benefits of participation in agency processes often inure to corporate entities for which participation has no such psychological meaning. Further, there is reason to think that agencies are more responsive to those business-entity comments than they are to the ones filed by ordinary people. I discuss this at length in Part VI.



refer to notice-and-comment as a democratic tool. A look at the literature finds scholars explaining that, by virtue of public participation in notice-and-comment rule-making, agency rules are more nearly “democratic and thus essentially self-legitimizing”;<sup>82</sup> that rule-making is itself a “refreshingly democratic” process;<sup>83</sup> that participation in rule-making is a “democratic right[ ]”;<sup>84</sup> and that electronic rule-making represents “online ‘deliberative democracy.’”<sup>85</sup> The literature reflects what appears to be a widespread intuition that notice-and-comment is an exercise in democracy. But is that correct? And if so, why?

In seeking to answer this question, we immediately run up against the fact that different theorists have different conceptions of democracy. C. Edwin Baker once broadly classed theories of democracy under the headings of elitist, pluralist, and republican, and those categories will work for our purposes here.<sup>86</sup> Elitist democracies, for Baker, are entirely vote-centric; the function of democratic institutions under this model is to maximize the likelihood that leaders and bureaucrats will be competent and public-interested by providing a mechanism through which the public can replace governments that are incompetent or corrupt. To accomplish these ends, the governmental system must feature voting, democratic accountability, and speech institutions to report on government malfeasance. Members of the public play their part on election day.<sup>87</sup>

Pluralist democratic theories, by contrast, demand more active citizen participation in government. They require that members of the public form interest groups, mobilize in defense of their shared interests, and exert leverage in the political bargaining that shapes the polity’s laws and policies. For the liberal pluralist theorist, it is insufficient that the citizen can vote; she must be able to lobby as well.<sup>88</sup>

Theorists of republican democracy, finally, challenge the liberal-pluralist assumption that citizens can appropriately be divided into interest groups on the basis of their exogenous interests and preferences. For these theorists, democracy should not simply aggregate individuals’ preferences without more. Rather, it must enable the thoughtful delibera-

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82. Mendelson, *supra* note 11, at 1343.

83. Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, LAW & CONTEMP. PROBS., Winter 1994, at 127, 129.

84. Noveck, *supra* note 12, at 517.

85. Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—for Better or Worse*, 34 OHIO N.U. L. REV. 469, 482 (2008).

86. See C. EDWIN BAKER, MEDIA, MARKETS AND DEMOCRACY 129–43 (2002); see also Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133, 1139–40 (2011).

87. See BAKER, *supra* note 86, at 129–34.

88. See *id.* at 135–38; see also, e.g., ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

tion among citizens through which values are shaped, through which citizens oriented to the common good can seek consensus.<sup>89</sup>

In this section of the article, I'll look at the connection of the right to be taken seriously with elitist and pluralist theories of democracy. Key strands of American political thought fall in this category, sometimes tending towards the elitist side of Baker's category divide. The Federalists saw too-active popular participation in government as bound up with the "mischiefs of faction" they sought to avoid.<sup>90</sup> James Madison, thus, while urging that government gains its legitimacy from democratic representation, was wary of direct public control of policy.<sup>91</sup> The goal of representation, he explained, is to

refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.<sup>92</sup>

More recent American political thought has been heavily influenced by a vote-centric approach that takes the institutions of representative government and free speech as the key guarantors of a democratic polity, treating democracy as synonymous with elections.<sup>93</sup>

As administrative law scholars have long realized, though, a vote- or election-centric model of democracy faces profound challenges when confronted with the administrative state. The problem is that administrative decision-makers are not elected. If I should disagree with the federal government's position to grant or deny a particular media merger, my only possible electoral response is to vote to throw out an entire presidential administration—but the lines of accountability between agency and president may be blurry, and my vote for president will almost cer-

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89. See BAKER, *supra* note 86, at 138–43;

90. THE FEDERALIST NO. 10 (James Madison).

91. See *infra* notes 314–315 and accompanying text.

92. THE FEDERALIST NO. 10, *supra* note 90. At the same time, Madison saw the people as the ultimate check against wrongful action by their representatives. In such cases, it was "the duty, as well as right, of intelligent and faithful citizens . . . to control [government actors] by the censorship of the public opinion." JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_speechs24.html](http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html). In the end, public opinion was "the only effectual guardian of every other right." *Id.* See Colleen Sheehan, *Sound the Alarm to the People: James Madison, Thomas Jefferson and the Principles of 1798*, LIBR. L. & LIBERTY (Apr. 17, 2012), <http://libertylawsite.org/liberty-forum/sound-the-alarm-to-the-people-james-madison-thomas-jefferson-and-the-principles-of-1798/>.

93. See Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 7 (2011).

tainly turn on other issues.<sup>94</sup> Electoral mechanisms, transparency, and free speech, without more, cannot guarantee the democratic bona fides of agency action, and they do not mean that individual government decisions are responsive to the popular will.<sup>95</sup>

How to address this administrative “democracy deficit”?<sup>96</sup> Under the traditional model of (and justification for) agency decision-making, agencies’ policy-making was deemed democratically acceptable because of the agencies’ relationship to Congress.<sup>97</sup> The law required administrative agencies to stay within the bounds of their statutory delegations; the courts were there to enforce those limits.<sup>98</sup> Agencies were seen as adequately constrained by their obligation to justify their decisions, in open proceedings, in terms of their instructions from Congress and the evidentiary record.<sup>99</sup>

This traditional model lost favor, though, as it became apparent that the agencies’ statutory obligations imposed only limited constraints on them—if an agency needed to show only that its actions were not arbitrary when considered in light of vague and broadly worded legislative instructions and authorizations, then the agency was hardly constrained at all. Instead, a second wave of theory in the 1960s and 70s came to see administrative agency legitimacy through a proceduralist lens. The administrative process was said to have legitimacy to the extent that all affected interests were given fair access to agency decision-makers. Under this model, dubbed “interest representation,” administrative legality rested in policy-making that gave a role to all relevant interests by giving them serious consideration in developing substantive policy.<sup>100</sup>

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94. See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 218–19 (2000). As Alan Morrison of Public Citizen once put it, “how many people in the world do you think are going to decide whom to vote for . . . based upon whether the Food and Drug Administration went after drugs or not in *Heckler v. Chaney*?” Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 738 n.240 (1990).

95. This is not a new point; much of U.S. administrative law scholarship has been devoted to defending the administrative state from this attack. See STEPHEN BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 146 (4th ed. 1999); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000); Weinberg, *supra* note 94, at 220.

96. Peter L. Strauss, *Legislation that Isn’t—Attending to Rule-making’s “Democracy Deficit”* 98 CALIF. L. REV. 1351, 1353 (2010).

97. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671–76 (1975); see also Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1334–35 (1984) (describing the “judicial review” model).

98. See Stewart, *supra* note 97, at 1673–74; Weinberg, *supra* note 94, at 221.

99. See MASHAW ET AL., *supra* note 23, at 39.

100. See MASHAW ET AL., *supra* note 23, at 41; Stewart, *supra* note 97, at 1712, 1722; Weinberg, *supra* note 94, at 222; see also Frug, *supra* note 97, at 1359–61. This vision can be analogized to John Hart Ely’s understanding of constitutional adjudication, in which the role of the courts is seen as “maintain[ing] access for all groups to a political process whose democratic legitimacy consists precisely in its potential responsiveness to the wishes of those groups.”

This involved a shift to an explicitly pluralist model of democracy. It based the legitimacy of the agency process, at least in part, on the possibility of citizen participation: on the ability of the public to make arguments to agencies and to have those arguments fairly considered.<sup>101</sup>

The interest representation model suggested that unmediated citizen participation in agency decision-making (and thus the right to be taken seriously) not only advances democracy but, indeed, is crucial to the agency's democratic bona fides. But U.S. administrative law has largely abandoned that model. On closer examination, it showed flaws. It depended, for its legitimizing power, on there being some metric we could use to tell when an administrative process "fairly" represents all interests. Yet some groups are going to be more influential in agency processes than others; on which occasions is that imbalance justified?<sup>102</sup> No agency can provide for unlimited participation given the needs of managerial efficiency; how do we know which refusals to accept outside input are appropriate, and which import subjectivity and arbitrariness?<sup>103</sup>

This problem in determining whether an agency process has been adequately pluralist, and thus legitimate, is reminiscent of the charge leveled at Jon Hart Ely's proceduralist vision of constitutional law:<sup>104</sup> There is no way to tell whether the process has given adequate respect and consideration to all interests other than by deciding whether one is satisfied with its substantive outcomes. Nor is it clear why various groups' ability to present their cases before the agency and a reviewing court achieves goals of democratic accountability in the first place, when the court can impose on the agency only limited constraints on its ultimate action.

U.S. administrative law thinkers have moved on from the interest representation model, largely abandoning the notion that interest-group participation should be deemed the source, or indeed should be the measure, of an action's legitimacy. More recently, they have emphasized

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MASHAW ET AL., *supra* note 23; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 465–66 (2003).

101. See Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 526 (1972). As the interest representation model took hold, administrative lawyers grappled with such questions as whether government should fund the participation in agency proceedings of interest representatives who could not otherwise afford to participate. See, e.g., Carl W. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 906–09 (1982).

102. See Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1498 (1983).

103. See MASHAW, *supra* note 73, at 29.

104. See ELY, *supra* note 100.

presidential control of the administrative process.<sup>105</sup> Presidential administration promises the benefits of accountability; under this approach, responsibility for nearly every agency action can be laid at the President's doorstep.<sup>106</sup> It leaves untouched, though, the problem of democratic insulation noted earlier—when the only influence a citizen has over the FDA's decision to approve a particular drug application is her power to vote for the other party's presidential candidate in the next election, she is armed with a very blunt instrument indeed.<sup>107</sup>

So is it meaningful to say that agency rules are democratic by virtue of public participation in notice-and-comment rule-making? One scholar argues that notice-and-comment rule-making provides “an ingenious substitute for the lack of electoral accountability of agency heads” because it provides citizens with “a structured opportunity to provide input,” insulated from the corrosive effect of large campaign contributions.<sup>108</sup> And yet the agency's insulation from the (messy, money-driven) political process is not itself a token of democratic legitimacy. Nor is there any reason to think that the comments filed in administrative proceedings reflect the distribution of public opinion.<sup>109</sup> Finally, public comments in notice-and-comment rule-making aren't especially constraining; the agency needs only to respond to them, not to follow their directions.<sup>110</sup>

There are respects in which the notice-and-comment feature of agency rule-making can be said to promote elitist or pluralist democracy. To the extent that notice-and-comment makes government decision-makers more aware of and potentially more responsive to public opinion, it is part of a larger collection of structural devices that “increase the incentives and capacity of elites to act intelligently for the

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105. See, e.g., Bressman, *supra* note 100, at 485–91; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994). For an early articulation, see Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

106. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2245–53 (2001).

107. Indeed, given the lack of transparency in White House decision-making, some have suggested that presidential control actually worsens the “democracy deficit.” See Strauss, *supra* note 96, at 1362.

108. Asimow, *supra* note 83, at 129. See also Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 100 (2011) (describing notice-and-comment as among the “cornerstones that ensure an accountable and democratically legitimate Fourth Branch”).

109. Cuéllar, *supra* note 45, at 473. Quite the contrary, Cuéllar continues: Public contributions to the notice-and-comment process generate perspectives that are so “extraordinarily skewed” that they may defeat “the normative rationales for consulting people in the first place.” *Id.* at 474.

110. Thus Beth Noveck's comment: “When, despite vociferous and voluminous public opposition to lifting media cross-ownership restrictions, the Federal Communications Commission (FCC) does so anyway, we are left wondering what purpose the notice and comment process really serves.” Noveck, *supra* note 12, at 448.

public good” and facilitate the replacement of underperforming administrations.<sup>111</sup> Notice-and-comment processes can be said to advance democratically responsive decision-making simply because they put citizens’ information and policy views before government decision-makers who might not otherwise be aware of them. There’s democratic benefit in decision-makers at least being able to hear from people who would otherwise be shut out of the discussion entirely. If bureaucrats are to act on the basis of grievances shared by members of the public, it’s necessary first that people with grievances be able to get the word out—to communicate their concerns and their views.

Notice-and-comment can be said to advance pluralist democracy more directly as another instantiation of the fight for power and influence that *is* democracy under the pluralist model—as the administrative parallel of legislative lobbying. Administrative decision-makers are policy decision-makers; views expressed in comments can influence their choices. But the analogy to legislative lobbying works only incompletely. In the pluralist vision, legislators respond to lobbying in order to retain office. Administrators don’t have the same accountability.

John Dewey once explained that if we are to have democracy rather than oligarchy, the masses must “have the chance to inform the [government-manager] experts as to their needs.”<sup>112</sup> He didn’t stop there, though; he added that “the enlightenment must proceed in ways which force the administrative specialists to take account of the needs.”<sup>113</sup> Does notice-and-comment *force* the administrative specialists to take account of public needs? Perhaps it’s time to look farther afield, and to examine other lenses through which notice-and-comment might be said to be democratic.

## V. DISCOURSE

Let’s turn to theories of republican or “deliberative” democracy. A premise of deliberative democracy is that we cannot have a fair or morally legitimate political system simply through pluralist aggregation of individuals’ exogenous preferences without more. Rather, deliberative democracy proceeds from Jurgen Habermas’s argument that a political system, to be legitimate, must enable meaningful participation by all people affected by its decisions.<sup>114</sup> I’m going to spend a couple of pages

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111. BAKER, *supra* note 86, at 132.

112. JOHN DEWEY, *THE POLITICAL WRITINGS* 187 (Debra Morris & Ian Shapiro eds. 1993) (excerpting Dewey’s 1927 book *THE PUBLIC AND ITS PROBLEMS*).

113. *Id.*

114. See A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 752, 759 (2003) (quoting Habermas’s statement that a legal

discussing Habermas's theory and the schools of thought it has inspired, because that theory provides a plausible path (albeit one with a hairpin turn) to a different appreciation of the right to be taken seriously.

Habermas's focus on the citizen's role in society follows from his position that "discourse"—a mode of speech in which every member of society can "take part, freely and equally, in a cooperative search for truth, where nothing coerces anyone except the force of the better argument"<sup>115</sup>—is the only legitimate means by which society can formulate moral norms.<sup>116</sup> In that discourse, each participant must be able to take account of the interests and concerns of all others, modifying his interests in light of his understanding and recognition of others, and participating with them in good faith and on an equal and untrammelled basis.<sup>117</sup> As Habermas recognizes, this is a challenging standard for conversation in the public sphere, all the more because of "the repressive and exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication."<sup>118</sup>

Habermas does not suppose that day-to-day political decision-making can happen through the unstructured discourse spanning a nation's public conversation.<sup>119</sup> Political decisions often appropriately rest on bargaining and negotiation, forms of instrumental communication that are not about the force of the better argument at all.<sup>120</sup> Politics, he explains, must therefore take place on two tracks. First is the informal public sphere, in which untrammelled public discourse can identify and interpret social needs; second are proceduralized institutional arenas—parliaments, cabinets, political parties—specifically designed for political decision-making.<sup>121</sup> Deliberation must take place in both spheres: "A deliberative practice of self-determination can develop only in the interplay between, on the one hand, the parliamentary will-formation institu-

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order "owes its legitimacy to the forms of communication in which alone [its citizens' private and political autonomy] can express and prove itself").

115. JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 198 (Christian Lenhardt & Shierry Weber Nichol森 trans., 1990); see Froomkin, *supra* note 114, at 771.

116. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 107 (William Rehg trans., 1996) (articulating the discourse principle).

117. See JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 49 (Ciaran P. Cronin trans., 1993).

118. HABERMAS, *supra* note 116, at 307–08; see also Kenneth Baynes, *A Critical Theory Perspective on Civil Society and the State*, in *CIVIL SOCIETY AND GOVERNMENT* 123, 138 (Nancy Rosenblum & Robert C. Post eds., 2002); Shane O'Neill, *The Equalization of Effective Communicative Freedom: Democratic Justice in the Constitutional State and Beyond*, 17 *CAN. J.L. & JURISPRUDENCE* 83, 87 (2004).

119. JAMES GORDON FINLAYSON, *HABERMAS: A VERY SHORT INTRODUCTION* 118–19 (2005).

120. See HABERMAS, *supra* note 116, at 285; Baynes, *supra* note 118, at 126.

121. See HABERMAS, *supra* note 116 at 307–08.

tionalized in legal procedures and programmed to reach decisions and, on the other, political opinion-building in informal circles of political communication.”<sup>122</sup>

A wide range of modern thinkers, doing work classed under the heading of “deliberative democracy,” have been influenced by Habermas’s work.<sup>123</sup> Among American legal academics, deliberative democracy dovetails with a school of thought dubbed civic republicanism,<sup>124</sup> also featuring a vision of “frequent participation and deliberation in the service of decision, by the citizenry, about the sorts of values according to which the nation will operate.”<sup>125</sup>

Deliberative democrats, as the name suggests, see deliberation as essential to legitimate political decision-making.<sup>126</sup> For this reason, they prominently stress the importance of citizens’ engaging in thoughtful and discursive deliberation with each other—that is, with other members of the public—about what government should do.<sup>127</sup> Their reasons for doing so vary. Some proceed from Aristotle’s perspective that political involvement is the highest, most fulfilling form of human endeavor, and thus is its own reward.<sup>128</sup> Others see consequentialist benefits in democratic deliberation that include public perceptions of governmental legit-

122. *Id.* at 275; see Baynes, *supra* note 118, at 127–28.

123. See JOSHUA COHEN, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17, 33 n.12 (Alan Hamlin & Philip Pettit eds., 1989) (explaining that three early presentations of deliberative-democracy theory overlap because they “all draw on Habermas”). For introductions to the field, see *generally* DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); *ESSAYS ON REASON AND POLITICS: DELIBERATIVE DEMOCRACY* (James Bohman & William Rehg eds., 1997); JAMES FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009); AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004); KYMLICKA, *supra* note 78; ETHAN J. LIEB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004).

124. See, e.g., Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1493–94 (1988); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4, 36 (1986); Mark Seidenfeld, *A Civic Republic Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511, 1514 (1992); Cass Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1541 (1988). For another perspective, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 *U. PA. L. REV.* 801 (1993).

125. Cass Sunstein, *Preferences and Politics*, 20 *PHIL. & PUB. AFF.* 3, 4 (1991).

126. See David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 *B.U. L. REV.* 1249, 1249 (2011).

127. See KYMLICKA, *supra* note 78, at 289–93.

128. Aristotle idealized political life as one in which *all* citizens—male, armed with the leisure that wealth brings, educated to think along the paths of civic virtue, bound to the other members of their small community by bonds of friendship and harmony, and putting the needs of the *polis* above their own—shared in “the interchange of ruling and being ruled.” ARISTOTLE, *THE POLITICS* 258 (E. Barker ed. & trans., 1961); see DEREK HEATER, *WHAT IS CITIZENSHIP?* 55–56 (1999); PETER RIESENBERG, *CITIZENSHIP IN THE WESTERN TRADITION: PLATO TO ROUSSEAU* 44–46 (1992). These views find echoes in the work of modern thinkers. See, e.g., HANNAH ARENDT, *ON REVOLUTION* 258–59 (1963) (“[N]o one could be called either happy or free without participating, and having a share, in public power.”).



imacy; better-quality decisions; the fostering of bonds of mutual understanding, empathy, and respect among citizens; and a more meaningful role for minority groups.<sup>129</sup>

This understanding of democracy has been widely championed in American law. It is front-and-center in the work of Cass Sunstein<sup>130</sup> and Bruce Ackerman.<sup>131</sup> It is the basis for Robert Post's description of democracy as resting on citizens' being able to participate in those modes of communication that allow them collectively to "forge . . . the 'public opinion which is the final source of government in a democratic state.'" <sup>132</sup> Citing Habermas, Post describes the ultimate purpose of free speech as that of enabling "the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society"—put another way, enabling "a culturally heterogeneous society to forge a common democratic will."<sup>133</sup>

Do any of the theories just discussed provide a basis for concluding that a right to be taken seriously, as I have described it, advances democracy, freedom, or normative government legitimacy? One might think so. After all, these theories stress the importance for democracy of citizens' active public engagement with the issues of the day. But the short answer to that question is no, not directly. Mechanisms such as notice-and-comment don't involve the sort of deliberation these theories describe.

In general, deliberative-democracy theories imagine one of two kinds of deliberation.<sup>134</sup> The first is deliberation among the people.<sup>135</sup> That deliberation is not merely any "form of political talk,"<sup>136</sup> but one with particular characteristics. It is marked by some measure of equality; no one person or advantaged group dominates.<sup>137</sup> Participants engage

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129. See KYMLICKA, *supra* note 78, at 289–93; Maeve Cooke, *Five Arguments for Deliberative Democracy*, 48 POL. STUD. 947 (2000); Ponet & Leib, *supra* note 126, at 1250. See generally GUTMANN & THOMPSON, *supra* note 123.

130. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

131. See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

132. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000) (quoting *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917)).

133. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 639, 671 (1990) (citing 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 81–82 (Thomas McCarthy trans., 1987)).

134. See Ponet & Leib, *supra* note 126, at 1249.

135. *Id.*

136. Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN REV. POL. SCI. 497, 502 (2008).

137. See *id.* at 504–05.

with each other, trying to convince each other. It is marked by an open-minded search for a larger public good, rather than the selfish goals of the participants.<sup>138</sup> The process of deliberation will cause participants to rethink what they had believed to be their own goals and interests.<sup>139</sup> Deliberation, we are told, should lead most participants to “appreciate the shallow basis for their prior views”; it is a process in which those who seek to convince will have the “principal task . . . to ask good questions, not to announce assertive conclusions.”<sup>140</sup> This sort of deliberation, at its ideal, instantiates Habermas’s practical discourse, which grows out of “a good faith commitment to honest debate.”<sup>141</sup> “Once parties undertake to debate with one another nonstrategically, they embark on a course that requires all affected parties to deliberate together in a reasoned conversation that aims at reasoned agreement.”<sup>142</sup>

Alternatively, deliberation can be seen to take place not among ordinary people, but among elites with decision-making authority.<sup>143</sup> It is focused on a decision that those deliberating persons will make as a body.<sup>144</sup> The goal is the same as before, though: As the participants, somewhat shielded from democratic pressures,<sup>145</sup> seek to reconcile their contrasting viewpoints, “a policy emerges that can serve a more universal consensus of the common good.”<sup>146</sup>

Notice-and-comment is neither of those things. It is neither communication among members of the public nor communication among elites. Rather, it is communication across that line as members of the public seek to influence agency decision-makers. Even more importantly, it is not deliberative. There is little dialogue in notice-and-comment as it is conventionally understood, little opportunity for members of the public to engage with each other in any sustained way. There is no openness in re-examining one’s own views, no rethinking of one’s own preferences.

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138. For the characteristics of Habermasian discourse, see Froomkin, *supra* note 114, at 767–77. Some thinkers urge that so long as discourse is plausibly other-regarding on its face, and the participants are actually seeking to convince (rather than, say, to bully), whether participants are subjectively seeking to advance their narrow interests or to advance a common good is not important. See Thompson, *supra* note 136, at 504–06. More often, though, deliberation theorists foreground the pro-social motivation of the participants, emphasizing that deliberation either begins with a search for the common good, motivates that search, or both. See, e.g., KYMLICKA, *supra* note 75 (noting that deliberation motivates participants to focus on the common good); COHEN, *supra* note 123, at 25 (same).

139. See Ricardo Blaug, *New Theories of Discursive Democracy: A User’s Guide*, 22 PHIL. & SOC. CRITICISM 49, 51 (1996).

140. See ACKERMAN & FISHKIN, *supra* note 131, at 183.

141. Froomkin, *supra* note 114, at 772.

142. *Id.*

143. See Ponet & Leib, *supra* note 126, at 1249.

144. See Thompson, *supra* note 136, at 502–04.

145. See, e.g., Seidenfeld, *supra* note 124, at 1540.

146. *Id.* at 1555.

That, after all, isn't the point. There is no attempt to convince one's peers—one's equals—within the group of the rightness of one's views. That, too, is not the point. Notice-and-comment does not facilitate consensus.

Each member of the public participating in a notice-and-comment process has the instrumental task of convincing the agency—an authoritative decision-maker—of the correctness of that participant's positions. This is not a mutual exchange in which the commenters "forge a common democratic will."<sup>147</sup> Commenters talk past each other, not with each other; they engage only insofar as is necessary to rebut each others' views for the agency audience.<sup>148</sup>

I'm not arguing in this section that there is anything wrong—or right—with the notice-and-comment process as I'm describing it. My point, rather, is that its merits have little to do with deliberative democracy.<sup>149</sup> The goals of deliberative democracy are best served by deliberation—by citizens' engaging *with each other* in open discussion. Notice-and-comment is something else.<sup>150</sup>

## VI. RESPECT

So why this right to be taken seriously? My answer looks to the respect that a democratic government should pay to each citizen's autonomy and equality. That respect—the government's obligation to treat citizens as "intrinsically significant moral agents"—is at the core of participatory democracy.<sup>151</sup> In that context, the striking part of the right to be taken seriously is not the right of the individual citizen to offer views, but rather the obligation of government to attend and respond. The respect government owes to citizens is at the root of its obligation to take their arguments seriously.

Fred Schauer once described judicial reason-giving as a sign of

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147. Post, *supra* note 133, at 671.

148. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 12 (1997). To be sure, like-minded commenters may coordinate with one another for strategic purposes—dividing up labor, agreeing on policy strategies, and so on. But this too is other than republican deliberation.

149. Mark Seidenfeld has argued that notice-and-comment serves deliberative democracy goals because it enables—or could enable—deliberation *within* the agency. See Seidenfeld, *supra* note 124, at 1541–62. But he does not explain why we should see the agency's analytic processes as deliberative, and his suggestions for promoting deliberation *within* the agency—including having an agency "assign some staff members to interact with each different interest group and . . . to see that interest group as their clientele,"—seem unrealistic. *Id.* at 1555.

150. I argue *infra* Part VII that Internet technology is not likely to make notice-and-comment more deliberative.

151. BAKER, *supra* note 86, at 136.

respect.<sup>152</sup> Why? A government that declines to give reasons is one that relies on authority without more, “indicat[ing] that neither discussion nor objection will be tolerated.”<sup>153</sup> By contrast, the giving of reasons “bring[s] the subject of the decision into the enterprise,” “opening a conversation rather than forestalling one.”<sup>154</sup> A government that is required to engage and to explain moves away from the mere instrumental exercise of authority; it is a government required to take its citizens seriously and to manifest that relationship by engaging with them in two-way communication.

We can see this more plainly through the lens of government legitimacy.<sup>155</sup> In Jeremy Waldron’s narrative, the roots of liberal thought lie in the Enlightenment’s “determination to make authority answer at the tribunal of reason and convince us that it is entitled to respect.”<sup>156</sup> Unless the social order can be justified, it cannot be legitimate; “the basis of social obligation must be made out to every individual, for once the mantle of mystery has been lifted, *everybody* is going to want an answer.”<sup>157</sup> In that sense, “[l]iberal, democratic politics is about justification.”<sup>158</sup>

Government, on this understanding, cannot legitimately speak to its citizens purely in the instrumental voice of command. It is required to give reasons whose point is to persuade, not to pronounce. Stephen Macedo similarly argues that the moral core of the liberal order is an open and conscientious commitment to public justification: “[L]iberal citizens expect to be answered with reasons rather than mere force or silence.”<sup>159</sup> The government’s obligation to provide reasons is thus a matter of its respect for each citizen’s capacities and agency.<sup>160</sup> Bureaucrats’ refusal to provide reasons would mean treating the populace as “objects of paternalistic legislation rather than as democratic citizens to

152. Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 658 (1995).

153. *Id.*

154. *Id.* For a somewhat different approach, see Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187 (Peter Brooks & Paul Gewirtz eds., 1996) (emphasizing the interplay of persuasion and hierarchical power in the judicial opinion).

155. See Solum, *supra* note 2, at 288–89 (the values of dignity, equality and autonomy support participation rights by virtue of their connection to legitimacy).

156. Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127, 134 (1987).

157. *Id.* at 135.

158. STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 41 (1991).

159. *Id.* Macedo, to be sure, ties the notion of public justification to public discussion—the “ongoing project of publicly interpreting, questioning, debating and reshaping” constitutional government—rather than to notice-and-comment. *Id.* at 76.

160. This theme can be found in the work of both republican theorists and (some) pluralist ones. Compare GUTMANN & THOMPSON, *supra* note 123, at 21–22, with Waldron, *supra* note 156, at 128.

whom they owe an honest account of their actions.”<sup>161</sup>

To flesh out this argument, it's useful to return to the work of Habermas, who begins by distinguishing between communicative and instrumental speech acts.<sup>162</sup> *Communicative* acts are mediated by discourse; *instrumental* (or strategic) acts bring about the desired end not by persuasion but by other means.<sup>163</sup> The distinction here, in rough terms, is that between persuasion on the one hand, and trick, threat or bribe on the other.

Habermas goes on to draw a line between those spheres of social life he calls “lifeworld” and “system.”<sup>164</sup> “Lifeworld” refers to the informal, non-marketized realm of social life, including household and family.<sup>165</sup> Lifeworld is the home of communicative action. It provides the social background, and the shared meanings and understandings, against which communicative action can take place.<sup>166</sup> The lifeworld is conducive to individual autonomy because it is based on mutual voluntary persuasion (which is a vernacular way of expressing what Habermas would call the “reciprocal recognition of validity claims”<sup>167</sup>); constraints on individual autonomy in that sphere are self-imposed.

“System,” by contrast, refers to the systems of money and power that steer the market economy and state bureaucracy.<sup>168</sup> System is the home of instrumental action, mediated by economic and state power. The instrumental goals that people find themselves serving here are for the most part not their own; they are the goals of the systems and institutions in which they are embedded. Those instrumental goals may be opaque to the people whose actions are steered by them and who work to realize them. And the networks of instrumental power can encroach upon realms of action and decision that properly ought to remain within the relative autonomy of the lifeworld—in Habermas’s language, the system can “colonize” the lifeworld.<sup>169</sup>

How is this relevant to the right to be taken seriously? I focused

161. GUTMANN & THOMPSON, *supra* note 123, at 45.

162. FINLAYSON, *supra* note 119, at 47–48.

163. *Id.* I am eliding, for simplicity, Habermas’s distinction between instrumental and strategic action. Instrumental action includes any act taken as a means to bring about the actor’s desired end; strategic action is a subset of instrumental action that involves achieving one’s ends by causing other people to do things. The key thing for this article’s purposes, though, is the difference between those categories and communicative action.

164. See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 113–89 (Thomas McCarthy trans., 1987).

165. See FINLAYSON, *supra* note 119, at 51.

166. See HABERMAS, *supra* note 164, at 131–32; FINLAYSON, *supra* note 119, at 51–53.

167. FINLAYSON, *supra* note 119.

168. *Id.*

169. See FINLAYSON, *supra* note 119, at 53–56; HABERMAS, *supra* note 164, at 342–43.

attention earlier on the government's obligation to attend and respond to information offered in the notice-and-comment process. That obligation puts governors and governed in a discursive relationship. As a citizen, I have a right to comment on pending government action; the state, in turn, must listen and explain. We can see that as bridging some of the separation between governors and governed by putting us in a discourse community.<sup>170</sup> Using Habermas's language, the obligation of the government to listen and give reasons is an obligation to engage in *communicative* rather than *instrumental* discourse—a small colonization of system by lifeworld, rather than the other way round.<sup>171</sup>

Putting it another way: The pay-off in the right to be taken seriously doesn't lie in commenters engaging in discourse with each other. Such discussions might be all very well, but they don't bridge the gulf between government and citizenry. The payoff, rather, is that government is being forced to engage with what citizens say. The bureaucratic subsystem cannot act merely authoritatively, announcing its mandates. Instead, it must listen, consider citizens' actual arguments, and respond with reasons that are responsive to those arguments, reasons that can persuade. In short, it must engage in a form of discourse that steps across the line dividing system from lifeworld.

What is democratic about notice-and-comment is not so much the citizen's ability to comment. Certainly free speech is important (and indeed vital to democracy). But the citizen's ability to weigh in on proposed agency action is of no more value in this regard than is any other instance of free speech. What is democratic, rather, is the government's obligation to attend, engage, and respond—that is, to give reasons. That obligation, of course, is imposed as a matter of instrumental rationality: The agency gives reasons so that it will not be reversed. But the point is that the agency's instrumental-rationality obligations require it to listen, to evaluate, to respond, to seek to persuade—to shift its orientation, if only a little, from instrumental power to dialogic engagement.

For that, the judicial-review enforcement mechanism is necessary. That too is consistent with Habermas's thought. Communicative action, Habermas explains, can generate institutions and rules that constrain and channel administrative processes.<sup>172</sup> Notice-and-comment is such an institution. In that way, the public can influence

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170. *But see infra* Part VIII.

171. Cf. Jürgen Habermas, *What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left*, 183 *NEW LEFT REV.* 3, 18–19 (1990) (emphasizing that public action can change the relationship, and redraw the boundaries, between the communicatively structured public sphere on the one hand and the bureaucratic subsystem on the other).

172. *See id.* at 18.

the evaluative and decision-making processes of public administration . . . so as to bring its normative demands to bear in the only language that the besieged stronghold understands: it cultivates the range of arguments that, though treated instrumentally by administrative power, cannot be ignored by it, as much as administrative power is conceived along constitutional lines.<sup>173</sup>

And in that manner, citizens, acting through the legislature, can structure bureaucratic processes so as indirectly to bring “the self-programming processes of state management . . . back within the horizons of the lifeworld.”<sup>174</sup>

All this, though, is theory. What about practice? Does it work that way in real life?

## VII. REALITY

There is reason to doubt that it does. Not all comments filed in agency proceedings are equal; some get more attention than others. A tremendous amount of influential communication with agencies takes place not through the § 553 notice-and-comment process, but through in-person *ex parte* contacts. This advantages well-funded and repeat participants, and disadvantages smaller, less well-funded entities that can't afford to maintain staff roaming the agency hallways. Small companies, “consumer interest groups and other ‘undesirables’” can have difficulty even scheduling meetings with agency key players.<sup>175</sup>

This raises the possibility that my argument from democracy, invoking the value of democratic connection between citizenry and government, is unmoored from reality. If administrative agencies carefully consider the comments of the politically influential and parties with whom they have long-term relationships, while attending only on a pro forma basis to the comments of ordinary citizens, then the process merely entrenches the cozy relationship between agency policy-makers and regulated actors, at the expense of genuine democratic responsiveness.

Let's look at the empirical literature and at three questions in particular: First, how important is the notice-and-comment period in agency decision-making? Second, who participates in the notice-and-comment

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173. *Id.*

174. *Id.* at 16.

175. Email from J. Scott Marcus, formerly the FCC's Senior Advisor for Internet Technology, to the cybertelecom-1 mailing list (Jul. 3, 2009) (on file with author) (quoted with permission). The political-science literature predicts that, where rules have low public profiles, deep-pocketed regulated parties will have disproportionate influence on the rule-making process. See William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 *POLITY* 595, 606–08, 610–11 (1986); *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980).

process? And third, whose comments are given serious consideration, and whose are most effective?

The answer to the first question is that while the notice-and-comment period does make some difference in the content of enacted rules, that difference is limited. Let's go back to the legal regime governing agency rule-making. It would not be feasible for an agency to issue a general, open-ended, notice of inquiry about a particular regulatory problem—say, “tell us what we ought to be doing to regulate leaking underground storage tanks”—and then, after reading and processing the comments it has received, immediately devise and promulgate a detailed, final rule. It would be infeasible notwithstanding that the text of the APA explicitly contemplates such a course. Section 553 states that the notice of proposed rule-making need only set out “a description of the subjects and issues involved” in the rule-making, as an alternative to specifying “the terms or substance” of a proposed rule.<sup>176</sup>

But it wouldn't work, for two reasons. First, the courts have held that the notice preceding the final rule must give “fair notice” of the agency's ultimate action<sup>177</sup>—it must provide sufficient warning of what the agency plans to do, in sufficient detail, to allow “meaningful and informed” comment.<sup>178</sup> Indeed, if the agency changes its mind during the comment period and adopts a rule different from the proposal, then participants have been denied their right to offer comments on that agency action. So unless the final rule is a “logical outgrowth” of the initial proposal, the agency is required to set the matter for another round of comment.<sup>179</sup> The key is whether potential commenters were “sufficiently alerted” to the possibility of the agency's doing what it ultimately did, so that they were well-positioned to offer comments on whether it would be a good idea.<sup>180</sup>

As a practical matter, this means that an agency engaging in the rule-making process needs to issue a notice of proposed rule-making (NPRM) incorporating an actual, specific proposal: “This is the rule we tentatively plan to enact.”<sup>181</sup> Absent such a proposal, commenters will not have enough to react to. Not knowing what the agency is proposing, they will not be able to offer sufficiently well-focused comments on

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176. 5 U.S.C. § 553(b)(3) (2006).

177. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

178. *Am. Med. Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989).

179. *Coke*, 551 U.S. at 174 (quoting *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986)).

180. *Nat'l Black Media Coal.*, 791 F.2d at 1023 (quoting *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980)).

181. There is nothing stopping the agency from issuing more general, open-ended notices earlier in the process, and on occasion agencies do. But those notices must be followed by one incorporating the specific proposal.



whether that course of action is advisable. And the agency, moreover, has good reason to get its proposal “right” before issuing the notice. If it decides that its proposal is deeply flawed and needs to be reworked, it will have to go to the time and trouble of a second round of notice-and-comment once it comes up with its new plan. As a result, agencies seek to refine rules nearly to their final form before issuing the NPRM.<sup>182</sup>

Second, even without regard to these concerns, an agency has strong incentive to work out a specific proposed rule before issuing the notice.<sup>183</sup> The notice-and-comment period, after all, is its last chance to get the rule’s details correct. The agency wants to get the final rule right, in its implementation details as well as in broad brush, both as a matter of professional commitment (what are rule-making staff for, if not to come up with sound, well-reasoned rules?) and in order to avoid judicial reversal.<sup>184</sup> It has the best chance of getting the implementation details right if it makes them public in advance of the comment period so that commenters can identify objections and flaws, rather than issuing a notice phrased in general terms and hiding its cards until the comment period is over.

For both these reasons, it’s routine for agencies to work out specific, highly detailed proposed rules in advance of issuing their notices of proposed rule-making, and then to use the comment period to get reactions to those rules. But that presents a further challenge: How is the agency to get the proposal right? The answer is that agencies routinely have extensive contacts, both formal and informal, with regulated parties in the *pre-proposal* stage.<sup>185</sup> Most of these contacts are nonpublic and undocumented.<sup>186</sup> They happen because the agency knows that those contacts are important if it is to generate sound, politically viable proposed rules.<sup>187</sup>

The agency may send out formal information requests to industry members, prior to the NPRM, in the course of formulating its rule; those formal requests may stimulate not only formal responses, but also fur-

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182. Wagner et al., *supra* note 108, at 110.

183. *See id.* at 110–11.

184. *See id.* at 111.

185. *See* William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70 (2004).

186. *See id.*

187. *See* David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32; E. Donald Elliott, Comment, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992); Wagner et al., *supra* note 108, at 110–11; West, *supra* note 185, at 70; William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC’Y 576, 585 (2009).

ther informal contacts between the agency and regulated parties.<sup>188</sup> A recent study of ninety Environmental Protection Agency rule-makings found that in a typical rule-making, there were twice as many informal contacts *prior* to the NPRM, as there were comments filed during the comment period.<sup>189</sup> These pre-NPRM contacts, moreover, were almost exclusively with regulated parties. Industry members “had, on average, at least 170 times more informal communications docketed with EPA during the pre-NPRM stage than public interest groups.”<sup>190</sup>

Interview evidence makes clear that these contacts are important to agencies. An EPA official explained the situation to Cary Coglianese:

We try to bring [industry] in as early as possible on what we are required to do and request their help very early on and usually this is appreciated because that way they have input as opposed to EPA unilaterally going out and looking at various textbooks and writing rules that are ridiculous because we don’t fully understand what the hell we are regulating.<sup>191</sup>

The study I just mentioned found that industries and trade associations were involved in the pre-notice development of nearly every significant EPA rule, prized for the technical knowledge they could bring to bear. Public-interest groups, for their part, were not necessarily even aware that an EPA rule was in development.<sup>192</sup>

There are two important lessons here. The first is that the pre-NPRM stage is an important one in rule development, one in which regulated parties have outside influence. The second is that the pre-NPRM phase alters the focus of notice-and-comment. The notice-and-comment process comes only after the agency has invested significant time and effort in developing its proposal and building consensus around it.<sup>193</sup> The agency may be reluctant at that point to contemplate fundamental changes (possibly requiring another comment round).<sup>194</sup> The “more pressure agencies have felt to complete the bulk of their work prior to the onset of the rule-making process,” “the less flexibility they show

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188. Wagner et al., *supra* note 108, at 125.

189. *Id.* at 124. This figure excludes pre-NPRM formal information requests and responses; with those included, the ratio would be about four to one. *See id.* at 125.

190. *Id.* at 125.

191. *Id.* at 126 (quoting Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 38–39 (1994) (unpublished Ph.D. dissertation, University of Michigan)). Industry members, for their part, rate pre-NPRM contacts as among the most effective forms of rule-making participation, more so than filing comments. *See* Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 364 (2005).

192. Wagner et al., *supra* note 108, at 126–27, 143.

193. *See* West, *supra* note 185, at 67, 72–73.

194. *See id.* at 72.

during rule-making to respond to the concerns of affected parties.”<sup>195</sup> For these reasons, former EPA General Counsel E. Donald Elliott emphasized that one needs to look to the pre-NPRM process to see “the kind of back and forth dialogue in which minds (and rules) are really changed.”<sup>196</sup>

The bottom line? Any analysis of notice-and-comment must take into account that the notice-and-comment period is only one of several phases in the rule-making process in which the agency shares information and views with people outside the government and receives comment and proposals. Those other phases are not marked by the same openness to all comers as notice-and-comment, or the same transparency. In particular, there is reason to think that agencies tentatively decide fundamental issues earlier in the rule-making process and are reluctant to revisit them during notice-and-comment; rather, in that period, their focus shifts to implementation details.

One might suppose that agencies ignore comments entirely in their decision-making about a rule’s substance and attend to them only in drafting the rule’s formal justification.<sup>197</sup> Top decision-makers, after all, never see the vast majority of comments.<sup>198</sup> Staff will read comments and draft a summary report for their superiors’ benefit, but that document may not make its way up the chain of command until well after the key decisions have been made.<sup>199</sup> In rule-makings drawing a large number of comments, agencies may farm the comments out to outside contractors to read and summarize, and top agency decision-makers will see no more than a staff summary of the contractor’s summary.<sup>200</sup> How influential, then, could comments be?<sup>201</sup>

Yet empirical studies show that the notice-and-comment process

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195. Barron & Kagan, *supra* note 187, at 231–32; see also Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1390 (1992).

196. Elliott, *supra* note 187, at 1495. Nor is the pre-NPRM period the only one shrouded from public view in which certain participants can have outsize influence on the substance of rules. Under procedures first put in place in 1981, the Office of Management and Budget (OMB) reviews all “major” rules, and all notices proposing such rules, before they can be published. See Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993), available at <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>. OMB’s meetings with non-government personnel have been skewed toward industry representatives. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 858 (2003). OMB’s intervention has routinely been in the direction of weakening the rule. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 72–73, 87 (2006).

197. See Sax, *supra* note 70, at 239.

198. See Pierce, *supra* note 70, at 67–68.

199. See *id.* at 68 n.59.

200. See *id.*

201. See Sax, *supra* note 70, at 239.

does affect the content of rules at least to some degree.<sup>202</sup> Wagner et al., for example, found in their sample set of ninety EPA rule-makings that the agency made changes in connection with just over half of the “significant” issues raised by commenters (that is, the issues that the agency itself classed as significant).<sup>203</sup> Yackee’s study of forty low-salience Department of Labor and Department of Transportation rule-makings similarly found that agencies altered their proposed rules in response to about half of suggested changes.<sup>204</sup> Cuéllar’s Nuclear Regulatory Commission rule-making case study reveals that the agency accepted nearly all of the recommendations raised by industry during the notice-and-comment period.<sup>205</sup>

Nor should that be surprising. Comments are both a source of information to the agency as it seeks to get its rules right and a source of litigation risk. In the task of crafting a rule that will withstand judicial scrutiny, it will often make more sense to amend a proposed rule in the face of a sound objection than to draft an awkward explanation of why the objection is not well-taken.<sup>206</sup> At the same time, though, those changes don’t appear to be fundamental. One study indicates that they are disproportionately subtractive—that is, they are likely to involve dropping part of a proposed regulation, reducing its coverage rather than extending it.<sup>207</sup>

Who participates in the notice-and-comment process? Historically, nearly all comments filed in agency rule-making proceedings have come from organized groups, and the vast majority of those have come from

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202. See Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 665 (1998); Cuéllar, *supra* note 45, at 463; Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 105, 107–08 (2006). *But see* WESLEY A. MAGAT ET AL., *RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR* 157 (1986) (finding, in a study of EPA’s technology-based water pollution control standards, that “[t]he volume of formal industry comments appears to have a highly limited influence in the rule-making process”).

203. See Wagner et al., *supra* note 108, at 130.

204. See Yackee, *supra* note 202, at 117–18.

205. See Cuéllar, *supra* note 45, at 459–60.

206. See Yackee, *supra* note 202, at 107–08; *see also* Wagner et al., *supra* note 108, at 118, 129.

207. See West, *supra* note 185, at 73; *see also* Wagner et al., *supra* note 108, at 130–31. West suggests that an agency’s changes to a rule following the comment period will often flow less from the “direct educational effect” of the comments on agency staff than from political mobilization that transcends the notice-and-comment process. See West, *supra* note 185, at 71. Other studies, though, show correlations between the number and unanimity of comments seeking a particular result and the likelihood that the agency will change its rule in the requested way. See, e.g., Yackee, *supra* note 202, at 117–18. In that context, it’s hard to tease out the relative importance to the agency’s decision-making process of the comments themselves and that of any accompanying political pressure.

industry.<sup>208</sup> Industry members have been more likely to participate in any given rule-making<sup>209</sup> and have submitted many more comments in the rule-makings in which they did participate.<sup>210</sup> Looking at ninety EPA rules promulgated between 1994 and 2009, we find that industry participated in all of the rule-makings in the sample; public interest groups participated in slightly fewer than half.<sup>211</sup> Industry submitted an average of thirty-five comments in a given rule-making; public interest groups, an average of not quite two-and-a-half.<sup>212</sup>

Whose comments are influential? Two studies here are particularly salient. The first is Yackee and Yackee's survey of Department of Labor and Department of Transportation rule-makings, assessing the circumstances under which agencies actually altered proposed rules to make the changes requested in comments.<sup>213</sup> There was a strong correlation between the number and unanimity of requests from business commenters seeking a particular change in a rule and the actual changes made.<sup>214</sup> Statistically, business commenters exercised a strong influence on final rules.<sup>215</sup> There was no such link, though, between the requests of nonbusiness commenters and ultimate results.<sup>216</sup> The authors' conclusion?

[C]laims of the equalizing effects of notice and comment procedures on agency outputs are largely misplaced. The agencies in our sample appear to consistently alter their final rules to reflect the comments of business interests; on the other hand, we find no statistically significant relationship between nonbusiness/nongovernment comments and

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208. See Wagner et al., *supra* note 108, at 109, 128–29; West, *supra* note 185, at 71; Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006); see also Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175, 187 (1992); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252 (1998).

209. See Cropper et al., *supra* note 208, at 187; Golden, *supra* note 208, at 252; Wagner et al., *supra* note 108, at 108 n.41.

210. See Yackee & Yackee, *supra* note 208, at 133. The advent of “e-rule-making,” in which members of the public can easily submit short comments by email, has changed this ratio. Members of the public submitted more than half a million comments in the FCC’s 2003 rule-making on media ownership rules. See *In re* 2002 Biennial Regulatory Review, 18 FCC Rcd. 13,620, 13,624 (2003). Several rule-makings posted on regulations.gov this year have generated more than 10,000 comments. See Mendelson, *supra* note 11 at 1345; see also Cuéllar, *supra* note 45, at 469–70. I discuss these developments later.

211. Wagner, *supra* note 108, at 128–29.

212. *Id.*

213. Yackee & Yackee, *supra* note 208.

214. *Id.* at 135.

215. *Id.*

216. *Id.*

changes in the final rule.<sup>217</sup>

The other piece of the puzzle is provided by Cuéllar. Cuéllar studied three recent rule-makings (by the Treasury Department, the Nuclear Regulatory Commission, and the Federal Election Commission) in which the vast majority of comments were filed not by businesses but by individuals.<sup>218</sup> These extensive comments from the general public were enabled by the agencies' adoption of "e-rule-making" procedures, allowing members of the public to submit comments electronically, opening up the notice-and-comment process to much more extensive public participation. I'll talk about e-rule-making at more length a little further on. For now, though, I'll focus on Cuéllar's findings regarding which comments the agency took seriously.

Two factors were highly significant in affecting whether the agency adopted the recommendations made in a comment. The first was the *sophistication* of the comment: whether it recognized the distinction between the respects in which the statute constrained the agency and those in which it left it free to act; whether it included at least a paragraph of text interpreting, and evidencing an understanding of, the statute's requirements; whether it urged a specific change in the agency's proposed rule; whether it included at least one argument or example supporting the commenter's concerns; and whether it provided legal, policy,

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217. *Id.* For a contrary suggestion unsupported by data, see STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 138 (2008) (hypothesizing that "a public interest group . . . vastly outnumbered in a particular agency proceeding may nevertheless . . . find that its views are considered more closely than are the views of its regulatory adversaries"). See also Golden, *supra* note 208 (finding agencies resistant to changing their proposals no matter what the source of suggested changes and seeing business and other groups as equally uninfluential).

David C. Nixon et al, *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59, 67, 72–73 (2002), found that the SEC was not more likely to accept arguments that it associated in its statement of basis and purpose with stock exchanges, trade associations or specific companies, than arguments that were coded, based on their identification in the notice, as "mixed" or "unspecified"; also, there was no significant correlation between the number of commenters identified in the statement of basis and purpose as supporting a change, and the SEC's adopting the proposal. Essentially all commenters in these rule-makings appear to have been regulated parties of some sort or other, though, and the authors' coding was entirely dependent on whether the agency in its statement of basis and purpose happened to refer to parties generically as "commenters" or identified them by name. *Id.* at 65.

Cropper et al., *supra* note 208, at 192, found that in rule-makings concerning pesticide cancellations, the EPA did not favor agricultural growers over environmental groups, but their study did not examine the success rates of comments filed in the same proceedings by pesticide manufacturers.

218. More than ninety-eight percent of the comments in the NRC and FEC proceedings were filed by individuals, as were seventy-two percent in the Treasury proceeding. See Cuéllar, *supra* note 45, at 442, 448, 456.

or background information as context for its position.<sup>219</sup> Among commenters who were not directly regulated entities, a one-point increase in a comment's sophistication (on a five-point scale) corresponded to a thirteen-fold increase in the likelihood that the agency would accept at least one of its suggestions.<sup>220</sup>

The second factor was commenter identity. Even controlling for sophistication, the agency was more likely to accept suggestions made by business entities than those made by nonprofit/nongovernmental entities or individual members of the public.<sup>221</sup>

These two factors reinforced each other because nearly all comments from members of the public were unsophisticated.<sup>222</sup> They did not include complex analysis; they did not evince understanding of the statutory background against which the agency operated. While some of them embodied "constructive insights relevant to agencies' legal mandates," they were nonetheless easier to dismiss—by virtue of their lack of sophistication, they seemed less reasonable, less helpful to agency staff, and less of a litigation threat.<sup>223</sup> Seeming more like policy "votes," they offered little to agency staff looking for legal and technical analysis.<sup>224</sup> In combination, the two factors meant that comments from the public went largely ignored.<sup>225</sup> For the most part, agencies did not feel the need even to respond because they read the comments as offering mere preferences or value statements, as opposed to the sort of legal or factual argument that might—if unanswered—leave the agency vulnerable to a charge of arbitrariness.<sup>226</sup>

It's questionable, then, just how much is left of my earlier theoretical analysis. If agencies tend to make their key regulatory choices before the notice-and-comment period even begins, in an environment where regulated parties have the forum to themselves; if the vast majority of comments are then filed by regulated parties; if agencies are more responsive to those comments than they are to those filed by members of the larger public; and if even in those cases where members of the public do file a large number of comments, agency staff dismiss those com-

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219. *See id.* at 431.

220. *See id.* at 478, 479–80. Whether the comment distinguished between statutory requirements and regulatory options corresponded to a forty-six-fold increase. *See id.* at 478.

221. *See id.* at 480–81. Both the "sophistication" and the "regulated party" variables were significant at the .001 level. *Id.* at 482.

222. *See id.* at 443, 449. A few comments from members of the public did articulate more sophisticated concerns. *See id.* at 457.

223. *Id.* at 416, 460.

224. *See id.* at 460–61, 484; Mendelson, *supra* note 11, at 1370–71.

225. For other examples of agencies' failure to engage with comments posted by members of the public, see Mendelson, *supra* note 11, at 1363–66.

226. *See id.*

ments as unsophisticated—well then, it looks silly to talk about the notice-and-comment process as embodying a “right to be taken seriously” that is democratic in any large sense, that imports dialogic engagement into the bureaucratic process in a pro-democratic way.<sup>227</sup>

There’s one more question to ask, though. As I’ve noted, the Internet has radically changed the way that agencies solicit and receive public comment. Can e-rule-making remedy any of the problems I’ve identified? Or will it just enable ever-larger floods of unsophisticated public comments for agency staffers to ignore?

Beth Noveck (who went on to lead the Obama White House’s Open Government Initiative) argued back in 2004 that internet technology could enable “better ways of organizing . . . the interpersonal relationships of the rulemaking process”; it could shift the emphasis from “one-off commenting by individuals or interest groups on a document” to “repeated interaction, conversation and deliberation” within communities of interest and expertise.<sup>228</sup> This participation would be “more collaborative, less hierarchical, and more sustained.”<sup>229</sup> To that end, Noveck suggested that agencies could push information about pending and completed rule-makings more broadly to subscribing websites and organizations; that, in the pre-NPRM stage, they could use software to engage groups of citizens in moderated discussions designed to bring about deliberation on the problem at issue and the costs of competing policy solutions; and that, once the draft was promulgated, they could use similar online discussions to enable constructive discussion of the proposal.<sup>230</sup>

Federal government electronic rule-making efforts, without question, have improved the rule-making process from the public’s perspective. Only a short time ago, the only way to learn about upcoming or ongoing rule-makings was to pore over Federal Register notices (or to

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227. Cuéllar suggests that agencies should address these issues by assembling public juries via random or stratified sampling, providing them with structured information about rules, and tasking agency lawyers with translating their opinions into sophisticated arguments for the comment record. See Cuéllar, *supra* note 45, at 491. Mendelson urges agencies to commit via “self-regulation” to take individual comments more seriously. Mendelson, *supra* note 11, at 1379. Neither seems likely.

228. See Noveck, *supra* note 12, at 435–36.

229. *Id.* at 438.

230. See *id.* at 495–509; see also, e.g., THOMAS C. BEIERLE, RES. FOR THE FUTURE, DISCUSSING THE RULES: ELECTRONIC RULE-MAKING AND DEMOCRATIC DELIBERATION 7 (2003), available at <http://www.rff.org/rff/Documents/RFF-DP-03-2.pdf>; CARY COGLIANESE, HARVARD UNIV. REGULATORY PROGRAM, E-RULEMAKING: INFORMATION TECHNOLOGY AND REGULATORY POLICY 15–18 (2004), available at [http://www.hks.harvard.edu/m-rcbg/rpp/erule-making/papers\\_reports/E\\_Rule-making\\_Report2004.pdf](http://www.hks.harvard.edu/m-rcbg/rpp/erule-making/papers_reports/E_Rule-making_Report2004.pdf); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 321–24 (1998).



get one's information from a person or firm that did). Today, all federal rule-makings are searchable through the web portal at <http://regulations.gov>.<sup>231</sup> Only a short time ago, filing a comment in a federal rule-making proceeding required filing a paper document with the relevant agency, and reading other comments required a physical trip to the agency's documents room. Today, members of the public can do both those things by visiting [regulations.gov](http://regulations.gov), at home in their pajamas.

But [regulations.gov](http://regulations.gov) has not been a panacea. A blue-ribbon ABA panel found in 2008 that the website "remains neither intuitive nor easy to use, even for those knowledgeable about rulemaking."<sup>232</sup> The rule-making materials and other information behind the user interface are "incomplete, inconsistent in quality, and difficult to extract."<sup>233</sup> Although [regulations.gov](http://regulations.gov) has helped increase the volume of public participation in a variety of rule-makings, it hasn't accomplished its goal of enabling *meaningful* and *informed* public participation.<sup>234</sup> Agency rule-makers, for their part, report that their experience with e-rule-making has not so far provided them with "new useful information or arguments" in the rule-making process.<sup>235</sup>

More fundamentally, simply moving the notice-and-comment process to the Web, without more, will not solve any of the problems listed above.<sup>236</sup> It will not usefully alter public participation.<sup>237</sup> It will not displace the crucial pre-NPRM period or the primacy of regulated parties during that period; it will not undo agencies' greater receptiveness to comments filed by business; it will not magically cause comments filed by members of the public to be more legally or technically sophisticated; and it will not cause agency staffers to take more seriously comments that lack that sophistication. At worst, it will merely cause electronic filing dockets to be overwhelmed by floods of unsophisticated com-

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231. See ABA COMM. ON THE STATUS & FUTURE OF FED. E-RULE-MAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 3 (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf>. Initially, only executive agencies were required to make their rule-makings available at <http://regulations.gov>. See *id.* at 12. Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011), available at [http://www.reginfo.gov/public/jsp/Utilities/EO\\_13579.pdf](http://www.reginfo.gov/public/jsp/Utilities/EO_13579.pdf), extended that direction to independent agencies. Some independent agencies maintain their own electronic commenting systems as well. See, e.g., <http://www.fcc.gov/comments> (Federal Communications Commission).

232. ABA COMM. ON THE STATUS & FUTURE OF FED. E-RULE-MAKING, *supra* note 231, at 4, 19, 31–32.

233. Farina et al., *supra* note 11, at 403.

234. *Id.*; Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 958 (2006).

235. Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes about E-Rule-making*, 62 ADMIN. L. REV. 451, 465 (2010).

236. See Noveck, *supra* note 12, at 465.

237. ABA COMM. ON THE STATUS & FUTURE OF FED. E-RULE-MAKING, *supra* note 231, at 20.

ments that are then consigned to the bit bucket.<sup>238</sup>

Cynthia Farina and other scholars, in their ongoing “Regulation Room” project, have worked hard to use Internet capabilities to explore new forms of interaction in the rule-making process.<sup>239</sup> Regulation Room has sought to mobilize members of the public to participate via deliberative engagement in Department of Labor rule-makings and to channel that engagement to the production of sophisticated and useful comments. The most important lesson from the project so far is the stunning difficulty of those tasks. Merely making potential participants aware of a given rule-making, and encouraging them to participate, was a major project. The organizers sought to identify stakeholder communities for each rule, locate the gatekeeper groups and individuals speaking to members of those groups, and develop and implement targeted messaging, including daily Facebook posting and Twitter tweeting.<sup>240</sup> They monitored blog traffic and contacted interested bloggers by email and telephone.<sup>241</sup> Exposure in “old” media turned out to be crucially important.<sup>242</sup> All of this required substantial human time and effort.<sup>243</sup>

The next step was informing visitors about the issues at stake in the rule-making and how they could participate effectively. This too was challenging. Members of the Regulation Room team (working from a pre-release draft of the NPRM) composed a series of Issue Posts for each rule to summarize the agency’s rule-making proposal in reader-friendly language, highlight the questions the agency had asked commenters to address, and break the proposals up into manageable chunks.<sup>244</sup> Then students trained in law and group facilitation techniques moderated the interaction, facilitating discussion and mentoring effective commenting.<sup>245</sup> These steps turned out to be necessary in order to ameliorate the technical, legal, linguistic, and attentional demands that rule-making documents make and to address users’ ignorance about the rule-making process and their tendency to cast votes rather than craft arguments.<sup>246</sup>

In the long-term future, it may be possible for technology to take on

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238. See Noveck, *supra* note 12, at 441–43, 479–81; Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rule-making*, 3 J. E-GOVERNMENT 41, 58 (2006).

239. For an overview of other efforts to enable public involvement outside regulations.gov, see Coglianese, *supra* note 234, at 960.

240. See Farina et al., *supra* note 11, at 419–27.

241. *Id.*

242. *See id.*

243. *See id.*

244. *See id.* at 412.

245. *See id.* at 412–14.

246. *See id.* at 416–18, 429–39.

some of the moderation functions performed in Regulation Room by human staff. Some other agency open-government projects, moreover, have yielded positive results: The Department of Veterans' Affairs, for example, reports some success using a web-enabled platform to receive and manage reaction to its Gulf War Illness Task Force Report,<sup>247</sup> and Noveck's own "Peer to Patent" project is a promising way to crowd source informed public reaction to proposed patents.<sup>248</sup> But it's hard to avoid Farina's conclusion that e-government innovation in rule-making faces huge challenges—it presents the paradox of a transparent, participatory process that, absent huge facilitative effort, offers only a tiny slice of the population the opportunity for meaningful engagement.<sup>249</sup>

Technology, in other words, will not save us. Rule-making notice-and-comment, however rosilily described, is a mechanism whose benefits will likely continue to flow for the most part to sophisticated, well-funded entities—primarily businesses regulated by the relevant agency—with ongoing relationships with the agency. Comments filed by ordinary members of the general public will still have only limited effects on the process. Indeed, to the extent that those comments present only viewpoints, votes, or brief statements of value, without substantial legal or technical argument or information, the agency need not even respond to them—from the standpoint of avoiding arbitrary decision-making, there will be nothing there that needs response.

I don't mean to suggest in this discussion that notice-and-comment is valueless. Agencies do read comments. The notice-and-comment process enables higher-quality decision-making by administrators. It genuinely contributes to agency legitimation and provides a thicker fabric of connection between the agency and the public. But it's important not to take all that too far. In considering any understanding of dialogic engagement between government and citizen, we need to take into account the reality of how notice-and-comment works. And on that examination, my theory of dialogic engagement comes up short; it's disconnected from that reality.

We're not done, though. I think there's more to learn about that disconnection. To get there, I'm going to tell an entirely different story.

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247. See LUKENSMAYER ET AL., *supra* note 11, at 29. See also *id.* at 20–22.

248. See Beth Simone Noveck, "Peer to Patent": *Collective Intelligence, Open Review, and Patent Reform*, 20 HARV. J.L. & TECH. 123 (2006). See also James Loisel et al., *Evaluation of the Peer to Patent Pilot Program*, (unpublished B.S. thesis, Worcester Polytechnic Institute), available at <http://www.wpi.edu/Pubs/E-project/Available/E-project-122109-150816/unrestricted/usptofinalreport.pdf>.

249. See Farina et al., *supra* note 11, at 416, 447.

## VIII. HISTORY

I've been describing the right to be taken seriously as a recent thing, locating it in the Administrative Procedure Act and other post-WWII statutes. But to get better perspective on the right to be taken seriously, it's time to look a lot farther back: to the historic understanding of the right of the people, guaranteed by the First Amendment, "to petition the Government for a redress of grievances."<sup>250</sup> The First Amendment's Petition Clause plays no significant part in modern constitutional law. Rather, the Supreme Court has told us, the right the Petition Clause appears to grant—that of communicating one's will to the government on matters of public policy—is merely a particular instance of the general right of freedom of expression.<sup>251</sup> Modern constitutional doctrine does not see the clause's language as imposing on government any obligation to consider and respond to citizens' arguments.<sup>252</sup>

In colonial practice, though, and in the eighteenth and early nineteenth centuries, the right of petition meant more. The petition right was not merely a component of the free speech right; it predated the free speech right, and was independent of it. It was said to be inherent in "the very nature" of the structure and institutions of a republican government.<sup>253</sup> Petitions were immune from sanction even where their content would otherwise constitute seditious libel or other criminality.<sup>254</sup> More importantly for our purposes, the petition right was associated with "an affirmative, remedial right [to] governmental hearing and response."<sup>255</sup> That is, as I'll explain, a citizen's right to petition the government, protected in state constitutions as well as the federal Constitution's First Amendment, was understood to impose on the government an obligation to hear, to fairly consider, and typically to respond to the arguments the citizen's petition raised.

It should be clear why I'm discussing the petition right so under-

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250. U.S. CONST. amend. I.

251. See *McDonald v. Smith*, 472 U.S. 479, 482 (1985); see also *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam), *aff'g in relevant part Lance v. Davidson*, 379 F. Supp. 2d 1117, 1130–32 (D. Colo. 2005). The Court in *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011), held open the possibility that there "may arise cases where the special concerns of the Petition Clause would" call for rights beyond those granted by the Speech Clause but ruled that the case before it was not one such.

252. See *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984); *We the People Found., Inc. v. United States*, 485 F.3d 140, 143 (D.C. Cir. 2007).

253. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1887 (1833).

254. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2173 (1998).

255. Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142 (1986).

stood: It looks on its face much like the modern right to be taken seriously. Each has or had at its center the ability of the ordinary citizen to speak to government about what substantive regulation or other steps it should undertake, coupled with a governmental obligation to listen and to attend to the substance of the communication. I'll set out in this section of my article how the early American Petition Clause right came to be, and how it came to disappear. In the following, and final, section, I will suggest what this means for our understanding of the modern right to be taken seriously.

### A. *English Antecedents of the Right of Petition*

Petition has its roots in feudal England, first in nobles' petitions to the King, as recognized in Magna Carta,<sup>256</sup> and later in individuals' petitions to Parliament and the Crown bureaucracy. Edward I (1272–1307), in particular, encouraged the filing of petitions by individuals to bolster his legitimacy and to create a sense of shared governance.<sup>257</sup> Under his reign, Parliament received several hundred petitions each session; addressing those petitions was one of its most important functions.<sup>258</sup> Petitioning became a safety valve for public discontent,<sup>259</sup> and Edward III (1312–77) established the practice that, at the opening of every session of Parliament, the Chancellor would declare the King's willingness to consider petitions of the people.<sup>260</sup> Through petitions, subjects registered complaints, sought review of official actions, and suggested changes in policies.<sup>261</sup>

The Parliament of that time should not be seen as a legislative body; it did not yet intrude on the prerogative of the King to rule. Its key functions included voting the King supplies to enable him to govern and presenting him with petitions for the redress of popular grievances.<sup>262</sup> Petitioners, in the late thirteenth and early fourteenth centuries, came from all segments of society, from nobility to the church to the poor, and

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256. See Magna Carta ch. 61 (1215), available at <http://www.constitution.org/eng/magnacar.htm>; Norman B. Smith, "Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, 1155 (1986).

257. See David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 114 (1991). It was also Edward I who formally expanded Parliament, then an advisory and revenue-raising body to the Crown, to include individuals said to represent "the Commons." *Id.*

258. *Id.*; Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. REV. 739, 747 (1999); see also Mark, *supra* note 254, at 2167 (Petitions "quickly came to dominate Parliament's calendar—indeed, they often became the legislative agenda.").

259. See Lawson & Seidman, *supra* note 258, at 752.

260. See Smith, *supra* note 256, at 1155.

261. See Mark, *supra* note 254, at 2165–66.

262. See RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 9 (1979).

even included prisoners.<sup>263</sup> Particularized petitions pleading individual grievances were referred to auditors, and later to the Chancellor, for quasi-judicial resolution.<sup>264</sup>

As elected representatives brought private petitions forward to Parliament, the House of Commons developed the practice of consolidating some of them into “common petitions” to the King.<sup>265</sup> Parliament declined to act on the King’s request for funds until the King had agreed to redress those grievances; in that way petitions were key to Parliament’s accumulation of power and its development of a legislative process.<sup>266</sup> A majority of fourteenth and fifteenth century laws were enacted in direct response to those common petitions.<sup>267</sup>

Parliament, with an institutional interest in noticing all petitions that came to it, established procedures to assure that they received appropriate consideration and response.<sup>268</sup> While individuals and groups filing petitions could not dictate government results, they thus had some power to set the government agenda.

The right of petition became controversial as England convulsed in the seventeenth century.<sup>269</sup> Yet by the eighteenth century, the right to petition for legal change and adjustment was accepted as a key element of the patrimony of British subjects.<sup>270</sup> Petitioning was part of the rights

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263. *See id.* at 10.

264. Mark, *supra* note 254, at 2168.

265. BAILEY, *supra* note 262, at 10.

266. Mark, *supra* note 254, at 2167.

267. BAILEY, *supra* note 262, at 10–11; Frederick, *supra* note 257, at 114; Lawson & Seidman, *supra* note 258, at 747–48; Mark, *supra* note 254, at 2167–68; Smith, *supra* note 256, at 1155–56.

268. *See* Lawson & Seidman, *supra* note 258, at 747; Mark, *supra* note 254, at 2168; STAFF OF H.R. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS, AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS: MARCH 4, 1789 TO DECEMBER 14, 1795, 3 (Comm. Print 1986) [hereinafter PETITIONS].

269. As the Civil War approached, there came to be a constant flow of petitions responding to political controversy, some with thousands of signatures, some presented by riotous crowds, and some incorporating what was seen as treasonous content. Debates over petition came to be result-driven. In 1679, Charles II purported to prohibit the circulation of petition for “specious ends” as tending to “raise sedition and rebellion.” 8 WALTER SCOTT, A COLLECTION OF SCARCE AND VALUABLE TRACTS, ON THE MOST INTERESTING AND ENTERTAINING SUBJECTS: BUT CHIEFLY SUCH AS RELATE TO THE HISTORY AND CONSTITUTION OF THESE KINGDOMS 124 (1812). Parliament answered that “it is and ever hath been the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliament and the redressing of grievances” and “[t]hat to traduce such petitioning as a violation of duty, and to represent it to his majesty as tumultuous and seditious, is to betray the liberty of the subject, and contribute to the design of subverting the ancient legal constitution of this kingdom.” Smith, *supra* note 256, at 1160 (internal quotation marks omitted). When William and Mary took over the British throne, they accepted the Declaration of Rights, providing in part that “it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.” Bill of Rights (1689), *reprinted* in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1971).

270. Smith, *supra* note 256, at 1156.

of Englishmen, an “ancient right” of English political life.<sup>271</sup> By 1829, we are told, both houses of Parliament “did little else” but debate petitions.<sup>272</sup> And Parliament declared in turn that its role was “to provide, as far as may be, an immediate and effectual redress of the abuses complained of in the petitions.”<sup>273</sup>

This petition right grew in the absence of an expansive free speech right or, indeed, modern democratic structures. Seditious libel prosecutions were used as punishment for disapproved speech in England well into the eighteenth century.<sup>274</sup> Speech that would otherwise constitute seditious libel, however, was immunized from punishment when it took the form of petition.<sup>275</sup> The right to petition, thus, did not flow from a robust pre-existing free speech right, but arose independently of and in the absence of one. Indeed, the recognized right of petition in the eighteenth century may have bolstered the nascent rights of speech and assembly, as speakers circulated publications and organized public meetings in support of petitions.<sup>276</sup>

Moreover, the right to petition arose at a time when British government lacked democratic structures and democratic legitimacy; as late as the American Revolution, some of the largest cities in England still lacked any parliamentary representation, and only about one in twenty English adults had the right to vote.<sup>277</sup> An extraordinarily broad range of English society participated in petitioning—far broader than the set of those who could vote for representatives. Petitioning gained importance, in the seventeenth century and after, in significant part because it provided an avenue for democratic participation, and influence on public policy, when other avenues were unavailable or problematic.<sup>278</sup>

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271. See Mark, *supra* note 254, at 2169.

272. Smith, *supra* note 256, at 1167 n.82 (internal quotation marks omitted) (quoting Peter Fraser, *Public Petitioning and Parliament Before 1832*, 46 HIST. 195, 209 (1961)).

273. *Id.* at 1167 (internal quotation marks omitted) (quoting 21 PARL. HIST. ENG. 367 (1780)).

274. *Id.* at 1168–69; see also *id.* at 1165.

275. See Mark, *supra* note 254, at 2173. Petition’s immunity from sedition law, and its relative independence from the free speech right, suggests a parallel to the immunity memorialized in the 1689 Declaration of Rights for “the freedom of speech and debates . . . in Parliament.” See SCHWARTZ, *supra* note 269, at 43. In both cases, the speakers could be seen as acting in a constitutional rather than a merely private capacity.

276. See Smith, *supra* note 256, at 1169.

277. The figure is approximate. Compare KIRSTIN OLSEN, DAILY LIFE IN EIGHTEENTH-CENTURY ENGLAND 6 (1999) (3% of adults) with LINDA COLLEY, BRITONS: FORGING THE NATION 1707–1837 51 (1992) (not less than 14% of adult males, which is to say 7% of adults). Voting was limited to adult male Protestants meeting property or professional qualifications that varied by location. In 1761, for example, the town of Bath had only thirty-two eligible voters. OLSEN, *supra*. Further, the fact that district boundaries weren’t updated to reflect population shifts left some cities (Manchester, Birmingham) entirely without parliamentary representation. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 174 (1969).

278. See Mark, *supra* note 254, at 2169–70. But see 1 WILLIAM BLACKSTONE, COMMENTARIES

## B. *Petition in the American Colonies and the United States*

### 1. PETITION IN THE COLONIAL PERIOD

The U.S. colonial story unfolded against that background. The 1641 Massachusetts Body of Liberties declared the right of every man, “whether Inhabitant or fforreiner, free or not free [to appear before] any publique Court, Councel, or Towne meeting, and . . . present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance.”<sup>279</sup> Colonists began to petition their authorities immediately upon their arrival in the new land; the primary responsibility of colonial assemblies from the start was the settlement of private disputes raised by petitions.<sup>280</sup> Colonial assemblies, moreover, appear to have read and responded to essentially all the petitions they received; that legitimate petitions required official consideration and response “was so widely held by all classes that it was regarded as axiomatic.”<sup>281</sup>

Colonial assemblies and magistracies saw a huge variety of matters brought before them by private initiative. The first recorded government business in colonial Connecticut concerned a grievance brought by one colonist that another one had “traded a . . . [firearm] with the Indians for Corne.”<sup>282</sup> The governing body responded by admonishing the trader, directing him to retrieve the gun, and enacting the rule that “henceforth none y<sup>t</sup> are within the Jurisdic[tion] of this Court, shall trade with the natiues or Indians any . . . pistoll or gunn or powder or shott.”<sup>283</sup> The first recorded petition in Virginia came less than a month after the landing at Jamestown.<sup>284</sup>

Petitions addressed a wide range of topics, as diverse as calls for regulation of tanners so as to preserve work for cordwainers and saddlers, pleas for price controls, requests to redraw parish boundaries, and

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ON THE LAWS OF ENGLAND 104–05 (1832) (focusing on the petition right’s value as a protection against executive malfeasance).

279. Mass. Body of Liberties (1641), reprinted in SCHWARTZ, *supra* note 269, at 73; see also Frederick, *supra* note 257, at 116–17 n.17; Mark, *supra* note 254, at 2177–78; Smith, *supra* note 256, at 1170–71.

280. See Higginson, *supra* note 255, at 145; Lawson & Seidman, *supra* note 258, at 748. The Virginia assembly twice, in 1642 and 1644, declared that its primary purpose was the redress of grievances. Smith, *supra* note 256, at 1172.

281. BAILEY, *supra* note 262, at 36; see also Mark, *supra* note 254, at 2162 n.20; Alan Tully, *Constituent-Representative Relationships in Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 CAN. J. HIST. 139, 146–57 (1976) (finding that petitions that the Pennsylvania legislature “ignored or rejected outright . . . were few in number”). Bailey adds the caveat that the Virginia legislature would not consider petitions “worded in an obnoxious or insulting manner.” BAILEY, *supra* note 262, at 30.

282. Higginson, *supra* note 255, at 144 (internal quotation marks omitted).

283. *Id.* (internal quotation marks omitted).

284. BAILEY, *supra* note 262, at 14–15.



requests for licenses to sell beer.<sup>285</sup> The petitions presented to the 1696 Virginia assembly included “requests for altering the court days in Accomack County, for reducing the fees charged by clerks of courts, for preventing horse racing on the Sabbath, for amending the tobacco laws, for creating a new county, and for building bridges and improving roads.”<sup>286</sup> There is reason to believe that most colonial legislation was enacted in response to petition.<sup>287</sup> Petitions were the most important drivers of the assemblies’ (uncoordinated, ad hoc) legislative agendas.<sup>288</sup>

A majority of the colonial assemblies combined judicial functions—resolving petitions alleging such things as fraud, unpaid debts, land disputes, slander, suits for back wages and release from apprenticeship, and claims for divorce—with legislative ones.<sup>289</sup> An assembly’s judicial caseload was, of course, plaintiff-initiated. It was natural that the assembly’s legislative agenda too would be at least in part citizen-driven, and that the assembly would see its larger role at least in part as one of responding to citizen demands and complaints. The institution of petition drew no clear line between legislative and judicial response.

The important role of petitioning in colonial assemblies advantaged

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285. See Mark, *supra* note 254, at 2179–90; see also BAILEY, *supra* note 262, at 17; Tully, *supra* note 281, at 142 (petitions relating to bounties for wild animals, vagrancy laws, fish dams on navigable rivers, and naturalization of immigrants, and seeking a ban on scolding wives).

286. BAILEY, *supra* note 262, at 19.

287. See Tully, *supra* note 281, at 145 (52% of laws passed in colonial Pennsylvania originated in petition); see also Higginson, *supra* note 255, at 144–47, 150–51 (Connecticut). Of the fourteen laws enacted by the 1696 Virginia assembly, nine stemmed from petition. BAILEY, *supra* note 262, at 19; compare 3 WILLIAM WALLER HENING, STATUTES AT LARGE 137 (1823), available at <http://vagenweb.org/hening/vol03.htm>, with 3 JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA 65–79 (H.R. McIlwaine ed., 1913). One of those Virginia petition-prompted statutes recited that “many great and grievous mischeifes have arisen and dayly doe arise by clandestine and secrett marriages to the utter ruin of many heirs and heiresses and to the great greif of all their relations.” HENING, *supra*, at 149. It imposed stiff fines on ministers who solemnized marriages without publication of banns as set out in the statute, forbade county clerks from issuing marriage licenses without parental permission, and modified inheritance law to nullify the effects of certain noncomplying marriages. *Id.* at 149–51. The House Journal does not recite the circumstances of the petition, and one can only wonder.

288. See Higginson, *supra* note 255, at 150. Thus, for example, the Connecticut assembly responded to a 1675 petition by granting the petitioner a ten-year monopoly on the milling of rape oil, banning the export of cole seed (the raw material for the mill) from the colony, and announcing a ten-year public subsidy to whoever would grow the seed. See 2 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 255 (1852), available at <http://www.archive.org/details/publicrecords02conn>.

289. See BAILEY, *supra* note 262, at 16; Higginson, *supra* note 255, at 146; see also Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1470, 1496 (1998) (noting that the New York legislature did not exercise private-law adjudicative authority, although it did come to adjudicate claims against the colony itself); Gordon S. Wood, *The History of Rights in Early America*, in THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 233, 239 (Barry Alan Shain ed., 2007) (urging that colonial assemblies “saw themselves more as courts making judgments rather than as legislatures making law”).

the assemblies in a variety of ways. First, the assemblies' responsiveness to petitioning was a source of legitimacy for them, as it had been for the Plantagenet kings. That an assembly was willing and able to extend relief to aggrieved citizens justified its existence and its claim of coercive authority. Next, assembly responses to petitions provided a way for the assemblies to extend their own authority and jurisdiction: The need to provide effective responses to citizen complaints provided a basis for assemblies' moves into substantive areas not previously understood to be within their legislative power.<sup>290</sup> Similarly, assemblies relied on their responsibility to respond to petitions as a weapon in separation-of-powers skirmishes with colonial governors and, indeed, other colonies and the Crown.<sup>291</sup>

Beyond that, petitioning was important as a means of informing colonial legislatures' actions. Colonial political and media institutions were otherwise inadequate to convey to assemblies sufficient information about problems that could or should be addressed. One 1668 petition thus notes that it was offered lest the petitioners' "beeing remoat & as ovt of sight might too much burie us in oblivion, or want of information might render [the assembly] the les sensible of our condition."<sup>292</sup> Information from petitions did not merely allow the assemblies to take credit for addressing problems; by conveying the information that the problems existed, it made it possible for the assemblies to address them.<sup>293</sup>

As in England, the petitioning process helped make up for deficiencies in suffrage and political representation. Suffrage in the colonies, though much more widely distributed than in England, was still typically restricted to taxpaying, property-holding white males.<sup>294</sup> Yet the right to petition was not so limited. Colonial assemblies accepted petitions from those without property, from women, from Indians, from convicted prisoners, and even from slaves.<sup>295</sup> A group of mulattos and free blacks successfully petitioned the Virginia legislature in 1769 to eliminate a tax

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290. See Higginson, *supra* note 255, at 150. The Connecticut assembly in 1698, for example, used the mechanism of response to petition to assert control over a group of Pequot Indians, who might otherwise have been considered subject to British authority. See 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 280 (1868), available at <http://www.archive.org/stream/public-recordsofc004conn#page/280/mode/2up>.

291. See Higginson, *supra* note 255, at 151–52; see also Desan, *supra* note 289.

292. Higginson, *supra* note 255, at 153 (internal quotation marks omitted) (quoting a 1668 petition from the town of Stonington).

293. See Tully, *supra* note 281, at 147.

294. See CARL DEGLER, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 91–92 (3d ed. 1984).

295. See BAILEY, *supra* note 262, at 41–45; Higginson, *supra* note 255, at 153; Mark, *supra* note 254, at 2181–87, 2190–91. Examples include women complaining of a minister's inappropriate behavior, or, along with men, seeking division of a religious parish. Higginson,

assessed on black women.<sup>296</sup> Petitioning provided a path into government, at least on the level of agenda-setting, for those who had no other public voice—although, in the end, the petitions would be resolved by officers whom the petitioners had no role in selecting.

That the colonists saw response to petition as a key legislative function is apparent from language in the new states' declarations of rights. The Delaware Declaration of Rights is exemplary; it not only guaranteed the right of "every man . . . to petition the Legislature for the redress of grievances," but added, "That *for redress of grievances*, and for amending and strengthening of the laws, *the Legislature ought to be frequently convened.*"<sup>297</sup>

How should we understand the historic petition right? We tend today to think of constitutional rights as meaningful only to the extent of their judicial enforcement. I've seen no evidence that anyone in colonial America ever brought a lawsuit claiming that the legislature had failed to consider a petition. But early American thinkers didn't agree that "law" exists only to the extent of judicial enforceability.<sup>298</sup> Legislatures saw their obligations to petitioners through the lenses of both legality and public policy; they mediated that tension through what Christine Desan has referred to as the "public faith." The public faith, she explains,

was the commitment that bound the members of a political community together. It was founded on the pledge by those acting for the colony—those agents of the community—that they would recognize and fairly satisfy [public obligations]. The responsibility of legislators to keep the public faith was not enforced in the courts, but in the public sphere; claimants registered their satisfaction or disapprobation through, most basically, their continued participation in the activity of the colony.<sup>299</sup>

## 2. WHAT PETITION WAS NOT

The right to petition can be contrasted with its upstart cousin in the

*supra* note 255, at 153 n.74; BAILEY, *supra* note 262, at 44. Petitions from slaves generally sought manumission. BAILEY, *supra* note 262, at 44.

296. See BAILEY, *supra* note 262, at 44; Mark, *supra* note 254, at 2185 (footnote omitted).

297. DELAWARE DECLARATION OF RIGHTS §§ 8, 9 (1776), *reprinted in* SCHWARTZ, *supra* note 269, at 277 (emphasis added). Other states' declarations contained similar language. See MARYLAND DECLARATION OF RIGHTS §§ X & XI (1776), *reprinted in* SCHWARTZ, *supra* note 269, at 281; MASSACHUSETTS DECLARATION OF RIGHTS §§ XIX, XXII (1780), *reprinted in* SCHWARTZ, *supra* note 269, at 343; NEW HAMPSHIRE BILL OF RIGHTS §§ XXXI & XXXII (1783), *reprinted in* SCHWARTZ, *supra* note 269, at 378–79; NORTH CAROLINA DECLARATION OF RIGHTS §§ XVIII & XX (1776), *reprinted in* SCHWARTZ, *supra* note 269, at 287.

298. See Desan, *supra* note 289, at 1481.

299. *Id.* at 1463.

new nation: the right of instruction. Instruction was the claimed right of constituents to direct their representatives to vote and act in particular ways, as principals instruct agents.<sup>300</sup> It thus concerned not a right to be taken seriously, but a right of popular control.

Instruction was common in colonial politics, particularly in New England. Its philosophical underpinnings lay in a strand of American political thought emphasizing that the people were the “sole lawful legislature” and that authentic power lay in the “people-at-large” rather than in their governmental vessels.<sup>301</sup> One 1783 author thus suggested that momentous matters should be decided by the entire citizenry, meeting separately in their parishes, with the legislature “restricted to a punctual observance of the will of their parishioners.”<sup>302</sup> In any event, he stressed, representatives must “abid[e] by the direction of their constituents” rather than being “free to act of their own accord”—for “[w]hat nation in their senses ever sent ambassadors to another without limiting them by instructions[?]”<sup>303</sup>

Nine states adopted bills of rights or declarations of rights between 1776 and 1783.<sup>304</sup> Of those, seven explicitly protected the right to petition,<sup>305</sup> and five of those seven also referenced the right of instruction.<sup>306</sup>

300. See Mark, *supra* note 254, at 2209; WOOD, *supra* note 277, at 188–92.

301. WOOD, *supra* note 277, at 366 (internal quotation marks omitted). We can see this view reflected in the 1776 Pennsylvania constitution, which sought to assure popular control through such means as a requirement that all public bills be published to the people at large, with “the reasons and motives for making such laws . . . fully and clearly expressed in the preambles,” and the bills not enacted until the following legislative session (after an intervening election). See PENN. CONST. OF 1776, § 15. That way, the people had “the perusal, and consequent approbation of every law” before it went into effect. WOOD, *supra* note 277, at 232 (quoting PENN. PACKET, Nov. 26, 1776).

302. Anonymous, *Rudiments of Law and Government Deduced from the Law of Nature*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805 565, 587 (Charles S. Hyneman & Donald S. Lutz eds., 1983), available at [http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=2066&chapter=188690&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2066&chapter=188690&layout=html&Itemid=27); see also WOOD, *supra* note 277, at 367–68.

303. Anonymous, *supra* note 302, at 587 n.\*\* (citation omitted). Others in the colonial period disagreed, seeing instruction as surrendering deliberation and a search for the common public good. See WOOD, *supra* note 277, at 193–96, 370–71.

304. See generally SCHWARTZ, *supra* note 269, at x–xi.

305. See DELAWARE DECLARATION OF RIGHTS § 9 (1776), reprinted in SCHWARTZ, *supra* note 269, at 277; MARYLAND DECLARATION OF RIGHTS § XI (1776), reprinted in SCHWARTZ, *supra* note 269, at 281; MASSACHUSETTS DECLARATION OF RIGHTS § XIX (1780), reprinted in SCHWARTZ, *supra* note 269, at 343; NEW HAMPSHIRE BILL OF RIGHTS § XXXII (1783), reprinted in SCHWARTZ, *supra* note 269, at 378–79; NORTH CAROLINA DECLARATION OF RIGHTS § XVIII (1776), reprinted in SCHWARTZ, *supra* note 269, at 287; PENNSYLVANIA DECLARATION OF RIGHTS, § XVI (1776), reprinted in SCHWARTZ, *supra* note 269, at 266; VERMONT DECLARATION OF RIGHTS § XVIII (1777), reprinted in SCHWARTZ, *supra* note 269, at 324.

306. See MASSACHUSETTS DECLARATION OF RIGHTS § XIX (1780), reprinted in SCHWARTZ, *supra* note 269, at 343; NEW HAMPSHIRE BILL OF RIGHTS § XXXII (1783), reprinted in SCHWARTZ, *supra* note 269, at 378–79; NORTH CAROLINA DECLARATION OF RIGHTS § XVIII

Pennsylvania's language was typical: "That the people have a right to assemble together, to consult for the common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."<sup>307</sup> When eight state conventions generated proposals in 1788 for amendments to the new federal Constitution, four of those states sought to guarantee a right to petition,<sup>308</sup> and three of the four also would have incorporated an instruction right. Virginia's language was typical: "That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances."<sup>309</sup>

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(1776), reprinted in SCHWARTZ, *supra* note 269, at 287; PENNSYLVANIA DECLARATION OF RIGHTS, § XVI (1776), reprinted in SCHWARTZ, *supra* note 269, at 266; VERMONT DECLARATION OF RIGHTS § XVIII (1777), reprinted in SCHWARTZ, *supra* note 269, at 324.

Some scholars posit a basic tension between the rights of petition and instruction. While instruction used the language of command, see WOOD, *supra* note 277, at 189, they argue that petition was marked by "hierarchical deference"—a web of reciprocal obligation in which the petitioner acknowledged the sovereign's authority and the sovereign considered the petitioner's requests, see Mark, *supra* note 254, at 2202. The sovereign, possessed of full authority in order to advance the general good, could be solicited but not commanded. Petitioners tended to frame their proposals humbly and deferentially, because one of the few legitimate bases for a legislature's refusing to accept a petition was disrespectful address; the institution of petition thus buttressed the authority of the officials to whom petitions were directed. See Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, in THE HOUSE AND SENATE IN THE 1790s 100, 104 (Kenneth R. Bowling & Donald R. Kennon eds., 2002); Mark, *supra* note 254, at 2201–03. On disrespectful address, see Mark, *supra* note 254, at 2170 (English practice); BAILEY, *supra* note 262, at 30 (colonial practice); PETITIONS, *supra* note 268, at 5 (congressional practice). St. George Tucker's 1803 annotated edition of Blackstone's Commentaries supports this thesis by contrasting a petition right "savour[ing] of that stile of condescension, in which favours are supposed to be granted," with instruction, "consonant with the nature of our representative democracy," employing "the language of a free people asserting their rights." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, Note D, § 12 (1803), available at <http://www.constitution.org/tb/t1d12000.htm>.

The matter, though, is not clear-cut. Others urge that by the eighteenth century the emotional valence of petitioning shifted so that it too, undertaken by a people imbued with notions of popular sovereignty, could carry a "hortatory or commanding tone." See Desan, *supra* note 289, at 1486; LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 25 (2004).

307. PENNSYLVANIA DECLARATION OF RIGHTS § XVI (1776), reprinted in SCHWARTZ, *supra* note 269, at 266. The other four were North Carolina, Vermont, Massachusetts, and New Hampshire. See *supra* note 306. Instruction's prominence in New England declarations of rights likely flowed from the long tradition of instruction in colonial New England. See WOOD, *supra* note 277, at 189.

308. See Maryland Ratifying Convention (1788), reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 735 (1971); New York Proposed Amendments (1788), reprinted in SCHWARTZ, *supra*, at 913; North Carolina Convention Debates (1788), reprinted in SCHWARTZ, *supra*, at 968; Virginia Ratifying Convention (1788), reprinted in SCHWARTZ, *supra*, at 842.

309. Virginia Ratifying Convention (1788), reprinted in SCHWARTZ, *supra* note 308, at 842; see also New York Proposed Amendments (1788), reprinted in SCHWARTZ, *supra* note 308, at 913; North Carolina Convention Debates (1788), reprinted in SCHWARTZ, *supra* note 308, at 968.

Madison's 1789 draft of what was to become the First Amendment to the U.S. Constitution incorporated an explicit petition right: It provided that "the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."<sup>310</sup> The draft's omission of an instruction right stirred debate. Representatives Gerry, Page, Tucker and Burke argued for the inclusion of instruction, urging that the right flowed necessarily from popular sovereignty.<sup>311</sup>

Most of the members who participated in the debate opposed instruction. Madison urged that the existing Petition Clause language, along with the Constitution's new speech protections, was sufficient to assure that the people could communicate their wishes to their representatives.<sup>312</sup> A purported right of instruction, he continued, would as a practical matter be nugatory—no formal legal consequences could follow from a representative's disobeying his instructions.<sup>313</sup> Moreover, Madison continued, from the perspective of popular sovereignty, instruction was "of a doubtful, if not of a dangerous nature"; the relevant sovereignty was that of the people as a whole, not that of the people of the particular district that elected a particular representative.<sup>314</sup> Binding instructions from voters would "risk . . . losing the whole system."<sup>315</sup>

Other speakers agreed that a right to instruct representatives would offend "the principles of the Constitution" and "every principle of justice."<sup>316</sup> Not only would it impede republican deliberation,<sup>317</sup> but constituents might instruct their representatives to seek things at which

Maryland, by contrast, limited its proposal to "a right to petition the legislature for the redress of grievances, in a peaceable and orderly manner." Maryland Ratifying Convention (1788), *reprinted in* SCHWARTZ, *supra* note 308, at 735.

310. House of Representatives Debates (Aug. 15, 1789), *reprinted in* Schwartz, *supra* note 308, at 1089. The draft's inclusion of a petition right was uncontroversial. The only cautionary note was sounded by Representative Gerry, who pointed out that petitioning had been "abused" in Massachusetts. *Id.* at 1090. His reference was to Shay's Rebellion, where petitioners marched to shut down the courts when their demands were not met. See DAVID P. SZATMARY, SHAY'S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 69 (1980) (quoting a contemporaneous observer for the proposition that "the stopping of the Judicial courts" had been "blended, in the minds of some people, with the redress of grievances" as a way of "awakening the attention of the legislature").

311. See House of Representative Debates (Aug. 15, 1789), *reprinted in* SCHWARTZ, *supra* note 308, at 1092–96, 1101–02; see also Mark, *supra* note 254, at 2207–12.

312. House of Representative Debates (Aug. 15, 1789), *reprinted in* SCHWARTZ, *supra* note 308, at 1096.

313. *Id.*

314. *Id.* at 1097. See also *id.* at 1101, 1104 (Reps. Lawrence and Sedgwick).

315. Cook v. Gralike, 531 U.S. 510, 521 (2001) (citing 1 ANNALS OF CONG. 739 (1789)).

316. House of Representative Debates (Aug. 15, 1789), *reprinted in* SCHWARTZ, *supra* note 308, at 1098 (Rep. Stone); *id.* at 1093–94 (Rep. Sherman).

317. See *id.* at 1091–94 (Reps. Hartley, Clymer, and Sherman); see also *id.* at 1094 (Rep. Jackson; instruction will drive the house into factions).

“every honest mind must shudder,” such as paper currency.<sup>318</sup> The House rejected the instruction right by a vote of forty-one to ten.<sup>319</sup>

### 3. PETITION AFTER 1789

U.S. citizens were eager to exercise their First Amendment right to petition. The more than 600 petitions to the First Congress included a great number of requests for payment of Revolutionary War claims,<sup>320</sup> but also covered such topics as slavery, tariffs, copyright protection, prohibition of rum, and a ban on “inaccurate editions of the holy bible.”<sup>321</sup>

Each petition was read on the floor of the relevant House when introduced.<sup>322</sup> The petition was then referred to an appropriate executive department, a standing congressional committee, an ad hoc committee constituted for the purpose, or the Committee of the Whole.<sup>323</sup> Each of these, except for the Committee of the Whole, was expected to report back to the full body.<sup>324</sup> The process was “time-consuming and often cumbersome.”<sup>325</sup> After several weeks of the 1795 session, the “principal part” of Congress’s time had been “taken up in reading [and] referring petitions.”<sup>326</sup>

The statistical record makes clear that not *every* petition to Congress resulted in a report on the merits, but a notable number did.<sup>327</sup> In the years 1789-1795, almost two thousand petitions were filed with the House.<sup>328</sup> A fifth of all petitions were referred to “select” House committees—that is, ad hoc committees comprising three to five members

318. *Id.* at 1100 (Rep. Vining); *see also id.* at 1091–92, 1102 (Reps. Hartley and Wadsworth).

319. *Id.* at 1105. The House, presumably, was self-interested; its members valued their freedom of action, and were disinclined to be tightly shackled. Regardless of their motivations, though, their vote was a resounding rejection of the instruction right and its underlying philosophy.

A 2001 Supreme Court case provides a coda. *Cook v. Gralike*, 531 U.S. 510 (2001), concerned a Missouri constitutional provision reviving instruction: It directed members of the state’s congressional delegation to take certain actions in support of a term limits amendment to the U.S. Constitution, and provided that election ballots would include “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” by their names if they failed to do so. The Court ruled the provision unconstitutional.

320. *See* William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *THE HOUSE AND SENATE IN THE 1790s* 29, 31, 47–56 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

321. *See id.* at 31–41; Abu El-Haj, *supra* note 93, at 30.

322. *See* PETITIONS, *supra* note 268, at 7.

323. *See id.* at 7–8.

324. *See id.* at 11–12.

325. *Id.* at 10.

326. John & Young, *supra* note 306, at 107 (footnote omitted) (internal quotation marks omitted).

327. PETITIONS, *supra* note 268, at 11, 361 tbl.1.

328. *Id.* at 362 tbl.2.

appointed for the purpose of reporting on the petition.<sup>329</sup> Eighty percent of these petitions were the subject of written reports back to the House.<sup>330</sup> A little over half were referred to an executive department; a petition claiming veterans' benefits, for example, might be referred to the Secretary of War for verification.<sup>331</sup> Over seventy percent of these petitions were the subject of written reports.<sup>332</sup> Approximately seven percent of petitions were referred to a House standing committee, and nearly two percent to the Committee of the Whole.<sup>333</sup> Approximately twelve percent of petitions were tabled without being referred,<sup>334</sup> and a fraction of one percent were rejected or withdrawn.<sup>335</sup>

Notwithstanding the imperfections, what emerges from the numbers is a strong commitment to "the right of every citizen to petition for a redress of grievances, and the duty of the House to consider such petitions."<sup>336</sup> Thus, when in 1799 Representative Harper sought to reject the filing of a petition challenging the administration of the Sedition Act, on the ground (he urged) that its claims constituted an "atrocious libel," the House mandated that the petition be received and referred to committee in the normal manner.<sup>337</sup> As Representative Gallatin responded, "the people have . . . a right to say, if they choose, that the administration of justice is corrupt," and "if they do say so, the fact ought . . . to be inquired into."<sup>338</sup>

In the first third of the nineteenth century, petitioning provided a vehicle for mass agitation on subjects ranging from the tariff, to the annexation of Texas, to the removal of the Cherokee Nation from Georgia, to the legality of the Bank of the United States.<sup>339</sup> After voting,

329. *Id.* at 8, 361 tbl.1.

330. *Id.* at 361 tbl.1.

331. *Id.* at 11, 361 tbl.1.

332. *Id.* at 361 tbl.1.

333. *Id.*

334. *Id.* The petition seeking a ban on inaccurate Bibles was apparently in this group. See diGiacomantonio, *supra* note 320, at 38.

335. PETITIONS, *supra* note 268, at 361 tbl.1.

336. 3 ANNALS OF CONG. 730 (1792). Steele, a North Carolina representative, made this concession while urging rejection of an anti-slavery petition without referral, on the ground that it was "a mere rant and rhapsody of a meddling fanatic, interlarded with texts of Scripture," tended "to alienate [slaves'] affections from their masters, and [excite] in them a spirit of restlessness," and asserted no concrete prayer for relief. *Id.* at 730-31.

337. 9 ANNALS OF CONG. 2957-59 (1799).

338. *Id.* at 2958; see Higginson, *supra* note 255, at 157 & n.105 (discussing other petitions relating to the Sedition Act); Smith, *supra* note 256, at 1176-77.

339. See Frederick, *supra* note 257, at 119, 130; Alisse Theodore Portnoy, "Female Petitioners Can Lawfully Be Heard": Negotiating Female Decorum, United States Politics, and Political Agency, 1829-1831, 23 J. EARLY REPUBLIC 573, 574, 603 (2003). See also Higginson, *supra* note 255, at 156-57 (noting petitions to Congress relating to such issues as contested election results, land distribution, and the abolition of dueling).



petition was “the primary mechanism for popular involvement in national politics,” and Congress invested the petition mechanism with “an almost sacred solemnity.”<sup>340</sup> Story’s 1833 *Commentaries on the Constitution of the United States* described petition as “result[ing] from the very nature of [republican government’s] structure and institutions,” adding that the disappearance of the right to petition would mean that “the spirit of liberty had wholly disappeared, and the people had become so servile and debased, as to be unfit to exercise any of the privileges of freemen.”<sup>341</sup>

The petition right came under attack, though, in connection with the slavery debate. Over time, slavery drew more petitions than any other matter.<sup>342</sup> The House answered some, tabled others without referral, and allowed the rest to die a quiet death, without consideration, in a slaveholder-controlled House committee.<sup>343</sup> With the start of the Twenty-Fourth Congress in 1835, enormous time was spent arguing about the antislavery petitions’ proper treatment.<sup>344</sup> Southern representatives urged that the petitions be summarily rejected; as Representative Hammond of South Carolina put it, the alternative was to “sit there and see the rights of the southern people assaulted day after day, by the ignorant fanatics from whom these memorials proceed.”<sup>345</sup> The question came to occupy Congress, and the deluge of petitions made normal House business problematic.<sup>346</sup>

Southerners argued that abolitionists had no right to insist that Congress receive their petitions; once a petition was presented to Congress, what Congress did with it was in its own discretion.<sup>347</sup> Defenders of the petition right, including John Quincy Adams, emphasized the constitutional right of all persons to be heard by petitioning Congress, and the legislature’s obligation—subsumed in that right—“to receive and deter-

340. John & Young, *supra* note 306, at 104–05.

341. STORY, *supra* note 253, at § 1887. Similarly, William Rawle’s 1829 *A View of the Constitution of the United States of America* said of the assembly and petition right that “[o]f this right in the abstract there cannot be a doubt.” He went on to emphasize, though, that the constitutional right should be limited to peaceable and lawful—rather than tumultuous and disorderly—assembly. William Rawle, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 124 (2d ed. 1829), *portion available at* [http://press-pubs.uchicago.edu/founders/documents/amendI\\_assemblys20.html](http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys20.html).

342. See Frederick, *supra* note 257, at 119. Many of the petitions focused on slavery in the District of Columbia, a matter plainly within the legislative power of Congress. See *id.* at 122–23.

343. See 11 REG. DEB. 1137–38 (1835); Frederick, *supra* note 257, at 117–18; WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 29 (1996).

344. See Frederick, *supra* note 257, at 124.

345. 12 REG. DEB. 1966–67 (1835); see Frederick, *supra* note 257, at 120–29; MILLER, *supra* note 343, at 33.

346. See Frederick, *supra* note 257, at 130.

347. See Higginson, *supra* note 255, at 159; see also, e.g., 12 REG. DEB. 2334 (1836).

mine upon the prayer of the petitioners.”<sup>348</sup> Legislative refusal to take that step, defenders argued, denied popular sovereignty by supposing that “the people of the United States are not to be reasoned with.”<sup>349</sup>

The House ultimately adopted Southern representatives’ desired rule that antislavery petitions were not to be received.<sup>350</sup> Abolitionists responded with ever-greater numbers of petitions, because their rejection made for good political theater.<sup>351</sup> The Massachusetts legislature adopted a resolve declaring the House gag rule, and parallel Senate procedure, “a palpable violation of the Constitution” and a denial of the

indisputable right of any portion of the people of this country, however mistaken in their views, or insignificant in number, at any time to petition Congress for a redress of grievances, or what to them may seem such; and [the obligation of] Congress . . . to receive all such petitions, and give them a respectful and deliberate consideration.<sup>352</sup>

The House finally repealed the gag rule in 1844, on the understanding that antislavery petitions would be buried in committee.<sup>353</sup>

Though petition remained important throughout the nineteenth century, it gradually lost its meaning.<sup>354</sup> By 1927, a contemporary writer described petitions as landing in “the waste basket,” ineffective in securing legislative action.<sup>355</sup> While it is still possible to file petitions with Congress today, they are referred to committee without reading or

348. S. JOURNAL, 25th Cong., 2d Sess. 136–37 (1838).

349. 12 REG. DEB. 2331 (1836). Representative Cushing described the rule that the legislature both receive petitions and consider them on the merits as one of the most basic “principles of democracy”; he counted the right of instruction as similarly fundamental. *See id.* at 2330.

350. *See* CONG. GLOBE, 26th Cong., 1st Sess. 150–51 (1840) (adopting a resolution that “no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territory, or the slave trade between the States or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever”); LEONARD L. RICHARDS, *THE LIFE AND TIMES OF CONGRESSMAN JOHN QUINCY ADAMS* 176 (1986).

351. *See* Mark, *supra* note 254, at 2225–26.

352. H.R. JOURNAL, 26th Cong., 1st Sess. 788 (1840).

353. *See* Frederick, *supra* note 257, at 139.

354. *See* Abu El-Haj, *supra* note 93, at 31–33. The conventional wisdom among legal writers is that congressional consideration of petitions simply ended with the crisis of the 1830s, *see, e.g.*, Frederick, *supra* note 257, at 139, 141, but the evidence doesn’t support such an abrupt shift. Citizens filed hundreds of thousands of petitions with Congress in the years that followed, presumably on the understanding that they would be read. *See* John & Young, *supra* note 306, at 137–38. *See also, e.g.*, *A Petition of 22,626 Women of Utah: Petition Before the H. Comm. on the Judiciary*, 44th Cong., 1st Sess. (Jan. 13, 1875), available at <http://www.archives.gov/historical-docs/doc-content/images/utah-statehood-womens-petition.pdf> (requesting statehood for Utah); Press Release, The U.S. Nat’l Archives & Records Admin., Century-old Hawaiian Petition Now Available on Microfilm (Aug. 9, 1999), <http://www.archives.gov/press/press-releases/1999/nr99-103.html> (describing an 1897 petition opposing Hawaiian annexation).

355. Abu El-Haj, *supra* note 93, at 35 (quoting LEON WHIPPLE, *OUR ANCIENT LIBERTIES* 106 (1927)) (internal quotation marks omitted).

debate, and are no longer a significant part of the legislative process.<sup>356</sup>

Today's constitutional understanding, moreover, has dropped any special meaning for the First Amendment right to petition; it is simply "an assurance of a particular freedom of expression."<sup>357</sup> The Constitution imposes no "obligation on the government to listen [or] to respond" to such speech.<sup>358</sup> Quite the contrary, the Court has told us: "It is inherent in a republican form of government that direct public participation in government policymaking is limited."<sup>359</sup> When it comes to government consideration of a contested policy rule, "it is impracticable that every one should have a direct voice in its adoption."<sup>360</sup> Policy-makers might be well-advised to listen to citizens' opinions, but they have no constitutional obligation to do so.<sup>361</sup>

Many factors contributed to the death of the historic petition right. Federal government structure post-1789 did not feature that combination of functions so conducive to petitioning, in which colonial legislatures saw little distinction between judicial (plaintiff-initiated) and legislative business.<sup>362</sup> As the size of the nation and the scope of government expanded, it made less sense to think that any citizen could dispatch a petition to a busy Congress and have it considered.<sup>363</sup> Wider suffrage offered other opportunities for political participation.<sup>364</sup> A House procedural change in 1836, at the height of the abolition controversy, meant that petitions came to be referred to agencies and committees without ever being read and discussed on the House floor; at that point, they

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356. See Senate Rule VII, para. 4, available at <http://rules.senate.gov/public/index.cfm?p=RuleVII>; House Rule XII, para. 3, available at <http://clerk.house.gov/legislative/house-rules.pdf>; PETITIONS, *supra* note 268, at 9.

357. *McDonald v. Smith*, 472 U.S. 479, 482 (1985); see also *Lance v. Coffman*, 549 U.S. 437 (2006) (per curiam), *aff'g in relevant part* *Lance v. Davidson*, 379 F. Supp. 2d 1117, 1130-32 (D. Colo. 2005).

358. *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979) (per curiam); see *supra* notes 251-252. Supreme Court decisions have given the greatest independent force to the Petition Clause as a protection of the right to file non-frivolous lawsuits, characterized as petitions to the judicial branch. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); see also *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

359. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984).

360. *Id.* at 284 (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)) (internal quotation marks omitted).

361. See *W. Farms Assocs. v. State Traffic Comm'n of Conn.*, 951 F.2d 469, 473 (2d Cir. 1991).

362. See *Higginson*, *supra* note 255, at 157-58; *Lawson & Seidman*, *supra* note 258, at 761.

363. See Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in *THE HOUSE AND SENATE IN THE 1790s* 57, 60 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

364. See PETITIONS, *supra* note 268, at 8-9.

became more nearly invisible.<sup>365</sup> And in the wake of that controversy, House members became more comfortable with simply ignoring petitions.<sup>366</sup>

More broadly,<sup>367</sup> petition grew out of a pre-liberal political culture in which the relationship between citizens and governors was one of organic reciprocal obligation, not of mass politics and electoral control.<sup>368</sup> The petition, in that world, gave the people a non-electoral means of entry into the legislature's search for the common good, enabling an "unmediated, personal politics" of reciprocal obligation in which citizens communicated grievances and proposed remedies, and legislators were to be receptive and responsive.<sup>369</sup> In late eighteenth-century America, where citizens paid tremendous attention to the question of what it meant for a government to be legitimate, the right of petition exemplified prevailing norms of legislative trusteeship.<sup>370</sup>

Prior to the Revolution, there was no distinction between public and private spheres comparable to today's. There were no providers of government services and no police. Government was viewed as simply one property holder in a world of many. Government actors achieved their ends by commanding or enticing private actions, relying on the everyday fidelity and participation of citizens.<sup>371</sup> The Revolution profoundly changed this, bringing into being an autonomous public sphere separate from the private one.<sup>372</sup> And norms shifted: the old world of "public faith" began to give way to a new one exemplified by *The Federalist's* focus on designing public institutions so as to mediate government actors' selfish and ill-motivated actions.<sup>373</sup> In this new world, citizens came to interact with government in a new way, not via a relationship of organic reciprocal obligation but as voters and rights-holders.

With the growth of both population and government, American political culture moved to a greater reliance on voting as the key link between citizen and government.<sup>374</sup> Citizens elected representatives, and

365. *See id.*

366. *See id.* at 9.

367. The historic right of petition, after all, lost its meaning in state legislatures as well as in the federal one; that shift wasn't dependent on factors peculiar to the federal government.

368. *See* Mark, *supra* note 254, at 2187–90, 2194.

369. LAURA JENSEN, PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY 46–47 (2003).

370. *See* Desan, *supra* note 289, at 1481–82.

371. *See id.* at 1445–46, 1490; HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 11–68 (1983); Wood, *supra* note 289, at 238–40.

372. *See* Wood, *supra* note 289, at 240–41.

373. *See, e.g.,* THE FEDERALIST NO. 51 (James Madison) ("Ambition must be made to counteract ambition.").

374. *See* Mark, *supra* note 254, at 2230.

to the extent that those representatives invaded popular rights, the courts were available to enforce those rights against the other branches of government. Citizens and lobbyists would still communicate with legislators, sometimes through mass petitions.<sup>375</sup> More than a million people are said to have signed John Birch Society petitions in the 1960s to impeach Earl Warren.<sup>376</sup> Opponents of the Affordable Care Act are said to have delivered 1.6 million signatures to Congress last fall calling for its repeal.<sup>377</sup> But the new petitions were instruments of mass politics, designed to influence legislators by conveying the message that their signatories were voters who would weigh the legislators' response at the polls. Just as the anti-slavery petitioners in 1835 did not genuinely expect Congress members to rethink their moral views of slavery based on their letters, these modern petitions were no longer about an expectation of legislative consideration and response.

What took the place of petition? To some extent, it was professional lobbyists—or, as Walt Whitman called them in 1856, the “[c]rawling serpentine men, the lousy combings and born freedom sellers of the earth.”<sup>378</sup> Tabatha Abu El-Haj points instead to the movement that began in the 1880s for direct democracy—the initiative and referendum, which allowed citizens to put policy proposals on the ballot directly.<sup>379</sup> These reforms, seeking a more direct, unmediated link between government and the people, spread to nearly half the states by 1918.<sup>380</sup> They adapted the right of petition for a vote-centric age, allowing citizens to shape the lawmaking agenda—to have their proposals considered on the merits by sovereign authority—without regard to their representatives' views.<sup>381</sup>

## IX. THE FUTILITY OF THE RIGHT TO BE TAKEN SERIOUSLY

The stories I've told in this article, I think, reflect a need deeply

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375. *See id.* at 2228.

376. *See* Robert L. Brown, *From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK. LITTLE ROCK L. REV. 1, 4 (2005).

377. *See* Press Release, House Energy & Commerce Comm., 1.6 Million Petitions to Repeal ObamaCare to be Delivered to Congress (Oct. 4, 2011), available at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=8967>.

378. Pasley, *supra* note 363, at 61.

379. *See* Abu El-Haj, *supra* note 93, at 35.

380. *Id.* at 36.

381. *See id.* at 35–38. Initiative today, though, is a tool for the deep-pocketed, far removed from its populist roots. *See California Ballot Initiative Petition Signature Costs*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/California\\_ballot\\_initiative\\_petition\\_signature\\_costs](http://ballotpedia.org/wiki/index.php/California_ballot_initiative_petition_signature_costs) (listing signature-gathering costs for eleven California ballot measures in 2010, ranging from \$987,833 to \$2,626,808). Petition management firms will guarantee ballot access for an appropriate fee. *See* Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in *CITIZENS AS LEGISLATORS* 1, 10–12 (Shaun Bowler et al. eds., 1998).

encoded in American DNA for government to listen to what we have to say, to consider it on the merits, and to treat us with respect. From the very start of the Republic, lawmakers took as a given that “individuals should be heard in the public councils.”<sup>382</sup> After all, the country was “composed of individuals.”<sup>383</sup> Unless citizens believed, with justification, that Congress would not only receive their petitions but would take them seriously, then government could not abide.<sup>384</sup> If the legislature were not to respect petition, it would deny the respect due to the citizenry as “people . . . to be reasoned with.”<sup>385</sup> It is that same desire to be taken seriously that causes us to characterize notice-and-comment as a democratic institution. The agency’s obligation to take commenters’ views seriously speaks to our desire to be taken seriously. We want bureaucrats to consider our positions in a dialogic way, not to treat us merely as subjects to be dictated to.

Martha Minow, in another context, emphasizes the communitarian nature of rights claims: Claims of right are made within and to a community.<sup>386</sup> Having a right thus depends on the willingness of those in power to take it seriously; “the rights tradition . . . sustains the call that makes those in power at least listen.”<sup>387</sup> The right to be taken seriously in its broadest sense represents the purest form of this principle, as a right to have those in power listen and consider what one has to say.

And yet the fact is that government bureaucrats and policy-makers are not necessarily inclined to treat ordinary citizens that way. They have their own goals and their own agendas. The law does not supply good tools for requiring them to address us communicatively rather than instrumentally. Indeed, it cannot.

The historic right of petition was not democratic, but it was—in certain respects—dialogic. The citizen presenting a petition to Parliament or the Crown had neither threat nor bribe to offer; he could only present the unforced power of argument. The Crown’s attention was the product of neither threat nor bribe. It was bound to consider the petitioner’s arguments (though not to grant them) as a matter of social role.

And yet as the norms that supported the obligation of public consideration and response in early America dissolved, it became clear that—when push came to shove—the legislature didn’t need to consider

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382. These are the views of “Candidus,” writing in 1790, and quoted in diGiacomantonio, *supra* note 320, at 30.

383. *Id.*

384. *Id.*

385. See *supra* note 349 and accompanying text.

386. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1874–80 (1987).

387. *Id.* at 1879.

or respond at all. This wasn't an obligation that could have been made judicially enforceable: Such a judicial role wouldn't have fit our understanding of separation of powers, and in any event it wouldn't have made a difference. After all, when the House repealed the gag rule in 1844, agreeing once again to receive petitions, it instead simply sent abolitionist petitions to languish in committee without meaningful consideration. When Congress decided that it would no longer engage with individual petitions on the merits, there was no way to force it to do so.

Petitioning in America, thus, ultimately became simply part of instrumental mass politics. In the new age, its transactional nature was more plain: A petition's signatories implicitly threatened to withhold their votes if politicians did not heed their demands. As such, though, petitioning was neither dialogic nor especially effective.

The innovation of the modern right to be taken seriously, as embodied in the Administrative Procedure Act and elsewhere, was that it had a judicial enforcement mechanism. Under modern law, if an agency fails to attend and respond to arguments made in rule-making comments, it can be called to task in court; the court can vacate the agency's action if not satisfied with its responses. This looks like the engagement of petition updated for a rights-based era, robust and enforceable.<sup>388</sup>

But as we have seen, this judicial enforcement mechanism is limited. It only applies to claims sounding in rationality rather than value, made in sophisticated language by a party that might plausibly seek judicial review. More importantly, the judicial enforcement mechanism cannot require an agency to consider a commenter's arguments with an open heart and mind; it can only require the agency to undertake the paperwork burden, after reaching its decision, of assigning some staffer to recite some plausible reason for rejecting the claim. And I think that limitation is inherent; we can't address it by tweaking legal requirements. Under a more elaborate set of legal rules, a court might (at some cost to practicality) require agency staffers to take more meetings with interested parties or to write longer responses to their proposals. But in the end, these too would just be paperwork burdens.

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388. Notice-and-comment lacks one key feature of petition: The historic petition right was agenda-setting because the authors of petitions chose the topics for which they invoked legislative attention. Modern administrative law incorporates some stark agenda-setting mechanisms. *See, e.g.*, 47 U.S.C. § 160 (2006) (providing that any person may petition the FCC to forbear from enforcing a statutory requirement, and that petition "shall be deemed granted" if the agency fails to issue a merits-based denial within a year). But those provisions are rare. As the example of the Consumer Product Safety Act requirement discussed *supra* note 74 makes clear, they can greatly impede an agency's efficiency by stripping it of control over its own agenda.

The direct-democracy mechanisms of initiative and referendum promised to carry over the petition right's agenda-setting function, but ultimately failed as a populist tool. *See supra* note 381.

Administrative law's enforcement mechanism, in other words, does not render notice-and-comment communicative in the Habermasian sense. Because it's driven by practicalities and litigation risk, it's ultimately instrumental. It's not about the unforced power of argument. And so it too is neither truly dialogic nor (for most of us) effective.

Why did both the historic petition right and the modern right to be taken seriously fall short? Because law, at least in its modern incarnation, cannot effectively impose on government a requirement that it engage with citizens on a human level rather than instrumentally. In order for a government entity to pay attention to citizens' comments, it must *want* to pay attention. If it doesn't want to pay attention, law has only blunt instruments to mandate that it do so.

In the end, law and politics are an instrumental realm; the dialogic function of notice-and-comment sits uneasily there. I suggested earlier in this article that the right to be taken seriously is appealing because it forces government to respond to citizens dialogically—to respond as if the relationship between government and citizen were the same sort of human relationship we have in those aspects of everyday life not driven by economics or government authority. But that, in the end, is an attempt to make government act like something it isn't. There's a contradiction in seeking to use an instrumental mechanism to make government act in non-instrumental ways—or, at the very least, to make government act *as if* it were acting in non-instrumental ways. That's an attempt to make our relationship with government more human than it is, less instrumental than it inevitably needs to be.

The institution of notice-and-comment seeks to simulate a dialogic, discursive relationship in which government must show the citizenry the respect of explaining itself—of hearing public comments and responding to them directly. I've suggested that that sort of relationship builds connection because it creates a sense that governors and governed are part of a shared community. But the point of judicial review is to compel agency staffers to write responses to the substance of public comments by threatening that otherwise they will be reversed. There is no way to avoid the instrumental nature of that mechanism. And, in the end, that undercuts the democratic connection that the right to be taken seriously might otherwise make.

None of this is to deny the benefits of notice-and-comment, or more generally, of the public's engagement with government policy-making. The notice-and-comment process has important epistemic value, contributing to more engaged and informed agency decision-making. It allows people, including ordinary citizens, to have their say before government, giving them a sense of belonging. It has democratic value to the extent



the judicial review mechanism can force government decision-makers to listen and attend to the issues their comments raise. But there are inherent limitations on how well all that can work.

Here's a coda to this discussion, a story that perhaps sums it all up: The Obama administration, as part of its openness initiative, recently created the "We the People" petition platform. The platform enables any adult to submit a short petition seeking changes in "the current or potential actions or policies of the federal government."<sup>389</sup> That person then receives a unique URL to disseminate via email, the web, or social media in order to get additional signatures; if the petition gains 150 signatures within thirty days, it becomes visible and searchable on the "We the People" portion of the White House website.<sup>390</sup> Under the initial plan, if a petition received 5,000 signatures within thirty days, it would receive a response on the merits from policy experts; the White House later upped that threshold to 25,000 signatures.<sup>391</sup>

"We the People" in some respects has been a clear success. In its first month of operation, it collected over a million signatures on a variety of petitions. Yet difficulties became clear soon enough. As of this writing, the Administration has declined to comment on twenty-eight percent of the petitions that crossed the signature threshold, including a petition that the federal government criminally charge the Florida-acquitted Casey Anthony and another requesting investigation and prosecution of the Church of Scientology. The White House explained that the petitions concerned specific law enforcement matters or were otherwise inappropriate for response.<sup>392</sup>

Not all of the petitions garnering White House responses, it's fair to say, related to causes the White House expected or welcomed. The greatest number of signatures so far (over 150,000 in all) came on a series of petitions seeking marijuana legalization.<sup>393</sup> Next was a petition with over 50,000 signatures requesting investigation of alleged prosecutorial and judicial misconduct in the criminal conviction of Sho-

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389. *We the People: Terms of Participation*, WHITE HOUSE, <https://www.whitehouse.gov/petitions#!/how-why/terms-participation> (last updated Dec. 6, 2011).

390. *Id.*

391. *See id.*; Macon Phillips, *A Good Problem to Have: Raising the Signature Threshold for White House Petitions*, WHITE HOUSE (Oct. 3, 2011, 3:13 PM), <http://www.whitehouse.gov/blog/2011/10/03/good-problem-have-raising-signature-threshold-white-house-petitions>.

392. *See Official White House Response to: Try Casey Anthony in Federal Court for Lying to the FBI Investigators*, WHITE HOUSE, <https://petitions.whitehouse.gov/response/why-we-cant-comment-0>; *Official White House Response to: Examine the Government's Failure to Investigate and Prosecute Church of Scientology Crime, Fraud, and Abuse*, WHITE HOUSE, <https://petitions.whitehouse.gov/response/why-we-cant-comment-petition-about-church-scientology>.

393. *See Gil Kerlikowske, Official White House Response to: Legalize and Regulate Marijuana in a Manner Similar to Alcohol and 7 other petitions*, WHITE HOUSE, <https://petitions.whitehouse.gov/response/what-we-have-say-about-legalizing-marijuana>.

lom Rubashkin, a meat-processing mogul whose case had become a cause célèbre in certain portions of the Hasidic Jewish community.<sup>394</sup> Next, among the petitions that have received responses so far, were ones seeking the removal of “under God” from the Pledge of Allegiance,<sup>395</sup> forgiveness of student loan debt,<sup>396</sup> elimination of the Transportation Security Administration,<sup>397</sup> and acknowledgement of “an extraterrestrial presence engaging the human race.”<sup>398</sup>

But the subjects of the petitions are not the problem. The problem, rather, has been the responses. They’re the stuff of position papers—the standard pap that we’re used to political office-holders feeding us when they’re trying to be safe, when they’re trying to be all things to all people. They are exactly what you would expect a press officer to gin up when directed to answer a question while putting his boss and the administration in the best possible light. Nor do I blame the authors, really—what else could any of us have expected? But it makes the whole enterprise seem pointless.

You can find, as a result, the following petition on the “We the People” website. It garnered 37,167 signatures.

*We petition the Obama Administration to:*

**Actually take these petitions seriously instead of just using them as an excuse to pretend you are listening**

Although the ability to submit petitions directly to the White House is a noble and welcome new feature of the current administration, the first round of responses makes blatantly clear the White House intends to just support its current stances and explain them with responses everyone who has done any research already knows.

An online petition is not meant as a replacement for using a search box in a web browser. We the People, those who grant you the power to govern in the first place, are requesting changes in policy

394. See *Official White House Response to: Call an Investigation into Allegations of Prosecutorial & Judicial Misconduct in the Case of Sholom Rubashkin*, WHITE HOUSE, <https://www.whitehouse.gov/petitions/!/response/why-we-can%E2%80%99t-comment>.

395. See Joshua DuBois, *Official White House Response to: Edit the Pledge of Allegiance to remove the phrase “Under God” and 1 other petition*, WHITE HOUSE, <https://www.whitehouse.gov/petitions/!/response/religion-public-square>.

396. See Roberto Rodriguez, *Official White House Response to: Forgive Student Loan Debt to Stimulate the Economy and Usher in a New Era of Innovation, Entrepreneurship and Prosperity*, WHITE HOUSE, <https://www.whitehouse.gov/petitions/!/response/taking-action-reduce-burden-student-loan-debt>.

397. See John Pistole, *Official Transportation Security Administration Response to: Abolish the TSA, and Use its Monstrous Budget to Fund More Sophisticated, Less Intrusive Counterterrorism intelligence*, WHITE HOUSE, <https://petitions.whitehouse.gov/response/response-we-people-petition-abolishment-transportation-security-administration>.

398. See Phil Larson, *Official White House Response to: Formally Acknowledge an Extraterrestrial Presence Engaging the Human Race*, WHITE HOUSE, <https://www.whitehouse.gov/petitions/!/response/searching-et-no-evidence-yet>.

directly, circumventing legislators who already do not listen to us. We the People request you govern FOR us, which means actually listening to us and actually acting in our interests instead of special interests.

You are not above us. You ARE us. Govern accordingly.<sup>399</sup>

But perhaps this other petition is somewhat more to the point.

*We petition the Obama Administration to:*

**We demand a vapid, condescending, meaningless, politically vapid response to this petition.**

Since these petitions are ignored apart from an occasional patronizing and inane political statement amounting to nothing more than a condescending pat on the head, we the signers would enjoy having the illusion of success. Since no other outcome to this process seems possible, we demand that the White House immediately assign a junior staffer to compose a tame and vapid response to this petition, and never attempt to take any meaningful action on this or any other issue. We would also like a cookie.<sup>400</sup>

## X. CONCLUSION

The right to be taken seriously—the right that government not only receive citizen comments but also attend to them on the merits and respond—is rooted in the now-forgotten historical right of petition and finds expression today throughout administrative and environmental law. It has a lot going for it. It leads to higher-quality government decision-making. It contributes to government legitimacy. It flows, ultimately, from government’s obligation to respect the autonomy and equality of each citizen, answering citizens with reasons rather than force, engaging them dialogically rather than instrumentally.

But its promise is muddled in practice. Real notice-and-comment rule-making doesn’t operate as the theoretical model would have it, and

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399. *We Petition the Obama Administration to: Actually take these petitions seriously instead of just using them as an excuse to pretend you are listening*, WHITE HOUSE (Oct. 28, 2011), <https://www.whitehouse.gov/petitions#!/petition/actually-take-these-petitions-seriously-instead-just-using-them-excuse-pretend-you-are-listening/grQ9mNkN>.

The White House issued a response, titled “We’re Listening. Seriously.” The response noted that, in January 2012, the Obama administration used its response to a “We The People” petition as a vehicle for announcing a new stance towards legislation aimed at offshore copyright infringement. It asserted that other petitions had “contributed to policy discussions . . . throughout the Administration,” and that petitions had “helped spur discussions” within the White House. *Id.*

400. See Sean Gallagher, *3,000 Sign whitehouse.gov Petition Seeking “vapid response,” Cookies*, ARS TECHNICA (Nov. 7, 2011, 11:03 AM), <http://arstechnica.com/tech-policy/news/2011/11/over-21000-sign-whitehousegov-petition-seeking-vapid-response-cookies.ars>. This petition expired without attracting sufficient signatures to oblige the government to respond and no longer appears on the White House website.

there's good reason to think that it can't. Its democratic justifications fall short when confronted with reality.

A look back at the right's historical roots begins to explain why. The historic petition right fell short in the nineteenth century for the same reason the modern right to be taken seriously falls short today—because law could not effectively impose on government a requirement that it engage with citizens on a human level rather than instrumentally. In order for a government entity to pay attention to citizens' comments, it must *want* to pay attention. If it doesn't want to pay attention, law has only blunt instruments to mandate that it do so.

The right to be taken seriously is appealing because it promises that government will respond to citizens dialogically—that is, it will respond as if the relationship between government and citizen were the same sort of human relationship that we have in those aspects of everyday life not driven by marketplace or government authority. Yet today, as in the eighteenth century, that promise reaches beyond the limits of law. Our tool for enforcing the right to be taken seriously is judicial review; we compel the agency to respond to comments by threatening that it will be reversed if it does not. There is no getting away from the instrumental nature of that mechanism. And, in the end, that undercuts the democratic connection that the right to be taken seriously might otherwise make.

