***Participation in the U.S. Administrative Process***

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At least on paper, U.S. administrative law places a premium on ensuring complete and meaningful participation in agency rulemakings. Participants are not only guaranteed the opportunity to comment on agency proposals, but agencies are legally required to consider their comments. If an agency fails to comply with these requirements, it can find itself defending its rule in court. Since each commenter is a potential litigant, U.S. agencies have legal incentives to take the comments seriously.

What actually happens in practice, however, is slightly different. Even though legal requirements impress upon agencies the need to provide formal opportunities for participation, agencies are not required to ensure that the opportunities they provide are effective. Administrative law also does not require that all significantly affected parties be actively represented in rulemaking that affects their interests. Instead, in the model contained in the Administrative Procedure Act (APA) the agency operates as a passive recipient of stakeholder input. Agencies are generally not required to monitor the intensity or diversity of stakeholder engagement, subsidize or actively solicit underrepresented groups, or otherwise ensure that the actual participants bear any resemblance to those who are actually affected by the agency’s action. [[1]](#endnote-1) The success of U.S. participation requirements ultimately relies on the stamina and resources of the affected parties, a dependence that can lead to significant imbalances in representation.

Exacerbating these limitations are gaps in the formal participation requirements themselves. Over time, eager participants and overburdened agencies have learned to exploit these gaps and have created a number of shortcuts and end-runs around the rules. As just one example, while agencies must carefully attend to commenters during the public comment period, there are effectively no restrictions on the processes agencies may use to develop the initial rule proposal. As a result, agencies can manage litigation risks by negotiating the rule proposal with the most litigious stakeholders in advance, outside the formal comment and recordkeeping requirements. Indeed, in some rulemaking settings these work-arounds have become so important that they serve as the primary means for agencies to advance their policies.

Consequently, there is a significant difference between what is promised by the formal U.S. administrative process on paper and what can happen in practice. This chapter extracts these two competing stories of U.S. administrative process. After surveying the formal requirements of U.S. administrative law in the first section, the second section considers the various ways in which the stated goal of ensuring diverse participation can be undermined in the real world. The third section then draws out some of the most important differences between this account of the U.S. regulatory system and rulemaking in the European Union (EU). This preliminary analysis suggests that, once the empirical realities of U.S. process are taken into account, rulemaking in the EU and the U.S. may not be so different after all. The final section closes with the identification of a few features of the EU system that might be worthy of borrowing in the reform of U.S. administrative process.

I. U.S. Administrative Law on Paper

The legitimate scope and reach of agency authority has been a continuing source of controversy in the development of the administrative state in the U.S. A number of different, but generally reinforcing oversight mechanisms have been devised over time within the three branches of government to check agency power. For example, Congress serves as the chief architect of the regulatory state―responsible for both the creation of agencies and their statutory authorizations. Congress also enjoys oversight powers, implemented through a variety of mechanisms, and controls agency budgets. The President is primarily engaged in overseeing the ongoing operations of federal agencies. Beyond the important power to appoint agency heads, a White House office also reviews and clears the most significant agency rules before they become official. This same office also reviews and modifies agencies’ budget requests before they are submitted to Congress.

Although each of these institutional oversight mechanisms exert significant constraints on agency power, the bureaucracy is accountable to the public only indirectly. No agency officials―even at the top levels―are elected. The parties implicated by agency action must instead work through Congress or the President to affect the substance of agency rules.

In order to create more direct accountability to the electorate and enhance the democratic legitimacy of this Fourth Branch, Congress passed a process statute -- the Administrative Procedure Act (APA) in 1946 – to provide formal mechanisms for affected interests to influence and oversee agency action (5 U.S.C. § 551 et seq). Specifically, the APA provides any interested party with a right to participate in an agency rulemaking (§ 553(c)). If the agency ignores a commenter who has identified flaws in the agency’s interpretation of its statute, material errors in its fact-finding, or logical inconsistencies in its reasoning, or if the agency violates procedural requirements, then that commenter can challenge the agency’s rule in court (§ 706(2)(a)). Since affected parties typically have both the stakes and expertise to scrutinize the agencies’ detailed and voluminous rules, Congress enlisted their services to keep the agencies in check, with the courts serving as legal referee.

The resulting reliance on interest groups to oversee the work of the agencies – called interest group pluralism (Stewart, 1975) -- is a central design feature of U.S. administrative process. Indeed, the use of regulatory participants to ensure agency legitimacy has become so critical to U.S. administrative process that Edward Rubin calls the APA a “one-trick pony.” As he argues: “All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties” (Rubin, p.101, 2003). The Attorney General’s Report in 1946 similarly stressed how pluralistic oversight of agencies would be pivotal to the success of the administrative state: “Participation by these groups [economic and community-based] in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests” (Report of the Attorney General’s Committee, p.103, 1941).

In embellishing the procedures that should govern this all-important participatory oversight, Congress identified two different types of rules, each of which entail different participatory processes. The first type of rule―formal adjudications―affect directly the “due process” interests of individual participants, for instance the granting of licenses and permits (§ 554). Congress developed much more extravagant, trial-like processes to ensure that these affected parties are adequately represented in the agency’s deliberations. These processes include the right to cross-examine and to present evidence, limits on ex-parte contacts, and on-the-record hearings (§§ 556 and 557).

Second, and much more common, Congress understood that many agencies would also promulgate rules that have more general application to a number of regulated groups (§ 553). This latter type of rule constitutes the lion’s share of agency rulemaking activity and it also presents far greater participatory challenges to both process design and implementation. In order to ensure that all affected parties can participate in so-called “informal rules,” [[2]](#endnote-2) Congress established a number of requirements, the most important of which are (1) the notice-and-comment process and (2) the agency’s responsibility to consider all comments submitted by interested persons in finalizing its proposal. Since informal rules are so pervasive in agency rulemaking and the goal of ensuring full participation can be particularly difficult, the rest of this chapter focuses exclusively on these two requirements of informal rulemaking.

1. A Mandatory Notice-and-Comment Process

In the APA, Congress guarantees all interested parties a right to provide the agency with comments on its proposed rule (§ 553(c)). In order to ensure that this comment period is meaningful, agencies are required, at the very least, to publish “either the terms or substance of the proposed rule or a description of the subjects and issues involved” (§ 553(b)(3)). If an agency violates this procedural step, affected interests can appeal the agency’s rule to the Court of Appeals (§ 706(2)(D)).

Beyond a mandatory comment period, the courts have imposed a number of other constraints on the agencies to prevent them from circumventing the spirit of the notice and comment requirement. For example, courts have held that, after the comment period, agencies cannot radically change their proposal in ways that effectively deny participants the ability to offer comments, called the logical outgrowth test ([Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1021 (D.C. Cir. 1978)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1978121484&ReferencePosition=1021)). Under the Freedom of Information Act and the courts’ interpretation of the APA, agencies must also ensure that participants have access, with only a few exceptions, to all of the information relevant to the rule (5 U.S.C. § 552; United States v. Nova Scotia Food Products Corp. 568 F.2d 247, 252 (2d Cir. 1977)). In designing their procedures, agencies have added even more participation-based features. For example, agencies sometimes voluntarily hold live hearings to supplement the record with oral discussion. Agencies also regularly extend the comment period to provide interested parties additional time to participate―in extreme cases agencies have kept the comment process open for months, and even a year.

Moreover, while the APA sets the floor for what constitutes an adequate opportunity for public participation in informal rules, it by no means limits what the agency can do with respect to soliciting input from interested parties. Some agencies, for example, float trial-balloon proposals through advanced notices of proposed rulemakings. In these advanced notices, agencies often suggest alternative approaches to the regulatory task at hand. This menu of regulatory possibilities is then refined, often through multiple rounds of comments and revised proposals, before the agency reaches the stage of the official proposed rule. Other agencies circulate drafts of underlying studies and analyses for notice and comment and hold stakeholder meetings―all of which are publicized in the Federal Register―long before the proposed rule is developed. In its revision of standards for a handful of common air pollutants like ozone and particulates, the U.S. EPA routinely convenes no fewer than five separate comment periods, in addition to a “scoping” stage early in the decision-making process, before drafting the proposed rule (Shapiro et al., 2012).

1. Considering Comments and the Threat of Litigation

Administrative law also provides commenters with the right to sue the agency when certain comments have been ignored. The resultant threat of litigation thus helps to ensure that the opportunity to participate is meaningful and not simply a paper requirement. More specifically, a commenter can sue the agency when: the agency has not provided a reasoned response to the commenter’s well-supported argument that the rule is factually, logically, or otherwise flawed in ways that make the rule arbitrary; the agency’s rule falls outside bounds of its statutory authority; the agency has violated procedural requirements; or any number of other specified grounds listed in the APA (§706). This ever-present threat of litigation gives the agency a good reason to take comments seriously. Added to this incentive are additional, court-devised requirements that signal rigorous judicial scrutiny of agency action. The *Chenery* doctrine, for example, requires that the agency’s explanations and justifications be contained within the four corners of the record and not advanced after the fact during judicial review. Agencies thus need to provide their rationale in the rulemaking record itself (SEC v. Chenery Corp., 318 U.S. 80 (1943)). The “hard look” doctrine developed by some courts in the 1970s further underscores the courts’ willingness to scrutinize an agency’s analysis carefully on appeal ([Ethyl Corp. v. EPA, 541 F.2d 1, 40 (D.C. Cir. 1976)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1976124548&ReferencePosition=37)).

As a result of this legal design, comments received during the notice-and-comment process play a central role in U.S. agency decision-making processes. Commenters who can credibly allege that the agency has violated the statute present the most significant litigation risk to the agency (Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). But from the perspective of an agency, all comments carry the possibility that the commenter has unearthed some important fact or logical error in the rulemaking. A commenter that points out, for example, that a potential air toxin is actually in a solid phase and consequently will not be dispersed in the air as a gas, should be heeded by the agency or they risk the possibility of a successful challenge in court (Chemical Manufacturers Assn. v. EPA, 28 F.3d 1259 (D.C. Cir. 1994)).

Also, since each commenter equates to a potential litigator, agencies in the U.S. are quite conscientious about ensuring they have considered all comments. To that end, many agencies routinely summarize the most “significant” comments and provide a response to each type of concern in a dedicated section in the preamble of the final rule. Some agencies even hire private contractors to catalog all comments and agency responses to ensure that no comment has been left unaddressed.

However, it should be quickly added that this duty to consider all comments under the APA does not directly translate into the ability of commenters to control regulatory outcomes. Most enabling statutes. provide agencies with considerable administrative discretion that verges on lawmaking power (American Trucking v. EPA, 175 F.3d 1027 (D.C. Cir. 1999)). Under these ambiguous mandates, the primary challenge is to ensure that the agency rule is not arbitrary in light of the larger record, which includes, but is not limited to, the comments received. For example, Congress provides the Occupational Safety and Health Administration (OSHA) with broad discretion to promulgate workplace standards for toxins and directs only that these standards assure “to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity” (29 U.S.C. § 655(b)(5)). The policies and values that are ultimately selected to develop these standards, as well as the relevant scientific and related information in support of the agency’s preferred rule, are ultimately reserved to the discretion OSHA (American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 (1981)). As long as the agency provides a reasoned response to all of the comments, the agency enjoys discretion in selecting a policy that falls within its statutory mandate.

1. Summary

These dual requirements of the APA – that the agency (1) provide an opportunity to comment and then (2) consider all comments submitted by interested persons―work together to form the centerpiece of the APA’s design for ensuring agency accountability. In U.S. administrative procedure, both requirements are mandatory, both requirements have been policed by the courts in litigation brought by unsatisfied commenters, and both requirements constitute essential, process-based constraints on agency efforts to devise general rules that operate like laws. However, at the same time that the agencies must follow these mandatory procedural steps, they enjoy considerable discretion on the substance. As long as agencies stay within their statutory mandates and provide reasoned explanations for their decisions in the context of the legal record, their underlying substantive choices are generally not considered appropriate for judicial review.

II. U.S. Administrative Law in Practice

The APA establishes mandatory participation requirements, yet its passive, “build it and they will come” approach means that there is no back-end requirement to ensure that this participatory process is actually working. Indeed, over the last four decades, while Congress and the President have each layered on numerous new requirements for agency rulemakings (Seidenfeld, 2000), little effort has been made to track the effectiveness of participation, including ensuring that all significant interests are represented (but see 5 U.S.C. § 611(a)(3).).

Empirical studies conducted of participation in U.S. agency rulemakings reveal, in fact, that public participation in practice can look quite different from what the formal APA process seems to promise on paper. Because of the substantial time and costs required, agencies have devised ways to simply avoid making rules. High-stakes interests game the system to gain an edge in influencing regulatory outcomes. And the general public may not be able to keep up, causing them to be badly under-represented in significant rules. And yet, the resulting participatory imbalances are not even noticed, much less relevant to the legality of the rule under the APA.

Each of these empirical realities―the gap between paper and practice―is described below. While the significance of these gaps remains an open question, the fact that they occur is largely beyond dispute.

1. Avoiding the Notice and Comment Process Altogether

As the requirements of the participation process increase, so do the incentives for agencies to avoid the process altogether. And, at least in some statutory settings, the evidence suggests agencies can become quite creative in developing their preferred policies without engaging in notice-and-comment rulemakings (Farber & O’Connell, 2014).

The most straightforward way for agencies to limit the burdens of the APA informal rulemaking process is to simply cease promulgating rules. Under the APA and related case law, while interest groups can challenge agencies when they miss statutorily prescribed deadlines, a petitioner seeking to force an agency to develop a long-awaited rule carries a high burden if Congress has left the regulatory timing to the agency’s discretion, which is often the case (§ 706(a)(1)).

The resulting “ossification” or extensive delay of rulemakings equates to a kind of paralysis by analysis that is due in part to the onerous burdens and delays imposed on agencies by the notice-and-comment requirements (McGarity, 1992). OSHA, for example, has promulgated very few worker protection rules over the last several decades, despite a long list of substances in need of workplace regulation (McGarity et al, 2010). Likewise, in the last 40 years, EPA has managed to ban only a handful of chemicals under its chemical regulatory statute (US GAO, 2005). The Consumer Product Safety Commission (CPSC) similarly has done very little to regulate latent harms in consumer products through proactive product standards (Public Citizen, 2008). In each of these cases, agency inactivity was precipitated by an adverse court decision that vacated an early agency effort to regulate (Indust. Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991); [Gulf South Insulation v. United States Consumer Prod. Safety Comm'n, 701 F.2d 1137 (5th Cir. 1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1983113856&ReferencePosition=1146)).

However, simple passivity is not the only way that agencies avoid the burden of notice-and-comment rulemakings. They can also develop policies in ways that bypass the hurdles and hoops of the rulemaking process. Indeed, a number of administrative scholars have discussed this strategic circumvention of the notice-and-comment process by agencies in a wide variety of settings (Farber & O’Connell, 2014; Mashaw and Harfst, 1990; Kolber, 2009; Mendelson, 2008). While this circumvention of the informal rulemaking process does not work when Congress statutorily requires the agency to promulgate informal rules, it can represent a vastly preferrable course of action for regulatory programs in which the agency enjoys the discretion to devise alternate ways to advance its policies. As just one example, in lieu of rules, the EPA has issued dozens of guidelines and interpretive memoranda to shepherd regulated parties through its complex hazardous waste disposal program (Tabler and Shere, 1990). EPA also routinely uses these memoranda to support findings of violations in its enforcement cases (e.g., Beazer East, Inc. v. EPA, Region III, 963 F.2d 603 (3d Cir. 1991)). Even though these agency guidances do not have the legal force of rules, they provide a more expeditious way to establish detailed requirements for regulated parties, with much of the same force. Guidances are also much easier to revise over time since agencies are freed of the numerous procedural obligations that attend notice-and-comment rulemaking.

1. Workarounds to Reduce the Litigation Risks for Informal Rules

Another creative way agencies have found to work around the burdens imposed by notice and comment and judicial review is to informally negotiate facets of their rules outside of the notice-and-comment period. As Don Elliott, a former General Counsel of EPA, observes: “[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theatre is to human passions―a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues” (Elliott, 1992).

1. Participation Outside the Notice and Comment Process

The notice-and-comment period is a formal, legally required point for stakeholder engagement, but the APA rulemaking process does not foreclose or regulate informal stakeholder engagement at other points in the process. These informal negotiations outside the notice-and-comment period can occur at several distinct stages in the rulemaking. First, the agency can enter into extended discussions with certain affected groups―particularly the most litigious ones―before its proposal is published in the Federal Register so that the proposal submitted for comment is essentially a *fait accompli* (Ferlong and Kerwin, 2005; West, 2009). Since the APA does not require these pre-proposed rule negotiations to be documented or even logged into the administrative record, they can occur largely outside the formal notice-and-comment process (Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977)). In fact, the courts’ “logical outgrowth” test – a common law interpretation of the APA – actually encourages agencies to engage in these pre-proposal discussions with affected parties (Shell Oil, 950 F.2d 741). Recall that the logical outgrowth test requires the agency to open a second notice-and-comment period if material changes are made to a proposal as a result of comments. The agency thus has strong, judicially-imposed incentives to get the proposal as complete as possible the first time around, an objective that can be accomplished, in part, by ensuring that the major stakeholders are satisfied with the proposed rule before it is published.

There is growing evidence that pre-proposal negotiations can be both extensive and imbalanced with regard to their representation of affected interests.In one study of ninety of EPA’s air toxic rules, EPA informally negotiated with regulated industry more than eighty times per rule on average during the pre-proposal stage, while it engaged with public interest groups fewer than once per rule (Wagner et al., 2011). Interviews of agency staff and interest groups underscore the potential significance of these pre-proposal negotiations as a means of influencing the substance of some proposed rules (Furlong and Kerwin, 2005; West, 2009).

Agencies can also negotiate with participants in the period after publication of a final rule, but before a rule is challenged in court. A trade association’s general counsel observed: “[Litigation] is often a vehicle to kind of lead to a revision of regulations. . . . There are a number of cases that are filed and automatically stayed because we are filing them just so we go back to the agency and basically kind of renegotiate the regs” (Coglianese p.127, 1994). Another corporate counsel remarked, “It is almost like having another rulemaking with those people who care enough about the issues to spend the time, being the ones who get to play” (ibid. p.131). This post-final rule negotiation can also be kept secret since it is considered a legal settlement and may be subject to deliberative-process privileges. And, although any significant changes that may emerge from these negotiations require notice and comment, changes to agency interpretations, enforcement policies, and other non-rulemaking documents need not be subject to the notice-and-comment requirements of rulemakings and hence can occur outside of the APA sunshine (Gaba, 1985; Rossi, 2001). These rule settlements thus constitute yet another, largely invisible work-around the notice-and-comment process.

1. End-runs around Notice and Comment

Stakeholders can also attempt to influence an agency rule outside the formal process by convincing one of the institutional checks (e.g., the President or Congress) to intervene on their behalf. The White House’s Office of Information and Regulatory Affairs (OIRA) provides one of the most powerful end-runs around the APA process because it is largely nontransparent. Pursuant to an Executive Order first issued in 1981 by President Reagan (Executive Order 12291), OIRA reviews the agencies’ significant rules at both the proposed and final stages and enjoys considerable power to influence the resulting, published rule (Executive Order 12866, § 3(f)). In the course of its review, OIRA sometimes makes significant changes to agency rules, sometimes delays rules for long periods of time (Rastello, 2013), and sometimes persuades the agency to abandon a rule altogether (GAO, 2003). [[3]](#endnote-3) In most cases, these political interventions “leave no fingerprints,” and in virtually all cases the changes are unexplained (Mendelson, 2010). Furthermore, meeting logs reveal that OIRA meets with affected parties, often repeatedly, on individual rules (Steinzor et al., 2011). Indeed, interest group lobbying of OIRA is so popular that one EPA appointee observed it has become a “cottage industry” inside the beltway (NAS, 2012).

Members of Congress may also offer regulatory participants valuable reinforcement in their effort to influence agency rules, although in contrast to OIRA review, most Congressional intervention is public.Congress, for example, has reserved the power to directly veto agency rules directly through the Congressional Review Act. While it has only used this power once in the case of OSHA’s workplace ergonomic rule (Rosenberg, 2008), it remains a threat to agency rules. More often, Congressional interventions materialize as some form of indirect, political pressure on the agencies that do not necessarily dictate specific rulemaking outcomes. Thomas McGarity has carefully documented how interest groups have engaged members of Congress to intervene in agency rulemaking processes on their behalf – what he calls a blood sport -- through politicized congressional oversight hearings, public relation campaigns, and related political attacks on the agencies (McGarity, 2012).

1. Inherent Design Features of the APA that can lead to Imbalanced Representation and Influence of Regulatory Participants

As noted in the introduction, inherent design features of the APA can also result in imbalances in representation and reduce agency accountability with respect to certain affected groups. These imbalances occur not *in spite of* the APA (as is the case with the workarounds just discussed), but *because* of it.

Most of the imbalance in stakeholder representation arises from the passive or pluralistic approach that undergirds the basic design of the APA participatory process. For rules in which all interests are engaged and active, the APA’s participatory process can work quite well to force the agency to consider a wide range of interests and justify its rule based on that input (Croley, 2008). However, for rules in which some affected groups cannot afford to participate vigorously or at all, the absence of key affected groups from the notice-and-comment process is highly problematic, making the agency less accountable to public interests. Yet this important fact is not explicitly noted, much less addressed by U.S. administrative process.

The likelihood of incomplete representation in a process that adopts a passive model for participation is well accepted in the political science literature. James Q. Wilson (1980) and William Gormley (1986) both developed 2x2 models that predict imbalanced policymaking processes for problems that are highly complex and for which the stakes of the general public are low and diffuse. For these types of rules, which may well constitute the majority of agency rules in the social regulation area, Wilson and Gormley both predict that diffuse and often under-informed public beneficiaries will ultimately cede control of regulation over to the concentrated minority group of regulated parties.

It is thus not surprising that in U.S. administrative process, there is increasing evidence of a systematic “bias towards business” in less salient but still publicly important rules, where high- stakes players can dominate the proceedings (Yackee and Yackee, 2006). Out of the hundreds and possibly even thousands of agency rules promulgated annually, the representatives of the diffuse beneficiaries are simply not able to keep up with regulated industry, sometimes dropping out of the rulemakings entirely. In fact, in virtually every empirical study examining interest group participation, public interest groups participated in only half of the rules under study, despite the fact that the public interest was affected by all or nearly all of the rules (e.g., Wagner et al, p.109, 2011).

Under the APA, however, the fact that the notice-and-comment process has been dominated by only one set of interests – for example, the regulated parties – is irrelevant as a matter of law. The agency is not even required to make note of the fact that significant affected groups were not represented in a rule (much less attempt to infer what those groups might have wanted had they participated or why they were absent from the rulemakings process), as long as the agency’s exercise of discretion remains within its statutory mandate. Since the process is based only on providing the opportunity to participate, regardless of whether resources exist to actually effectuate those participatory rights, those who do not avail themselves of the process are assumed, as a matter of law, to be both uninterested and unaffected.

The agency can reach out to these parties informally, of course, but doing so would often overload an already heavy rulemaking docket. Moreover, if the agency attempts to advance concerns that it associates with these unrepresented groups its activism could actually increase the vulnerability of the rule to challenge by opponents who placed their concerns on the record and preserved their right to challenge the agency in court. From the agency’s perspective, focusing only on the comments logged into the record is the legally safer, as well as the more expedient and politically neutral course for dealing with gaps in participation*.* And, consequently, empirical evidence suggests that agencies act as such: the final changes in agency rules tend to track – in a statistically significant way – the types of comments the agencies receive (Yackee and Yackee, 2006; Wagner et al, 2011).

A second, more subtle structural participatory weakness in the design of the APA is the mixed message it sends to agencies to ensure that its proposals are accessible to the full range of participants. On paper, the APA requires that an agency’s proposal be clear and succinct. Specifically, the agency is required to provide a “*concise general* *statement* of their basis and purpose [for the rule]” (§ 553(c)) (emphasis added). But perhaps because it is a subjective feature that eludes easy enforcement, the courts rarely reverse a rule for having an unduly complex statement of basis and purpose and instead tend, albeit unwittingly, to encourage and incentivize “complexification.” For example, the APA places no limit on the number and volume of comments, and at the same time the courts demand that the agency must consider all of these comments carefully. As Richard Pierce observes, “[t]he courts have replaced the statutory adjectives, ‘concise’ and ‘general’ with the judicial adjectives ‘detailed’ and ‘encyclopedic’” (Pierce, p.445, 2010).

More subtle incentives may also encourage agencies to promulgate unduly complex rules. For example, agencies appear more likely to avoid political controversy in settings where their rules are incomprehensible. Both the White House and Congress are less likely to intervene if they cannot understand what the agency is doing (Wagner, 1995). At the same time, in insulating its policies through excessive complexity and opacity, the agency enjoys more discretion and authority. That is not to say these incentives necessarily lead to a conscious agency strategy to deliberately complexify rules. However, there is also little counter pressure offsetting the agency’s tendency to write unnecessarily long, detailed, and largely inaccessible rules. Because thinly financed public interest groups are already straining to find resources to participate, these hyper-complex and lengthy rules may break the proverbial camel’s back.

A final crack in the participatory design of U.S. administrative process is the practical possibility that, in some settings, an agency may be relatively unconcerned about the sanctions associated with a judicial remand. For example, if the White House commands a change to a rule that would increase the rule’s vulnerability to a court challenge, a rational Administrator, (who is, coincidentally, appointed by the President) may opt for following the preferences of the Chief Executive and take the risk that several years down the road a court might send the rule back. In other words, condemnation by the courts could be a small price to pay for promulgating a rule that is―despite its potential illegality―preferred by at least one and perhaps both of the agency’s other institutional checks―the President and Congress.

Thus, the APA and judicial review, while legally required, may in practice be treated by the agency as constraints that are secondary to more immediate political demands and pressures. Regardless, administrative scholars seem to have amassed little evidence either way on whether the threat of judicial review actually serves as an important constraint in cases where political pressures push heavily and urgently in the opposite direction (cf. Mashaw, p.536, 2005).

III. Comparative Critique

One of the signature features of U.S. rulemaking is its formal participation requirements―an elaborate procedure that distinguishes the U.S. from most other systems, including the EU. Yet while the U.S. is sometimes held out as having a more robust and even more egalitarian approach to participation, its passive, pluralistic model, along with other cracks in the design of its process, have led to significant practical gaps in ensuring meaningful participation by affected groups. Once these realities are taken into account, the U.S. may be less different from the EU and other administrative systems than would initially appear on paper.

This section compares participation in U.S. and EU rulemaking, keeping the empirical realities of the U.S. regulatory process in mind. At the outset, however, an important qualification is in order: the larger institutional context of both countries is bracketed, even though, ultimately, some of their institutional differences may be so great that the effort at comparison breaks down.[[4]](#endnote-4) Thus, while this section treats EU Commission consultations and U.S. agency rulemakings as rough analogs insofar as they both involve important policy choices and produce a form of regulatory law, readers should consult other chapters in this volume to better understand the limitations of this analogy (Bignami and Zaring 2015; Smismans 2015). This section also brackets participatory issues that arise when the EU Commission chooses to transfer its authority to voluntary associations or industry groups; the focus here is only on decisions of the Commission itself.

1. Some Differences between the Participatory Processes of the U.S. and EU
2. Legal Assurance for Participation in the U.S.

Subject to the preceding qualification regarding the hazards of transnational comparisons, the first and perhaps most important point of contrast between the U.S. and EU arises from the formality of U.S. rulemaking. In the EU, the Commission has a duty to consult the public before undertaking many types of policy initiatives but this duty is generally not judicially enforceable. Relative to the U.S, therefore, there are fewer legal constraints on the Commission’s discretion, both in providing interested parties with an opportunity to participate and in deciding to ignore comments, meritorious or otherwise. As Prof. Bignami summarizes (with qualifications related to the Constitutional Treaty): “[i]mportantly, the Communication on Consultation does not give citizens and their associations the right to go to court if their views are not solicited or their comments are not accepted – one element of a pluralist order” (Bignami, p.79, 2004; Smismans, 2014).

By contrast, as described in the previous section, in the U.S. the right to participate and to have one’s comments considered is legally enforceable. This legal backing would seem to explain U.S. agencies’ fastidious efforts to respond to comments in detail. Under the APA, U.S. agencies face considerable costs―measured in resources, time, and reputation – from dismissing comments too hastily or carelessly. Protracted litigation over such lapses reminds U.S agencies of the importance of “considering” each and every comment.

The legal enforcement of participation rights in the U.S. has even greater implications for participants. Interested parties know that they must be provided an opportunity to lodge comments and be given a reasonable time to prepare them. Regulatory participants also know that they generally must lodge comments in order to challenge the substance of an agency’s rule in court (McKart v. United States, 395 U.S. 185 (1969); Gelpe, 1985). Moreover, once the participants’ comments are filed with the agency, these comments must be duly considered, no matter how long or detailed they may be. If the agency does not provide adequate time for comment or is motivated by political or other predilections that lead the agency to play favorites among commenters in ways that run afoul of Section 706 of the APA, the losing group can challenge the agency’s rule in court. Agencies thus operate in a legal environment in which they understand that the cost of ignoring comments could be a legal challenge and a court reprimand. In the air toxic rules promulgated by EPA, for example, public interest groups brought a series of cases challenging EPA’s deviation from the statutory text in its rules (Wagner, 2012). The courts repeatedly sent the rules back to EPA to be repaired, often with relatively specific legal instructions about how the agency could permissibly read the statute on the issues of interest to petitioners (Sierra Club v. EPA, 479 F.3d 875, 883 (D.C. Cir. 2007)).

Yet the experience of the U.S. system, analyzed in the previous section, also reveals how the law-on-the-books is incomplete in ways that can undermine participatory rights. First, as mentioned earlier, in cases of significant political pressure by the President or Congress, concerns about judicial reversal under the APA may take a back seat and may even be ignored entirely by the agency (Stewart, 1975). Somewhat similarly, if a U.S. agency is captured by the regulated industry or eager to advance a particular end, then the risk of judicial review may be insufficient to reign in its discretion―the benefits of noncompliance to the wayward agency may outweigh the costs of an adverse court decision.

Second, there is no parallel legal right of interested parties to participate in the agency’s development of the rule proposal, despite the seemingly influential role of early deliberations in framing the rule. Thus, while the notice-and-comment stage does provide a guaranteed opportunity for interest groups to lodge comments, high-stakes groups take advantage of other steps in the rulemaking process to influence agency rules. Moreover, during these informal negotiations, most U.S. agencies are not required to document their engagement with affected parties, despite the fact that the negotiations could ultimately prove quite influential in shaping the substance of the agency’s proposal. Indeed, it remains to be seen―and could well depend on the type of rule and agency―whether the comment period or these informal pre-rule and post-rule negotiations are substantively more important in shaping individual rules (West, 2009).

Even taking into account these practical realities, however, the formal and legalized process in the U.S. still seems on balance to provide rulemaking participants (whether associated with major organizations or not) with stronger protections against being excluded or ignored as compared to the EU. While these protections are not complete or always effective, they work to produce a system that does not allow agencies to bypass important steps in the participatory process and that generally encourages agencies to take comments seriously.

1. Participatory Gaps in the U.S. System

In other ways the participatory protections of the U.S. system appear weaker than the EU’s, at least in some types of rulemakings. Like other domains of the U.S. legal system, the extensive rights that are afforded in the rulemaking process can be costly to exercise and therefore many interested parties may not be able to afford to engage in the first place. U.S. rulemaking is a type of “pay to play” system: the only interests that administrative agencies are required to consider are those that are backed by written (or in some cases, formal oral) comments, especially those comments backed by the threat of litigation. In addition, as discussed above, notice-and-comment requirements may serve inadvertently to discourage the agency from actively seeking out thinly financed, but affected groups or attempting to factor in their concerns if they fail to file written comments.

The EU, by contrast, adopts a more informal and less legalistic, but also a more active and “functional” approach that attempts to seek out the full range of interests throughout the decision-making process, a commitment that emerges from the neo-corporatism underpinnings of its basic administrative design. As Stijn Smismans (2015) describes in his chapter, the EU Commission both solicits a diverse range of views through its neo-corporatist participation model and subsidizes some of the more thinly financed groups to ensure their participation (ibid.; Mahoney & Beckstrand, 2011). The EU’s Water Framework Directive provides a concrete example of this consultation approach. It requires Member States to “encourage the active involvement of interested parties” in developing river basin management plans at the individual watershed level (Directive 2000/60/EC, the Water Framework Directive, §14(1)). At least in some watersheds, the mandate is taken quite seriously. In the United Kingdom, the consultation by the government in one area included widely disseminated public surveys, the solicitation of views from about 500 citizens, and the creation of representative liason groups (Fisher et al, 2013).

The EU institutionalizes its more proactive approach to participation in a variety of ways (Smismans 200). One of the most significant mechanisms appears to be the legal creation of advisory committees, boards assembled in ways that attempt to ensure all major organizational interests, as well as Member States, are represented (Smismans 2015; Smismans, 2004; Bignami, 2012). However, while the use of these committees reflects a proactive approach to soliciting diverse participation, the implementation of the committees in the EU is far from perfect (Smismans 2015). Among the complaints that have surfaced is the claim that advisory committees generally do not afford ready access for less established groups, that there is considerable secrecy surrounding their deliberations and the nature of appointments to the committees (ibid), and that the EU Commission ultimately retains discretion regarding when advisory committees should be consulted (Communication from the Commission, 2012). Nevertheless, a relatively diverse set of participants is generally brought to the table during the decision-making process (Bignami, 2012).[[5]](#endnote-5)

Reinforcing the use of these advisory committees are a variety of soft-law duties placed on EU Commission to engage―in an active, rather than passive way―with a diverse set of affected interests in the decision-making process (Strauss et al, 2008). Commission guidance documents establish a standard set of practices for participation and consultation of civil society throughout the policy chain, especially for major policy initiatives (Smismans, 2015). Likewise, guidelines on impact assessments direct the Commission to consult with a range of interested parties and to indicate how that consultation affected the development of the proposal, as well as to communicate critical or dissenting opinions (Smismans, 2015; Strauss et al, 2008). The Commission’s initiative to promote a “civil dialogue” with more thinly financed groups (Smismans, 2014) and its effort to initiate consultations at a relatively early stage in the decision-making process when the policy options are still forming (Strauss et al, 2008; Smismans, 2015) ―as opposed to after they have gelled, as is often the case with U.S. notice-and-comment rulemaking―both evince a more active engagement with participants. [[6]](#endnote-6)

While compliance with these more inclusive participation processes may be somewhat disappointing in practice (Nadal, 2008; Lee and Abbott, 2003), the EU’s acknowledgment of the need to ensure public interest involvement in regulatory policymaking contrasts with the U.S.’s passive approach. Although it is possible that overall this more active process could ultimately lead to meaningful differences in regulatory outcomes due to broader participation, the fact remains that judicial review is generally unavailable to enforce what remain flexible and discretionary soft-law duties, making the two systems difficult to compare (Smismans, 2004).

1. Learning from the EU

Given the inherent weaknesses in the ability of the U.S. administrative process to ensure adequate representation of all affected interests, the EU’s commitment to active solicitation of all major stakeholders offers a refreshing alternative model for enhancing representation in the administrative state. While in theory the U.S. has already endorsed a commitment to active solicitation of affected parties through the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and the Negotiated Rulemaking Act (NRA) ([5 U.S.C. §§ 561](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=5USCAS561&FindType=L)-[70 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=5USCAS570&FindType=L)), both programs fall far short of establishing an expectation and norm that administrative agencies actively solicit diverse participation. For their part, negotiated rulemakings have been few in number (at last count, roughly three per year) due to the added resources they demand from agencies (Lubbers, 2008). Perhaps even more pertinent, the primary reason for negotiating rules is to reach a consensual rather than an adversarial solution. Consequently, the focus is more on bilateral problem-solving than on providing a mechanism to ensure all affect groups are adequately represented (Ibid.). More vigorous use of FACA committees, by contrast, has the potential to actively engage diverse perspectives. Administrative agencies, however, regularly bypass these committees because of obstacles involved in implementing them, including mandatory caps on the number of advisory committees an agency can empanel, nontrivial costs associated with establishing and maintaining the committees, and related red-tape requirements set forth by FACA itself (Executive Order 12838; OMB Circular A-135; Bull, 2011).

More specifically, the EU offers a few mechanisms that the U.S. could borrow to encourage agencies to engage all significantly affected parties in rulemakings without a radical overhaul of the administrative process. For example, agencies could be required to record all communications with interest groups in their rulemaking dockets, regardless of the stage of the rulemaking (e.g., Smismans, 2014). Additionally, if an agency meets with high-stakes, litigious players at the pre-proposal stage, there could be a parallel expectation that agencies provide equal time and resources―via education, outreach and other services―to more thinly financed groups at the same stage of the process. Perhaps regulatory negotiation requirements could even be triggered if the comment period on a rule reveals that parties significantly affected by the rule did not lodge comments.

Courts could be enlisted to enforce the new consultation requirements. A disproportionate share of agency resources dedicated to meeting with only one set of interests outside of the notice-and-comment process might provide a new legal basis for procedural error that would lead to the vacatur of a rule. Failure by the agency to engage in mandated outreach could also lead to heightened judicial scrutiny of an agency decision. In reviewing this type of challenge, the court would adopt the vantage point of the unrepresented interests or waive the exhaustion requirement (which requires the challenger to have raised the argument in the notice-and-comment procedure) for thinly financed groups altogether (Markoff, 2012).

The EU also appears to be actively engaged in ensuring that at least some of the important work of the Commission is accessible to general readers. Some of this commitment is embedded in the EU’s functional approach to participation: because the Commission is charged with engaging all major stakeholders, the costs of unduly complicated, long, or even incomprehensible products fall more heavily on the Commission than on the participants. Moreover, because the Commission engages affected groups when proposals are first being developed, interested parties are alerted to the choices and framing issues before these choices can become obscured by evolving complexity.[[7]](#endnote-7) Strict page limits on some (but certainly not all) Commission reports, like impact assessments, provide still further evidence of the EU’s commitment to ensuring some modicum of accessibility for their regulatory products. For example, under Commission guidance issued in 2005, impact analyses are limited to thirty pages (Communication from the Commission, 2005).

While this type of comprehensibility may have been initially contemplated by the U.S. Congress in the 1940s, the evolution of the administrative process has led to precisely the opposite incentives for American agencies― the development of long, complex, and often unintelligible rules and preambles (Wagner, 2010). Indeed, U.S. agencies generally find that they are rewarded for rules that are convoluted and difficult to understand, alienating commenters (and some courts), and ultimately reducing the risk of successful legal challenges to the rules. Therefore, in the U.S.’s passive approach to participation, the costs of inaccessible rules and preambles fall not on the administrative agencies, but the participants.

To counteract the general inaccessibility of agency rules, the U.S. could also import some of the EU’s mechanisms for increasing the visibility and accessibility of key regulatory products. As mentioned earlier, a requirement that the agency actively engage all affected interests could create a much-needed incentive for U.S. agencies to produce regulatory outputs that are more accessible to general readers. Other more mundane requirements, for instance page limits and format specifications, could also promote greater accessibility to the work of U.S. agencies.

IV. Conclusion

The administrative processes of the U.S. and EU are often considered quite different from one another. The actual practice of U.S. rulemaking, however, suggests ways in which the two systems may not be quite so different after all. While the U.S. system does afford important rights and guarantees for regulatory participants, these guarantees can be overshadowed by political pressures and significant structural gaps that lead to the inadequate inclusion of the concerns of affected interests.

A grounded comparison also reveals features of the EU process that may provide greater participatory protections as compared to the U.S. Indeed, some of the most immediate lessons that follow from this comparative effort show severalways in which the U.S. process might be improved by borrowing from the EU. Regardless of the overall implications for administrative design, however, the comparative effort, at the very least, suggests the importance of ensuring that comparisons between these systems are based not only on legal theory but on empirical reality. Such an empirically informed understanding of the formal aspirations of the letter of the law paves the way to more accurate and productive transnational learning.

1. Endnotes

   Congress did create an office to advocate on behalf of small businesses, however. See The Small Business Regulatory Enforcement Fairness Act (5 U.S.C. § 611(a)(3)). [↑](#endnote-ref-1)
2. Hybrid rules, for which Congress may impose additional participatory requirements on the agency by statute, such as requiring formal hearings in addition to notice and comment, are treated as informal rules for present purposes since they still do not follow the APA adjudicatory rulemaking requirements described above (Lubbers, 2006). [↑](#endnote-ref-2)
3. For select facts and figures on OIRA review, go to OMB’s Regulatory Dashboard at <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>. [↑](#endnote-ref-3)
4. As just one example, the EU Commission is comprised of appointed officials from member countries who are then ratified by the Parliament. For a wonderful birds’ eye treatment of these institutional differences, see, e.g., Strauss, et al (2008) and Bignami (2012). [↑](#endnote-ref-4)
5. It should be noted that the institutionalization of advisory committees in developing binding rules is not a feature that is unique to the EU. The legislature in India, for example, requires the formation of committees comprised of a mix of government and affected parties, called “pollution control boards,” to implement significant environmental programs (Divan and Rosencranz, 2001). [↑](#endnote-ref-5)
6. To engage in early consultation, the EU Commission may also solicit input from all affected stakeholders through structured questionnaires that inquire about particular issues in some specificity at a very early stage of the process (Strauss, 2008). For an example, see Article 29 Working Group on Data Protection, November 20, 2002, 12251/02/FR. [↑](#endnote-ref-6)
7. As a first step, the EU Commission publicizes that it is initiating a policymaking proposal and then dedicates considerable effort to assessing policy alternatives in a transparent way, including soliciting broad input on how to frame the policy options. A “Roadmap” is then published that scopes out the policy project, again in a way that is intended to solicit broader engagement. This Roadmap provides a much more complete summary of the project, including the “main problems” being addressed, the “main policy objectives” of the EU initiative, and “the policy options” available. (This comprehensive, early analysis of regulatory initiatives stands in contrast with the approach taken in the U.S. Unified Agenda, the Executive Branch’s overview of regulatory activities under development.) After developing a credible range of policy alternatives, the EU Commission is then required to perform an impact assessment that provides an even more elaborate conceptual statement of the problem and the policy options. This requirement is often enforceable as a matter of law, and the EU Commission can be sued for its failure to conduct an impact analysis. (Strauss et al, 2008)

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