DELIBERATIVE RULEMAKING: AN EMPIRICAL STUDY OF PARTICIPATION IN THREE AGENCY PROGRAMS

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"Democratic deliberation" and "reason-giving" are fundamental to ensuring the legitimacy of the administrative process, yet whether and how agencies incorporate these values into the development of rules is hotly contested. Some maintain that the public notice-and-comment required by the Administrative Procedure Act (APA) is largely window-dressing for a preordained outcome. Others take a more generous view, arguing that agency rules are informed by public comment, even while acknowledging that participation is less-than-inclusive.

Our empirical study of rulemakings in three areas from the early 1980s to 2009 (N=125 rules) finds that agencies took attentive stakeholders seriously and engaged with them in innovative ways that went well beyond the APA's minimum requirements. Each of the three agencies provided opportunities for dialogue with interested parties throughout the rulemaking process. They did so, however, in very different ways that have important normative implications. The deliberative processes developed by the Environmental

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Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) were problematic in somewhat opposite respects. By contrast, several features of the Federal Communications Commission's (FCC's) unique approach to rulemaking may, with some adjustments, promote deliberation in ways that have received little attention.

INTRODUCTION

Bureaucracy is at a crossroads in the United States. Although many limitations of administrative governance were already well-documented before President Trump took office,[1] its frailty became most visible during his tenure.[2] As he discredited and, in some cases, dismantled agencies, he was able to draw on a deep distrust among sectors of the public.[3] His denigration of scientific advice and other forms of expertise resonated with a large number of Americans who question the legitimacy of bureaucracy.[4] Although the agencies survived the onslaught, the experience demonstrated just how vulnerable the administrative state has become.

Now, with a new President and Congress determined to revitalize the Fourth Branch and "build back better," it is time to take on some ambitious renovation.[5] The blueprint for this remodel is still a work in progress, but the goal is clear. Beyond simply reversing some Trump policies, reformers hope to create a more open and responsive federal bureaucracy in a way that will inspire public trust in its decisions.[6] At least potentially, administrative law scholars and students of government have an opportunity to help shape those efforts.

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1. For example, agencies made disappointing progress in implementing statutory mandates, leaving workers unprotected and families exposed to toxic products. *See, e.g.*, CARL F. CRANOR, TRAGIC FAILURES: HOW AND WHY WE ARE HARMED BY TOXIC CHEMICALS (2017). National crises such as the Deepwater Horizon spill are pinned, in significant part, on agency errors. *See, e.g.*, NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 55–127 (2011), https://www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf (emphasizing that national crises such as the Deepwater Horizon spill are pinned, in significant part, on agency errors).

2. *See, e.g.*, Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENV'T. L. REV. 247 (2019) (discussing the Trump Administration's attacks on the science used in agency decisions); Lisa Rein et al., *How Trump Waged War on His Own Government*, WASH. POST, Oct. 29, 2020 (same).

3. *See, e.g.*, JOHN HALPIN ET AL., CTR. FOR AM. PROGRESS, TRUST IN GOVERNMENT IN THE TRUMP ERA: A COMPREHENSIVE STUDY OF U.S. PUBLIC OPINION ON THE FEDERAL GOVERNMENT UNDER THE TRUMP ADMINISTRATION, 1–3 (2018) https://www.americanprogress.org/issues/democracy/reports/2018/05/24/451262/trust-government-trump-era/.

4. *See id.* at 9.

5. *Join the Biden-Harris Administration*, WHITE HOUSE, https://www.whitehouse.gov/get-involved/join-us/ (last visited Aug. 16, 2021). During the first few days of his presidency, President Biden issued several dozen executive orders. *See, e.g.*, Paul Leblanc, *Biden Has Signed 42 Executive Actions Since Taking Office. Here's What Each Does*, CNN, https://www.cnn.com/2021/01/29/politics/biden-executive-orders-climate-health-care-coronavirus-immigration/index.html (last updated Jan. 29, 2021, 6:07 PM).

6. *See, e.g.*, JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, REGULATION AS SOCIAL JUSTICE: A CROWDSOURCED BLUEPRINT FOR BUILDING A PROGRESSIVE REGULATORY SYSTEM (2019), https://cpr-assets.s3.amazonaws.com/documents/Regulation-as-Social-Justice-Report-FINAL.pdf.

But where to begin? One feature of agency governance stands out as especially crucial—namely, the processes in place that ensure agency decisions are accountable to the public.[7] Volumes have been written about the pivotal role that public engagement and oversight *should* play in promoting the values of responsiveness and accountability.[8] It is therefore well-established that "democratic deliberation" is a necessary condition to ensuring the legitimacy of administrative governance within our constitutional system.[9] Indeed, without this deliberation, the equally important administrative value of "reason-giving," touted as a basis for accountability, becomes an empty conversation.[10]

Yet there are longstanding concerns that these participatory processes have not been working very well, even before President Trump's dismantling project.[11] At a general level, narratives on both the right and left signal wide-ranging, negative perceptions about agency engagement with stakeholders.[12] The right portrays the bureaucracy as a "deep state" comprised of zealous, parochial, and perhaps even sinister civil servants who are out of touch with the American public.[13] The left portrays agencies as repositories of critical policy expertise[14] but worries that the institutional processes through which they carry out their mandates leave them vulnerable to "capture" by regulated parties.[15]

7. *See, e.g.*, Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, HARV. L. & POL'Y REV. (forthcoming 2021); Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 676 (2009) (lamenting the dearth of research and attention to questions related to "institutional competence and structure that determine whether administrative regulation can be effective").

8. As Michael Sant'Ambrogio and Glen Staszewski observe from their review of the literature: "there is virtually unanimous agreement that public participation is vital to securing a legitimate place for agency lawmaking within American democracy." Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 804 (2021).

9. *See* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 174–76 (2018); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1445 (2013); Richard B. Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1808–10 (1975).

10. *See, e.g.*, MASHAW, *supra* note 9, at 112–26.

11. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1668 (2018).

12. *See id.* at 1659.

13. *See, e.g.*, Charles S. Clark, *Deconstructing the Deep State*, GOV'T EXEC., http://www.govexec.com/feature/gov-exec-deconstructing-deep-state (last visited Aug. 16, 2021).

14. *See, e.g.*, Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1534–35 (2018); Michaels, *supra* note 11, at 1657–67.

15. *See, e.g.*, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1–2 (Daniel Carpenter & David A. Moss eds., 2014).

Compounding these perceptions is evidence of systematic biases in agency rulemakings.[16] Empirical research has shown that public comment is highly imbalanced in many contexts, that there are often backdoor negotiations between regulated parties and agencies, and that some rulemaking projects are so large and produce such unwieldy evidentiary records that they seem incapable of yielding timely and reasoned decisions.[17] Some participatory processes might even be rigged—by Congress or the agencies—to favor some interests over others.[18]

Yet the literature is strangely silent when it comes to understanding what agencies are doing at the ground level to accommodate participation.[19] Even regarding some of the problematic evidence just noted, it is quite possible that agencies have found ways to counteract imbalanced participation or unwieldy comment processes in the interest of public accountability and responsiveness.

In this project, we look under the hood to see what is actually going on in agency deliberative practices. Equipped with a large empirical dataset that captures over thirty years of rulemakings in three agency programs, we set out to understand how agencies have in fact been inviting deliberations with members of the affected public in crafting their often lengthy and technical rules. In our investigation, deliberation is defined as a dialogue that allows participants to engage with one another as well as the agency, and democratic deliberation is defined to encompass a dialogue that includes all affected interests outside the government.[20] With those criteria in mind, we

16. Scholars like Kerwin and Furlong; Sant'Ambrogio and Staszewski; and the Yackees, along with others, have developed pioneering methods that are finally allowing some illumination of historically black-boxed processes. *See generally* Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RSCH. THEORY 353 (2005); Sant'Ambrogio & Staszewski, *supra* note 8; Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

17. *See infra* Section I.A.

18. *See, e.g.*, Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 271–73 (1987).

19. As just mentioned, scholars have not completely ignored the search for practical evidence concerning the nature and effects of democratic deliberations in agency rules. The exceptions include the work of Furlong & Kerwin, *supra* note 16. *See also* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (5th ed. 2019); Brian Libgober, *Meetings, Comments, and the Distributive Politics of Rulemaking*, 15 Q.J. POL. SCI. 449 (2020); Sant'Ambrogio & Staszewski, *supra* note 8; MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT IN RULEMAKING (2018), https://www.acus.gov/report/public-engagement-rulemaking-final-report.

20. *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN L. REV. 411, 412 (2005) ("shed[ing] light on some important questions arising at the intersection

study participation during the full life cycles of 125 rules in three regulatory programs administered by the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Federal Communications Commission (FCC) between the early 1980s and 2009, well before President Trump took office. Although no two agencies or programs are alike, these three agencies offer a representative cross-section of the federal regulatory bureaucracy in key respects. FCC is an independent commission, EPA is an independent Executive-Branch agency, and OSHA is located within a larger Executive-Branch department. The three agencies also vary in the complexity and the contentiousness of the policy issues they normally confront. The evidence we gathered is both quantitative and qualitative, and we have reached out to other scholars and former agency staff to ground our findings.

Our research yields some predictable as well as some unexpected discoveries that add to our understanding of the rulemaking process in ways that have received little attention. First, although much of the empirical literature focuses on the role of notice-and-comment, there was in fact a good deal of impactful stakeholder participation that occurred before and after that phase of the process. Second, our aggregate data and case studies clearly illustrate the limitations of efforts to generalize about rulemaking based on the study of one agency. Although all three engaged extensively with affected interests, how each agency did so varied dramatically. The deliberative models they employed can be explained, at least in part, as adaptations to their distinctive technical, political, and legal rulemaking environments. Third, to say that deliberation is extensive is not necessarily to say that it is democratic or otherwise a source of accountability. Indeed, two of the deliberative processes—at EPA and OSHA—might charitably be described as problematic, if not dysfunctional, albeit in different ways. In contrast, there are several key features in the deliberative approach used by FCC that seem to sidestep some of the challenges confronting rulemakings at EPA, OSHA, and perhaps other agencies. Although FCC's deliberative model has received harsh criticism in some quarters, several core features of its approach offer promise for rulemaking processes more generally.[21]

Our analysis begins with a brief overview of what we currently know about participation in agency rulemakings, with an emphasis on some of the worrisome shortfalls in its inclusiveness and effectiveness. We then share the

of regulatory policy and democratic politics"). As a practical matter, since our empirical methods cannot determine who all the affected parties are in a given rulemaking, we cannot assess whether a rulemaking deliberation is in fact democratic. However, we can identify processes that are clearly *un*democratic in cases where key stakeholders (most often the public beneficiaries) are missing entirely from the deliberative process.

21. *See, e.g.*, *infra* Section II.

design of our study, followed by a description of our empirical findings. Our final two sections summarize the descriptive findings and then offer some normative observations and preliminary recommendations that can be drawn from them. We conclude with a cautiously optimistic assessment of FCC's deliberative process, elements of which may be warranted in other areas of administrative regulation.

II. ORIENTATION AND METHODS

Although public participation is key to the legitimacy of rulemaking, a number of well-recognized obstacles limit its inclusiveness and effectiveness. In this background section, we discuss the pivotal role that participation plays in rulemakings, as well as the growing body of evidence that reveals problems with current agency approaches to participation. We then close with a brief description of the empirical methods that we use to gain some purchase on how the deliberative processes are employed in practice at the three agencies we studied.

A. Background

The Administrative Procedure Act (APA) of 1946 establishes a broad framework for agency rulemaking.[22] While the skeletal requirements of the APA have been supplemented in important ways by the courts, various presidents, and the agencies themselves, its general contours governing public participation in rulemakings remain intact. The so-called "informal" procedures set forth in section 553 of the Act still require agencies to publish a notice of proposed rulemaking (NPRM) in the *Federal Register* and, at a minimum, to solicit written comments from the public.[23] Agencies are then expected to consider those comments under threat of having their rules challenged in the courts.[24] Since the 1970s, judges have interpreted the APA's "arbitrary" or "capricious" standard of review to require that an agency give reasons for rejecting comments that speak to a rule's factual or legal premises.[25]

In this design, public participation—or, more accurately, meaningful deliberation with outside stakeholders—is the lynchpin that inculcates democratic goals into bureaucratic decisionmaking.[26] Kenneth Culp Davis

22. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706.

23. *Id*. § 553.

24. *See id.* § 553(c) (stating that "agenc[ies] shall give interested persons an opportunity to participate" in the process and have their comments incorporated in the new rule).

25. § 706(2)(A).

26. "Deliberation" can be defined for our purposes as a dialogue during the course of a rulemaking that allows participants to engage with one another as well as the agency. "Deliberative democracy" takes the concept one step further, denoting deliberations that are

famously characterized notice-and-comment rulemaking as "one of the greatest inventions of modern government."[27] Its genius by some accounts is that it is more responsive and accountable to the public than Congress or the White House. This is because agencies must be open to information provided by all interested persons and are subject to judicial challenges by stakeholders that are harmed by rules in ways that are not supported by the law and sound empirical evidence.[28] In theory, these promises of responsiveness and accountability should inspire trust in the administrative state. They provide a ready answer to critics on the right who view bureaucrats as out-of-touch zealots as well as to those on the left who fear that agencies are in bed with special interests.[29]

Yet the literature raises a number of concerns regarding how the promise of rulemaking deliberation plays out in practice. First, there is substantial evidence of inequities in the ability of affected parties to participate in a meaningful way, with thinly financed groups often disappearing from the

inclusive and actively include all attentive outside interests. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004); Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE; CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 69 (Seyla Benhabib ed., 1996) (observing that "what is considered in the common interest of all results from processes of collective deliberations conducted rationally and fairly among free and equal individuals"). Selecting among the competing normative theories of deliberative democracy is well beyond the scope of this project, however.

Due to the practical constraints of our empirical methods, we are able to consider only three general types of deliberative scenarios in this study: 1) there are no deliberations or very limited engagement between the agency and interested persons in a rulemaking; 2) the rulemaking deliberations are vigorous between the agency and one set of interests, but are under-inclusive since other key participants are missing; 3) the deliberations are pluralistic with opposing views engaged with one another and the agency, but it is not clear whether all affected parties are participating. Our findings are thus limited in what they can reveal about the truly democratic nature of the rulemaking deliberations. We obviously also must bracket the motivations—ethical, self-interested, or otherwise—of the agency and participants.

27. Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 324 (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970)).

28. *See generally* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 94 (2019) (discussing Comer's work and using examples to make this point); Mark Seidenfeld, *The Problem with Agency Guidance—or Not*, YALE J. ON REGUL.: NOTICE & COMMENT (May 3, 2019), https://www.yalejreg.com/nc/the-problem-with-agency-guidance-or-not-by-mark-seidenfeld/; Nicholas R. Parrillo & Lee Liberman Otis, *Understanding and Addressing Controversies About Agency Guidance*, REGUL. REV. (Mar. 5, 2018), https://www.theregreview.org/2018/03/05/parrillo-otis-understanding-addressing-controversies-agency-guidance/.

29. *See, e.g.*, *supra* notes 11, 13–14 and accompanying text.

deliberative scene altogether.[30] Theorists have long hypothesized that only the most intensely affected and well-financed entities (usually regulated parties) can afford to participate meaningfully in the agency's deliberative proceedings. This is especially apt to be the case in rulemakings characterized by complex issues that have a direct economic impact on well-financed parties.[31] Over the last decade, a handful of empirical studies document that—even assuming diffuse affected publics are represented by funded organizations with attorneys—their interests are still not presented consistently. Indeed, only about half of the rules that affect the public involve at least one public nonprofit or other commenter that is not a regulated entity. For the other half of the rules, there is only industry and the occasional state or local government.[32] And in proceedings where a public

30. *See, e.g.*, RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 63 (2019) (arguing that procedures are not neutral; in writing a rule, agencies can choose to make it more accessible or more obscure); RICHARD STOLL, EFFECTIVE EPA ADVOCACY: ADVANCING AND PROTECTING YOUR CLIENT'S INTERESTS IN THE DECISION-MAKING PROCESS 94–95 (2010) (observing how the Environmental Protection Agency (EPA) is particularly eager to meet with directly affected parties that have factual information to share); Cuéllar, *supra* note 20, at 414–15 ("[T]he sophistication with which a comment is written seems to affect the probability that the agency will accept suggestions in that comment."); Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 82, 84 (2013) (discussing the unified interests of the financial industry in its contact with agencies about the development of the Volcker Rule). *But see* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 4 (2008) (trumpeting practical evidence that the Administrative Procedure Act (APA) is working to better protect the public). In some rules, public participants may wage a "postcard" or "e-mail" campaign during notice-and-comment that urges members of their organizations to send form comments. *See, e.g.*, Steven J. Balla et al., *Where's the Spam? Interest Groups and Mass Comment Campaigns in Agency Rulemaking*, 11 POL'Y & INTERNET 460, 461–64 (2019) (studying over 1,000 "mass comment campaigns" directed at EPA rulemakings). In this study, we consider these types of form-letter campaigns—and even the concern about robotic engagement in the comment process—to fall largely outside of the types of meaningful exchange of ideas or deliberations that concern us here.

31. *See, e.g.*, JAMES Q. WILSON, THE POLITICS OF REGULATION 367–70 (1980) (providing four quadrants where interest group pressures vary substantially from one quadrant to another); William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595, 606–07 (1986) (same).

32. *See* Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175, 178, 187 (1992) (examining interest group engagement in pesticide registrations between 1975 and 1989 and finding environmentalists participated in 49% of the cancellations); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 253–54 (1998) (studying eight rules promulgated by EPA and the National Highway

interest representative does file a comment, that entity is almost always outnumbered—at least twofold and in some studies tenfold—when compared to industry comments.[33]

Second, the formal notice-and-comment stage in an agency's decisionmaking process may not be the most important step where participation can take place.[34] Rather, the most important deliberative opportunities may occur earlier in informal, and sometimes questionable, ways that are not governed by the APA's requirements for open and transparent participation.[35] The proposal-development stage of rulemaking can be the place where agencies can best accommodate and reconcile competing interests in informal and often undocumented meetings and

Traffic Safety Administration (NHTSA), using content analysis to determine who participates and influences federal regulations, and finding no citizen engagement in five of the eight rules); Yackee & Yackee, *supra* note 16, at 131, 133 (2006) (studying forty lower-salience rulemakings promulgated by four different federal agencies and finding that business interests submitted 57% of comments, whereas nonbusiness or nongovernmental organizations submitted 22% of comments, of which 6% came from public interest groups); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128 (2011) (discovering that public interest groups participated in notice-and-comment for less than half (48%) of the rules setting emission standards for hazardous air pollutants from major categories of industry).

33. Yackee and Yackee, *supra* note 16, at 133 (finding public interest groups made up 6% of comments, slightly more than one-tenth of comments submitted by business groups, which made up 57% of comments); Wagner et al., *supra* note 32, at 128–29 (finding that "[t]he mean number of comments per rule filed by public interest groups across all rules was 2.4 (4%) as compared to a mean number submitted by industry of thirty-five (81%) comments per rule.").

34. *See, e.g.*, STOLL, *supra* note 30, at 86–87, 94 (making this point continuously through his book on rulemaking advocacy); Libgober, *supra* note 19, at 457–58 (noting that agencies have more discretion and flexibility earlier in the rulemaking process).

35. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 595 (1984) (highlighting that "by the time a proposed rule has hit the Federal Register, many of the most critical decisions on direction and detail have already been decided."). Although formal mechanisms such as advance notices of proposed rulemaking and negotiated rulemaking do provide structured opportunities for participation in the development of notices of proposed rulemaking (NPRMs), they are not used in the great majority of cases. William West found that this was true even for significant rules. William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 586 (2009). Our data also support this, as we note later. The Small Business Regulatory Enforcement Act (SBREFA) may impose some added structure in these pre-NPRM discussions, but not necessarily in a way that ensures that the pre-NPRM participation is inclusive and diverse. While our data may provide some insights into the effects of SBREFA on participation, that particular inquiry is beyond the scope of our study.

discussions.[36] Indeed, agencies may not be able to formulate technically sound and politically feasible proposals in many cases without securing input from stakeholders both inside and outside of the government prior to publishing a proposal.[37] Moreover, since substantial changes in proposals that could not have been anticipated from an NPRM run the risk of judicial reversal under the logical outgrowth test,[38] informal pre-NPRM negotiations offer yet another legally backed reason for agencies to work out the flaws in their proposals in advance. As a result, the formal proposal operates more as a final working draft than a preliminary opening statement in a deliberative exchange with stakeholders.[39]

Empirical work reinforces the theoretical possibility that some proceedings are front-loaded in this fashion. Research by Osofsky and Oei; Sant'Ambrogio and Staszewski; Furlong and Kerwin; Krawiec; and Chubb, among others, provides direct and indirect evidence of significant deliberations with a number of stakeholders occurring during the pre-NPRM step.[40] Yet despite the intensity of these pre-NPRM deliberations, these same studies also raise disturbing questions about the inclusiveness of participatory

36. *See, e.g.*, West, *supra* note 35, at 588–90 (noting that "most participation in proposal development occurs at [an agency's] specific invitation," rather than during notice-and-comment).

37. *See, e.g.*, ESA L. SFERRA-BONISTALLI, EX PARTE COMMUNICATIONS IN INFORMATION RULEMAKING: A REPORT FOR ACUS 17–18 (2014) (discussing these benefits of vigorous deliberations); *see also* Furlong & Kerwin, *supra* note 16, at 361–68 (detailing the history of agency deliberations that suggest agencies did reach out to participants in a variety of ways beyond notice-and-comment).

38. *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741, 746–47, 750–52, 757–61 (D.C. Cir. 1991) (reversing EPA regulations because they were not a logical outgrowth of the proposed regulations and failed to give adequate notice to interested parties).

39. *See* BENJAMIN W. MINTZ AND NANCY G. MILLER, A GUIDE TO FEDERAL AGENCY RULEMAKING 177 (2d ed. 1991) (explaining that a rule can be vacated for differing too greatly from the agency's proposed rule).

40. *See, e.g.*, JOHN E. CHUBB, INTERESTS GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY 142 (1983) (describing ex parte communications at each stage of promulgating oil regulations, based on interviews in the energy sector); Krawiec, *supra* note 30, at 59 (noting extensive contacts between agencies and industry groups pre-NPRM when promulgating the Volcker Rule); Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 213 (2019) (describing the Treasury's explicit acknowledgement of comments received prior to NPRM when developing § 199A regulations); Sant'Ambrogio & Staszewski, *supra* note 8, at 809 (explaining that updates to rules "are typically initiated as a result of informal interactions between agency officials and regulated entities."); Furlong & Kerwin, *supra* note 16, at 363 (finding an increase in direct contact between agencies and interested parties); *see also* Wagner et al., *supra* note 32, at 125–26 (finding an average of eighty-four informal contacts between agency and industry groups per rule promulgated by the EPA).

opportunities.[41] In one set of EPA rules, for example, regulated industry communicated with EPA on average eighty-four times before the proposed rule was published, while public interest groups were largely absent from the pre-NPRM deliberations.[42] These informal deliberations introduce troubling sources of insider dealmakings that can be hidden from view and can undermine the integrity of the deliberative process.

A third worry about the integrity and value of rulemaking deliberation is the possibility that the agency may be poised to reject constructive input that would lead to significant changes in its proposal by the time the notice-and-comment process rolls around.[43] Insider testimonials—most notably Don Elliott's comparison of notice-and-comment to "Kabuki theatre"[44]—suggest that, in some rulemakings, public participation at the comment stage is a charade, obscuring the "real" deliberations that lie beyond the reach of APA-mandated recordkeeping and explanation.[45] The theoretical explanations for this are compelling. Proposed rules often take years to develop and are invested with substantial sunk organizational costs in the form of analysis and consensus building.[46] In addition, changing a proposed rule in a way that might not have been anticipated by affected interests may require another round of public comment, further delaying what may already be a protracted process.[47]

Empirical studies again offer reinforcing evidence. Several scholars and practitioners with extensive experience in the rulemaking process have examined the significance of the changes made in response to

41. *See, e.g.*, Sant'Ambrogio & Staszewski, *supra* note 8, at 827 (discussing barriers to public participation in pre-NPRM deliberations, including lack of motivation and understanding).

42. Wagner et al., *supra* note 32, at 125.

43. *See, e.g.*, West, *supra* note 35, at 580–83 (describing the disincentives to changing a rule after notice-and-comment).

44. The term "kabuki theatre" is used only to document the perception that public participation in notice-and-comment can be performative. *See* Jon Lackman, *It's Time to Retire Kabuki*, SLATE (Apr. 14, 2010, 7:03 AM), https://slate.com/human-interest/2010/04/it-s-time-for-pundits-to-stop-using-the-word-kabuki.html (explaining that equating the term with "loathsome fakery" has xenophobic connotations and that the actual artform of Kabuki is "far from empty and monotonous").

45. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992); *see also* POTTER, *supra* note 30, at 63 (describing how agencies can control the extent and value of public input through procedural choices); Oei & Osofsky, *supra* note 40, at 222 (noting that most agency input occurs outside the notice-and-comment process). *But see* Cuéllar, *supra* note 20, at 414–15 (finding that agencies change rules in response to comments and disagreeing with the notion that public comments make no difference).

46. *See, e.g.*, *infra* notes 51–53, 108–110 and accompanying text.

47. *See supra* notes 35–37 and accompanying text.

comments and determined that they tend to relate to minor issues.[48] For example, Marissa Golden's case studies of eleven proposed and final rules issued by different agencies found that only one of those proceedings led to a change that went to the heart of the policy.[49] Another study based on interviews with officials closely involved in the development of forty-two regulations selected at random from the *Federal Register* argued that fundamental changes in proposed rules were discouraged by sunk costs and the need to provide opportunities for additional public comment.[50]

A fourth reason to worry about the integrity of participation is a more contemporary concern. As regulations and information relevant to their promulgation become ever more abundant, rules grow ever more complex, intricate, and labyrinthine.[51] Even when participation is meaningful, balanced, and working perfectly, the agencies may simply lack the capacity to make effective use of public input. Evidence of this attention deficit includes the fact that agencies often contract out to private sector consultants the task of organizing and summarizing public comments in large rulemakings.[52] The practical challenges agencies face are apparent in the length of many preambles, the massive size of supporting records, and the large number of commenters.[53]

48. *See, e.g.*, Golden, *supra* note 32, at 259–60 (finding eight of ten rules studied changed as a result of comments, but only one change was a major change); Gabriel Scheffler, *Failure to Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700, 747, 759 (2020) (concluding that both public and business interests did not always get their way and often lost); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 71 (2004) (same).

49. Golden, *supra* note 32, at 259.

50. *See* West, *supra* note 48.

51. *See* Thomas O. McGarity, *Science and Policy in Setting National Ambient Air Quality Standards: Resolving the Ozone Enigma*, 93 TEX. L. REV. 1783, 1784 (2015) (detailing the EPA's efforts to promulgate national ambient air quality standards and the volume of documents and data created in the process); *see generally* Thomas O. McGarity, *Politics by Other Means: Law, Science, and Policy in EPA's Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103 (2001) (analyzing the complex framework of pesticide regulation).

52. *See, e.g.*, PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 62–63 (2017) (discussing this role for contractors).

53. *See, e.g.*, JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 283 (1989) (identifying that the Occupational Safety and Health Administration (OSHA) spends four years, on average, promulgating new health rules, generating a lengthy record of testimony and documents); WENDY WAGNER, INCOMPREHENSIBLE!: A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT 161–68 (2019)

Finally, the APA's provision of a single deliberative opportunity during the comment process implicitly assumes that a rule is static once established, and will not require additional public engagement and oversight.[54] In reality, however, the policies advanced by rulemakings are often moving targets, and the rules that emerge must therefore be more dynamic and adaptive.[55] In fact, agencies revise rules frequently, and about two-thirds of these revisions occur without a formal opportunity for public comment.[56]

Although the literature offers several reasons to worry about the integrity of the rulemaking process, studies have taken on one, and at most two, of the foregoing problems in isolation from the others.[57] The aggregate picture of rulemaking deliberation—including the relative validity of these concerns and how they relate to one another in ways that speak to the legitimacy of administrative governance—remains a mystery. Perhaps more urgently for the current efforts to reboot the administrative state, existing scholarship provides ample reasons for despair and little direction for reform.

With that tension in mind, we rely on both quantitative and qualitative analysis to provide a broader perspective on the deliberations that occur throughout the rulemaking life cycle in three agencies. Do the agencies take public participation seriously? To what extent is participation inclusive of all affected groups in ways that produce equitable outcomes? How do agencies adapt to the distinctive technical, political, and legal demands that define their rulemaking environments? Are some ways of accommodating input from stakeholders more effective than others in terms of the values we associate with democratic deliberation and reason-giving?

(documenting the incomprehensibility of some agency rules.); Patrick McLaughlin & Richard Williams, *Why We Need Regulatory Reform in Two Charts*, MERCATUS CTR. (May 27, 2014), http://mercatus.org/publication/why-we-need-regulatory-reform-two-charts (showing the increase in number of pages in the *Code of Federal Regulations* between 1975 and 2011); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 775 (2003) (showing the increase in number of pages in the *Code of Federal Regulations* between 1970 and 1995); *see also infra* notes 257–262 and accompanying text (analyzing the length of comment periods and number of issues covered in rules).

54. *See, e.g.*, Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 227 (2017) (noting that rulemaking is generally considered a "static process").

55. *Id.*

56. *Id.* at 211. For about twenty-five percent of the revisions, agencies did offer some opportunity for input, usually after the promulgation as a direct final rule. *Id.*

57. However, there are some exceptions to this neglect. *See* Furlong & Kerwin, *supra* note 16, at 356–59; KERWIN & FURLONG, *supra* note 19, at 180; Sant'Ambrogio & Staszewski, *supra* note 8, at 799–802; SANT'AMBROGIO & STASZEWSKI, *supra* note 19, at 4–9.

B. Our Study

A central purpose of our study, then, is to gain greater understanding of the role of participation in rulemakings from both a positive and a normative perspective. A related purpose is to examine how the answers to the questions we pose may vary from one area of regulation to the next. To that end, we examine the public deliberations occurring in 125 rules promulgated by three agencies: the Environmental Protection Agency (chemical test rules), the Occupational Safety and Health Administration (worker protection rules), and the Federal Communications Commission (broadcast rules). Because participatory dynamics and even bureaucratic cultures may vary within as well as across organizations, we focus on the universe of regulations implementing specific regulatory programs within each of the agencies. The selection of entire sets of rules within programs allows us to study a wide range of rules—most routine, some controversial, and a few economically significant—without drifting beyond the three discrete rulemaking environments.

We selected programs that we expected to differ from one another in key respects, such as the nature of the stakeholder community, the culture of the agency, the role of presidential oversight, and the public salience of regulatory decisions.[58] The three agencies also employ different participatory procedures, both within and outside the context of notice-and-comment.[59] They also differ in the manner and extent to which they are subject to political influence. Although its rules are often politically salient and sometimes attract the attention of Congress, for example, FCC is an independent agency that does not fall under the direct control of the White House. Most of OSHA's rules were of considerable interest to well-organized groups, and as an Executive

58. *See* Wagner et al., *supra* note 54, at 199–201 (providing further explanation on the selection of these three agency programs). We further differentiate the "task environments" in which our agencies operate in terms of dimensions that scholars such as William Gormley and James Wilson have used to generalize about the dynamics of participation in bureaucratic policymaking. The technical complexity of the issues agencies confront helps determine who is *able* to participate in a meaningful way, and the intensity of regulatory effects on potential winners and losers helps determine who has the *incentive* to organize and marshal resources for effective participation. *See, e.g.*, WILSON, *supra* note 31 and accompanying text; Gormley *supra* note 31, at 607–08.

59. For example, if objections are filed to a proposed rule, OSHA interprets its statutory authority to require a hearing. *See* 29 U.S.C. § 655(b)(3). Federal Communications Commission (FCC) adopts more formal processes for rulemakings—like regulating communications with the agency as ex parte contacts. 47 C.F.R. § 1.1200 (2015) (stating that rules regulating "ex parte presentations in Commission proceedings" have been adopted to ensure fairness and integrity). EPA, by contrast, tends to engage with participants throughout the rulemaking life cycle informally, although it does attempt to log these communications. *See infra* note 77 and accompanying text; SFERRA-BONISTALLI, *supra* note 37, at 48.

Branch agency, its decisions may well have been influenced by political appointees within the Department of Labor and perhaps by the Office of Information and Regulatory Affairs (OIRA) and other actors within the White House.[60] Although EPA is also an Executive Branch agency, its test rules never involved OIRA review, were not newsworthy, and generally did not trigger much interest from high-level political appointees.[61]

Virtually all our data on participation are drawn from the agencies' own records and rules. We tracked participation by cataloging each entry in the agencies' docket indices that supported each of the rules in our study.[62] We recorded information about the nature, timing, and intensity of participation of each participation event in each of the dockets from the beginning of the rulemaking life cycle to the publication of the final rule. Even though information in the docket indices was likely incomplete,[63] it provided the best and presumably only publicly available record of participation throughout the rulemaking life cycles. Our data on the effects of public comment were extracted from the agencies' "response to significant comments" in the preamble of each of the final rules in our study. Law students relied on coding instructions to identify whether a comment sought to increase or retract the government's market intervention, whether each comment was accepted or rejected by the agency, and whether the issue involved conflict among stakeholders.[64] Although our data on the effects of public comment

60. *See* Tom McGarity, *OSHA Case Studies for Deliberative Rulemaking* 2, 4–6, 8–18 (unpublished manuscript), https://utexas.box.com/s/vhn6an099he7qkubo70qx82f51jwrflf (last visited Aug. 16, 2021). Note that some of the communications between OSHA and the White House and/or the Office of Information and Regulatory Affairs (OIRA) are apparently not routinely logged into the OSHA rulemaking dockets, however. Thus, tracing political channels of influence on OSHA rulemakings is not possible in our study, which relies on the docket indices as the primary source of participation data.

61. This is based on a study of final rule statements identifying whether these test rules were economically significant; the identification of OIRA and White House communications in the docket index, see *infra* note 87; and an anonymous interview with an EPA scientist serving in the Toxic Substances Control Act (TSCA) unit at the time most of the rules in our study were promulgated. Anonymous Interview with former EPA staff by phone with Wendy Wagner (July 12, 2019) (on file with author).

62. Wendy Wagner et al., *Empirical Methods for Deliberative Rulemaking* 2–3 (August 2, 2020) (unpublished manuscript) (available at https://utexas.box.com/s/ojqfngbvmzbo5iu45m5fb61opzflzh8x) (providing a fuller statement of our methods).

63. For example, agencies typically included only the most relevant information in their dockets occurring pre-NPRM. Some agencies may have also begun to assemble the docket well into the rulemaking, after many unrecorded pre-NPRM communications already occurred. *See id.* at 2.

64. All three agencies (particularly EPA and FCC) tended to be quite methodical in

reflect the agency's own characterization of which comments were significant, these methods again offer the most expeditious and perhaps the most accurate way to track the primary changes made to a final rule.[65]

Since quantitative data are limited in what they offer about substantive features of the rulemaking, we also conducted a dozen in-depth case studies of rules selected to represent varying levels of regulatory impact and participation.[66] Each study was developed around a common set of questions that allowed us to identify the impetus behind the rule, the key issues and stakeholders it involved, and who might have influenced the resolution of those issues at different stages of the rulemaking.

III. DELIBERATIVE RULEMAKINGS AT EPA AND OSHA

So, what do we see? This section describes participation in the regulatory programs administered by EPA and OSHA. We begin with an examination of these two agencies because their deliberative approaches seem to be limited in somewhat opposite ways that coincide with common criticisms of the rulemaking process. Whereas participation in EPA's development of test rules suffers from a lack of inclusiveness and transparency, participation in OSHA's development of health and safety rules is so extensive that it results in paralysis. We first set the stage with a summary of the regulatory environment within which each agency operates. We then share our results on when public deliberations occurred during rulemaking, who participated in the deliberations, and how and whether the deliberations influenced the final rule.

ticking off each significant issue and responding to each of them in sequence in their preambulatory discussions. We used these agency characterizations to identify and "count" individual issues.

65. Given the large number of comments for each rule, as well as the large number of individual changes identified by the agencies in the final preamble, tracing each of the individual comments to final rule changes (assuming we could access all the comments through the Freedom of Information Act (FOIA)) would be extremely time-consuming and resource-intensive and could lead to new types of coding errors.

66. *See* Wendy Wagner, *EPA Case Studies for Deliberative Rulemaking* 3, 7, 10, 15 (June 28, 2020) (unpublished manuscript) (available at https://utexas.box.com/s/vhn6an099he7qkubo70qx82f51jwrflf); McGarity, *supra* note 60, at 2, 4–6, 8–18; Bill West, *FCC Case Studies for Deliberative Rulemaking*, 1, 6, 10, 14, 19, 23 (May 30, 2020) (unpublished manuscript) (available at https://utexas.box.com/s/vhn6an099he7qkubo70qx82f51jwrflf).

A. The Deliberative Process for EPA's TSCA Test Rules

1. The Regulatory Environment

Established in 1970, EPA's mission is focused on environmental and public health protection, with primary emphasis on regulating pollutants, wastes, and hazardous substances.[67] EPA is a stand-alone agency that is directly accountable to the President. The Toxic Substances Control Act (TSCA)[68] is among the few dozen statutes that EPA administers. The TSCA directs EPA to regulate "unreasonable risk[s]" that result from chemicals and chemical products,[69] and among the agency's authorities is the ability to require manufacturers to test the toxicity of their chemicals.[70] The statutorily mandated Interagency Testing Committee first recommends chemicals for testing.[71] EPA then has a year to determine whether to proceed with a test rule for the listed chemical(s).[72] To support a test rule, EPA must establish either that the chemical is produced in substantial quantities or that there is a potentially significant risk of exposure and adverse effects resulting from the chemical.[73]

Once EPA determines that a test rule is justified under the TSCA, it must lay out the terms of its proposed rule. This includes identifying the endpoints of concern based on the chemical structure and other evidence (e.g., developmental toxicity, mutagenicity) and identifying the types of tests that will best provide evidence of potential toxicity.[74] In some cases, EPA may also tier the testing requirements based on the sequential results of earlier mandated tests.[75]

In our study, we examine all of EPA's test rules promulgated during the relevant time period (1980 to 2009), although in practice all of these rules were promulgated between 1984 and 1993. As we will discuss below, EPA's TSCA test rules were quite technical. Among the regulatory programs that EPA administers, the TSCA test rules are likely to attract the least amount of public and political attention. They may therefore provide a "worst case" set of rules for testing the inclusiveness of regulatory deliberations.[76]

67. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970), *reprinted as amended in* 5 U.S.C. app. Reorganization Plan No. 3 of 1970 (2018).

68. 15 U.S.C. § 2601.

69. *Id.* § 2601(b).

70. *Id*. § 2603.

71. *Id*. § 2603(e)(1)(A).

72. *Id*. § 2603(e)(1)(B).

73. *Id*. § 2063(a)(1).

74. *See, e.g.*, Wagner, *supra* note 66, at 1, 4.

75. *Id*. at 4.

76. *See* Wagner et al., *supra* note 32, at 106. We thus expect TSCA test rules to be even more dominated by industry than EPA's air toxic rules examined in a prior study by one of us. *See id.*

EPA has also issued agencywide ex parte policies that govern all rulemaking deliberations. Those policies actively encourage stakeholder engagement at all points in the rulemaking process, but they also demand relatively elaborate docketing of that participation. In a written policy dating back to 1983, known as the "Fishbowl Memo," agency staff is expected to log each and every written "ex parte" communication with stakeholders into the rulemaking docket, as well as all written and oral communications that influence the agency's decision.[77]

2. Findings on EPA's Rulemaking Deliberations

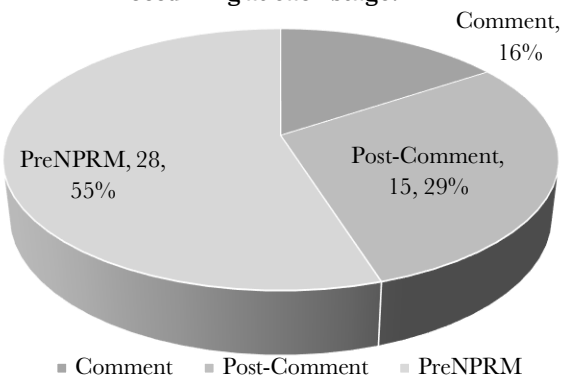
Our findings break out into three categories. First, we consider the timing of the deliberations; did public engagement occur primarily during notice-and-comment or at other points? We then discuss who participates over the course of the rulemaking. We conclude with evidence of how these deliberations—particularly during notice-and-comment—may have influenced the final rules.

a. When does participation occur?

The vast majority of EPA's deliberations with affected parties occur outside of the notice-and-comment process (87% of the contacts). Based on the tally of individual contacts (e.g., letters, meetings, phone calls, telefaxes, etc.), the ratio of recorded stakeholder engagements pre-NPRM is three times greater than the number of comments filed during notice-and-comment. And the ratio between contacts occurring after notice-and-comment compared to during notice-and-comment is greater than two-to-one. See Figure 1.

77. Memorandum from William D. Ruckelshaus, EPA Admin., Contacts with Persons Outside the Agency, to all EPA Employees (May 19, 1983), https://www.regulationwriters.com/downloads/EPA-Fishbowl-Memo-05-19-1983-Ruckelshaus.pdf. *See also* SFERRA-BONISTALLI, *supra* note 37 (quoting Memorandum from Lisa P. Jackson, EPA Admin., Transparency in EPA's Operations, to all EPA Employees (April 23, 2009), https://19january2017snapshot.epa.gov/sites/production/files/2014-02/documents/transparency_in_epas_operations.pdf).

Figure 1: Mean Participation/Rule throughout Lifecycle of EPA TSCA Test Rules (N=38 rules).
The number denotes the mean number of participation events occurring at each stage.



Our case studies reveal why this engagement is so extensive—EPA appears to be effectively negotiating its test rules with industry throughout the rulemaking process.[78] In the three case studies, EPA either relied on the industry to formulate the proposed rule or worked through pre-NPRM meetings and draft-exchanges to negotiate the content of proposals before publishing them in the *Federal Register*. The deliberations, however, apparently consisted of more than quid pro quo negotiation. One EPA careerist we interviewed underscored how a company's expertise on the toxicity of its chemicals substantially exceeded that of EPA toxicologists simply because of its experience in the research and development process. As a result, EPA scientists communicated frequently with industry to better understand the underlying toxicology of the chemicals under investigation.[79]

78. Note that this approach predated the Negotiated Rulemaking Act of 1996. Pub. L. 104-320, § 11, 110 Stat. 3870.

79. Marissa Golden's study portraying EPA staff as non-ideological professionals lends further support to this hypothesis. *See, e.g.*, MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 150, 155, 166–67 (2000) (observing that during President Reagan's Administration, EPA staff "did not act ideologically because they did not consider themselves ideologues. This was partly a legacy of the agency's history and culture that fosters consensus building and promotes those who try to balance environmental and industry perspectives"). Brehm's and Gates' empirical study of bureaucratic behavior also lends some more general support to this professional view of the role of agency staff. JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 196–99, 202 (1999).

EPA's strategy of actively deliberating with industry over the proposed rules during the 1980s and 1990s was apparently uncontroversial. The negotiated approach was effectively endorsed by the Natural Resources Defense Council (NRDC), the primary public interest group involved with test rules, as well as the district court reviewing a challenge to one regulation.[80] The district court found that, despite a procedural problem arising from EPA's failure to publish the industry's proposal in the *Federal Register*, the process of negotiating the test rules was sensible, provided that the agency then subjected the negotiated proposals to public comment. In the court's words, this informal "negotiation to determine appropriate test protocols as well as other relevant criteria certainly is not only permissible but indeed preferable to blind, often impractical, bureaucratic blundering."[81]

After publication of the proposed rule and after receiving formal comments, EPA continued to meet and correspond with stakeholders before publishing a final rule. This post-comment activity occurred in thirty-three of the thirty-eight rules.[82] In the case studies, some of these deliberations involved meetings with affected industry groups to discuss the comments further.[83] As we discuss in a companion paper, agency

80. Nat. Res. Def. Couns. v. EPA, 595 F. Supp. 1255, 1259 (S.D.N.Y. 1984). In litigation successfully brought against the agency for not publishing the negotiated rule as a proposal for notice-and-comment, the court offered more information on EPA's process:

> According to EPA, after ITC designates priority lists of chemical substances in the *Federal Register*, EPA conducts two public meetings scheduled at ten and sixteen weeks after the ITC designation. *Id.* ¶¶ 16, 18 at 8, 9. At the second meeting, EPA announces its preliminary decision whether to require testing. . . . [If testing is considered appropriate,] EPA requires that its scientists and the industry representatives reach preliminary agreement on a testing program. *Id.* ¶ 21 at 10. Between weeks sixteen and twenty-four EPA apparently holds informal meetings with industry to attempt to reach this negotiated test agreement. *Id.* ¶ 20 at 10. EPA reviews the manufacturers' study plans, which include test standards and schedules for submission of test data. Acceptable proposals are published and the ensuing comments are reviewed before publication of EPA's final decision to adopt a negotiated voluntary testing agreement. *Id.* ¶¶ 22–26 at 10–12.

Nat. Res. Def. Council, 595 F. Supp. at 1259.

81. *Id*. at 1262.

82. Richard Stoll also notes this post-comment stage as an important one for rulemaking participants. *See* STOLL, *supra* note 30, at 118.

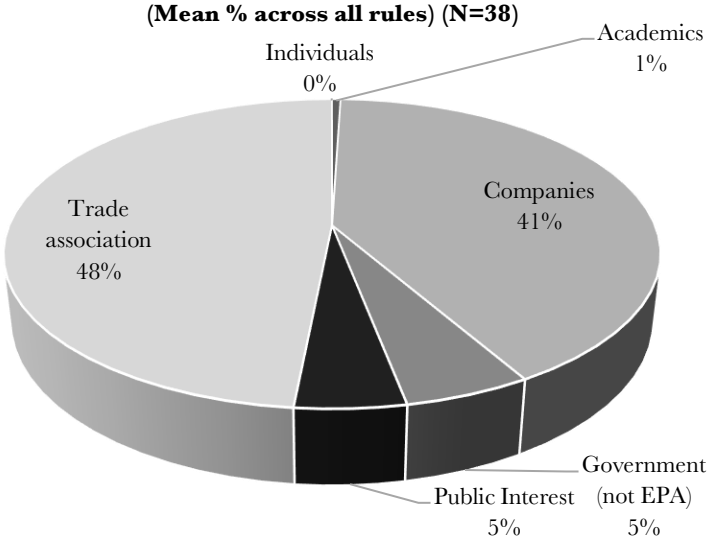
83. *See* Wagner, *supra* note 66, at 3, 10, 15, 17. We note parenthetically that in our earlier study of post-final rule revisions, EPA continued to engage stakeholders and revised all its final rules at least once. Wagner et al., *supra* note 54, at 202–04. Participation during this post-final stage is more difficult to track, and since we limit our focus in this study to the deliberations preceding the first final rule (to keep the study manageable), we are not sure what forms these deliberations took.

deliberations with affected stakeholders continued after publication of the final rule as well and regularly led to revisions to the rules.[84]

b. Who Participates?

While the rulemaking deliberations for EPA's TSCA rules were extensive and sometimes continuous, the participants engaged in these deliberations were dominated by, and often consisted exclusively of, regulated entities. Over 89% of the formal comments on the TSCA's test rules were submitted by individual corporations or trade groups. By contrast, representatives of diffuse public interests contributed less than 5% of the comments. Public interest groups were also absent entirely from 81% of the rulemaking proceedings—thirty-one of the thirty-eight rules involved no public interest participation at any stages of the process. When nonprofits did participate, only one group submitted comments. Figure 2 summarizes these findings.

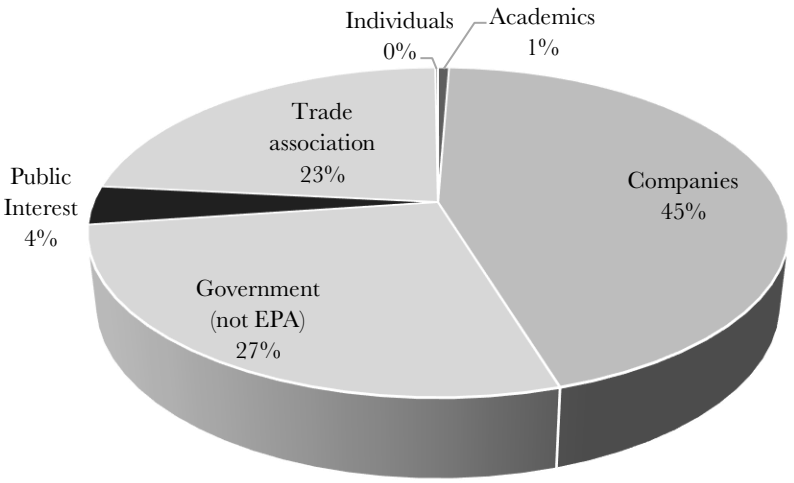
Figure 2: Parties Filing Comments in EPA TSCA Rules (Mean % across all rules) (N=38)



84. Wagner et al., *supra* note 54, at 212, 217–18, 222–26 (observing that 100% of EPA's TSCA test rules were revised and this was generally the result of pressure from regulated parties; additionally, the revisions were largely nontransparent and difficult to understand, even in the *Federal Register* description).

Industry domination was even heavier during the deliberations outside of the notice-and-comment period.[85] For example, only 4% of the pre-NPRM participants were public interest groups.[86] See Figure 3.

Figure 3: Mean % of Different Participants in EPA TSCA Rules preNPRM (N=38)



Why was participation so industry-heavy in the EPA TSCA test rule initiatives? As discussed above, the compliance requirements were generally concentrated on a few industries and were never economically significant (the rules generally entailed industry burdens of less than $10 million per rule).[87] There appeared to be virtually no public attention to these individual rules,[88]

85. Given the low salience of these rules, we do not expect that public interest groups were using other venues—e.g., the White House or political appointees—to sidestep the rulemaking process in order to raise their concerns.

86. In the government sector, the dominant participants were the National Institute for Environmental Health Sciences, the National Institute for Occupational Safety and Health, and the U.S. International Trade Commission (ITC).

87. Additionally, only two test rules involved internal comments and responses to comments from the Office of Management and Budget (Dockets 42084 and 42046/42111), and the communications in both dockets are limited to one set of comments/responses each. Yet since EPA is not required to docket White House communications, we cannot assume that this docketing practice was consistent over time.

88. Our search of the "News" database in Westlaw yielded six general articles that covered: a critical Government Accountability Office (GAO) report published in 1983, a

in part, at least, because they were highly technical and difficult for laypersons to understand.[89] As a practical matter, the scarce resources of public interest groups require them to pick their battles by focusing on rules that will generate public attention and will be easier to challenge.[90] In addition, EPA was under a statutory deadline that required the agency to initiate a proposed test rulemaking within one year of the U.S. International Trade Commission (ITC) designation or to explain why a test rule was unnecessary.[91] The short statutory deadline may have caused EPA to develop more expeditious ways to engage affected parties, particularly when trade associations and companies were well organized, highly invested in the standards, and apparently receptive to the agency's outreach.

c. Does Participation Matter?

Our ability to assess the effects of these deliberations is limited to the notice-and-comment stage. Only at that stage do we have a clear "before" (the rule proposal) and an "after" (the final rule) for comparison. Even though industry was usually unopposed, our results demonstrate that EPA still rejected industry suggestions about twice as often as it accepted them. See Figure 4.

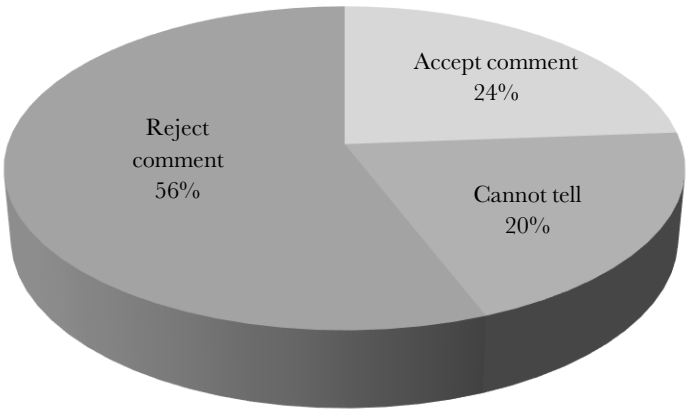
deadline suit challenging EPA's general lack of test rules, and early (1978) discussions about the scope of EPA's testing authority with respect to categories of chemicals versus individual chemicals. There was no coverage of the individual test rules themselves, however. Search conducted on 8/6/2020 using the following search terms: (EPA "Environmental Protection Agency") /10 (chemical*) /30 test! and DATE (before 2000) & (TSCA "Toxic Substances Control").

89. *See, e.g.*, Wagner et al., *supra* note 54, at 224 (recounting the poor understandability of EPA's rule revisions from the standpoint of student coders relative to OSHA's and FCC's revised rules); c*f.* KERWIN & FURLONG, *supra* note 19, at 182–83 (noting how rules that have these features tend to generate less public participation).

90. *See*, e.g., Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemaking: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1734 n.76, 1746–47 (2012) (discussing how challenging agency factfinding as arbitrary and capricious—most likely the only challenge available to public interest groups in this setting—is difficult).

91. 15 U.S.C. §§ 2603(e)(1)(A)–(e)(1)(B).

Figure 4: EPA's Mean Response to Comments (N=38)



EPA's rejection of industry comments was arguably not a rational response from a self-interested legal perspective.[92] A company or trade association that wished to proceed ahead with litigation could threaten to delay a test rule. By contrast, the risk of litigation from public interest groups was quite low given their absence from most of the rules. The high rejection rate of industry comments was also inconsistent with the agency's political environment given that many (82%) of the test rules were promulgated during a Reagan Administration that was decidedly pro-business in its regulatory philosophy.[93]

What, then, explains the high rejection rate of unopposed industry comments? Two complementary explanations are appealing, neither of which can currently be ruled out based on the evidence. On the one hand, agency staff may consider the NPRM a "draft final rule," especially after extensive pre-notice give-and-take with industry representatives. Accordingly, the agency may resist additional changes that further weaken the negotiated proposal on principle. On the other hand, EPA staff may be

92. STOLL, *supra* note 30, at 93 (suggesting that litigation threats are so ever-present at EPA that they likely do not directly influence EPA's rulemaking decisions).

93. Wagner et al., *supra* note 32, at 145. Six of the seven remaining TSCA test rules were promulgated under President H.W. Bush. The last test rule was promulgated during the first year of the Clinton Administration in November 1993.

eager to earn the public's trust and thus remains open-minded and attentive to any and all information that improves the rule's legality and scientific merits, regardless of its source.[94] This explanation suggests that the agency is acting as a "neutral" expert that is not cowed by legal threats.[95] In one test rule promulgated during the Reagan Administration that we examined in our case studies, for example, EPA not only strengthened the proposed test rule it had developed in collaboration with industry, but it then rejected industry's objections to its more protective requirements.[96] The fact that industry rarely followed up on the high rate of rejected comments with litigation against EPA's test rules reinforces the possibility that the rejected comments might not have been terribly compelling; only three of the thirty-eight test rules promulgated by EPA (8%) were ultimately challenged (by industry) on arbitrary and capricious grounds.[97]

This is not to say that industry's participation was not influential. Since nearly all of the comments came from industry, the overall effect of the roughly 33% of industry comments that were accepted was to weaken the test rules. Where our coders could confidently identify the direction of changes (which occurred roughly half the time for EPA's rules), 91% of EPA's

94. This "neutral professional" staff hypothesis is consistent with the literature on bureaucratic behavior. *See generally* BREHM & GATES, *supra* note 79, at 2–3 (1999); GOLDEN, *supra* note 79; POTTER, *supra* note 30, at 191–92 (summarizing the literature and finding that bureaucrats are less polarized than Congress).

95. This evidence of a professional backbone in the agency's response to comments comports with other literature on agency expertise. *See, e.g.*, DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 654 (2010) (observing, based on his study of the FDA, that "[r]egulatory politics requires a delicate balance between fear and facilitation," and that includes "projecting a fearful image" and "symbolically reminding . . . companies who is in charge . . . ."

96. A staff member who worked on that rule revealed that EPA brought in a large team of agency scientists who determined that the test rule needed to be more, rather than less stringent. *See* Wagner, *supra* note 66, at 2–3 (explaining that EPA relied on the expertise of top level companies like DuPont for scientific information, but independent officials and government contractors independently made policy evaluations and occasionally rejected the advice of industry experts).

97. The three cases were: Chem. Mfrs. Ass'n v. EPA, 859 F.2d 977, 991 (D.C. Cir. 1988); Chem. Mfrs. Ass'n v. EPA, 899 F.2d 344, 352 (5th Cir. 1990); Ausimont U.S.A. Inc. v. EPA, 838 F.2d 93, 95–96 (3d Cir. 1988). We did not include the *Natural Resource Defense Council v. EPA* litigation in this count since it challenged EPA's approach on process grounds and not on the substance of the test rule itself. *See* Nat. Res. Def. Council, Inc. v. EPA, 595 F. Supp. 1255, 1259 (S.D.N.Y. 1984); *see also* Wagner, *supra* note 90, at 1722–23, 1744, 1774 (observing that the majority of litigation regarding toxic air emissions rules were brought by public interest groups while the majority of pre-proposal input was from industry, suggesting that industry does not bring litigation because they have nothing left to litigate).

changes eliminated or vitiated test requirements in various ways, such as placing greater trust in regulated parties to monitor themselves.[98]

3. Summary

The way in which EPA has adapted to its regulatory environment of industry pressure and statutory deadlines—by negotiating chemical test rules with industry—may have been expedient, but it is far from inclusive or transparent. The notice-and-comment process is founded in civic republican norms of democratic deliberation. A process enabling multiple rulemaking exercises to proceed with only minimal input from representatives of those the agency is supposed to be protecting—American citizens and our nation's environmental resources—does not align with that foundational intent. Although it is possible that EPA's rejection of most industry comments during the notice-and-comment process indicates that it is standing up for diffuse and poorly represented public interests, it might also signal that the agency has already acceded to industry's demands in the pre-NPRM process to such an extent that regulated interests have little to gain from challenging the rejections. In either case, the fact that key provisions of its rules are negotiated with industry before the publication of the NPRM makes it difficult to assess the relative accuracy of these (and other) explanations without insider knowledge.

B. The Deliberative Process for OSHA's Workplace Standards

1. The Regulatory Environment

OSHA was created by the Occupational Safety and Health Act of 1970, the purpose of which was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[99] The statute empowers OSHA to promulgate and enforce occupational safety and health standards requiring conditions and practices that are "reasonably necessary or appropriate to provide safe or healthful employment . . . ."[100]

OSHA must establish an occupational "health" standard addressing toxic chemicals or harmful physical agents in a way that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity

98. From the perspective of judicial review, it is not clear that the agency is safer in weakening versus strengthening a rule when, as is usually the case, commenters weigh in on both sides of an issue. *See* Wagner, *supra* note 90, at 1758.

99. 29 U.S.C. § 651.

100. *Id.* §§ 652(8), 654(a)(2).

even if such employee has regular exposure to the hazard . . . for the period of his working life."[101] By contrast, OSHA's "safety" standards, which run the gamut on the technical and physical features of the workplace, need only be "reasonably necessary or appropriate" to protect workers.[102] For both sets of standards, the agency must prescribe appropriate labels, emergency treatments, and "proper conditions and precautions of safe use and exposure."[103] OSHA can also prescribe protective equipment, control technologies, monitoring requirements, and periodic medical examinations.[104]

From its inception, OSHA has interpreted the Occupational Safety and Health Act to require the agency to employ rulemaking procedures that closely resemble formal rulemaking. For each rulemaking exercise, the agency creates a formal administrative record, accomplished by holding a public hearing before an administrative law judge (ALJ) at which witnesses present written and oral testimony subject to cross-examination by agency lawyers and representatives of interested parties on crucial issues.[105] OSHA's presentation of the evidence supporting a proposal usually includes the testimony of OSHA staff, but it can also include the testimony of experts who OSHA hires as consultants on particular technical issues for which its staff lacks sufficient expertise.[106] The rulemaking record consists of the written testimony, a transcript of the hearing proceedings, pre- and post-hearing written submissions, written comments from the public, and publications and other materials that the agency staff relied upon in formulating the rule.[107]

2. Findings on OSHA's Rulemaking Deliberations

a. When does participation occur?

At OSHA, rulemaking deliberations appeared to occur primarily during

101. *Id.* § 655(b)(5).

102. *Id.* § 652(8).

103. *Id.* § 655(b)(7).

104. *Id.*

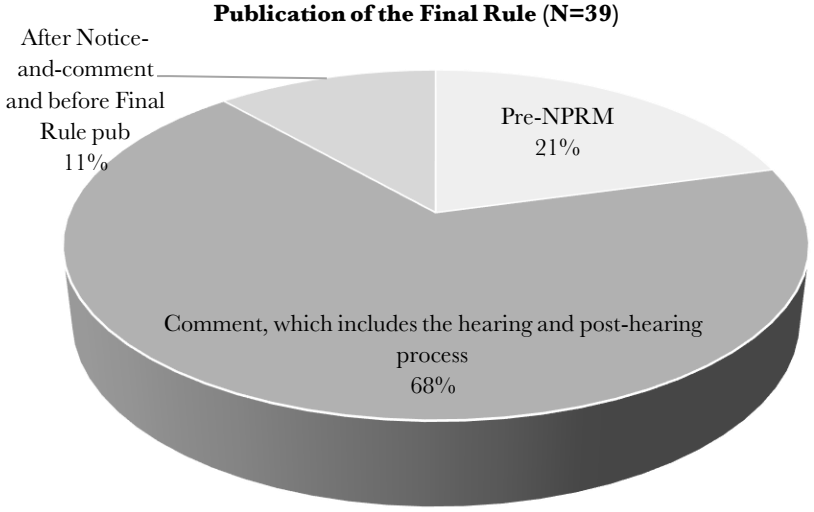
105. 29 C.F.R. § 1911.15 (2020).

106. McGarity, *supra* note 60, at 5, 16; *see* Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L. REV. 729, 747 (1979) (explaining the challenges faced by OSHA judges when litigants bring outside experts with greater qualifications than administrators to argue a particular factual or policy point).

107. *See* McGarity, *supra* note 60, at 5; *see also* McGarity, *supra* note 106, at 808 (explaining how, when reviewing OSHA regulation of pesticide, courts of appeals "had before them records closely resembling those normally before a federal district court, replete with transcripts, expert testimony, cross-examination, and judicial findings").

three consecutive points in the rulemaking life cycle: 1) the notice-and-comment period; 2) OSHA's live hearings, which routinely follow the written comment process;[108] and 3) a post-hearing comment period, during which OSHA invites follow-up filings and responsive filings. See Figure 5.

Figure 5: Participation in OSHA Rules Across Stages before Publication of the Final Rule (N=39)



Since the latter two types of deliberation are somewhat unique to OSHA, they warrant a bit more explanation. The live hearings allow for real-time exchanges among stakeholders, as well as between the stakeholders and the agency that go well beyond the deliberation afforded by the APA's notice-and-comment requirements. Because the hearings are only logged into the docket as one entry (e.g., hearing transcript), however, we do not have quantitative data on the average number of participants, hours of deliberation, or other features.[109]

We were able to gain some insight into the hearings from our case studies, however. In the asbestos case study, for example, OSHA held a lengthy

108. In the Occupational Safety and Health Act (OSH Act), Congress requires OSHA to hold hearings only upon request by a commenter. *See* 29 U.S.C. § 655(b)(3). Yet in practice, OSHA holds the hearings as a matter of course. *See* McGarity, *supra* note 106, at 766–78 (explaining that while the OSH Act does not require OSHA to adopt rulemaking procedures that are more formal than required under APA § 553, agencies engaged in highly technical rulemakings such as OSHA or EPA may benefit from holding hearings anyway to better inform their decisionmaking process and insulate their final decisions from judicial review).

109. To capture this data, we would need to seek the transcripts for each of the rules by FOIA and then hand code every comment.

formal hearing from June 19 through July 10, 1984, and it received post-hearing submissions through November 1, 1984 (an innovation we discuss next).[110] The record from the hearing consisted of the transcript of the proceedings, more than 340 exhibits and approximately 55,000 pages of material.[111] In the formaldehyde case study, OSHA presented the testimony of ten expert witnesses[112] and three other government agencies presented additional testimony.[113] Eighteen private sector organizations, including corporations, industry associations, unions, and public interest groups, also provided testimony.[114] During a post-hearing comment period, the agency received 120 additional exhibits.[115] OSHA re-opened the record to receive public comment on new information regarding human cancer risk and new exposure data; it received seventeen responses during the one-month additional comment period.[116] The entire record consisted of more than 1,400 exhibits with approximately 30,000 pages of testimony and comments.[117] OSHA hearings on safety regulations are generally less extensive. In the concrete and masonry case study, OSHA held a two-day hearing in which it presented two witnesses and heard from seven witnesses testifying for labor, industry, engineering firms and formwork designers.[118] Even so, the added deliberations were not inconsequential.[119]

The second deliberative opportunity occurs through OSHA's routine use of a post-hearing process, in which participants are invited to submit additional evidence, including presumably responses to the evidence and arguments offered by others.[120]

110. McGarity, *supra* note 60, at 5.

111. Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22,612, 22,614 (June 20, 1986) (to be codified at 29 C.F.R. pts. 1910, 1926).

112. McGarity, *supra* note 60, at 12 (citing Occupational Exposure to Formaldehyde, 52 Fed. Reg. 46,198 (December 4, 1987)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. McGarity, *supra* note 60, at 16–17 (citing Concrete and Masonry Construction Safety Standards, 53 Fed. Reg. 22,612 (June 16, 1988)).

119. *See id.* (noting that even from the abbreviated form of "safety" hearings relative to "health" hearings, OSHA made substantive changes to concrete and masonry regulations).

120. Several examples exist of OSHA's typical hearing and post-hearing process. *See* Press Release, Occupational Health & Safety Admin., OSHA's Rulemaking to Protect Workers from Beryllium Exposure (Aug. 28, 2020) https://www.osha.gov/beryllium rule/DSG-6038-Beryllium_Hearing_Procedures.pdf (describing the procedural steps OSHA followed while promulgating standards for beryllium and ways the agency revised its proposal when it issued its final standard); Memorandum from David Michaels, U.S. Dep't of Labor,

Since OSHA does not docket engagement with participants as extensively during the pre-NPRM stage as compared with EPA, it is difficult to determine the nature of those deliberations.[121] Nevertheless, OSHA's docketed indices reveal that about 70% of the pre-NPRM activity that occurred involved the exchange of background documents and studies between the agency and regulated parties without extensive commentary. Only about one-fifth of these pre-NPRM communications were formally docketed as "letters" that conveyed positions, and a reading of this list suggests that much of the dialog addressed specific points.[122] There was also much less interaction post-comment between stakeholders and the agency than with EPA.

Since there is no APA requirement that OSHA actively log its pre-NPRM activity, it is possible that the rulemaking dockets simply do not offer a reliable indication of OSHA's deliberative processes during this formative period.[123] For example, the technology-based standards that OSHA typically promulgates require agency staff to assess the means that are available to reduce risks, and that normally requires field investigations to ascertain what is currently employed in the workplace and what new technologies might be available by the time the standard is in place.[124] This, in turn, demands numerous interactions between OSHA staff and the health and safety staffs of the relevant companies.

on Hearing and Post-Hearing Procedures for OSHA's Proposed Standard on Occupational Exposure to Respirable Crystalline Silica (Mar. 4, 2014) https://www.osha.gov/silica/hearing_procedures.html (describing OSHA's general procedural processes in the context of its silica standard rulemaking).

121. Based on several discussions with anonymous OSHA officials, it is our impression that at a general level these pre-NPRM discussions are not extensive in most administrations.

122. In the asbestos case study, "of the 131 entries in the record prior to the publication of the NPRM, 37 came from government entities (mostly OSHA itself), 22 came from companies, 20 came from trade associations, 11 came from independent sources (e.g., the Mount Sinai School of Medicine and the American Public Health Association), and 3 came from unions." McGarity, *supra* note 60, at 4–5. In the case of the concrete and masonry standards, the agency published an advance notice of proposed rulemaking to elicit information on whether the standards should be revised in light of two major construction project collapses and a number of masonry wall collapses that had generated public pressure for action. The agency "received 48 comments from unions, companies and trade associations." *Id.* at 14.

123. *See, e.g.*, SFERRA-BONISTALLI, *supra* note 37, at 24–25, 69–70, 79–81 (describing the state of the law governing these ex parte contacts and noting that pre-NPRM ex parte communications are permissible).

124. *See, e.g.*, McGarity, *supra* note 106, at 736 (explaining when regulators must decide scientific questions, they tend to rely on experiments conducted by scientists in the field).

We suspect also that pre-NPRM engagement at OSHA and OSHA's docketing practices vary among rules and administrations. In at least the formaldehyde rule, for example, OSHA's interaction with regulated entities appeared to take the form of more active negotiation. During the rule's development, agency staff and high-level officials (under President Reagan) met regularly with industry representatives as they formulated the agency's position on whether formaldehyde was a probable human carcinogen.[125] While the agency was deciding whether to promulgate an emergency temporary standard, the second-in-command at OSHA's Health Standards Directorate met with a lawyer for the industry trade association on a monthly basis.[126] After the agency denied a union petition to promulgate an emergency temporary standard, OSHA personnel conducted a series of technical meetings with employees and consultants from the Formaldehyde Institute, an industry trade association.[127] During that same time period, union representatives requested to meet with agency officials on several occasions, but never received responses to their requests.[128] An industry lawyer even wrote a high-level OSHA official to complain about a letter that an OSHA scientist sent to the International Agency for Research on Cancer.[129]

125. *See* McGarity, *supra* note 60, at 10; *see also* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 87 (1993) (detailing controversial actions agency officials took during the OSHA rulemaking, including meeting with industry representatives even after the rulemaking fell out of the public spotlight). None of these discussions are logged into the agency's lengthy docket index. By contrast, there were fifteen logged in communications with members of Congress regarding the formaldehyde rule.

126. *See Auchter Statement in Formaldehyde Case Lists Staff Contacts With Industry Group*, 12 O.S.H. Rep. (BL) No. 47, at 989 (Apr. 28, 1983).

127. *See id.*

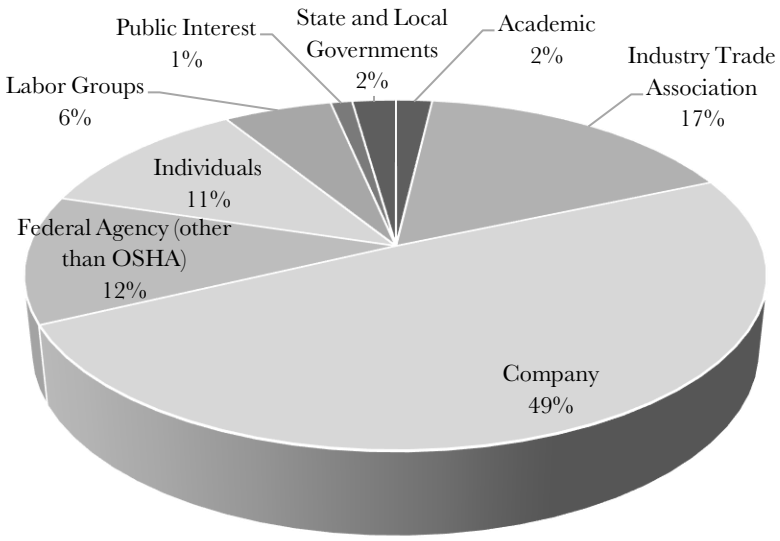
128. *Id.*

129. *See Infante Firing Proposal Dropped as Auchter Dismisses All Charges*, 11 O.S.H. Rep. (BL) No. 11, at 205 (Aug. 13, 1981); *AFL-CIO Questions Auchter's 'Fitness' as Result of Infante Firing Proposal*, 11 O.S.H. Rep. No. 9, at 173 (July 30, 1981); Morton Mintz, *Cancer Expert Charges "Pressure" on Regulators*, WASH. POST, July 15, 1981, at A21; *OSHA Official Proposes to Dismiss Infante, Carcinogens Office Director*, 11 O.S.H. Rep. No. 6, at 108 (July 9, 1981).

b. Who Participates?

OSHA's health and safety standards attracted a much more diverse range of commenters compared to EPA's testing rules.[130] Although participation was still heavily weighted in favor of business, OSHA received substantial public comment in absolute terms from various other sources. Participants also submitted substantially more comments during notice-and-comment in OSHA rulemaking. On average, each of its 39 rules attracted 154 comments—more than ten times the level of participation in EPA's proceedings.[131] See Figure 6.

Figure 6: Mean Composition of Different Participants filing Comments on All OSHA Rules (N=39)

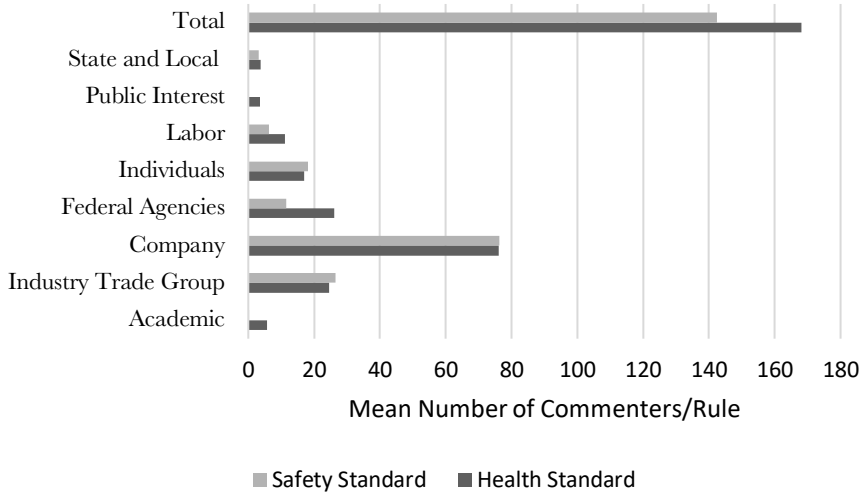


130. Although we do not provide separate pie charts, the data revealed that OSHA's more scientifically intensive health rules generated most of the academic and public interest commentary; in contrast, labor and individuals were slightly more active in the safety rules. For both types of rules, however, engagement by industry was roughly the same.

131. Since some participants filed multiple sets of comments, this number overstates the total number of stakeholders.

In contrast with EPA test rules, where trade groups representing an entire industry played a dominant role as commenters, trade groups were active in OSHA rulemaking, but substantially outnumbered by individual companies. See Figure 7. This may help to explain the much larger number of issues raised in OSHA rulemakings during the comment period, including multiple different employer positions and perspectives.[132]

Figure 7: Participation in Comment Period for OSHA Rules according to whether Safety or Health Standard



Although representatives of labor were badly outnumbered by regulated industry in OSHA's proceedings, at least one labor group weighed in on 87% of all OSHA rules.[133] Moreover, in contrast to EPA and FCC, academic participation was relatively high, particularly with regard to OSHA's health rules, comprising roughly 3% of all comments (labor was 8%).[134] Although we do not have data on the positions taken by academic participants, our

132. *See also infra* Figure 18 (comparing the maximum, mean, and median numbers of issues raised in rulemakings by FCC, EPA, and OSHA, and showing that for all three metrics, OSHA ranks first of the three agencies).

133. Rules that did not involve any labor groups filing comments were Dockets S020A-1, S108C-1, S204-1, S301-B, and S778-1. Interestingly, these were also safety (and not health) rules.

134. Note that Figure 6 combines the health and safety rules; academic participation accounts for a lower share when safety rules are included. *See supra* Figure 6.

case studies indicate that they tended to support labor. [135] This inference is further reinforced by the fact that there is a robust academic discipline devoted to worker safety and health, such as the academics who train occupational nurses and industrial hygienists.

The diversity of participation and the number of issues under consideration made OSHA's decisionmaking difficult. On average, over half of the issues raised during notice-and-comment involved overt disagreement among affected interests; by contrast, only 4% of the issues involved unanimity among the multiple and diverse stakeholders on the proper course for the rulemaking.[136] This high level of disagreement among stakeholders stands in stark contrast to EPA's TSCA test rules, where *none* of the issues raised during notice-and-comment across thirty-eight rules ever involved a disagreement among competing groups.[137]

Why was OSHA's participatory mix more diverse and less lopsided than at EPA? Virtually every OSHA rule involved hotly contested issues, and some even attracted interest from political officials, notwithstanding the fact that only 15% of the rules (N=6) were deemed economically significant for purposes of interagency review. In addition, OSHA's more formal hearings, coupled with the absence of deadlines, could conceivably lead to a more extensive and leisurely participatory process. It may thus be easier for academics, public interest groups, and others with limited resources to prepare comments.

c. Does Participation Matter?

The public deliberations did impact OSHA rules, but like EPA, there was nothing close to a one-to-one correspondence between a comment and a rule change. Despite lopsided participation by industry, OSHA not only rejected the majority of industry comments on proposed health rules, but it also made aggregate adjustments that appeared to move both health and safety rules in a more protective direction between the proposed and final rule stages. It is thus conceivable that the agency was fully aware of participatory imbalances and reviewed comments skeptically as a result.

While the participation of various groups differed to some extent in the health versus the safety rules, see Figure 7, the differences were more dramatic in how the agency responded to the comments. See Figure 8. For

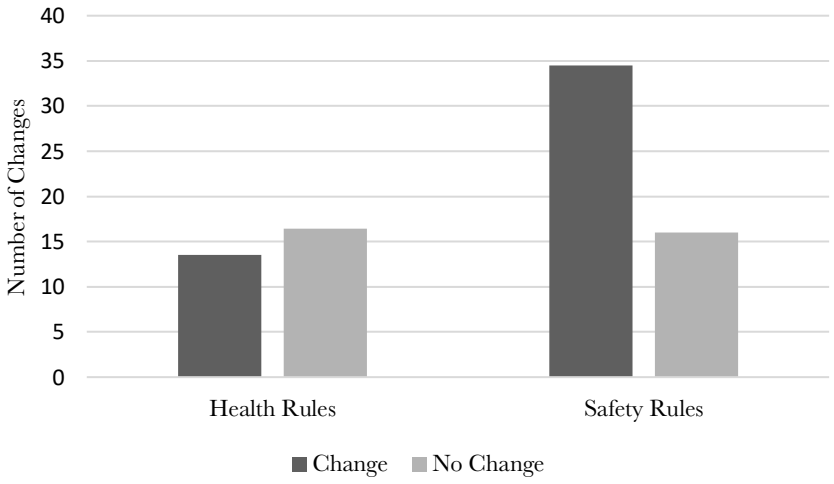
135. *See* McGarity, *supra* note 60, at 6, 13 (explaining that it was difficult to determine whether the academic participants were "paid consultants to trade associations, companies or unions," but that academic participants and union comments were accepted by OSHA at higher rates compared to industry comments).

136. The remaining coded issues involved a single group or interest raising a concern.

137. *See infra* Figure 16.

the science-intensive health rules, OSHA rejected the majority of the comments. But the converse was true in the safety rules. Indeed, this is the only set of rules in our study for which the agency accepted most of the comments. Operating almost as the mirror image of EPA, OSHA accepted nearly two comments on safety rules for every comment it rejected.

Figure 8: Mean Number of Changes/Rule in response to comment in OSHA Health and Safety Rules (N=39)



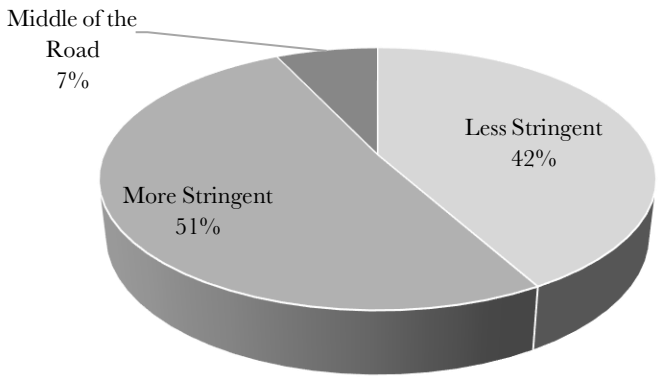
Our best explanation for this difference in the influence of commenters between health and safety standards stems from the uniquely intensive staff scientific work needed to assess health risks. Perhaps the agency's proposed health rules reflect its best judgment on the science, based on the information gleaned throughout the rulemaking process, and the agency is therefore less likely to find that comments alter its analysis in ways that warrant rule adjustments. Since safety standards tend to focus on safety technologies and to reflect economic and behavioral concerns, the relevant information and perspectives are likely broader than with health standards.[138] Safety risks may be more apparent than health risks to the companies and their employees, and the companies may be more familiar than OSHA staff with the kinds of

138. *See* John Howard, *OSHA Standards-Setting: Past Glory, Present Reality and Future Hope*, 14 EMP. RTS. & EMP. POL'Y J. 237, 238 (2010) (explaining that OSHA health standards, which regulate things like toxic chemicals and physical agents, require the agency to consider only the best available science and to issue the "most adequate[]" standards to protect employees from material impairment of health or physical capacity, which is a goal that distinguishes health standards from safety standards).

technologies and work practices that are available to reduce those risks.

The valence of OSHA's changes as measured by the stringency of the rules' protections, however, was relatively consistent across both health and safety rules. See Figure 9. In both settings, OSHA generally made the rules more protective as a result of the comments and testimony.[139] All of this, both the valence of the issues and OSHA's response, trended in a more protective direction even though most commenters (68%) came from industry.

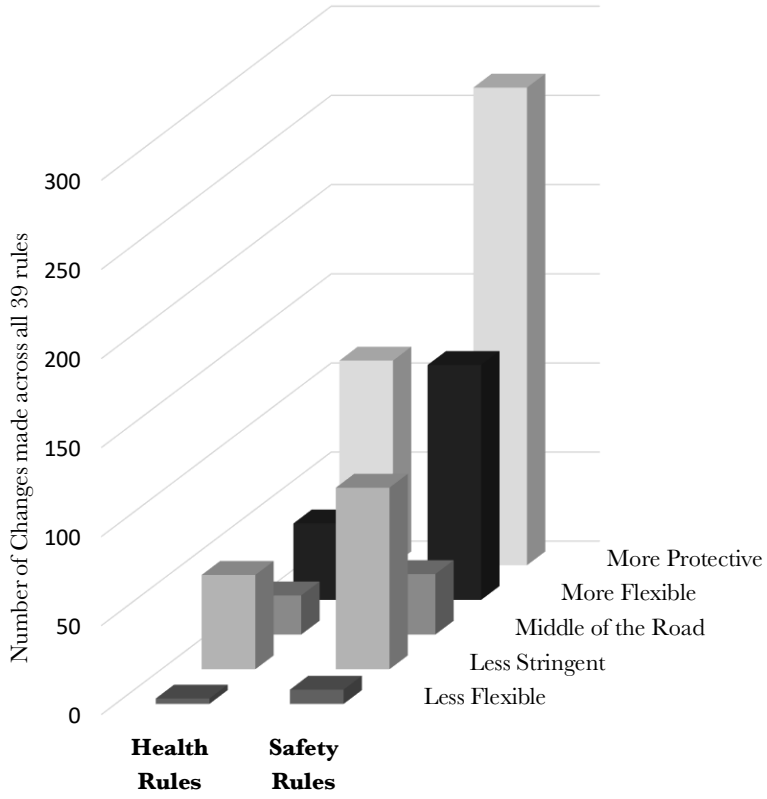
Figure 9: Policy tilt of change made to the OSHA rules as a result of comments (N=39)



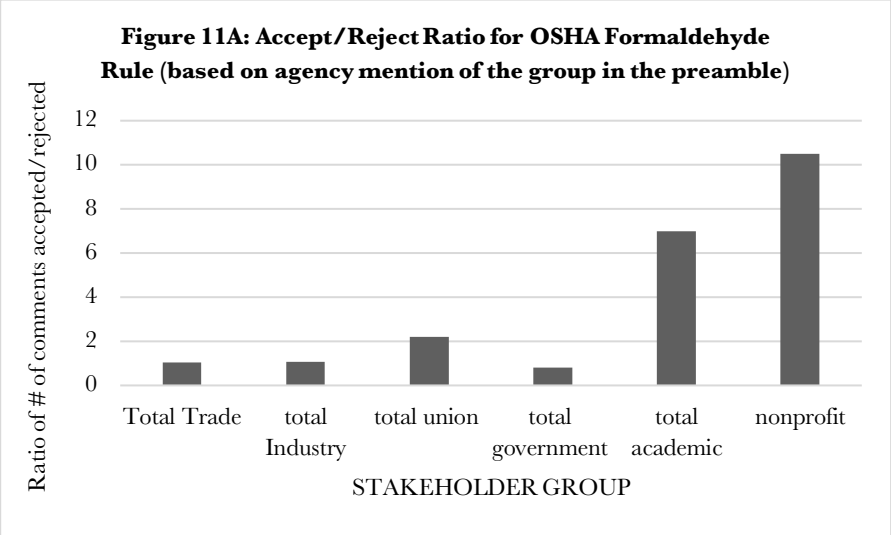
Our coding also allowed us to discern some nuances in the types of changes that the agency made to the rules. When commenters proposed a more flexible approach to complying with the rule (e.g., a menu of alternative technological options to meet a standard instead of a prescribed work practice), OSHA was more likely to accept the comment than when the commenter advocated for changes that would make the compliance options less flexible than the agency's proposal. See Figure 10.

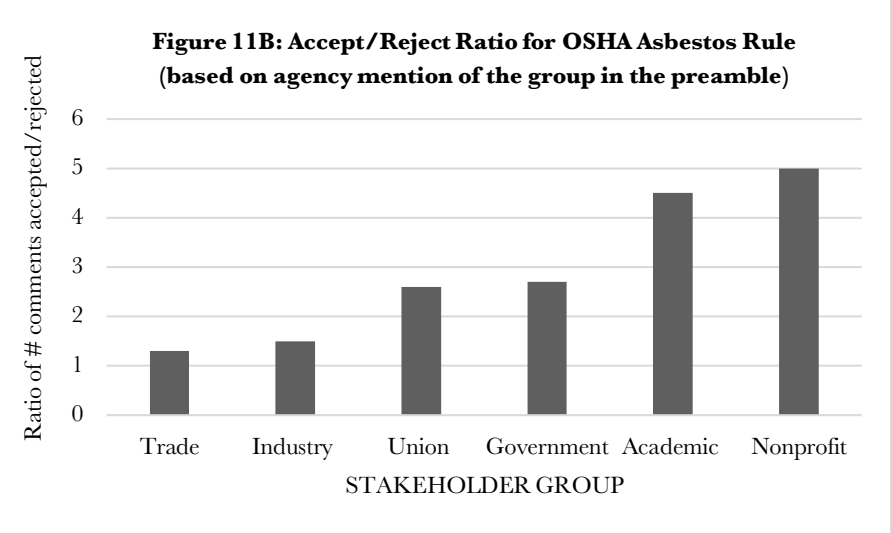
139. Recall that we are relying on OSHA's own summary of the "significant comments," which may bias, by either under- or over-counting, the true nature of the comments. *See* Wagner et al., *supra* note 62.

Figure 10: OSHA's Acceptance of Changes in Relation to Policy Implications (across all 39 rules)



We were able to gain more purchase on these quantitative results through the three case studies. In these three rules, according to OSHA's preambulatory discussion of its response to significant comments, OSHA accepted nonprofit and academic comments about five to ten times more often than it rejected them. By contrast, when OSHA discussed a significant industry comment, it just as often indicated it was rejecting the comment as accepting it. See Figures 11A and 11B.





Although we hypothesized that this trend in OSHA's varying acceptance of comments might vary by administration, the data do not suggest any clear differences based on partisan turnover in the White House. Indeed, the formaldehyde and asbestos rules, both of which demonstrated a protective tilt, were promulgated during the Reagan Administration.[140] While some anecdotal evidence suggests that presidential priorities

140. *See* McGarity, *supra* note 60, at 1, 7–8.

sometimes infiltrate deep into OSHA's work, including the staff's technical risk assessments,[141] our data on the Agency's response to comments—in the aggregate—stay relatively constant over time.

The case studies also provide some additional insights into OSHA's response to public participation. In the asbestos rulemaking, OSHA acceded to the almost unanimous position of the commenters that it should establish a separate standard for the construction industry because it involved much less intensive worker exposures to asbestos.[142]

In the formaldehyde rulemaking, where there was a strong difference of opinion on the issue, the agency agreed with the commenters who argued against establishing a separate standard for the construction industry. But it created a general exemption for all workplaces where exposure to formaldehyde was limited to materials containing no more than 0.1% formaldehyde.[143] In both cases, the decisions appeared to be driven by a pragmatic concern for protecting workers where exposure was likely to be significant, but the agency did not want to go so far as to make it impossible for employers to comply. This was entirely consistent with the statutory goal of protecting workers without regulating them out of their jobs.

When the issue focused on animal toxicity, epidemiological studies, and the appropriate risk assessment models to use, OSHA was quite resistant to criticisms from both industry and unions. It hewed fairly closely to the testimony of its own employees and consultants. For example, OSHA rejected out of hand the industry contention that it should ignore benign tumors in animal studies in its carcinogen risk assessments.[144] These appeared to be issues over which the agency was protective of its own expertise and unwilling to be persuaded that it had erred.[145] The same was true with respect to setting the action levels that would trigger "exposure monitoring, training, physical examinations, and other requirements in

141. *See, e.g.*, Robert Iafolla, *After Extended OMB Review, OSHA Cut Silica Rule Price Tag by Half, Lowered Benefits*, 43 O.S.H. Rep. (BL) 1057, 1057–58 (Nov. 7, 2013) (noting criticism that "it was political pressure not to release any substantial regulations rather than conducting additional analyses" that precipitated suggestions); Thomas McGarity & Wendy Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719, 1729–33 (2019) (explaining how Reagan, George W. Bush, and Trump officials developed innovative techniques to manipulate inherently malleable scientific models to achieve models that supported their deregulatory preferences, and thus justify weaker chemical safety guidelines than might otherwise have been proposed).

142. McGarity, *supra* note 60, at 2.

143. *Id.* at 9.

144. *Id.*

145. *See id.* at 8–10 (discussing how OSHA's response to the risk of formaldehyde exposure for workers rejected the complaints and dissent of industry).

various workplaces."[146] In both rulemakings, the agency rejected industry arguments that it need not establish an action level or that the action levels should be set at a less stringent level. This could reflect the fact that while the requirements triggered by action levels may have made it more costly for employers to comply, they were clearly feasible and not so expensive that companies would be forced into bankruptcy.

In the concrete and masonry safety standard rulemaking, OSHA was receptive to comments from both companies and unions, and it frequently departed from its proposals in light of the comments.[147] After proposing to allow construction loads, like scaffolding, to be attached to partially completed structures with the approval of the project engineers or architects, OSHA was persuaded by expert testimony that neither engineers nor architects were likely to take structural loads into account. The agency therefore decided to require the approval of a "'person qualified in structural design.'"[148] OSHA sided with the unions in requiring employers to take steps beyond fall protection techniques (e.g., guardrails) to keep employees from being impaled on protruding steel bars set in reinforced concrete, but it sided with employers when it decided against prohibiting employees from working beneath concrete buckets.[149] The agency often adopted the position taken by its consulting experts when they diverged from the positions of experts for companies and unions. When the unions agreed with employers that a safety precaution was not feasible, OSHA was happy to accept their assessment.[150] On one issue (the height of free-standing masonry that should be subject to shoring requirements), the unions and employers struck a compromise that OSHA accepted, even though it differed from its proposal and the testimony of its own expert witnesses.[151]

3. Summary

OSHA's rulemaking environment is different from EPA's in several respects. OSHA generally receives comments from a broader range of stakeholders than EPA. Although many of its workplace standards are as technically complex as EPA testing standards, especially with respect to health standards, competing representatives of both labor (albeit outnumbered) and industry appear to be heavily engaged in OSHA's proceedings. Many of its rules are also economically significant and generate political interest as well as

146. *Id.* at 9.

147. *See id.* at 17–18 (detailing groups from which OSHA accepted and rejected comments).

148. *Id.* at 15.

149. *Id.*

150. *See id.* (noting that when unions and industry agreed that in-place testing of concrete strength was not always practical, OSHA allowed for in-place and post-removal testing).

151. *Id.* at 15–16.

participation by other agencies, state governments, public interest groups, and members of the academic community. The economic and political salience of OSHA's rules is underscored by the fact that many require significant capital investments and are therefore not easily reversed. OSHA's experience with judicial review is vastly different than EPA's; nearly every health standard and most safety standards are challenged in courts of appeals.[152]

The ways in which OSHA structures participation in its proceedings can plausibly be explained in terms of these demands and constraints. Given the absence of deadlines, disagreement between well-represented stakeholders on technical questions, and the need to get it right the first time, it is not surprising that the agency is strongly motivated to appear dispassionate and to develop painstaking rationales for its rules. This is reflected in its efforts to gather information in the formulation of proposals, but also in the time and resources it devotes to soliciting and assessing public comment through formal hearings. As OSHA is a favorite target of conservative pundits, it takes particular care to be neutral and rigorous in its development of policy, shown by its interpretation that its statute requires not only written comments but an opportunity for rebuttal testimony and the cross-examination of witnesses on crucial issues.[153]

The normative implications of OSHA's approach to rulemaking are in some sense the inverse of EPA's. The process is more open and adversarial, and one suspects more rigorous in its evaluation of empirical evidence than the informal pre-notice negotiation that largely shapes TSCA test rules. If it promotes the values of transparency and rationality, however, OSHA rulemaking is also far more protracted and resource-intensive.[154] Once its regulations are finalized, often after years of deliberation, OSHA's protective effects may be further delayed by legal challenges that stay a rule's implementation for additional years.[155] OSHA may be an example of an agency that deliberates so thoroughly that it accomplishes very little.[156]

152. *See* MCGARITY & SHAPIRO, *supra note* 125, at 1, 254; PATRICK SCHMIDT, LAWYERS AND REGULATION: THE POLITICS OF THE ADMINISTRATIVE PROCESS 1, 54 (2005).

153. *See* 29 C.F.R. § 1911.15 (2020).

154. *See, e.g.*, SCHMIDT, *supra* note 152.

155. *See, e.g.*, David Michaels and Jordan Barab, *The Occupational Safety and Health Administration at 50: Protecting Workers in a Changing Economy*, 110 AM. J. PUB. HEALTH 631, 632 (2020) (lamenting that "OSHA's standard-setting process is broken; it takes years or even decades, and huge resources, to issue new standards able to withstand strong antiregulatory political opposition and well-funded industry lawsuits. The result is that the agency has few up-to-date standards for protecting workers from chemical exposures or safety hazards."); Wagner et al., *supra* note 54, at 234–36 (stating OSHA itself stays the effectiveness of its rules quite frequently).

156. *See, e.g.*, Adam M. Finkel, *A Healthy Public Cannot Abide Unhealthy and Unsafe Workplaces*, 108 AM. J. PUB. HEALTH 312, 312 (2018) (noting that OSHA has not been able to "impose meaningful penalties for noncompliance with basic precautions.").

IV. DELIBERATIVE RULEMAKINGS AT FCC

FCC's deliberative approach to rulemakings—in contrast to the other two agencies—has been studied more extensively and criticized harshly. Among the complaints are that the Commission tends to afford well-connected insiders greater access through ex parte contacts; that it lacks transparency regarding the specifics of these communications; and that its use of open-ended notices further tips the balance of influence in favor of participants with greater resources.[157] Rather than giving up on FCC, these same critics offer a number of promising reforms, some of which are extracted from FCC's own innovative practices.[158]

Without dismissing the concerns that critics raise, our study offers a comparative perspective that is missing from accounts that focus on the Commission in isolation from other agencies. It is with this in mind that we present our analysis of the FCC. Especially when viewed in a broader context, its distinctive approach to participation in rulemaking has some important advantages over more conventional models if implemented properly. It involves innovations that can overcome both the industry-driven deliberations evidenced at EPA and the over-proceduralized deliberations that appear to paralyze OSHA.[159]

What are the innovations? As discussed below, FCC often approaches rulemaking as an iterative rather than a static exercise. It selects parts of the rules ex ante on which it will proceed, while also raising open-ended questions that keep the information, views, and policies out in the open. To preserve the integrity of the process, moreover, it tracks stakeholder communications as "ex parte" in a way that, while not always complete, provides a path to greater transparency. Finally, FCC incorporates processes that allow stakeholders to respond to one another, thus potentially reserving its limited resources for issues upon which the parties disagree.

157. *See, e.g.*, Weiser, *supra* note 7, at 677, 685, 692, 702 (elaborating on these criticisms); *see also* J. Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615, 639–41 (2014) (discussing how agenda setting lies outside the APA's reach and can occur in ways that might be biased); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-79, FCC MANAGEMENT: IMPROVEMENTS NEEDED IN COMMUNICATION, DECISION-MAKING PROCESSES, AND WORKFORCE PLANNING 24 (2009) [hereinafter GAO Report, FCC MANAGEMENT] (emphasizing the frequency of ex parte contacts just before a decision is made by the Commissioners).

158. *See, e.g.*, Weiser, *supra* note 7, at 679, 690, 699–701 (diagnosing structural problems and then discussing numerous reform proposals based in part on past FCC practices); Bernthal, *supra* note 157, at 619, 621 (proposing reforms).

159. *See* text accompanying *infra* notes 257–52 (describing the sometimes enormous rulemakings at OSHA).

A. The Regulatory Environment

FCC is an independent regulatory agency comprised of five members that was established by the Communications Act of 1934.[160] Commissioners are appointed by the President subject to Senate confirmation, and the President can designate the Commission's chair; otherwise, members are insulated from direct control by the White House.[161] They serve for fixed, overlapping five-year terms during which they may not be removed for political or policy reasons.[162] As a further arrangement designed to ensure balance if not neutrality, no more than three commissioners may belong to the same political party.[163]

Originally created to regulate radio broadcasting, FCC now oversees communication via radio, conventional television, satellite, wire, cable, and phone service.[164] It promulgates rules in these areas that, among other things, establish standards of consumer access,[165] promote fair competition that will benefit consumers,[166] allocate the electromagnetic spectrum among competing uses and users,[167] define the responsibilities of broadcasters to serve the public,[168] and promote safety and homeland security.[169] Some rules are issued at the agency's discretion pursuant to open-ended mandates, as when it defines criteria for the allocation of broadcast licenses in the "public interest, convenience, or necessity."[170] Others are specifically required by Congress, as when Congress told FCC to establish policies for the transition from analog to digital television by a prescribed date.[171]

160. 47 U.S.C. § 154.

161. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

162. *Id*. at 620, 625, 629. The President may, in theory, remove a commissioner "for cause." Although this authority has not been fleshed out in practice, presumably it is confined to malfeasance or the incapacity to perform the duties of the office.

163. *See id.* at 620.

164. *See* Weiser, *supra* note 7, at 680, 682–86; GAO Report, FCC MANAGEMENT, *supra* note 157, at 5–10 (providing background on FCC).

165. *See* FCC, *Universal Service*, https://www.fcc.gov/general/universal-service (last updated July 26, 2021).

166. *See, e.g.*, FCC, *Local Telephone Competition Enforcement*, https://www.fcc.gov/general/local-telephone-competition-enforcement (last visited Aug. 16, 2021).

167. *See* FCC, *Radio Spectrum Allocation*, https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation (last visited Aug. 16, 2021).

168. *See* FCC, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION, https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf (2019).

169. FCC, *About the Public Safety and Homeland Security Bureau*, https://www.fcc.gov/general/about-public-safety-and-homeland-security-bureau (Sep. 4, 2019).

170. GAO Report, FCC MANAGEMENT, *supra* note 157, at 36 (quoting from 47 U.S.C. § 214(a), § 310(d)).

171. DTV Delay Act, Pub. L. No.111-4, 123 Stat. 112 (2009).

Aside from its substance, FCC rulemaking is distinctive in several respects. One is the fluid nature of the affected parties and their positions on various issues. Unlike EPA, which typically pits concentrated industry interests against diffuse public interests,[172] and unlike OSHA, where well-organized industry and labor groups often battle,[173] FCC combines these two dynamics. Some of its rules involve tension between public and industry interests, but many (and often the same ones) also involve conflict among industry groups that stand to gain or lose economically.[174] Alliances between public-interest advocates and industry groups, as well as among industry groups, shift depending on the specific issues at stake.

Another difference is that, unlike Executive Branch agencies with a single head, FCC is a commission whose members often disagree. In fact, it is common for important rules to be accompanied by separate dissenting opinions and/or opinions that endorse some but not all of the majority's arguments.[175] The Commission also entertains limited ex parte communications throughout this fluid process, and each of these communications is supposed to be carefully docketed, consistent with the formal, legalistic character of its decisionmaking.[176]

172. *See, e.g.*, *supra* Section II A.2.b (discussing the heavy industry participation as set against light nonprofit representation); Wagner et al., *supra* note 32, at 124–28.

173. *See* McGarity, *supra* note 60, at 9.

174. *See, e.g.*, West, *supra* note 66, at 3–4, 7, 21, 23, 25 (discussing the various industry interests pitted against one another in the four case study rules); *see also* Wagner et al., Supplemental unpublished Table, dated July 31, 2020, identifying the industries winning and losing on individual issues in *Broadcast Services: Financial Interest and Syndication Rules* (citing 56 Fed. Reg. 26,242 (June 6, 1991)), available at https://utexas.box.com/shared/static/c5ur t6r96978d867j0nzaa1db0zq0xf4.docx (data in table was collected by coding the "significant comment" section of the Final rule for each reference to an identified commenter and the agency's decision to either reject or accept each comment on each individual issue).

175. As one example, FCC's NPRM seeking comments on a proposed protective framework was accompanied by five separate opinions, two of which were dissenting. *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 23,360 (proposed Apr. 20, 2016) (to be codified at 47 C.F.R. pt. 64); *see also* Dissenting Statement of Commissioner Michael O'Rielly to Protecting the Privacy of Customers of Broadband and Other Telecommunications Services (Apr. 1, 2016), https://www.fcc.gov/document/fcc-releases-proposed-rules-protect-broadband-consumer-privacy/orielly-statement; Dissenting Statement of Commissioner Ajit Pai to Protecting the Privacy of Customers of Broadband and Other Telecommunications Services (Apr. 1, 2016), https://www.fcc.gov/document/fcc-releases-proposed-rules-protect-broadband-consumer-privacy/pai-statement.

176. *See generally* 47 C.F.R. §§ 1.1200–1.1216 (2020) (discussing the processes and procedures for ex parte communications in FCC); *see also* SFERRA-BONISTALLI, *supra* note 37, at 42–45.

B. Findings on FCC's Rulemaking Deliberations

1. When Does Participation Occur?

FCC's approach to participation and deliberation looks quite different from EPA and OSHA in a number of respects, most evidently regarding when participation occurs. Unlike EPA and OSHA, the deliberative environment throughout FCC rulemakings is more fluid and continuous, albeit formalized into discrete ongoing opportunities to participate. Before sharing our data on this issue, we first outline these general differences in the nature of participatory processes.

First, and most importantly, our data pick up on FCC's incremental approach to rulemaking, which has been discussed in the general literature.[177] The agency frequently publishes open-ended notices, followed by one or more further notices that resolve some issues, and defer others, pending additional comment.[178] In its Low-Power FM Radio proceeding, for example, the Commission issued four further notices and six reports and orders (partial rules that resolved some of the issues) as it proceeded. Although this may be an extreme illustration, a study by the Government Accountability Office (GAO) found that of 3,408 rules promulgated by the agency between 1990 and 2007, only 390 contained the "text of [the] proposed rules under consideration."[179] As discussed later, open-ended notices may have both advantages and disadvantages from a normative perspective, but they obviously make it difficult to identify discrete stages of the rulemaking process in many cases.

Second, FCC seems to create room in its deliberations for formalized crossfire between the participants through hearings, reply comments, further notices, and other mechanisms. This allows the agency to vet facts and suggested options in an open, adversarial way that would be missed through a one-step written comment period. Since FCC technically catalogs these crossfire opportunities as occurring after the comment process, we have coded these communications as occurring post-comment.[180]

177. *See also* Weiser, *supra* note 7, at 692, 698 (discussing this feature, often critically); GAO Report, FCC MANAGEMENT, *supra* 157, at 27 (discussing open-ended notices that are routine in FCC rulemakings).

178. Weiser, *supra* note 7, at 692, 698.

179. GAO Report, FCC MANAGEMENT, *supra* 157, at 27; *see also* Bernthal, *supra* note 157 (generally discussing FCC's rulemaking process).

180. OSHA, in contrast to FCC, characterizes its post-hearing submissions as comments. Thus, in the case of OSHA, we categorized the post-hearing comments as occurring exclusively within the comment stage. Doing so also illuminated the extent of ad hoc, informal communications occurring within OSHA after the comment period closed. (Since FCC's

Third, formal record-keeping rules exist that govern ex parte or informal communications between stakeholders and the agency, but these requirements apply only after a proceeding receives a docket number.[181] Depending on when this docket number is assigned (e.g., when a proposal is first published in the *Federal Register* versus when FCC first initiates internal discussions on a proceeding), FCC's logging of pre-NPRM communications for purposes of our study is likely incomplete.[182] Fortunately, the Commission's regular use of notice-and-comment to define problems and explore alternative solutions early in the policy development process provides some reason to suspect that pre-NPRM deliberations with stakeholders might be limited.[183] On the other hand, criticisms of shady negotiations at FCC provide reason for concern that at least some rules may be developed in circumstances that involve imbalanced and effectively nonpublic discussions with key stakeholders.[184] Our data cannot speak to this issue.

With these qualifications, Figure 12 reveals that the majority of docketed communications at FCC occur at the post-comment stage. Some of this is attributable to the use of reply comments and post-comment crossfire. But much of the activity includes other types of engagement as well. Indeed, more than one-half of all ex parte communications occur during this post-comment period. Our findings of substantial post-comment deliberations also seem to be consistent with criticisms that FCC allows parties with greater resources and perseverance to enjoy greater access to the rulemaking deliberations.[185]

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entire deliberations are formal and on the record, there should have been none of this ad hoc communication, *see supra* note 176).

181. FCC's ex parte rules make it clear that the various requirements apply to proceedings, but they do not define that term or specify when a "proceeding" commences. *See, e.g.*, Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, 52 Fed. Reg. 21,051, 21,052 (June 4, 1987) (to be codified at 47 C.F.R. pt. 1). Other sources at FCC only clarify that a proceeding is "docketed." *See, e.g.*, FCC, *Definitions of EDOCS Terms*, https://www.fcc.gov/edocs/definitions-edocs-terms (April 13, 2020).

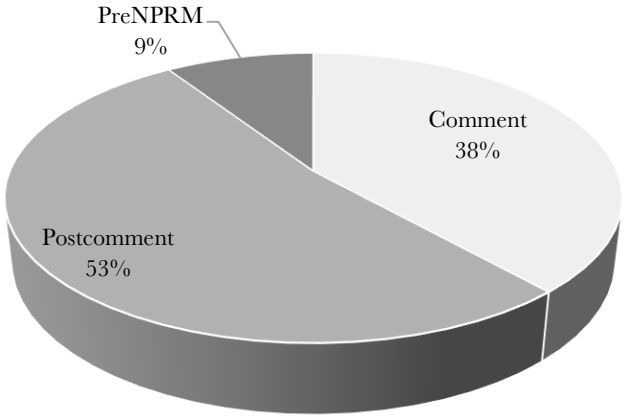
182. *See* Bernthal, *supra* note 157, at 620–21, 640–41, 649 n.164 (reporting that FCC does not docket pre-NPRM communications but providing no citation for this assertion from FCC sources). Our own data do indicate that at least some pre-NPRM communications with stakeholders are docketed (about 4% of all docketed entries) and that about one-quarter of these pre-NPRM communications are identified as ex parte.

183. *See supra* note 177 and accompanying text (discussing the steps in FCC rulemaking process having varying levels of clarity and development of an actual rule).

184. *See, e.g.*, Bernthal, *supra* note 157 at 640–41 (noting that pre-proposal rulemaking occurs "outside the public light of the APA"); Weiser, *supra* note 7, at 678, 692, 700 (same).

185. *See, e.g.*, Bernthal, *supra* note 157, at 639 (discussing numerous ex parte communications that occur after the comment period is closed); GAO Report, FCC

Figure 12: Stage of Participation in FCC Rules (N=48)



FCC also utilizes additional deliberative tools that vary by rulemaking. These include hearings, workshops and conferences hosted by the agency, agency studies that involve input from experts and affected interests, talking to people at trade conferences, and the publication of petitions for public comment.[186] Although we lack systematic data on agenda setting for the rules in our study, this outreach appeared in some cases to inform the Commission's decision to propose a rule.[187]

MANAGEMENT, *supra* note 157, at 31–34 (explaining the Commission's rules on ex parte meetings and stakeholders' concerns about the submission of vague, last-minute ex parte summaries).

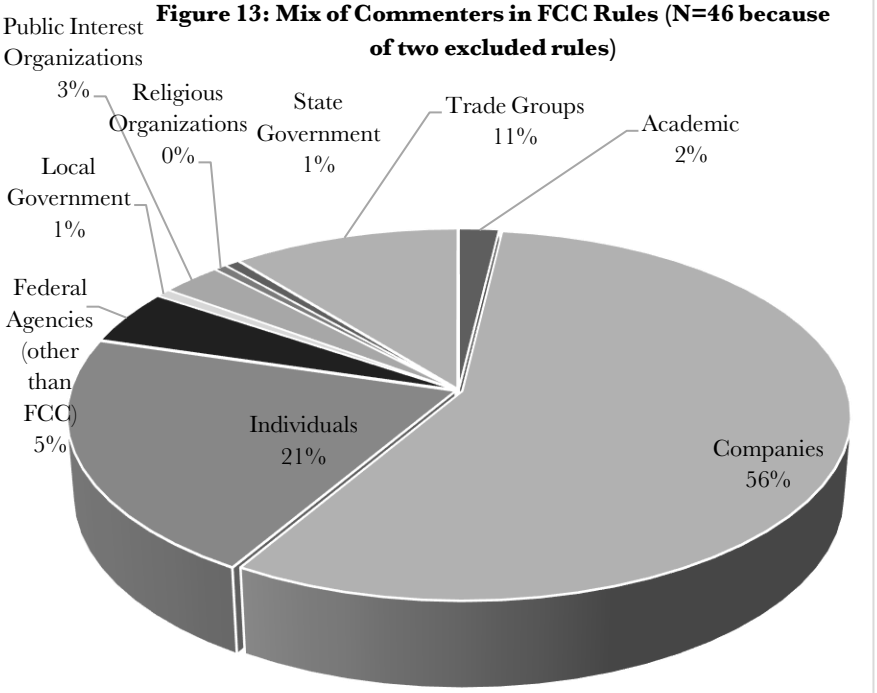
186. *See generally* West, *supra* note 66 (discussing the tools the Commission used and considered in rulemakings in six major proceedings); *see also* Weiser, *supra* note 7, at 702–03 (discussing how FCC should utilize workshops and data-driven commissioned reports); GAO Report, FCC MANAGEMENT, *supra* note 157, at 30 (discussing how some stakeholders have suggested FCC should rely more heavily on its administrative law judges to develop records on which to base decisions for hearings).

187. *See generally* West, *supra* note 66 (discussing why certain rules were placed on FCC's agenda).

2. Who Participates?

The mean number of commenters in FCC rulemakings was forty if we eliminate two outlier regulations that generated thousands of individual submissions.[188] With this exclusion, Figure 13 indicates that participation was relatively diverse in comparison to EPA but not necessarily OSHA.[189]

Figure 13: Mix of Commenters in FCC Rules (N=46 because of two excluded rules)



188. Including such comments would arguably provide a misleading sense of the mix of participants. One set of mass comments supported the expansion of low-power FM radio and the other addressed a regulation establishing programming obligations and restrictions for children's television. If the two outlier rules are included in the dataset, the average number of participants per rule exceeded 211 on average, with a maximum number of commenters of well over 7,200 in one rule. A recent study by Balla, Beck, Cubbison, and Prasad suggests that these comments may not carry a great deal of weight in the agency's analysis of comments. *See* Balla et al., *supra* note 30, 464–65, 476; *see also* Cuéllar, *supra* note 20, at 414, 417, 463, 476 (noting how lay people's lack of "technical sophistication" tends to affect FCC's capacity and willingness to consider their comments).

189. If those two rules were included in the dataset, the slice attributed to individuals would be over 86% of the comments/average per rule.

The mix of participants in FCC rulemakings differs from that in both of our other agencies in notable ways.[190] Even without the two outlier rules, FCC proceedings include a surprisingly large proportion of comments from individual citizens. Indeed, more than half (62%) of FCC rules attracted comments from individuals.[191] For the vast majority of the rules receiving individual comments (68%), the individualized comments numbered a dozen comments or less per rule and were often personalized, indicating that they were not the kind of form letters associated with mass-comment campaigns.[192] As a point of contrast, there was only one individual commenter among all of EPA's thirty-eight TSCA test rules.

FCC is also distinguishable from EPA and OSHA by the fact that, although most public comments were submitted by companies and trade associations, business interests were on opposite sides of the issues in many of its proceedings. The broad categories of "companies" and "trade groups" therefore mask the diversity of participation in FCC rulemakings to a much greater degree than in the other two agencies. Conflict among their constituents may also prevent inclusive trade groups such as the National Association of Broadcasters from weighing in on some issues. This may help to explain the comparatively low percentage of comments from trade groups in general.

3. Does Participation Matter?

The variables we have chosen to describe the nature and effects of participation in rulemaking are not as easily applied to FCC as they are to OSHA and EPA. It is also difficult to identify changes in proposed rules when the proposals are open-ended or list alternative courses of action, as is often the case for important FCC regulations. Moreover, when changes can be identified and linked to public comments, it is not always possible to code decisions in terms of more or less intervention into the market. This is the case with regard to a rule establishing criteria for the allocation of broadcast spectrum among various types of commercial interests, for example.

Bearing these caveats in mind, our aggregate data indicate that the overall pattern of influence via public comment in FCC proceedings is distinct from the patterns in the other two agencies. Although the Commission rejected a

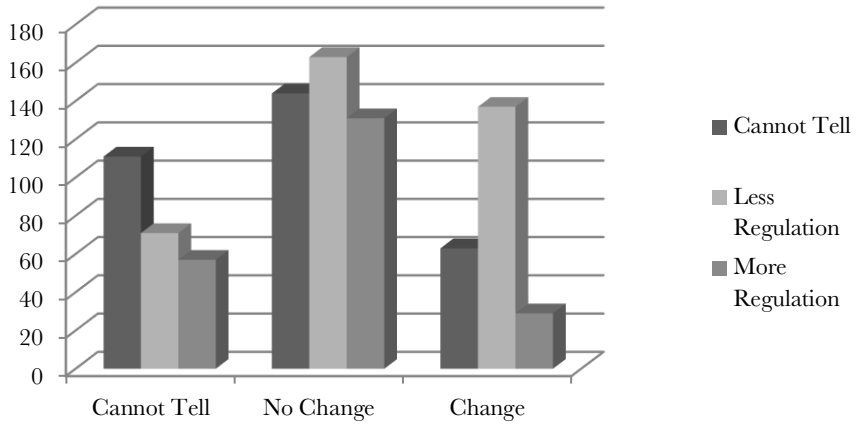
190. It is possible that some of the industry stakeholders in OSHA and EPA rules limited participation by individual employees and contractors, thus dampening some attentive individuals from participating.

191. *See supra* Figure 12.

192. For a few sample individualized comments from FCC rules in our dataset, *see* https://ecfsapi.fcc.gov/file/6520199439.pdf; https://www.fcc.gov/ecfs/filing/10718052459162; https://ecfsapi.fcc.gov/file/6519838641.pdf; https://ecfsapi.fcc.gov/file/6519844484.pdf; https://ecfsapi.fcc.gov/file/6519838540.pdf.

majority of the comments it received,[193] the acceptance rate was much closer to that of OSHA than to EPA's high rejection rate. Insofar as the coders could discern the direction of change in light of public comments, twice as many changes were in the direction of less, as opposed to more government intervention. See Figure 14. A closer look at individual proceedings, however, suggests that stakeholder input was hardly dominated by homogeneous business interests as was the case for EPA.

Figure 14: Changes in FCC Rules favoring more or less Regulation as requested by commenter (N=48)



We conducted in-depth examinations of six regulations taken from our larger dataset in order to gain more purchase on the dynamics of FCC rulemakings. All of the rules we chose were important, but they varied considerably in substance as well as in the number of issues they raised and the volume of public comment they elicited. Whatever a "representative sample" might be, the cases speak to the diversity of the technical and political environments in which FCC policymaking takes place:

Subscription Television—a rule reversing earlier regulations that had defined subscription television as "broadcasting," thus eliminating the need for cable and satellite providers to comply with equal employment opportunity requirements and equal-access obligations with regard to things such as political speech[194]

Financial Interest and Syndication—a rule eliminating earlier regulations that

193. *See infra* Figure 15.

194. *See* Change in Classification, 52 Fed. Reg. 6152, 6152–53 (Mar. 2, 1987).

had prevented the major networks from owning or otherwise controlling the syndication rights to television programs[195]

Low-Power FM Radio—a rule departing from earlier policy by setting aside spectrum and taking other actions to encourage the expansion of low-power FM (LPFM) broadcasting[196]

Children's Television—a rule establishing obligations for digital television licensees with regard to programming and advertising aimed at children[197]

Model for Predicting Broadcast Television Field Strength—a rule adopting a model that would allow regulators to predict the strength of over-the-air signals (without conducting on-site measurements) for the purpose of determining whether viewers were eligible to receive alternative satellite service[198]

Conversion to Digital Television—a rule establishing criteria for the allocation of licenses and other requirements governing the transition from analog to digital television[199]

Although space does not allow a thorough description of these proceedings, we can draw from them several observations about participation in FCC rulemaking that distinguishes it from the other two agencies. A notable difference is that industry groups often oppose one another in ways that vary depending on the issues at stake.[200] Conflict is sometimes confined to competitors within the same sector, as was primarily the case in the establishment of criteria for the allocation of licenses in the transition from analog to digital television. Other proceedings involve disagreement across sectors of the communications industry. In the rule adopting a field-strength model, for example, over-the-air broadcasters were pitted against the satellite industry because assumptions about the effects of predictive variables such as terrain and vegetation would determine who could receive services from the

195. *See* Broadcast Services; Financial Interest and Syndication Rules, 56 Fed. Reg. 26,242, 26,244 (June 6, 1991).

196. *See* Creation of Low Power Radio Service, 65 Fed. Reg. 67,289, 67,289, 67,297 (Dec. 11, 2000) (affirming decisions reached in the Report and Order that encouraged expansion of low-power FM (LPFM) broadcasting and clarifying certain rules).

197. *See* Child.'s Television Obligations of Digi. Television Broads., 19 F.C.C. 22,943, 22,950–52, 63 (2004) (report and order and further notice of proposed rulemaking) (detailing digital television licensee's new obligations regarding children's programming and advertising).

198. Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition & Measurement of Signals of Grade B Intensity, 14 F.C.C. 2654, 2656 (1999).

199. *See* Broadcast Services; Digital Television, 66 Fed. Reg. 65,122, 65,122–23, 65,130 (Dec. 18, 2001).

200. *See generally* West, *supra* note 66 (discussing how opposition of industry groups in these four proceedings resulted in further action like additional petitions for reconsideration, further notices of proposed rulemaking, new rules, and lawsuits).

latter (and cut into the markets of the former).[201]

The competing economic interests of different industry groups can also be aligned with or opposed to public interest groups and other participants in FCC proceedings—again as a function of the specific issues under consideration. Labor and consumer groups joined with studios, production companies, program distributors, writers, and independent television stations in opposing the rule that would eliminate existing financial syndication regulations, whereas the major networks were allied with the Department of Justice and the Federal Trade Commission in support of those changes.[202] Providers of subscription television services supported a redefinition of broadcasting that would free them from regulatory requirements, but that rule was opposed by over-the-air broadcasters because it would place them at a competitive disadvantage with respect to cable and satellite companies and by public interest groups that objected to the relaxation of equal employment opportunity and equal-access requirements for non-traditional broadcasting.[203]

Industry groups were more unified on most of the key issues in the other two proceedings. The Children's Television rule pitted broadcasters against diffuse public interests. The latter, who were represented by several groups, argued that digital television should be subject to the same programming requirements and restrictions on exploitative advertising that the Commission had established for analog television pursuant to the Children's Television Act of 1990,[204] whereas the former argued that differences between the two technologies called for a more relaxed approach.[205] Although the LPFM proceeding was more multidimensional in terms of the interests involved,[206] the most important issues pitted full-power broadcasters against advocates of micro-power radio who were motivated by their beliefs about community programming needs rather than economic self-interest. The latter were well-represented, and they were opposed on many of the technical, economic, and social issues in that complex proceeding by established interests (including the National Association of Broadcasters and National Public Radio) that had previously enjoyed absolute primacy over

201. *See id.* at 25.

202. *See id.* at 7.

203. *See id.* at 3–4.

204. Pub. L. 101-437, 104 Stat. 996.

205. *See* West, *supra* note 66, at 17 (discussing how FCC responded to comments from these two groups).

206. In addition to full-power and low-power FM broadcasters, the interests of translator stations were added to the mix on some of the issues. *See* West *supra* note 66, at 10 (discussing how LPFM stations can cater to many types of audiences to promote diversity, including educational and religious groups, to labor unions, people with disabilities, university students, linguistic minorities, and people interested in local public affairs or specific kinds of music).

LPFM in FCC's allocation of the electromagnetic spectrum.[207]

The case studies also illustrate the fluidity and interconnectedness of participation in FCC rulemaking over time. It is sometimes difficult to determine where one proceeding ends and another begins, given the Commission's tendency to resolve issues incrementally through a series of partial rules and further notices. The issues and arguments are sometimes apparent well before the Commission formally initiates proceedings, and it resurrects and supplements them after it promulgates the final regulation through various mechanisms.[208] For example, financial syndication restrictions had always been controversial, and the Commission had conducted a study twelve years before the publication of notice arguing that the regulations were no longer needed because the proliferation of cable channels had eroded any vertical market control that the three major networks might once have enjoyed.[209] The Commission put a tentative decision to eliminate the rules on hold five years later because of opposition from the motion picture industry and its allies in Congress and the Reagan White House.[210] After the Commission published a final rule in 1991, participation continued in the form of ex parte communications, petitions for reconsideration, and a lawsuit that forced a continuation of the proceeding.[211]

Three other cases also involved issues that had been percolating for years and that had already been addressed by affected interests in the agency's development of earlier rules and in various other ways. The Commission had been planning to re-designate subscription television for some time, in large measure because a series of court cases had drawn attention to the inconsistency with which it had applied the definition of broadcasting to new communication technologies as they emerged.[212] The key issues and positions of various affected interests surrounding the encouragement of

207. *Id.* at 12.

208. We had to drop a few rules from the dataset precisely because we could not link them to discreet participation periods.

209. West, *supra* note 66, at 6.

210. *See* Penny Pagano, *At Issue: New Battle Looms Over Syndication Rights*, L.A. TIMES (June 6, 1989, 12:00 AM), https://www.latimes.com/archives/la-xpm-1989-06-06-ca-1815-story.html.

211. See West, *supra* note 66, at 8–9.

212. *See* ROBERT R. BRUCE ET AL., *Legal Discussion of the Appropriate Regulatory Classification for Subscription Direct-to-Home Satellite Services*, POLICIES FOR THE REGULATION OF DIRECT BROADCAST SERVICES app. at 115–29 (1980) (discussing the legal background in favor of not applying common carrier regulatory classification on subscription television services); *e.g.*, Satellite Bus. Sys., 95 F.C.C.2d 866, 872 (1983) (deciding how to designate a subscription television service). The issue was brought to a head by a 1984 court case, Comm. for Cmty. Access v. FCC, 737 F.2d 74, 77–78 (D.C. Cir. 1984) (finding a former radio station licensee failed to comply with community interest requirements to be granted a license renewal).

LPFM radio and the application of children's programming requirements and advertising restrictions to digital television were likewise evident from sources of information such as legislative hearings, commission reports, position papers, and various publications.[213]

Because different segments of the broadcast industry oppose one another on many if not most of the issues the Commission addresses, the rulemaking process often devolves into one of striking compromises. This can involve finding a middle ground on controverted technical issues, as when the Commission reduced clutter loss values to one-third of those it had proposed in the rule establishing a predictive field-strength model.[214] Whatever its merits on empirical grounds, this was a concession to over-the-air broadcasters who opposed use of the model more generally. The practical effect of this change was to expand the radius within which their signals were assumed to be of high quality, thus enlarging the geographical area in which they would be protected from cable television.[215]

Compromise can also take the form of logrolling. Although the Subscription Television (STV) rule was a victory for that industry, the agency sought to appease analog broadcasters by deciding that their conversion to STV would not be considered a "major change" and thus would not require public notice and hearings to determine if it was in the public interest.[216] The effort to appease different groups was so evident in one of our case studies that a reviewing court found it to be irrational. Judge Posner of the Seventh Circuit Court of Appeals noted in overturning an intermediate version of the Financial Syndication Rule that "[t]he impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated."[217]

This is not to say that FCC is only attentive to business interests. Although our aggregate data suggest that most changes to proposals are in the direction of less regulation, our case studies do not indicate that diffuse interests are poorly represented or consistently overlooked. The extension of children's

213. *See* West, *supra* note 66, at 10–18 (discussing the issues and positions of interested groups in the LPFM and children's television regulation proceedings).

214. Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, 65 Fed. Reg. 36,639, 36,640 (June 9, 2000) (to be codified at 47 C.F.R. pt. 73).

215. *See id.* (discussing how lower clutter loss values help make correct predictions more often about field strength so it does not under or overpredict).

216. *See* West, *supra* note 66, at 3–4 (discussing the significance of a rule not being considered a "major change").

217. Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992).

regulation to digital broadcasting in some measure was undoubtedly required by law, yet the Commission had considerable discretion in determining how closely its requirements would mirror the ones it had established for analog television. Although its initial NPRM consisted primarily of questions,[218] they were leading ones that had been influenced by a President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters, a petition from People for Better Television, and letters and informal requests from various other public interest groups.

The final rule that emerged from the Children's Television proceeding did make some concessions in response to industry comments.[219] Broadcasters were given some flexibility in the rescheduling of children's programs that might be preempted by sporting events and other special telecasts, and licensees who owned several channels were able to spread their programming obligations unevenly across stations to some extent. The concessions were relatively minor, however, and were made within the framework of a rule that was generally a victory for advocates of children's television regulation. The Commission rejected the broadcast industry's fundamental market-based arguments.

The LPFM proceeding can also be framed as a victory for David over Goliath. Whether advocates of low-power FM radio are the equivalent of public interest groups is an open question, but they were undoubtedly influential. The proposal to set aside frequencies for LPFM was influenced by two petitions and 13,000 inquiries from individuals interested in obtaining stations.[220] LPFM interests were also well-represented in the series of partial rules and further notices that followed, and the Commission accepted their arguments over those of full-power broadcasters more often than not. Although subsequently authorized full-power stations retained the primacy they had always enjoyed, FCC established a case-by-case procedure through which that policy could be waived in the public interest if there were no alternative frequencies available for LPFM.[221]

The Commission's promotion of LPFM interests on the issue of minimum separation distance is particularly striking. Although full-power commercial broadcasters and National Public Radio persuaded Congress to enact legislation in 2000 that prohibited licensing LPFM stations on the third-

218. *See* Child.'s Television Obligations of Digit. Broads., 15 F.C.C. 22946, 22955–61 (2000) (notice of proposed rulemaking) (asking questions for the public to consider and answer when submitting comments).

219. *See* Child.'s Television Obligations of Digit. Broads., 19 F.C.C. 22943, 22945–50 (2004) (report and order of further notice of proposed rulemaking).

220. West, *supra* note 66, at 10.

221. *Id.* at 11.

adjacent frequencies that FCC had authorized earlier that year,[222] the agency issued a rule in 2007 allowing LPFM broadcasting on second-adjacent channels (which was implicitly proscribed but not mentioned in the statute).[223] The 2005 Commission's notice that solicited comment on this change and its subsequent rule were based in part on an independent study of broadcast interference that supported its original determination, but they were also influenced by ex parte contacts with low-power advocates and by information obtained at a forum that was attended primarily by the LPFM community.[224]

As a broad generalization, then, FCC rulemaking takes place in an environment characterized by frequent disagreement on technical and economic issues that often reflects the interests of participants. It can be distinguished from our other two agencies by the frequency with which business groups are at odds with one another, and perhaps also by the degree to which diffuse interests participate in the process, although we are less able to assess the extent to which FCC's process attracts the full range of affected parties. Based on our case studies, at least, the Commission seeks to accommodate competing interests, although how well it accomplishes this obviously varies.

FCC is also distinctive in *how* it accommodates the views of affected interests. Four of the proceedings we examined in detail began with notices that were in large part open-ended, and these were followed by one or more further notices that moved from the general to the specific and resolved issues on a piecemeal basis in some cases.[225] This procedural approach is sometimes blamed for allowing for capture by insiders in a subset of rules.[226] But the incremental approach that emerges from FCC deliberations more generally—

222. Radio Broadcasting Preservation Act of 2000, H.R. 3439, 106th Cong. (2000). The Act was passed in reaction to a rule that had been promulgated earlier that year. *See* West, *supra* note 66, at 12.

223. *See* West, *supra* note 66, at 11 (discussing the waiver process for LPFM stations on second-adjacent channels for those seeking one).

224. *See* Creation of a Low Power Radio Service, 20 F.C.C. Rcd. 6763 (2005) (second order on reconsideration and further notice of proposed rulemaking) (discussing the ex parte meetings and forum, and Prometheus' study, which pushed the Commission to request comment on changes); *see generally* Adam Marcus, Public Interest Pirates: The History of the Micropower Radio Movement (May 16, 2002) (unpublished manuscript), (available at http://www.geocities.ws/mcsquared88/lpfm.pdf (discussing the beginnings of radio and the LPFM classification).

225. The two that did not fit this pattern were hardly free of conflict but were the least complex of the six. Whether or not subscription television should be defined as broadcasting or the Longley-Rice Model should be used to predict field strength were not issues that lent themselves to a great deal of bargaining and compromise. *See* West, *supra* note 66 at 1, 23–24.

226. *See, e.g.*, Weiser, *supra* note 7, at 678 (suggesting that industry capture may sometimes occur).

which sometimes do include more focused questions for engagement[227]—likely reflect, at least in part, the agency's pluralistic environment coupled with frequent disagreement among the commissioners on important rules.

C. Summary

FCC's rulemakings follow a deliberative process that is unusual, if not unique. Whereas other agencies often spend a good deal of time and effort developing specific proposals, the Commission regularly publishes notices that invite the public to define problems and propose solutions before the Commission has come up with a definite proposal. Only 11.4% of the initial NPRMs it published between 1990 and 2007 contained the text of a specific proposal.[228] For important and controversial regulations, FCC often follows open-ended notices with one or more reports and orders (rules) and further notices that resolve some issues and defer others while the agency collects additional information to resolve disagreements.

What explains FCC's distinctive approach to rulemaking? Some have suggested that the agency lacks the professional staff needed to formulate specific proposals.[229] Its incremental approach could also be grounded in its history and organizational culture given that FCC had developed policy incrementally through case-by-case adjudication for the first several decades of its existence.[230] The independent commission method of rulemaking also introduces a necessary formalism to ensure equal access, but the impracticality of a purely adversarial approach to informing complex, dynamic rulemakings may have motivated the agency to adopt a hybrid approach, harnessing the adversarial process through a distinctive inquisitorial model. FCC may also find that approaching rulemaking in this incremental manner keeps Congress apprised of the issues on the table and allows the agency to get advance warnings of legislative conflicts that may lie ahead.

Of course, none of these constraints are unique to FCC. Many regulatory agencies are understaffed and at an informational disadvantage with respect to industry; rulemaking was generally avoided as a means of implementation before the 1970s; there are obviously other independent commissions; and Congress is interested in other areas of regulation. In any case, the way in

227. *See id.* at 695, 698–99 (discussing some FCC innovations that involve more specific questions or a tiering of the process that leads to more focus within a single rulemaking life cycle).

228. GAO Report, FCC MANAGEMENT, *supra* note 157, at 27.

229. *See, e.g.*, Bernthal, *supra* note 157, at 657–58 (detailing deficiencies in FCC information collection and procedural architecture as well as the lack of expertise among commissioners).

230. *Cf.* Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach: Which Should it Be?*, 22 L. & CONTEMP. PROBS. 658, 666 (1957).

which the Commission feels its way along procedurally is arguably consistent with a "task environment" defined by conflict involving fluid coalitions of interests that unite for different reasons, by uncertainty and competing arguments with regard to many technical and economic issues, and by frequent disagreement among its own members that reflects these constraints. It has much in common in this regard with Charles Lindblom's classic description of policymaking as "muddling through."[231] As such, it may have advantages from a normative perspective that have been overlooked.

V. ANALYSIS & CONCLUSIONS

Although the purpose of the Administrative Procedure Act was to impose a degree of procedural uniformity on how a rapidly expanding bureaucracy accommodated the interests that would be affected by its rules and adjudicatory orders, bureaucracies adopt their own distinctive forms of decisionmaking and deliberation.[232] Thus, although each of the agencies we studied operated within its broad structures, the APA's notice-and-comment requirements allowed for considerable variation in the timing and means of public participation. Much as life-forms adapt to survive or flourish, we may explain this variation across our three agencies as institutional adaptation to the distinctive technical, political, economic, and legal factors that defined their policymaking environments, perhaps considered through the prism of organizational culture. Our data reveal unexpectedly extensive deliberation occurring among the agencies and affected interests. Yet their deliberative approaches are by no means identical and vary in ways that have important implications. We begin by discussing the similarities across the three agencies and then the differences.

A. Conclusion 1: Rulemaking Deliberations are Extensive.

At a very general level, deliberations in all three agencies went beyond the APA's requirements in ways that civic republicans would applaud in some respects.[233] By sometimes reaching out and negotiating with stakeholders, holding public meetings, and voluntarily including other types of deliberative opportunities throughout their rulemakings, each agency, in its own innovative way, facilitated deliberation before, during, and after notice-and-

231. *See generally* Charles E. Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959) (describing an incremental approach to public administration and policy change).

232. *See, e.g.*, Furlong & Kerwin, *supra* note 16, at 354.

233. *See generally* CROLEY, *supra* note 30, at 62–64 (summarizing literature regarding civic republican theory nicely).

comment.[234] A singular focus on the APA's modest requirements will miss these more expansive and continuous opportunities for stakeholders to interact with and persuade agency decisionmakers.

These findings resonate with the small, but excellent, body of empirical work that precedes our study.[235] The Sant'Ambrogio and Staszewski study is particularly illustrative, providing a rich set of examples of these methods, including the creative use of focus groups, public complaints and hotlines, web-based outreach, and other enhanced deliberative methods.[236] This practical evidence suggests that if deliberation in light of reason-giving is critical to the legitimacy of administrative governance, the agencies generally seem to be embracing this responsibility to accommodate the views of stakeholders that go well beyond the minimum legal requirements. These elaborate deliberative processes may ultimately reflect agency self-interest in the sense that the public engagement may enhance a rule's chance of success. As Rachel Potter notes, when faced with competing demands (and accompanying risks of litigation), broader participation can enable an agency to develop rules that are politically acceptable.[237] Extensively vetted rules are also more likely to have a stronger factual grounding and face a better chance of surviving judicial review and achieving successful implementation down the road.[238] Despite the potential costs of this outreach in terms of the time and resources expended on reworking proposals to incorporate additional information and arguments, the three agencies may perceive that they have more to lose than to gain from minimizing public participation.

This is not to say that participation was equally representative of all relevant interests. In all three agencies, the logged-in participation throughout the rulemaking life cycle was heavily weighted in favor of corporations and their trade associations. Industry submitted 89%, 66%, and 67% of all comments in EPA, OSHA, and FCC proceedings, respectively. Trade groups that appeared to offer a consensus position on behalf of the entire industry were especially active in EPA rules, accounting for more than half of the comments in the aggregate.[239]

234. *See also* STOLL, *supra* note 30, at 94–95 (observing EPA's amenability to open-ended input and participation).

235. *See* POTTER *supra* note 30, at 63; STOLL *supra* note 30, at 94–95 and accompanying text.

236. Sant'Ambrogio & Staszewski, *supra* note 16, at 823–26 (explaining agency practice in engaging the public through a study for the Administrative Conference of the United States).

237. POTTER, *supra* note 30, at 77.

238. *See, e.g.*, POTTER, *supra* note 30, at 76–77; *see also* STOLL, *supra* note 30, at 96 (discussing EPA's particular receptivity to fact-intensive information).

239. We did not analyze the individual comments of participants, so our impression that trade group participation in EPA rules represented more comprehensive consensus positions on behalf of industry is based on the fact that trade groups were more engaged in the

Moreover, these numbers likely understate the degree to which industry dominated participation because the same groups also tended to be more active outside of the notice-and-comment period. This is entirely consistent with the findings of other studies.[240]

There was some representation of diffuse public interests by individuals and organizations in OSHA and FCC proceedings, but it was not nearly as strong as the industry efforts. This fact, coupled with preexisting concerns about the sufficiency of nonprofits as proxies for broad-ranging and sometimes differing individual views, reinforces the likelihood of some democratic deficit in the adequacy with which these processes account for a diffuse public.[241]

B. Conclusion 2: Deliberations Influence Rules.

Although it is not possible to provide a comprehensive tally of when and how public deliberations matter, our findings suggest that notice-and-comment forces agencies to consider the input of affected interests and to give reasons for their decisions. And the acceptance rate for comments certainly suggests that the comments make a substantive difference, even if only to some indeterminant degree in the absence of a thorough understanding of the issues at stake. At the same time, agencies often support their rejection of comments with elaborate explanations, signaling that the dialogue with stakeholders triggers internal deliberations or at least prods agencies to analyze issues and arguments they might have otherwise overlooked.

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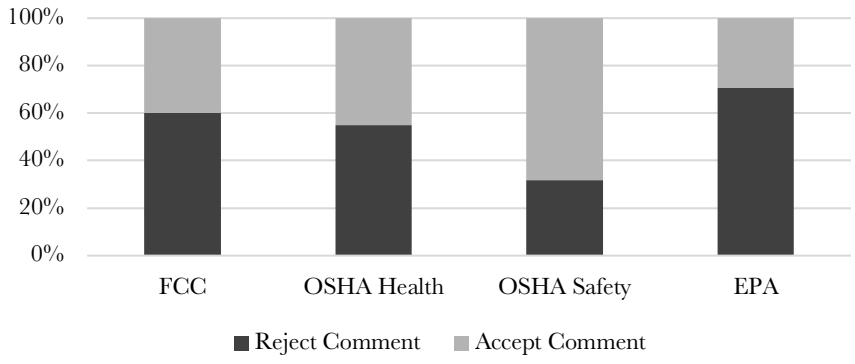
rulemakings (measured by the number of individual entries in the docket) as compared to the individual companies. *See supra* note 85 and accompanying text. If this is the case, then it might suggest more significant industry influence because of the stronger consensus positions that inform policy choices. *See, e.g.*, Krawiec, *supra* note 30, at 82, 84 (observing unified position by industry in pre-NPRM participation in Volcker Rule); David Nelson & Susan Webb Yackee, *Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking*, 74 J. POLS. 339 (2012) (empirically finding greater policy influence associated with stronger consensus coalitions). *But see* Scheffler, *supra* note 48, at 723, 742–43 (observing limited cohesiveness in the various industry positions on a Department of Transportation (DOT) case study).

240. The results are consistent with Wagner's own work as well as with previous work of the Yackees, Golden, and others that finds industry participation tends to substantially outweigh the participation of individuals and public interest groups. *See, e.g.*, *supra* note 32. Our EPA rules, in fact, show a more lopsided and industry-dominated process than any of these other studies. We suspect that this is attributable to the very technical features of the substantive decisions, the fact that the rules involve tests and not restrictions (thus sparking less attention from the public sector), and the narrow set of industries the test rules ultimately impact.

241. *See, e.g.*, Cuéllar, *supra* note 20, at 463, 472–73, 490 (making a compelling case on the value of diffuse public input and the current deficiencies with which existing processes provide opportunities for engagement); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (raising concerns about the adequacy of nonprofit representation).

Figure 15 confirms that notice-and-comment was influential. Agencies changed their proposals in ways that were consistent with public comment to a degree that would not be predicted by those who view notice-and-comment as a largely symbolic exercise. Yet while the agencies appear to have responded carefully to the numerous significant issues stakeholders raised in the often lengthy preambles to their regulations, they did not acquiesce to those comments automatically.[242] With the exception of OSHA safety rules, the agencies still rejected the majority of comments they received to varying degrees.

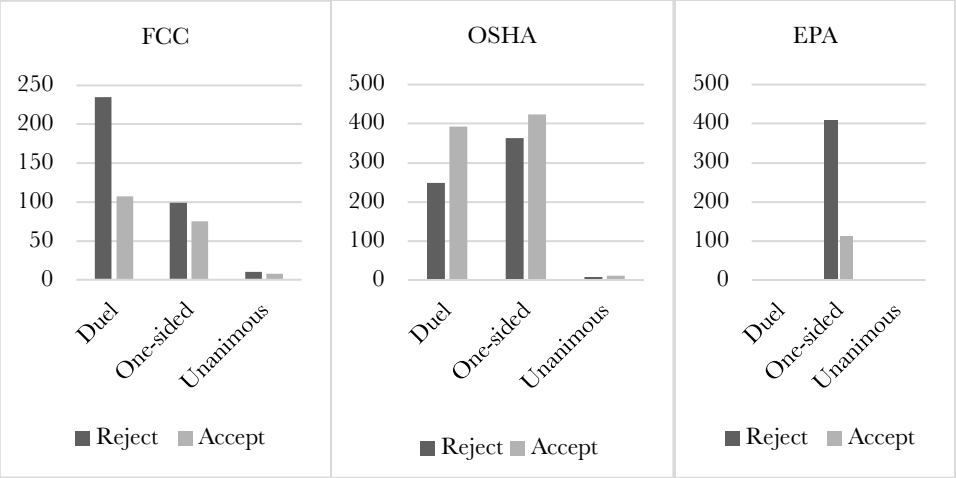
Figure 15: Percent of Issues Changed based on Comments



The collective agency responses to one-sided comments (only one group advocating a position), versus opposing public comments, lend further perspective to these data. Predictably, FCC, and to a lesser extent, OSHA, were more likely to change their proposals in a way that was consistent with public comment when one or more stakeholders simply advocated for a particular change without any apparent opposition. Perhaps more interesting, however, is the degree to which all three agencies rejected public comments even when the stakeholder suggestion was unopposed. As discussed below, this was especially notable for EPA, where most of the input came from industry representatives who were unified in their comments on EPA's rules, virtually all of which sought to weaken the rules in some way. See Figure 16.

242. This is consistent with the findings of others. *See* Kerwin & Furlong, *infra* note 252; *see also* Scheffler, *supra* note 48, at 747 (concluding from the DOT rule that "[m]ore often than not, even the most influential interest groups did not get precisely the changes that they asked for in the final rule.").

Figure 16: Agency Response to Comments Based on Whether There is Stakeholder Conflict or Comment is Unopposed



Our results are thus consistent with the findings of other rulemaking studies reporting that agencies do make changes to rules as a result of the comment process.[243] Surveys of both the participants' and the agencies' perceptions of the role of comments in rulemakings reinforce this conclusion. For example, 85% of the rulemaking participants surveyed by Furlong and Kerwin considered comments to be an important mechanism for influencing rules.[244] A 2020 GAO study which surveyed fifty-two agency program offices between 2013 and 2017 on their perceptions of the role of public comments reports that forty-nine of the offices (95%) believed that the comments "resulted in at least some substantive changes to final rules."[245] Some scholars have questioned the significance of the changes the agency ultimately makes,[246] but there is consistent evidence across studies that agencies do modify rules in some ways as a result of notice-and-comment.

Because there were no before and after documents that allowed us to track

243. *See, e.g.*, Yackee & Yackee, *supra* note 16, at 137 (noting that agencies respond to business interests in the comment process); Wagner et al., *supra* note 54.

244. Furlong & Kerwin, *supra* note 16, at 364.

245. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-383R, FEDERAL RULEMAKING: INFORMATION ON SELECTED AGENCIES' MANAGEMENT OF PUBLIC COMMENTS 7 (2020).

246. *See, e.g.*, Golden, *supra* note 32, 259–60 & ex.6 (noting that agencies very rarely change their rules "a great deal" in response to public comment and typically change their rules "some," a "minimal" amount, or not at all); West, *supra* note 35, at 579 (stating that some research shows that changes agencies make in response to comments are not particularly significant and rarely go to the heart of the policy).

changes during the development of proposed rules, we were not able to code the effects of participation other than written comments on the NPRM.[247] The extensive participation that we document during other stages of the rulemaking process in two of our programs nevertheless suggests that it was of considerable value both to the agency and the participants.[248] Kerwin and Furlong provide strong evidence of this based on their survey of participants engaged in a number of different federal rulemakings.[249] This is hardly surprising given the specificity of many proposed rules and the time and effort that go into their development. It is likely that the agencies have answered fundamental questions regarding the definition of problems and the choice of alternative solutions by the time an NPRM is published.

Thus, while our own data do not speak directly to the effects of participation outside of notice-and-comment, the broader evidence from our study combined with a thin but persuasive body of existing literature suggests that it is likely quite influential.[250] Lying beneath this observation are questions about these informal deliberations that may not readily lend themselves to quantitative analysis. Perhaps foremost among them is whether the imbalances in pre-notice participation that we have described skew proposals in ways that disfavor poorly represented interests. This is certainly a reasonable supposition given the perceptions of lobbyists surveyed in the Furlong and Kerwin study, as well as the agencies' frequent dependence on industry for key information needed to craft a proposed rule.

Finally, our data suggest that neither the threat of litigation nor the sheer volume of input caused the agencies to capitulate to one-sided stakeholder comments seeking change.[251] The disconnect was most obvious in the case of EPA's TSCA test rules, where industry representatives were typically the only participants. But OSHA and FCC also occasionally resisted changing their proposals in response to industry

247. In light of Libgober's research suggesting that industry meetings with agencies may carry more weight than written comments in influencing agency rules, this limitation in our study may be a significant one. *See* Libgober, *supra* note 19, at 451–52 (noting that meetings, which generate few records, are quite effective in shaping agency policy).

248. *See also* Krawiec, *supra* note 30, at 82, 84 (finding extensive industry engagement—relative to other affected groups—during the pre-NPRM period of the Volcker Rule); Oei & Osofsky, *supra* note 40, at 213.

249. Furlong & Kerwin, *supra* note 16, at 364; *see also supra* notes 34–35 and accompanying text.

250. *See also* Libgober, *supra* note 19 (reinforcing the suspicion of industry influence outside notice-and-comment with a study of industry lobbying at the Federal Reserve Board).

251. Litigation concerns might help explain the relatively elaborate reason-giving discussions in final rule preambles. *See* Oei & Osofsky, *supra* note 40, at 257 (explaining how high-profile litigation for tax rulemaking affects the rulemaking process).

comments, even when the commenters were unopposed. These findings are in fact consistent with a few other empirical studies which find that concentrated industry commenters fared poorly in convincing agencies to make changes to their rules.[252]

Agency deliberations with stakeholders were not necessarily subservient to the preferences of the two political branches, either. FCC's accommodation of low-power advocates over the objections of the National Association of Broadcasters and other commercial interests is particularly striking given its seeming disregard for congressional preferences. Changes in administration had no discernable impact on OSHA's responsiveness to industry comments, despite its location in the Executive Branch and the obvious differences in the regulatory philosophies of Republican and Democratic administrations.[253] Additionally, EPA rejected most industry comments in all of the test rules, despite the fact that all but one of these rules were promulgated under neoliberal Republican administrations.

It would be naïve to suggest that agencies are completely open-minded and uninfluenced by the views of particularly powerful or litigious interest groups or to the legal and political risks associated with their actions. As supplemented by interviews with agency careerists, however, our aggregate data and case studies suggest that the agencies were actively cultivating deliberations that fleshed out the issues arising in rulemakings in meaningful ways.[254] The incentives and organizational dynamics that account for this bear further investigation. In an optimistic vein, however, we might speculate that expedient, self-interested bureaucratic behavior is sometimes eclipsed by a reasoned decisionmaking process in which professional staffers consider the merits of stakeholder input.[255]

252. Several other empirical studies report a similar finding—namely disproportionate participation by industry in rulemakings that nevertheless fare poorly in persuading the agency to make the requested changes. *See* Furlong & Kerwin, *supra* note 16, at 356–59 (describing studies from 1986 and 1990 that discuss how industry participants fared poorly in persuading the agency to make the requested changes); Scheffler, *supra note* 48 (conducting a case study that exposes industry's limited influence in a DOT rulemaking).

253. We did not do a similar, administration-based examination of EPA rules because all but one of the EPA TSCA rules were promulgated in a Republican Administration and the vast majority were promulgated under President Reagan. *See supra* note 88.

254. We remind the reader that our data, and therefore our conclusions, do not include the Trump Administration or much of the Obama Administration.

255. *See* CROLEY, *supra* note 30, at 73–76 (finding that agencies are capable of assessing information independently to arrive at outcomes that are contrary to bureaucrats' self-interests).

C. Conclusion 3: There is Substantial Variation in how Agencies Engage Public Deliberation.

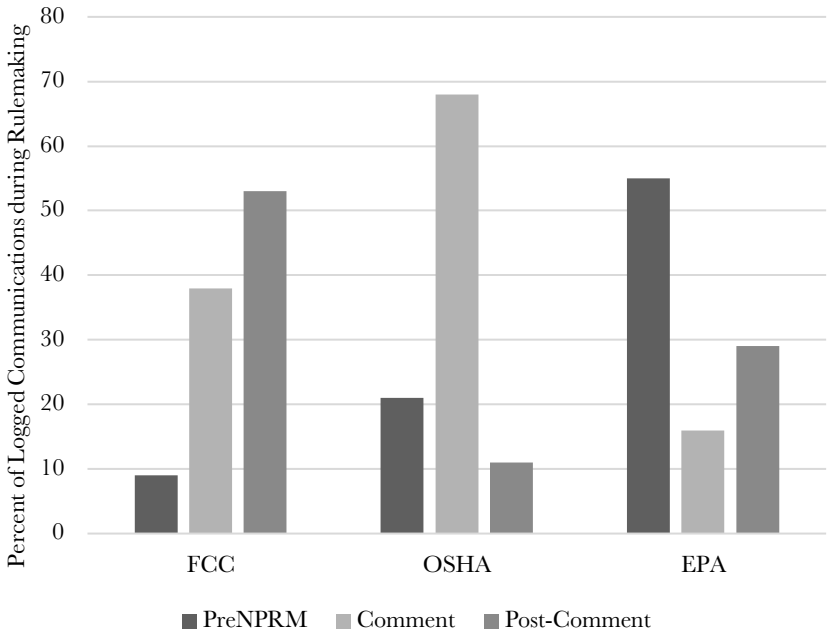
If the similarities across our three agencies tentatively suggest some broad generalizations about the role of participation in rulemaking, the differences are equally instructive, particularly from a normative perspective. The variations were evident with regard to a number of important deliberative features.

In setting workplace standards, OSHA embraced elaborate, trial-like public hearings that allowed not only participation but cross-examination of agency and stakeholder witnesses and rebuttal testimony. The deliberations were so extensive that OSHA's records could encompass as many as 213 issues, see Figure 18, with many revisions afterwards. EPA's approach in promulgating chemical test rules was arguably the opposite of OSHA's open outreach. It involved extensive deliberations, but they were all informal and occurred outside normal processes where the agency engaged the manufacturers and trade associations most knowledgeable about chemicals in the development of its test rules. In contrast to both EPA and OSHA, the majority of deliberations in FCC broadcast rules occurred in the post-comment phase. In part, this is because FCC offers opportunities for post-comment reply-styled filings that provide adversarial opportunities for the parties to respond to each other's factual assertions and policy arguments. At the same time, a substantial share of ex parte communications occurred during this stage of the rulemaking.

Figure 17 charts some of this variation in the extent and placement of deliberations in the three agency programs.[256] EPA's deliberations peaked outside the notice-and-comment process, occurring primarily pre-NPRM. By contrast, OSHA's much more extensive deliberations (with a mean of about 154 comments) appear to be concentrated predominantly during the notice-and-comment process. FCC's approach led to a more stairstep form of deliberation, with extensive communications occurring after the comment period. While the filings reached a peak of sixty-six mean submissions during the post-comment vetting process, the direct adversarial nature of these submissions may have helped reduce the agency's investigatory burdens, just as briefs can educate judges about the key issues in play.

256. Because docketing practices between the agencies vary outside of the notice-and-comment process, we cannot make firm comparisons. We know that EPA's written policies require docketing communications throughout the rulemaking (although an interviewee suggested this was not always followed). *See* SFERRA-BONISTALLI *supra* note 37 and accompanying text. FCC appears to take a similar position with its ex parte policy. *See supra* note 59. OSHA remains a mystery; although several anonymous OSHA personnel indicated that OSHA attempts to resist pre-NPRM communications, a position that is also consistent with its semi-formal approach to rulemaking.

Figure 17: Proportion of Mean Communications with Stakeholders at each Stage of the Rulemaking Lifecycle



Although a standard period for notice-and-comment is thirty days, this phase of the process also lasted much longer on average for all agencies.[257] See Table 1. While some of the longer periods might have involved an opening and closing of multiple comment opportunities, it was not uncommon for the record to remain open over the course of an agency's single comment period, with multiple extensions.

257. Rachel Potter generally found short comment periods on average in her study. POTTER, *supra* note 30, at 120. However, she notes that when there was likely political opposition to an agency rule, the comment period was extended. *Id.* at 122, 127. There may be other reasons why our three agencies tended to go overboard in remaining accessible to comment, but our study suggests a tendency to remain open as long as participants have something to offer. *See also* STOLL, *supra* note 30, at 120–21 (observing generous extensions by agency, including in considering comments submitted after the comment period closed).

	EPA	FCC	OHSA Health	OSHA Safety
Median Comment	61	56	83	101
Mean Comment	211.16	137.98	315	515
Maximum Comment	1489	2226	1916	2670
Minimum Comment	30	4	31	60

Table 1: Number of Comments on Agencies Rules

As the table indicates, OSHA's safety standards spanned the longest comment period.[258] It is perhaps no coincidence that these rules also often involved the largest number of participants weighing in from diverse backgrounds and the greatest number of issues. By contrast, FCC's comment process was the least protracted. Perhaps given the incremental approach adopted by FCC in its broadcast rules, the agency values the swift finalization of one rule in order to make progress on the larger, and therefore longer, rulemaking project.

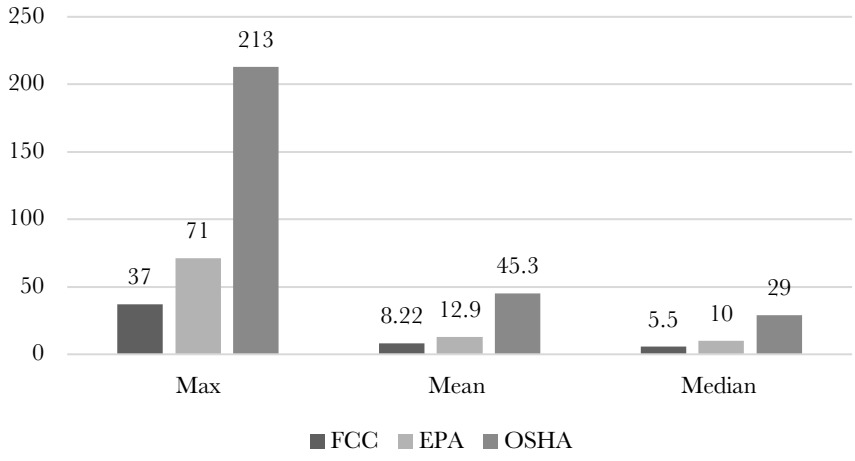
Finally, the actual number of issues in contention during notice-and-comment varied considerably from agency to agency, suggesting that some rulemakings were more focused, while other rules attracted input on hundreds of discrete issues. FCC deliberations were again the most limited; the mean number of issues at play in an FCC rule was only eight issues per rule, with a maximum number of thirty-seven. EPA received many fewer commenters than FCC—less than half—but faced almost double the number of issues raised in notice-and-comment, averaging thirteen issues per rule even after extensive pre-NPRM negotiations.[259] The maximum number of issues raised for a single rule at OSHA was 211, with the mean for health rules totaling 35 significant issues and safety

258. We also compared the comment period with the times it took the agency to ultimately issue a final rule. In general, the mean comment period was about half of the time the agency took to develop its response.

259. There were only two commenters in an EPA rule that involved seventy-one issues. The docket in this proceeding contained dozens of written correspondences, meetings, and telephone calls from Eastman Kodak and the Chemical Manufacturers Association that occurred before the NPRM was published. *See* Docket 42085, Diethylene Glycol Butyl Ether and Diethylene Glycol Butyl Ether Acetate; Test Standards and Requirements, 53 Fed. Reg. 5932, 5932 (1988) (to be codified at 40 C.F.R. pts. 795 & 799).

rules averaging out at 54 significant issues. As Figure 18 reveals, there was also considerable variation within an agency's program regarding the number of issues raised by commenters.

Figure 18: Total Number of Issues per Rule raised by Commenters



The large number of issues raised by some rules may be indicative of complex policy decisions, but that is not necessarily the case. It might simply reflect the nature of the proceedings and motives of the participants. Richard Stoll reminds us that there are "no limitations" to the number, volume, or nature of communications one can lodge with the agency,[260] and James Landis hypothesized in the 1950s that stakeholders can exert a "machine gun" impact on agencies through unlimited participation.[261] Another possible metaphor is "blunderbuss" submissions, filed by a single participant or by multiple participants in a coordinated fashion, that consist of dozens—or even hundreds—of criticisms of every conceivable aspect of the proposal.[262]

It is possible that the large number of issues raised in so many OSHA rulemakings, as indicated in the above chart, resulted from only a handful of blunderbuss submissions. One might also wonder whether some of the EPA rules—particularly the seventy-one comments lodged by two commenters who were already deeply involved in the pre-NPRM negotiations—fit that

260. STOLL, *supra* note 30, at 85.

261. *See, e.g.*, *id.* at 105, 124–25 (suggesting the "piling on" strategy as potentially effective, particularly when the comments are substantive and unique).

262. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1400 (1992).

description. FCC may have dodged these bullets in part as a result of its more vigorous adversarial cross-vetting among participants, which may have helped discipline blunderbuss practices that would be quickly called out by opponents.

VI. THE ROAD AHEAD

The agencies in our study provided multiple opportunities for stakeholders to participate in their rulemakings before, during, and after the comment period.[263] Stakeholders identified dozens and sometimes hundreds of issues during the comment period, and the agencies dedicated considerable energy and resources to addressing their concerns. Equally instructive is the fact that the agencies occasionally facilitated participation in different and sometimes creative ways. We attribute this in large measure to the unique challenges and pressures the agencies confront in order to be effective and to maintain their legitimacy and support within the political system.

Institutional analysis can be sterile if divorced from its normative implications. Accordingly, we consider in this final section the distinctive ways in which our three agencies deliberated in terms of the core administrative values of transparency, analytical rigor, effectiveness, and balanced responsiveness. Our conclusions are preliminary and must be qualified by a consideration of the environments in which the agencies operate, but they nonetheless may have prescriptive implications going forward. Notwithstanding the criticisms that have been levied against it, FCC's distinctive way of developing policy may have advantages over more conventional approaches to rulemaking that have gone unnoticed.

A. Preliminary Conclusions

Despite the opportunities for participation they provide, our data and case studies indicate that the deliberative processes employed by EPA and OSHA are limited in somewhat opposite ways. EPA negotiates the key features of TSCA testing regulations with industry before a notice appears in the *Federal Register*, and the effects of public comment appear more limited. If EPA's process lacks transparency and perhaps balanced responsiveness in this regard, OSHA's development of health and safety rules arguably lacks effectiveness. Whereas all interested parties can participate through notice-and-comment and even cross-examination, the input of studies, expert testimony, and other submissions is so extensive that OSHA rulemakings seem to suffer from paralysis.

The extent to which the limitations of these approaches can be avoided is unclear given the legal, technical, and political environments in which the two agencies operate. EPA's promulgation of test rules is constrained by

263. As noted elsewhere, our data ends before the Trump Administration.

statutory deadlines, and it is not clear that representatives of diffuse public interests would have the incentive and wherewithal to participate if the process were simply made more open, without corresponding subsidies or similar outreach mechanisms for thinly financed groups. OSHA may have little discretion to develop rules in a more expeditious way given the more formal procedures and heightened burden of proof it has interpreted its organic legislation to require. Still, the two agencies' approaches may be subject to longstanding criticisms of rulemaking procedures more generally—that they are performative in the case of EPA and a source of ossification in the case of OSHA.[264]

FCC's unorthodox approach seems to mitigate both of these problems. Public notices that address some questions but are open-ended with respect to novel or controversial issues can promote transparency and afford meaningful opportunities for all stakeholders to participate at an early stage of the decisionmaking process, before the agency has invested significant organizational resources and political capital in defining problems and choosing specific courses of action. This stands in contrast to EPA's practice of developing detailed proposals in consultations with industry that take place behind closed doors. It also contrasts with OSHA, which extensively develops proposed rules that often involve hundreds of moving parts and contestable issues.

FCC places comments, ex parte communications, studies, and other information it receives in response to initial and subsequent notices in a docket that remains open and publicly accessible throughout its proceedings.[265] Some of its dockets span multiple rulemakings that develop policy incrementally or that involve issues that are otherwise interrelated.[266] In addition to its transparency, this process can entail a richer and more effective form of deliberation than is often the case in a conventional rulemaking. Rather than using public comment to test a fully developed proposal that has acquired substantial momentum, FCC's more incremental approach can facilitate an open and ongoing dialog among interested persons that can move from the general to the specific on important issues. The process is typically adversarial to be sure and still may not be adequately

264. EPA's and OSHA's deliberative processes also illustrate the internal tensions in the design of administrative process discussed by Blake Emerson, in which the "efficient promulgation of rules often comes at the expense of thorough deliberation by all affected parties over the precise contours of those rules." EMERSON, *supra* note 28, at 170. *See also* Elliott, *supra* note 45 (stating that public participation is not where rulemaking occurs); McGarity, *supra* note 262, at 1,403 (noting ossification at OSHA).

265. U. S. GOV'T ACCOUNTABILITY OFF., GAO-07-1046, FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION 1–2 (2007).

266. *Id.* at 26–27.

inclusive of all affected interests (we simply cannot determine this from our data). FCC's process is also often driven by economic and other interests rather than by a desire to share information among dispassionate experts. It does, however, provide the agency with an early sense of what the difficult questions are, where stakeholders stand on them, which issues can be resolved, and which should be deferred pending additional deliberation.[267] This vetting and culling of issues can be useful, particularly in an era in which many federal agencies are notoriously understaffed.

Reinforcing FCC's incremental approach to rulemaking are several other complementary features that appear to enhance stakeholder deliberations. Most noteworthy is its solicitation of crossfire among commenters after the comment period closes. This adversarial process presumably helps the agency gain greater purchase on points of disagreement, as well as identify areas of unexpected consensus. The facilitation of this dialog allows the FCC to shift still more of the information-gathering and analytical burdens to the participants themselves, although doing so could also raise the cost of participation for these parties.[268] The Commission's formal logging of ex parte communications also enhances deliberation. While logging does not begin until after a proceeding receives a docket number, at that point the agency generally, but not always, appears to provide easily accessible information about all stakeholder communications. A study by GAO found that most of the hundreds of ex parte filings in the four proceedings it examined were appropriately informative, and that the participants it interviewed were generally aware of each other's positions when that was not the case.[269]

FCC's approach to rulemaking is not without its critics.[270] Rather than promoting transparency and balanced access, Philip Weiser argues that open-ended notices leave a vacuum that is filled by ex parte communications.[271] This, he argues, allows experienced actors to discern the agency's intentions

267. *Cf.* Bernthal, *supra* note 157, at 619, 620, 638, 645 (discussing how FCC lacks resources and thus depends heavily on stakeholders for information).

268. While OSHA attempts some of this through its post-hearing processes, during which participants can file responses to other participants, the lack of focus, coupled with hearings that span months makes OSHA's attempt at instituting an adversarial approach less practical or effective, at least for the larger rules. *See supra* Section III.B.

269. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1046, at 21.

270. *See, e.g.*, Bernthal, *supra* note 157 (calling for reform at FCC); Weiser, *supra* note 7 (critiquing the institutional failures of FCC); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1046 (finding that some ex parte filings did not comply with FCC's requirements and some stakeholders had special access to nonpublic information).

271. Weiser, *supra* note 7, at 677 (noting that the agency has for years worked with ex parte communications rather than a formal notice-and-comment procedure).

and influence the direction policy will take behind the scenes.[272] Although these ex parte contacts are docketed, Weiser notes that the descriptions of what transpired are sometimes so vague as to offer little transparency.[273]

Weiser also feels that the open-ended process comes at the expense of planning and the agency's ability to deal with interrelated issues in a holistic and coherent way.[274] Expanding on this critique, Brad Bernthal argues that the "prevailing FCC practice" of "open-ended rule making practices without deadlines" is a further source of "uncertainty and delay" that stifles innovation within the communications industry—effects that are "especially problematic for startups and newcomers with limited financial resources and little regulatory savvy."[275] Several stakeholders GAO interviewed in a subsequent study added to this critical assessment, complaining that open-ended notices tend to create an excessive volume of public comment, some of which addresses issues that turn out to be irrelevant to the agency's final course of action.[276]

B. The Advantages of Incrementalism

Why, then, has FCC's tendency to engage in "ad hoc decision making . . . remained largely intact,"[277] despite such long-standing criticism? We suggest that its approach is best understood as an adaptation to an environment where synoptic decisionmaking is ill-suited for the issues it must often confront. In many cases, the agency faces uncertainty about means-ends relationships and disagreements over the goals that policy should serve. These challenges are reinforced by constantly changing technologies and commercial practices within the communications industry, as well as by frequent disagreement among the commissioners over the direction policy should take.[278] FCC's efforts to meet these challenges have arguably evolved from its early reliance on adjudication to develop policy to a hybrid model of rulemaking that produces generally applicable standards, but retains some of the advantages of case-by-case decisionmaking.[279] This incremental method allows the agency to deal with problems that have ripened or that are

272. *Id.* at 692; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1046, at 4.

273. Weiser, *supra* note 7, at 685 (providing a case study to make this point).

274. *Id.* at 683.

275. Bernthal, *supra* note 157, at 620.

276. GAO Report, FCC MANAGEMENT, *supra* 157, at 27–28.

277. Weiser, *supra* note 7, at 682.

278. *See, e.g.*, *id.* at 678; Bernthal, *supra* note 157, at 635.

279. *Cf.*, Lindblom, *supra* note 231, at 86 (noting that policymakers who make incremental changes to policy aim to make small changes towards the overall policy goal while avoiding major mistakes); Paul Berman, *Thinking About Programmed and Adaptive Implementation*, *in* WHY POLICIES SUCCEED OR FAIL 205 (Helen H. Ingram & Dean E. Mann eds., 1980).

otherwise technically and politically tractable, sometimes by issuing partial rules where it can break down general policy into its constituent parts, and to defer other issues pending the collection of more knowledge or additional experience in dealing with individual situations.

The broader relevance of the FCC's approach lies in the fact that it is hardly the only agency that must resolve complex technical and social issues in a dynamic regulatory environment. Similar challenges exist in many other regulatory environments. Although the theoretical advantages of rulemaking help to explain its dramatic expansion over the past fifty years,[280] it remains subject to the informational and political constraints that once discouraged its use by FCC and other agencies.[281] Efforts to address many complex issues all at once face analytical challenges that make it difficult to anticipate their effects. And because it is more precipitous and encompassing in its impact, rulemaking adds to the political challenges agencies face. The backlash against regulation that followed on the heels of the so-called rulemaking revolution of the 1970s suggests that the certainty that a comprehensive policymaking approach provides may not outweigh the burdens it imposes in the eyes of regulated entities. As Ernest Gellhorn and Barry Boyer note:

> Despite these advantages of rules over individual adjudications, the agencies probably would not have made such a marked shift toward rulemaking without some external pressures. From the agency's perspective, writing a general rule is often more difficult than deciding a particular case, and the likelihood of producing an undesirable or unintended result is correspondingly greater. Moreover, general rules are more likely to inspire concerted opposition from those who will be covered by them.[282]

Indeed, the criticism that FCC's open-ended notices result in excessively protracted proceedings may overlook the fact that other agencies often spend years developing detailed proposals before publishing an NPRM.[283] As OSHA's experience demonstrates in this study, agencies that attempt to support a single, comprehensive rule with analysis that considers the full range of interests and possible effects can encounter substantial disagreement

280. *See generally* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 403–05 (1981) (explaining early administrative adjudicators proposed or extended policy only to the issues brought before the agency, compared to more nuanced rulemaking currently conducted by agencies).

281. *See, e.g.*, Baker, *supra* note 230, at 662–64 (indicating that rulemaking relies on expanding on prior agency policy, preventing rulemaking that may invalidate previous rules or ad hoc adjudication, settling issues without lengthy hearings, providing interested parties an opportunity to speak, and overall agency reviewability).

282. ERNEST GELLHORN & BARRY B. BOYER, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 10, 307 (1997).

283. *See, e.g.*, West, *supra* note 48, at 69 (explaining a study of forty-three rules found the average length of the proposal--development process was 5.3 years).

and delays. Additionally, once an agency finalizes a comprehensive rule, revisions are often needed soon thereafter to address unanticipated effects and correct analytical oversights. In an earlier study, we found that the difficulty of predicting the substantive and political consequences of decisions helps to explain why so many rules are revisions of previous rules.[284]

If initial notices are open-ended with regard to some issues under FCC's approach, then further notices typically allow affected interests to weigh in on more clearly defined questions or recommendations. Among the explanations for this is that reviewing courts expect agencies to "fairly apprise interested persons' of the issues" in their proceedings under threat of vacating the final rule.[285] Moving from the general to the specific in this way may generate initial input that has little to do with the agency's final course of action. Given that agencies typically consult with at least some affected interests as they define problems and consider and eliminate alternative solutions as they develop specific NPRMs, however, the current choice under the traditional notice-and-comment process may be between deliberating in the shade or proceeding with the rulemaking incrementally. Although agencies sometimes use mechanisms such as open hearings and advanced notices to gather public input at an earlier stage of the process, this is by far the exception rather than the rule.[286] While FCC's approach can be criticized as inefficient, then, whatever costs it might incur in terms of wasted input and delay should be weighed against the early and open access its notices provide.

Incrementalism has long been out of fashion as a prescriptive theory of bureaucratic decisionmaking.[287] This is reflected not only in the emphasis on rulemaking, per se, but in other institutions designed to promote comprehensive rationality in administration. These include constraints on the rulemaking process, such as cost-benefit analysis and the expectation that agencies base their decisions on evidence in a record,[288] as well as more general requirements that agencies develop strategic plans that establish a hierarchical order of ends and means.[289] Yet incrementalism has undeniable advantages that were once widely recognized within the fields of public

284. *See* Wagner, et al., *supra* note 54, at 194–98 (arguing that adaptive rulemaking is necessary as the information underlying rules is bound to change).

285. B.W. MINTZ & N.G. MILLER, *supra* note 39, at 177.

286. In a sample of 249 regulations taken from the *Federal Register* in June and July of 2007, only 3.6% of all rules and 15.2% (5/33) of significant ones involved advanced notices. *See* West, *supra* note 35, at 586 tbl.1.

287. *See, e.g.*, Diver, *supra* note 280, at 408–09 (noting criticisms of incrementalism).

288. *See generally* THOMAS O. MCGARITY, REINVENTING RATIONALITY (1991).

289. *See, e.g.*, WILLIAM F. WEST, PROGRAM BUDGETING AND THE PERFORMANCE MOVEMENT: THE ELUSIVE QUEST FOR EFFICIENCY IN GOVERNMENT (2011).

administration and political science.[290] It can allow agencies to avoid mistakes while addressing critical policy issues in ways that are technically sound and politically feasible. Indeed, even critics of FCC's rulemaking have suggested reforms that seem to preserve the advantages of an incremental approach. These include mechanisms such as providing more precise questions, sponsoring studies, and conducting information-gathering hearings throughout the rulemaking process.[291]

C. Extrapolating FCC's Incremental Approach to Others

Assuming that FCC's incremental approach offers a potentially useful way for it to develop rules, an obvious question is whether that would be workable in other contexts. After all, a key finding of our study is that agencies comply with and supplement notice-and-comment requirements in adaptive ways that are consistent with their distinctive legal, technical, and political environments. FCC's rulemaking setting—which includes some high-profile broadcast rules, relatively diverse participants whose alliances shift from issue to issue, substantial independence from the chief executive, and frequent disagreement among the commissioners—positions it in a very different regulatory environment from OSHA and EPA, as well as many other agencies.

Several questions thus arise in extrapolating FCC's incremental approach to other regulatory arenas. First, might some agencies' organic legislation prevent them from adopting an incremental approach? Would such a deliberative process be compatible with the statutory deadlines that EPA test rules must meet, for example, or with the more formal hearings that OSHA has interpreted its statute to require? Perhaps an incremental approach is simply not feasible for certain types of rules, such as protective standards, where companies are eager for final compliance requirements that allow them to plan ahead.

On the other hand, the findings from our prior study of these same agency rules reveal that post-promulgation revisions of EPA's and OSHA's final rules were, if anything, more extensive than with FCC rules, albeit less deliberative since the agencies regularly revised their rules without notice-and-comment.[292] This post-promulgation approach to revising rules was presumably deployed in part because the agencies adhered to a synoptic approach. Even more to the point, these extensive revisions (staying deadlines, excluding industries, sub-dividing requirements, adding more flexibility to specific standards and provisions for case-by-case waivers) are a

290. See, for example, Lindblom, *supra* note 231, at 87, providing the classic articulation of this argument. *See also* AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1984).

291. *See, e.g.*, Weiser, *supra* note 7, at 693, 695, 699–701, 703, 711, 715–16 (discussing these and other promising reform proposals designed to improve deliberations).

292. *See* Wagner et al., *supra* note 54, at 203 (discussing rule revision).

testament to how common it is for agencies to break off pieces of rulemaking initiatives for subsequent determination or adjustment.[293] The primary difference is that rather than the post-hoc and often ad hoc and nontransparent approach that EPA and OSHA take to rulemaking revisions, FCC engages in a planned approach to incremental decisionmaking at the outset.

Where participation in the development of rules is one-sided, a second question is whether an open-ended and adversarial process would make much of a difference or whether diffuse public interests would still remain on the sidelines.[294] FCC's participants tend to be diverse, offering multiple perspectives in ways that provide benefits of deliberative incrementalism that might not transfer well to EPA rulemakings. Additionally, shifting coalitions of well-financed stakeholders in FCC rulemakings may leave no particular group disadvantaged in at least some rulemaking settings. At first blush, then, applying its incremental and adversarial approach to the development of EPA test rules might appear to favor industry stakeholders and further deplete the limited resources of diffuse public interests.

If creatively implemented, however, FCC's approach might actually provide representatives of diffuse interests with more leverage in some rulemaking deliberations. Teasing out the overarching policy issues incrementally can facilitate greater engagement with all stakeholders, including thinly financed groups. In certain OSHA and EPA rulemakings, for example, there are dozens or even hundreds of issues in play in a single proceeding. Paring these down to a few, manageable policy questions can make decisions more accessible to a wider swath of participants. This potential advantage is particularly evident when FCC's approach is compared with the conventional approach, where agencies often revise rules after the fact and out of sight.[295]

One-sided and unopposed deliberations with the regulated industry would also be more visible under FCC's approach. The interactions between the agency staff and industry representatives, as revealed by the logging of ex parte contacts,[296] would provide an early accounting of how rulemaking deliberations are playing out. In the context of test rules, for example, the one-sided EPA–industry negotiations would become evident well before the

293. *Id.* at 205–08.

294. GAO reports that even in FCC proceedings, some of these thinly financed groups find themselves somewhat disadvantaged because of the costs of engaging in crossfire and related deliberative opportunities. GAO Report, FCC MANAGEMENT, *supra* 157, at 27–28.

295. Wagner et al., *Dynamic Rulemaking*, *supra* note 54, at 208–13, 227 (noting that rulemaking is generally considered a "static process").

296. *See, e.g.*, FCC, *Ex Parte*, https://www.fcc.gov/proceedings-actions/ex-parte (last visited Aug. 16, 2021) (outlining ex parte presentations); 47 C.F.R § 1.1200-1.1216 (2019) (defining rules and procedures surrounding ex parte communications).

rulemaking was completed. This might in turn provide additional momentum for reforms, such as the use of proxy representatives or subsidies to facilitate engagement by nonprofit and grassroots organizations.

While our emphasis has been on finding a way to strengthen participation in ways not yet explored in the literature, we would be remiss if we did not identify the need for reform of several other well-known deliberative problems that are underscored by our empirical findings. First, in our study participation was dominated by industry and industry trade groups, with far less engagement by thinly financed interests, a finding consistent with other empirical studies.[297] Although EPA's rulemakings were by far the most one-sided, the imbalance was significant across all three agencies at all stages of the rulemaking process.

It is possible that agency staff attempt to address participation inequities as they respond to comments. This perhaps was the case for OSHA's health rules and EPA's testing rules, for example, where industry comments were rejected at a significantly higher rate than they were accepted.[298] Yet even the best efforts of civil servants to anticipate the views of missing stakeholders will likely fall short. We thus join the growing chorus of scholars who suggest that agencies move beyond their current methods of engaging affected interests. Each of our agencies supplemented the APA's requirements in ways that were salutary and sometimes creative, but that remained largely passive. Among the proactive measures that might help level the participatory playing field are proxies, subsidies, citizen advisory boards or juries, and other indirect incentive approaches.[299]

A second, and also unsurprising, problem that occurred across the three agencies was the potential existence of undocumented deliberations occurring during the development of proposed rules.[300] Our own efforts to describe participation were in fact limited precisely because of the absence of information about how the agencies engage with stakeholders as they are defining problems and evaluating and eliminating possible solutions.

297. *See supra* note 40 and accompanying text (citing examples of industry participation in hearings across various agencies).

298. *See supra* Sections II.A.2 and II.B.2. (identifying EPA and OSHA practices of responding to comments from interested industries).

299. *See, e.g.*, Cuéllar, *supra* note 20; Sant'Ambrogio & Staszewski, *supra* note 8, at 832–43 (discussing possible plans to increase public engagement); Neil K. Komesar & Wendy Wagner, *The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 944–47 (2017) (suggesting the establishment of a public advocate to increase public engagement).

300. *See* SFERRA-BONISTALLI, *supra* note 37, at 69, 79–81 (discussing this general problem); *see also* Bernthal, *supra* note 157, at 640–41, 649–52 (discussing the lack of pre-NPRM logs and the influence of stakeholder discussions in the pre-NPRM stage at FCC).

Although this was less of an issue for FCC given the frequent use of open-ended notices, even its proceedings could be opaque with regard to participation that might have influenced agenda-setting decisions at the early stages of the process. The literature is again filled with excellent proposals for reform on how to handle these pre-NPRM stakeholder deliberations, and we reference that reform literature as a starting point on this score as well.[301]

CONCLUSION

We discovered an unexpectedly rich world of deliberations within agency rulemakings in the three agency programs we studied. Our evidence suggests that the APA's limited constraints on informal rulemaking provide more than sufficient flexibility to allow agencies to adapt the procedures they employ in ways that facilitate meaningful participation in accordance with the demands of different regulatory environments. On the other hand, our findings also indicate that some agencies have fared better than others when exposed to hostile regulatory environments over four decades. While it is not surprising that EPA and OSHA—who face perhaps the greatest deliberative challenges in different ways—have struggled to develop participatory processes that are both inclusive and effective, the unorthodox way in which FCC has adapted to its environment may have little-appreciated advantages. Any normative conclusions from our study remain tentative; the fact that FCC's approach is so unorthodox suggests the need for further analysis. At least on its face, however, an incremental approach to rulemaking addresses long-standing criticisms of the rulemaking process in ways that may offer exactly the kind of innovative approach needed for a rebooted administrative state.

301. *See, e.g.*, SFERRA-BONISTALLI, *supra* note 37, at 86–87 (suggesting reforms to the ex parte process); *see also* Sant'Ambrogio & Staszewski, *supra* note 8, at 832–33, 837, 847 (suggesting changes to ex parte processes to increase public engagement).