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### Repository Citation

Michael Herz, "*Data, Views, or Arguments*": *A Ruminatiion*, 22 Wm. & Mary Bill Rts. J. 351 (2013), <http://scholarship.law.wm.edu/wmborj/vol22/iss2/7>

## “DATA, VIEWS, OR ARGUMENTS”: A RUMINATION

Michael Herz\*

[T]he agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . .

—5 U.S.C. § 553(c)

### INTRODUCTION—THE PARABLE OF THE HONEYBEES

In 1989 Charles Koch gave a short paper at the Annual Symposium of the Institute of Bill of Rights Law, which that year was, of course, devoted to the bicentennial of the Bill of Rights. Charles’s paper was entitled *Cooperative Surplus: The Efficiency Justification for Active Government*.<sup>1</sup> It was a brief comment (actually more of an assault) on Richard Epstein.<sup>2</sup>

“Cooperative surplus” is an economist’s term; it refers to the additional benefits that can be created when individuals cooperate instead of compete.<sup>3</sup> Think of the prisoner’s dilemma. Charles’s basic point was that government exists to create, and then fairly to distribute, a cooperative surplus.<sup>4</sup> That is a very happy view. I think it is basically right, at least in theory. To be sure, government *feels* coercive, and people are naturally more focused on what it takes than on what it gives. But at bottom it is a mechanism of cooperation and mutual agreement, one that is (or can be) at least Kaldor-Hicks efficient.<sup>5</sup>

I mention this article for three reasons.

First, it is a reminder that as administrative lawyers, often absorbed in the grubby details, we should look to the big picture from time to time. And this is a very happy account of the big picture.

Second, while Charles focuses on substantive principles, he does make a passing reference to procedure, noting that in light of this conception of government’s basic

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<sup>1</sup> Charles H. Koch, Jr., *Cooperative Surplus: The Efficiency Justification for Active Government*, 31 WM. & MARY L. REV. 431 (1990).

<sup>2</sup> *Id.* at 431.

<sup>3</sup> *Id.* at 434–35.

<sup>4</sup> *Id.* at 435.

<sup>5</sup> For a discussion of Kaldor-Hicks efficiency and its relation to governmental functions, see Herbert Hovenkamp, *Legislation, Well Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990).

function, “the Constitution requires that we take or allocate surplus through a certain type of decisionmaking: a republican form and due process.”<sup>6</sup> That is, legislative policy-making requires a republican form of government;<sup>7</sup> adjudication must be conducted with due process.<sup>8</sup> Agency rulemaking—the administrative counterpart to legislation—is not directly subject to either of these constitutional commands. However, it can be seen as a small-r republican undertaking.<sup>9</sup> In this Article, I will address certain small-r republican aspects of rulemaking—ways in which it is or is not about open debate and popular input.

And third, Charles mentions bees. This may not seem important. But I want to talk about honeybees and need a hook. Here is the bees reference: “Active government is necessary to create the cooperative surplus on which we all thrive. Because man lacks the altruistic instincts of bees and ants, we can only achieve the cooperative surplus by accepting compelled cooperation. In a complicated society, government necessarily performs this function.”<sup>10</sup>

Charles thought that bees and human beings were too different for the first to be any sort of model for the second. I am ultimately going to agree. But not everyone does. One person who does not is Thomas Seeley, a professor of biology at Cornell University and one of the world’s leading experts on honeybees. For many years, he has researched how wild honeybees go about picking sites for new hives after a swarm has left its old home. In 2010 he published a book for lay readers with the intriguing, charming, and slightly challenging title of *Honeybee Democracy*.<sup>11</sup> Seeley argues that the collective decisionmaking process through which honeybees pick a hive site holds lessons for human beings.<sup>12</sup> For Seeley, honeybees offer a real-world example (perhaps the only real-world example?) of a perfectly functioning democracy.<sup>13</sup>

When a honeybee colony starts to outgrow its existing hive, it breeds a new queen, and the old queen and most of the colony heads off to a new home.<sup>14</sup> When they leave the existing hive, they do not know where they are going. They just leave and then assemble in a massive swarm someplace close by.<sup>15</sup> There they sit, for a few hours or a

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<sup>6</sup> Koch, *supra* note 1, at 438.

<sup>7</sup> U.S. CONST. art. IV, § 4.

<sup>8</sup> U.S. CONST. amends. V & XIV, § 1.

<sup>9</sup> See generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

<sup>10</sup> Koch, *supra* note 1, at 442. This excerpt recalls James Madison: “If men were angels, no government would be necessary.” THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>11</sup> THOMAS D. SEELEY, HONEYBEE DEMOCRACY (2010). The book is helpfully reviewed by Adrian Vermeule, *The New Fable of the Bees*, NEW REPUBLIC (Jan. 26, 2011), <http://www.newrepublic.com/book/review/honeybee-democracy-thomas-seeley>.

<sup>12</sup> See SEELEY, *supra* note 11, at 1.

<sup>13</sup> See *id.* at 1–19.

<sup>14</sup> See *id.* at 6 (describing the bees’ house-hunting process).

<sup>15</sup> See *id.*

few days, while they search for a site for the new colony.<sup>16</sup> Some sites are better than others, and the colony’s success depends greatly on picking a good spot. So hundreds of scouts go house-hunting and report back to the whole group.<sup>17</sup> The collective listens to the reports, sends some more bees to check out the most promising sites, listens to their reports, and then makes a collective decision about which site to choose.<sup>18</sup> Consensus achieved, they take off, en masse, and fly straight to their new home.<sup>19</sup> With remarkable reliability, this process produces the right outcome—the bees select the best of the available alternatives.<sup>20</sup>

Sounds fantastic. How does it happen?

When scouts return to the swarm having located a possible site for the new home, they do the famous “waggle dance” (also used by bees to tell their hive-mates where good sources of nectar can be found) directly on the surface of the swarm.<sup>21</sup> This alerts other bees to the existence and location of a possible site. But what about its quality? The bee communicates information about the quality of the site through the exuberance of the dance—that is, how quickly she dances and how long the dance lasts.<sup>22</sup> Other bees then go check out the site, but because more bees will be exposed to a stronger dance, more will go check out the site for which there is a more enthusiastic report.<sup>23</sup> Assuming the later visitors are equally enthusiastic, support for a good site builds quickly; support for poor sites disintegrates.

Seeley concludes with a very optimistic analogy to democratic elections. He states that bees

conduct[ ] a frank debate among the scout bees supporting the various proposed nest sites. This debate works much like a political election, for there are multiple candidates (nest sites), competing advertisements (waggle dances) for the different candidates, individuals who are committed to one or another candidate (scouts supporting a site), and a pool of neutral voters (scouts not yet committed to a site). Also, the supporters for each site can become apathetic and rejoin the pool of neutral voters. The election’s outcome is biased strongly in favor of the best site because this site’s supporters will produce the strongest dance advertisements and so will gain converts the most rapidly, and because the best site’s supporters will revert to neutral-voter status the most slowly. . . . [T]he

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<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.* at 13–16.

<sup>22</sup> *See id.* at 14.

<sup>23</sup> *See id.* at 14–15.

bees do not minimize conflict to reach this consensus. Specifically, there is no suppression of dissenting views in the debate. Moreover, there is no pressure toward social conformity. Instead, each scout bee makes her own, independent decision of whether or not to support a site, based on her own, personal evaluation of the site, not on how others judge the site. Thus the bees aggregate the information about their options by conducting an open debate in which the best site prevails by virtue of its superiority, as judged time and time and time again by dozens, if not hundreds, of independent-minded scout bees.<sup>24</sup>

Seeley's comparison is to an election, but one might draw a similar optimistic comparison to notice-and-comment rulemaking, which generally also involves gathering information and evaluating alternatives. The hope for notice-and-comment rulemaking is that it will produce an outcome better than what the agency would have produced on its own by tapping into the broader and deeper wisdom outside the agency. Perhaps agency rulemaking has something to learn from honeybees?

It seems a great shame, but Seeley is, I am afraid, overstating the case. I loved this book. But I am not convinced it has valuable lessons for collective decisionmaking by human beings, at least in the political or policymaking arenas. The settings are too disparate. The bees' task looks daunting: they must make a vitally important decision in a limited amount of time from among a large number of options. They have solved the problem strikingly by combining interdependence with regard to agenda setting (which potential sites should we look at) with independent evaluation (which of those sites is the best). But compared to policymaking by human institutions, their task is unbelievably easy. For one thing, all the participants have equal resources and skills; no one bee's "voice" will drown out others or be more convincing than the merits of her position justify. More abstractly, and more important, the bees are applying decisionmaking criteria that are objective and agreed-upon; they are gathering *information*, not arguing about *values*. And to the extent they are aggregating preferences, the preferences are shared rather than conflicting or idiosyncratic. Seeley speaks of "views" about and "support" for different options.<sup>25</sup> But these terms are not quite right in that they imply a subjectivity present in human debates and absent in the case of the bees. The difference is highlighted by the fact that no bee visits more than one potential site; there is no direct comparison between sites, just an (implicit) comparison between the one site an individual bee sees and the (inborn and shared) understanding of what makes a good site.<sup>26</sup> Supporters of the worse sites simply give up, because they know the site is not that great, even if they have not seen a stronger dance about some other site.<sup>27</sup> So there

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<sup>24</sup> *Id.* at 236.

<sup>25</sup> *See, e.g., id.* (describing how the bees reach a consensus when selecting the best site).

<sup>26</sup> *See id.* at 122 ("[Scout bees] are able to judge the absolute quality of a site through reference to an innate scale of nest-site goodness.").

<sup>27</sup> *Id.* at 137–45.

is no *convincing* going on, there is a collective gathering of information that informs a judgment driven by universally agreed-upon, objective criteria applied by utterly rational decisionmakers.<sup>28</sup>

Alas, that is not what happens when human beings make group decisions.<sup>29</sup> Unfortunately, then, agencies cannot model their notice-and-comment processes on the waggle dance. But considering the differences between how bees choose a new home and how agencies write regulations still helps us think about what is taking place in notice-and-comment rulemaking and what the role of comments (a.k.a. “human waggle dances”) might or should be. It is to that issue that I now turn.

### I. THE APA THESAURUS

A familiar canon of construction holds that each word in a statute has a distinct meaning and none is superfluous. “It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”<sup>30</sup> Of course, the assumption that statutory drafters do not just get out the thesaurus and write a list of synonyms may be misplaced. Legal writing is often crammed with redundant synonyms, and the judicial insistence that every word in a statute must have an independent meaning can be fictional.<sup>31</sup>

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<sup>28</sup> Honeybees also do not make the sort of “errors” detailed by behavioral economists. So, for example, bees who were initially supportive of a particular site do not become wed to it or invest it with greater qualities than it actually has. No need, then, to worry about the endowment effect with regard to honeybee due process. Cf. Paul R. Verkuil, *An Essay on Due Process and the Endowment Effect*, 22 WM. & MARY BILL RTS. J. 563 (2013).

<sup>29</sup> Adrian Vermeule suggests that honeybee democracy may still hold lessons for human democracy in some settings:

In many cases, to be sure, human groups do not have bedrock common interests or preferences. Instead they have genuine conflicts of interest or incompatibilities of aims and values that go all the way down. Yet in such cases heterogeneous groups tend to fissure into more homogeneous subgroups, or to drive out dissenters; over time, self-sorting tends to produce human swarms with common preferences, implying that conflict will tend to occur across rather than within groups.

Vermeule, *supra* note 11. That seems right to me. But “conflict . . . across rather than within groups” is exactly what government agencies have to resolve, making rulemaking one of those settings where the honeybees are, well, a different species. Indeed, Seeley too acknowledges that in general human beings are engaged in “adversary democracy,” whereas “the group decision making of swarm bees is ‘unitary democracy’ since it involves individuals who have congruent interests (choose the best homesite) and share preferences (small entrance opening, etc.)” SEELEY, *supra* note 11, at 118–19.

<sup>30</sup> *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *accord Ransom v. FIA Card Servs.*, N.A., 131 S. Ct. 716, 724 (2011).

<sup>31</sup> See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*,

It is not fictional, however, with regard to the Administrative Procedure Act (APA).<sup>32</sup> The APA is carefully and precisely written; a number of its provisions set out a string of not-quite-synonyms, and the differences between these distinct terms should be taken seriously. The point is not so much that judges should be more ferociously textualist in interpreting familiar APA phrases; I do not think we can or should return to preambles that are truly “concise” and “general,” for example.<sup>33</sup> Rather, considering the particular terms chosen, especially where there are multiple terms, provides a window into the drafters’ understanding of the administrative processes they were setting up and a framework within which to place our own efforts to understand and reshape those processes.

The APA contains a number of what we might call “thesauric” provisions. Most involve phrases with which we are so familiar that we no longer hear or focus on the actual words:

- “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>34</sup>
- “contrary to constitutional right, power, privilege, or immunity”<sup>35</sup>
- “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”<sup>36</sup>
- “assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees”<sup>37</sup>
- “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license”<sup>38</sup>

None of this is poetry, or even the preamble to the Constitution. But it is precise, thorough, and clear. Drafters who write like this are trying hard to cover all the bases. They are choosing their words deliberately and with care. And they are thinking carefully about the processes they are setting out.<sup>39</sup>

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65 STAN. L. REV. 901, 934–36 (2013) (reporting that in actuality statutory drafters are often self-consciously redundant).

<sup>32</sup> Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2006)).

<sup>33</sup> See § 553(c).

<sup>34</sup> *Id.* § 706(2)(A).

<sup>35</sup> *Id.* § 706(2)(B).

<sup>36</sup> *Id.* § 706(2)(C).

<sup>37</sup> *Id.* § 551(10)(E) (one of seven meanings of “sanction”).

<sup>38</sup> *Id.* § 551(9) (definition of “licensing”). “License” is also a defined term; it comes in eight flavors. *Id.* § 551(8) (“[L]icense includes the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”). That means that “licensing” could in theory be any of eighty-eight different undertakings—the eleven kinds of “licensing” multiplied by the eight kinds of “licenses”!

<sup>39</sup> In at least one instance, this effort led the drafters astray. The APA defines “rule” as “an agency statement of general or particular applicability and future effect.” § 551(4) (emphasis

## II. “DATA, VIEWS, AND ARGUMENTS”

I want to focus on one mildly thesauric provision in particular. It is in the first sentence of § 553(c), which reads: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>40</sup>

I am especially interested in the four-word phrase “data, views, or arguments.” But before turning to those terms, there is one other notable aspect of this provision—the reference to “an opportunity to *participate in the rule making* through submission.”<sup>41</sup> The italicized terms are arguably unnecessary. The substance of the provision would seem little different if it had provided that “the agency shall give interested persons an opportunity to submit.” Instead, the provision highlights the direct involvement of those outside the agency. It is an embrace of a sort of partnership between the agency and these interested persons. “Participation” has become a watchword of contemporary open government enthusiasts,<sup>42</sup> but here it is in 1946. The premise is that those outside the agency have something important to contribute.

The language raises a second preliminary question: *who* outside the agency has something important to contribute? The APA refers to “*interested persons*.”<sup>43</sup> This

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added). One leading scholar has said this “may be the most blatantly defective provision in the Act.” Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077, 1077 (2004). Then-Professor Antonin Scalia once observed that “it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard.” Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383. The drafters’ error was adding “or particular.” The essential feature of a rule is its general applicability; its command applies to a class of cases rather than an individual. Particularity is the essential characteristic of an order. Professor Levin explains what the words are doing there—they are an effort to exempt certain decisions, such as ratemaking for a single firm, from the requirements for formal adjudications. Levin, *supra*, at 1081–82.

Nevertheless, the inclusion of the ‘or particular’ language in the definition of ‘rule’ was a blunder. Those words are superfluous, because the last clause of § 551(4) *expressly* defines ratemaking and kindred activities as rulemaking. The drafters were guilty of overkill, because they did not need to tinker with the opening clause in order to achieve the result they sought. In the process of making the definition sufficiently comprehensive to cover the exceptional cases *for which they had separately provided anyway*, they made the definition meaningless.

*Id.* at 1082.

<sup>40</sup> § 553(c).

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> See, e.g., Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) (stating that government should be transparent, participatory, and collaborative).

<sup>43</sup> § 553(c) (emphasis added).



language is often quoted but always overlooked. The assumption, usually implicit, is that anyone who cares enough to submit comments is “interested.” But “interested” can also mean having a stake. In a nutshell: is the opposite of “interested” *uninterested* or *disinterested*? It seems likely that the drafters of the APA understood “interested” to mean having a stake; they were focused in particular on regulated entities,<sup>44</sup> though there was also some concern for other affected parties. Moreover, for the term to do any real work, it cannot mean “anyone who finds the rulemaking of interest,” because by definition anyone who submits a comment meets that standard. On the other hand, to my knowledge no one has ever suggested limiting the right to comment to stakeholders.<sup>45</sup>

The uncertainty is apparent in President Obama’s Executive Order on “Improving Regulation and Regulatory Review.”<sup>46</sup> Section 2(c) states: “Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”<sup>47</sup> Thus, here the open-government President is focused on stakeholders; he makes clear that they include not only regulated entities but also regulatory beneficiaries, but he seems to draw the line there. On the other hand, section 2(a) of the same order has no such limitation: “regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among state, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and *the public as a whole*.”<sup>48</sup>

The question of who participates has become especially salient in recent years as the rulemaking process has moved online, enabling fuller participation by the lay public. What has been primarily an insiders’ game has opened up, and significant effort is being put into making it more accessible to all.<sup>49</sup> Notice-and-comment rulemaking is

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<sup>44</sup> See, e.g., ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941) [hereinafter ATTORNEY GENERAL’S FINAL REPORT] (“Participation by [those upon whom agency authority is brought to bear] in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.”).

<sup>45</sup> There seems to be no caselaw on the meaning of this term in § 553(c). In contrast, the same term in the APA’s *ex parte* provision, § 557(d), has been the subject of litigation, and is understood to limit the universe of covered individuals at least to some extent. See, e.g., *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (holding that President is an “interested person” within the meaning of 5 U.S.C. § 557(d)); *Prof’l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982) (holding that head of the American Federation of Teachers was an “interested person” with regard to a dispute over the certification of a different public employees’ union).

<sup>46</sup> Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012).

<sup>47</sup> *Id.* at 216.

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> See, e.g., Gregory D. Jones, *Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two Tier Regulation System for Regulations.gov*, 62 ADMIN. L. REV. 1261, 1262–70 (2010).

seen as an example of self-governance, and of democracy in action; by definition, more thorough-going and effective participation by the citizenry makes it more democratic. But it is worth examining what exactly lay commenters bring to the process.

Under the APA, “participants” offer three distinct things: data, views, and arguments. Those three terms seem carefully chosen. I do not want to attribute superhuman exactitude to the drafters, who were not necessarily or always using these three terms with utter precision.<sup>50</sup> But it matters that these terms are not synonyms. Identifying these three things—all three but only these three—reflects an implicit theory about what it is that commenters might provide, which in turn reflects an implicit theory about what it is rulewriters need to know in order to write good rules, which in turn reflects an implicit theory, most broadly, about what legitimizes agency action.

#### A. Data

The most straightforward of the three is “data.” Sound policy and effective regulation are impossible without an adequate understanding of relevant facts. In the modern world, “data” resonates in a way that it did not in 1946. Policy is to be “data-driven”;<sup>51</sup> key insights are to be had by mining “big data.”<sup>52</sup> But for purposes of understanding

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<sup>50</sup> For example, the Senate Report displays less care than I am giving the drafters credit for. At one point, describing the rulemaking process, it summarizes: “Agencies must publish notice and at least permit interested parties to submit their *views* in writing for agency consideration before issuing general regulations.” S. REP. NO. 79-752, at 7 (1945) (emphasis added). A few pages later, it explains: “[a]gency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive *data or argument* relating thereto.” *Id.* at 14 (emphasis added). Similarly, one early version of the House bill contained this predecessor to §553(c):

(b) PROCEDURES.—In all cases in which notice of rule making is required pursuant to subsection (a) of this section, the agency shall afford interested parties an adequate opportunity, reflected in its published rules of procedure, to participate in the formulation of the proposed rule or rules through (1) submission of written *data or views*, (2) attendance at conferences or consultations, or (3) presentation of *facts or argument* at informal hearings.

Administrative Procedure Act, H.R. 339, 79th Cong. § 3(b) (1945). Here “data” and “facts” seem to be paired synonyms, as do “views” and “argument.” The alternative reading is that “data” and “views” are material best presented in writing and “facts” and “argument” best presented orally, which would be mystifying.

<sup>51</sup> See, e.g., DANIEL C. ESTY & REECE RUSHING, GOVERNING BY THE NUMBERS: THE PROMISE OF DATA-DRIVEN POLICYMAKING IN THE INFORMATION AGE (Apr. 2007), [http://www.americanprogress.org/issues/2007/04/pdf/data\\_driven\\_policy\\_report.pdf](http://www.americanprogress.org/issues/2007/04/pdf/data_driven_policy_report.pdf) [hereinafter CENTER FOR AMERICAN PROGRESS WHITE PAPER]; see also MICHAEL LEWIS, MONEYBALL (2004). See generally Gary Wolf, *The Data-Driven Life*, N.Y. TIMES MAG., May 2, 2010, at MM38.

<sup>52</sup> See, e.g., TEACHAMERICA FOUNDATION, DEMYSTIFYING BIG DATA: A PRACTICAL GUIDE TO TRANSFORMING THE BUSINESS OF GOVERNMENT 6 (predicting that the impact of “big data” on government will be “transformational”).

§ 553,<sup>53</sup> “data” seems simply a synonym for “information.” *Of course* gathering data should be an element of notice and comment; if the process does nothing else, it should inform the agency.<sup>54</sup> As the 1941 Report of the Attorney General’s Committee on Administrative Procedure explained, rulemaking

procedures . . . should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses. They should also be adapted to eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action.<sup>55</sup>

Historically, critical information was perceived to come most obviously from members of the regulated community.<sup>56</sup> Those directly affected by proposed regulations will have the best information about their own products and activities. But the APA allows comment by all “interested persons,” which clearly extends at least to regulatory beneficiaries, and maybe more broadly than that. The Senate Judiciary Committee’s compilation on the legislative history of the APA, quoting the Attorney General’s Committee, notes that an agency’s “knowledge is rarely complete, and it must always learn the . . . viewpoints of *those whom its regulations will affect*.”<sup>57</sup>

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<sup>53</sup> 5 U.S.C. § 553(c) (2006).

<sup>54</sup> *See, e.g.*, STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON ADMINISTRATIVE PROCEDURE ACT 20 (Comm. Print 1946) (“[P]ublic participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.”).

<sup>55</sup> ATTORNEY GENERAL’S FINAL REPORT, *supra* note 44, at 102; *see also* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 216 (2013) (noting that because “crucial information often comes from people in the private sphere, which has unique access to that information,” providing for public comment “is not merely sensible . . . it is indispensable”); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1875 (2013) (“[T]hose outside of the federal government often have indispensable information, and OIRA understands one of its crucial tasks as encouraging the receipt and careful consideration of that information.”).

<sup>56</sup> On the challenges involved in getting information from regulated entities themselves, *see* Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277 (2004).

<sup>57</sup> STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON ADMINISTRATIVE PROCEDURE ACT 20 (Comm. Print 1946) (emphasis added). Similarly, the Attorney General’s Committee “was very specific in its recommendation that those who are affected by rules should have an opportunity to express their views with respect to those rules.” ATTORNEY GENERAL’S FINAL REPORT, *supra* note 44, at 68; *see also* *Hearing on the Administrative Procedure Act Before the H. Comm. on the Judiciary*, 79th Cong. (1945) (statement of C.A. Miller), *reprinted in* S. COMM. ON THE JUDICIARY, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 69 (1946).

We are presently in the middle of a shift in understanding about the nature of the information that can be collected through notice-and-comment rulemaking. The traditional view, implicit in the legislative history of the APA, is that the sources of information will be experts.<sup>58</sup> In turn, experts will almost always be either specialists in a field or participants in the industry or activity to be regulated.

If the old idea was to dismiss lay contribution with a dismissive, “What do they know?,” the last decade has seen increasing recognition that the public knows *a lot*. Crowds are “wise.”<sup>59</sup> They possess phenomenal “dispersed knowledge.”<sup>60</sup> The best way to solve a problem is crowdsourcing.<sup>61</sup> This is the lesson, most famously, of Wikipedia, and it is a central theme of much contemporary writing about the Internet.<sup>62</sup>

These principles have been endorsed within the executive branch. President Obama’s Memorandum on Transparency and Open Government,<sup>63</sup> the very first executive memorandum of his presidency, is a much-invoked endorsement of transparent, participatory, and collaborative government. Its explicit theory as to why citizens should participate in government is not that their *views* matter; indeed, it is silent on that score. Rather, it states that they have important *information* to bring to bear:

Public engagement enhances the Government’s effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.<sup>64</sup>

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<sup>58</sup> See, e.g., THE BUREAU OF NATIONAL AFFAIRS, ADMINISTRATIVE PROCEDURE ACT: SUMMARY AND ANALYSIS 1–5 (1946).

<sup>59</sup> See, e.g., JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS (2004).

<sup>60</sup> CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 19 (2006).

<sup>61</sup> See, e.g., BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL (2009); DON TAPSCOTT, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 3 (2010).

<sup>62</sup> See, e.g., Joshua Porter, *The One Crucial Idea of Web 2.0*, BOKARDO (Mar. 17, 2006), <http://bokardo.com/archives/the-one-crucial-idea-of-web-20> (“If there is one idea that encapsulates what Web 2.0 is about . . . it’s the idea of leveraging the network to uncover the Wisdom of Crowds.”).

<sup>63</sup> Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009).

<sup>64</sup> *Id.* Note also the “meta” aspect of the last sentence: the public will have knowledge about how to go about accessing the knowledge held by the public. The problem of infinite regress

It is striking that the argument here sounds not in democracy or accountability, but in what might be termed data production. Perhaps the memorandum should not be taken at face value. It is hard to disentangle the permanent campaign from governance. But I do not think that the memorandum and accompanying efforts are merely public relations. The Obama administration genuinely buys into the dispersed knowledge/crowdsourcing/wisdom-of-crowds cluster of ideas.

Former Office of Information and Regulatory Affairs Administrator Cass Sunstein has portrayed notice-and-comment rulemaking in particular as a technique for drawing on dispersed knowledge:

In the current era, it is far easier than ever before to have access to dispersed knowledge. Consider the rulemaking process itself. A large advantage of notice-and-comment rulemaking is that it allows agencies to offer proposals, and supporting analyses, that are subject to public scrutiny, and that can benefit from knowledge that is widely dispersed in society. On numerous occasions in the last eighteen months, final rules have been significantly different from proposed rules, and public comments are a key reason.<sup>65</sup>

Sunstein's model of how this alchemy works draws on Hayek. Hayek celebrated the price system as a "marvel" through which small pieces of dispersed, private, unshared information were aggregated and widely communicated.<sup>66</sup> Electronic networks could, in theory, serve the same function. Wikipedia stands as the primary example.<sup>67</sup> Prediction markets are another.<sup>68</sup> But these tools have yet to be effectively harnessed by the notice-and-comment process. Sunstein's happy assertion that public comments have been a "key reason" for changes between proposed and final rules has some

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looms. The public will also have knowledge about how to access the public's knowledge about how to access the knowledge held by the public.

<sup>65</sup> Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Remarks on the 30th Anniversary of the Regulatory Flexibility Act: Open Government is Analytic Government (and Vice-Versa) 6 (Sep. 21, 2010); *accord* SUNSTEIN, *supra* note 60, at 216 (stating that while "public officials know a lot . . . crucial information often comes from people in the private sphere, which has unique access to that information").

<sup>66</sup> SUNSTEIN, *supra* note 60, at 14–15.

<sup>67</sup> See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 109–42 (2008).

<sup>68</sup> See SUNSTEIN, *supra* note 60, at 103–45 (describing prediction markets and arguing that they provide valuable information for regulators and other public institutions); Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933 (2004) (arguing that agencies should take prediction markets' prognostications into account in making their own predictive judgments).

support,<sup>69</sup> but most research cuts the other way.<sup>70</sup> Moreover, It is not clear that such changes resulted from new *information* contained in public comments.

All of this returns us to the honeybees. The jacket blurb for *Honeybee Democracy*, implicitly invoking the principle of the wisdom of crowds, states that the book “shows that decision-making groups, whether honeybee or human, can be smarter than even the smartest individuals in them.”<sup>71</sup>

The problem here is that taking the existing notice-and-comment process and moving it online is completely inadequate to tap into the citizenry’s dispersed knowledge. Participation rates are way too low.<sup>72</sup> The questions asked are too open-ended.<sup>73</sup> The setting creates an incentive to be argumentative and one-sided rather than honest, accurate, and complete.<sup>74</sup>

Furthermore, rulemaking generally involves issues as to which crowds are not all that wise. For example, in the classic wisdom-of-crowds type problem, a specific factual issue (such as the weight of an ox or the number of jelly beans in a jar) is presented, people have distinct or private sources of information, and one person’s opinion or guess is unknown to and cannot affect anyone else’s.<sup>75</sup> Whether to list the polar bear as

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<sup>69</sup> See Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RESEARCH & THEORY 103 (2006).

<sup>70</sup> See, e.g., Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 912–13 (2006) (arguing that lay comments are unlikely to provide useful or influential information); Kimberly D. Krawiec, *Don’t “Screw Joe the Plummer”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013) (reviewing comments on proposed “Volcker Rule” under the Dodd-Frank Act, and concluding that the industry submissions were hugely more polished and convincing, and thus likely to be influential, than lay submissions); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011) (surveying multiple EPA rulemakings and concluding that industry accounted for eighty-one percent of the comments filed and that eighty-three percent of the changes made between the proposed and final rules weakened the rule); see also Marissa Martino Golden, *Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250, 252 (1998) (reporting dominance of business interests in the commenting process).

<sup>71</sup> SEELEY, *supra* note 11, at book jacket. The blurbist is careful: all that has been demonstrated is that groups *can be* smarter than their smartest member, not that they *always* or even *usually* are.

<sup>72</sup> See Benjamin, *supra* note 70, at 933–35.

<sup>73</sup> See Fred Emery & Michael Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31 ADMIN. & REG. L. NEWS 1, 8 (2005) (arguing that agencies will generate better public comments if they list specific issues on which they are seeking comment).

<sup>74</sup> See Jones, *supra* note 49, at 1266 (discussing general shortcomings of modern notice-and-comment).

<sup>75</sup> SUROWIECKI, *supra* note 59, at XVI–XXI.

an endangered species, what level of ozone will protect the public health, how to define “proprietary trading,” or whether the Plan B contraceptive is appropriately sold to fifteen-year-olds without a prescription just are not that sort of problem. And were notice-and-comment to become a more deliberative process, in at least some cases that would only increase the opening for the pathologies rather than the benefits of group decisionmaking. Particularly where the right answer is hard to recognize even if it is offered (as opposed to so-called “Eureka problems”—those where everyone realizes the answer has been found once someone hits on it), the very process of deliberation can amplify error and aggregate prejudice and misinformation.<sup>76</sup> In many settings there is a risk that turning to the crowd will produce worse information, not better, since the particular conditions under which crowds are “wise” will not exist.<sup>77</sup> Perhaps it is no surprise, then, that in a recent report from the IBM Center for the Business of Government entitled, and devoted to, *Using Crowdsourcing in Government*, the word “rulemaking” does not appear.<sup>78</sup>

This is not to say that opening up notice-and-comment to outsiders cannot or will never provide better information. It is only to say that simply increasing access will not magically do so. The most sophisticated and important efforts to meet this challenge are to be found at the Cornell e-Rulemaking Initiative and its “Regulation Room” project.<sup>79</sup> They have not yet solved the problem, but have offered the most helpful and nuanced account of exactly how lay commenters can contribute important information to rulewriters.<sup>80</sup> An important conclusion is that the most useful lay comments will come not from members of the general public but from individuals who possess “situated knowledge.” “This knowledge is based on their on-the-ground experiences with the kinds of problems, circumstances, or solutions involved in the proposed regulation.”<sup>81</sup> Such knowledge might reveal levels of complexity of which the agency was unaware, hidden contributions to existing problems, possible unintended consequences of particular proposed solutions, or ways of thinking about a problem that just had not occurred to policymakers without day-to-day, on-the-ground experience. Such information will

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<sup>76</sup> SUNSTEIN, *supra* note 60, at 103–04, 127–29, 138–42; *see also* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking* 28 (Harvard University Faculty Research Working Paper Series No. RWP 0-044, 2004) (“Greatly expanding participation could very well exacerbate cognitive cascades and tendencies toward groupthink that can afflict policy deliberations.”).

<sup>77</sup> *See, e.g.*, SUNSTEIN, *supra* note 60, at 103–45.

<sup>78</sup> *See* DAREN C. BRABHAM, *USING CROWDSOURCING IN GOVERNMENT* (2013).

<sup>79</sup> *See* Cynthia Farina et al., *Rulemaking 2.0*, 65 U. MIA. REV. 395, 397 (2011) (providing an overview of the Regulation Room Project).

<sup>80</sup> *See* Cynthia Farina et al., *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185 (2012).

<sup>81</sup> Cynthia Farina & Mary Newhardt, *Rulemaking 2.0: Understanding and Getting Better Public Participation*, CORNELL-RULEMAKING INITIATIVE PUBLICATIONS 15 (Aug. 1, 2013), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1014&context=ceri>.

not be relevant and available in every or even most rulemakings, and will be presented in a narrative form that does not much resemble traditional, professionally prepared comments.<sup>82</sup>

### B. Argument

For honeybees choosing the site for a new hive, information is all that is at stake. Section 553(c) of the Honeybee Administrative Procedure Act, HAPA, says that all interested bees can participate “through submission of waggled data, without opportunity for oral presentation.”<sup>83</sup> But agency decisions turn on, and the APA expressly protects the ability of interested persons to submit, more than just information.

A second thing interested persons can submit is “arguments,” i.e., reasons to do, or not to do, something. I don’t really have much to say about this category, about which there is little to, shall we say, argue. Of course agencies should be aware of arguments for and against their proposed rules. “Arguments” surely *include* discussions of the agencies’ legal obligations or constraints, an understanding of which is an essential objective of notice-and-comment rulemaking, but the statute does not say and is not limited to “legal arguments.” Agencies do things for reasons. They must engage in “reasoned decisionmaking.”<sup>84</sup> To figure out what paths to take, they need to hear arguments, i.e., reasons pointing to particular conclusions. As the Report of the Attorney General’s Committee put it, in language roughly that of the final statute, rulemaking “should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and *the dangers and benefits of alternative courses.*”<sup>85</sup>

Some of the above discussion about whether members of the lay public have useful information can also be applied to the question whether they will be able to make effective, relevant, and useful arguments. But arguments rise and fall on their own merits.

### C. Views

The trickiest of the three sorts of public submissions is “views.” It is noteworthy that the statute identifies this as a distinct category, not implicit in the first two. One might have thought that “views” were the result of combining “data” and “arguments.” But the APA implicitly says they are not. If views are relevant, and views are different from data and arguments, then rulemaking is not a wholly technocratic process and

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<sup>82</sup> See Jackeline Solivan & Cynthia Farina, *Regulation Room: How the Internet Improves Public Participation in Rulemaking*, CORNELL E-RULEMAKING INITIATIVE PUBLICATIONS (Apr. 1, 2013), <http://scholarship.law.cornell.edu/ceri/13>.

<sup>83</sup> Surely you weren’t *really* expecting a cite.

<sup>84</sup> *E.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

<sup>85</sup> ATTORNEY GENERAL’S FINAL REPORT, *supra* note 44, at 102 (emphasis added).



agencies may be valuably informed by learning about the views, or attitudes, of interested persons. The challenge, as we shall see, is to identify exactly how, if at all, views that are not supported by data or arguments are useful to any agency. In actuality, agencies for the most part ignore such free-standing statements,<sup>86</sup> and it is hard to see how they could do differently.

### 1. Statutory Limits

One general point at the outset. Whether and how “views” might count will always depend in part on the terms of the relevant background statute. One could imagine Congress specifically instructing the agency to take public sentiment into account, or specifically foreclosing doing so. I am not aware of a statute that explicitly does either.<sup>87</sup> However, a statute that expressly limits relevant considerations implicitly forecloses reliance on public sentiment. This is the lesson of, among other decisions, *Massachusetts v. EPA*.<sup>88</sup> There, the EPA denied a petition requesting that it regulate emissions of greenhouse gasses (GHGs) from automobiles. The Clean Air Act provides that the EPA Administrator “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the Administrator’s] judgment cause [sic], or contribute [sic] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.”<sup>89</sup> The EPA denied the petition for two reasons. First, it thought that GHGs were not “air pollutants” within the meaning of the Act, and therefore it lacked the authority to regulate their emission from automobiles.<sup>90</sup> Second, even if it had such authority, it thought that regulating GHG under the Clean Air Act was a very bad idea.<sup>91</sup> This was for many reasons, not the least of them being that the President believed in a voluntary approach to GHG

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<sup>86</sup> See, e.g., Benjamin, *supra* note 70, at 913–14. For example, consider the following somewhat plaintive lament:

During the public comment period for receiving information, . . . we received over 2,750 comments. Despite our request for specific scientific and commercial information, the vast majority of commenters simply noted their opposition to the petition to delist the Southern Resident killer whale DPS, while a handful of comments supported the petition. . . . We did receive several substantive comments regarding both the biological and legal aspects of the DPS determination as raised in the petition.

NOAA Listing Endangered or Threatened Species: 12-Month Finding on a Petition to Delist the Southern Resident Killer Whale, 78 Fed. Reg. 47,277, 47,279 (Aug. 5, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-08-05/pdf/2013-18824.pdf>. To paraphrase: We wanted data and arguments, but just about all we got was views.

<sup>87</sup> Accord Benjamin, *supra* note 70, at 907–08.

<sup>88</sup> 549 U.S. 497 (2007).

<sup>89</sup> 42 U.S.C. § 7521(a)(1) (2006).

<sup>90</sup> *Massachusetts v. EPA*, 549 U.S. at 513–14.

<sup>91</sup> *Id.* at 512–13.

reductions and thought that unilateral reductions would harm the U.S. position in international negotiations about global GHG reductions.<sup>92</sup> The Supreme Court rejected both grounds for denying the petition.<sup>93</sup>

With regard to the relevance of the President’s “views,” the Court purported to be agnostic about their merits, but it rejected reliance on them because, whether sensible or not, they were not on the table under the statute.<sup>94</sup> The statute says that if in the Administrator’s judgment GHGs emitted by mobile sources may reasonably be anticipated to endanger public health and welfare, then the agency must regulate those emissions.<sup>95</sup> Therefore, the only statutorily relevant question is whether GHGs may reasonably be anticipated to endanger public health and welfare. Note that Congress had not expressly *precluded* other factors, including those relied on by the EPA; the statute was simply silent about them. A strong reading of *Massachusetts v. EPA* puts off-limits considerations that are logically relevant to the decision to be made—i.e., reasonable people exercising their discretion would consider them—but are not mentioned by the statute. However, it is probably a mistake to read the decision this broadly. The more modest understanding is that in this case the Court thought Congress had prohibited consideration of these factors by stating that the Administrator “shall” regulate when certain conditions are met, period. That is, Congress has not actually been silent about these considerations, including the President’s views; it had been meaningfully silent, in an *expressio unius* fashion.

The Court was not focused on the fact that the source of the EPA’s reservations was the White House. If the EPA had said “it seems to us that regulating these sources is a mistake,” rather than “it seems to the President that regulating these sources is a mistake,” the opinion and the result would have been identical. And just the same would have been true if the agency had deferred to a strong expression of *public* views.

Even this reading (and certainly the strong reading) of *Massachusetts v. EPA* is in some tension with a presidential model of administration.<sup>96</sup> Prominent among factors not enumerated by statute will always be presidential preferences. Of course, the President does not make those preferences known through the submission of comments during the notice-and-comment rulemaking, and does not rely on § 553(c) to allow him to “participate” by submitting “views.”<sup>97</sup> But a statute that precludes consideration of the President’s views would seem also to preclude consideration of the public’s views. And some of the arguments for taking the President’s views into

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 501.

<sup>94</sup> *Id.* at 533–34.

<sup>95</sup> *Id.* at 506.

<sup>96</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339 (2001) (describing and endorsing active presidential oversight of agency policymaking).

<sup>97</sup> On the many routes of White House influence on agency decisionmaking, see Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

account are also arguments for taking the public's views into account, since the reason the President's views matter—what legitimates his authority over the executive branch—is that he has been selected by the public.

## 2. Views and Votes

The least complex understanding of a “view” is that it is a statement of a bottom-line: a conclusion stripped of supporting rationale, facts, and elaboration. For example, “It’s always been my view that agency regulations do more harm than good.”

Consider a few actual rulemaking comments from individuals that might be seen as expressions of views. (In each instance, what is set out constitutes the entire submission; they are not edited down to just the unhelpful bits.)

“Please DO NOT allow smoking of electronic cigarettes on aircraft”<sup>98</sup>

“regulate [sic]”<sup>99</sup>

“this regulation is needed immediately to reverse the dangerous trend of distracted driving, and needs, at some point to be extended to all motorists. [sic]”<sup>100</sup>

“It is important to put into place guidelines/restrictions on emissions from our power plants. These restrictions on new plants are a start, although I support regulating the emissions of all power plants. Please support these new restrictions on new power plants. It is a beginning!”<sup>101</sup>

These are homemade variations on the other typical form of lay comment, which is the submission of a brief email (or, historically and still occasionally, postcard) written by an advocacy group for submission by its members. Such mass comments do not inform the agency of anything other than the fact that a bunch of people agree with the sentiments expressed; each additional submission adds nothing except the very fact that another person endorses the view expressed. The whole premise of a concerted effort

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<sup>98</sup> Comment from Addison, DOT-OST-2011-0044-0335 (Oct. 24, 2011), <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0044-0335> (regarding proposed ban on the smoking of electronic cigarettes on airplanes).

<sup>99</sup> Comment from Val Laurent, FSOC-2010-0002-1094 (Nov. 6, 2010), <http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-1094> (regarding the Volcker rule).

<sup>100</sup> Comment from Paul E. Kikta, FMCSA-2009-0370-0048 (Apr. 28, 2010), <http://www.regulations.gov/#!documentDetail;D=FMCSA-2009-0370-0048> (regarding proposed ban on texting while driving a commercial vehicle).

<sup>101</sup> Comment, EPA-HQ-OAR-2011-0660-4337 (May 10, 2012), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-4337> (regarding proposed regulation of greenhouse gas emissions from coal-fired power plants).

to get multiple people to tell the agency the same thing over and over is that the *content* of each submission after the first is unimportant; what counts is the fact that someone cared enough to make it.

What should an agency do with such expressions of views? These comments are, in essence, votes. But is notice-and-comment an election?

Almost since the APA was passed, the rulemaking process has been surrounded by a good deal of rhetoric about its essentially democratic character.<sup>102</sup> Indeed, at the time the Act was considered and enacted, a standard proposition was that notice-and-comment was a response to the unrepresentative nature of agencies.<sup>103</sup> The Final Report of the Attorney General’s Commission expressly rejected modeling rulemaking procedures on the legislative process precisely because agencies were not representative bodies, whose “members in theory bring with them a large part of the knowledge and opinion out of which after open discussion the laws are to be framed.”<sup>104</sup> Because an agency’s job is “not to ascertain and register its will,” it had to follow a process that would provide it the information and views of those affected by its decisions.<sup>105</sup> On this account, notice-and-comment becomes a direct substitute for and an equivalent of voting. This conception is reflected in judicial opinions. “The essential purpose of according § 553 notice and comment opportunities,” writes the D.C. Circuit, “is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”<sup>106</sup> “[P]ublic participation assures that the agency will have before it the facts and information relevant to a particular administrative problem . . . [and] increase[s] the likelihood of administrative responsiveness to the needs and concerns of those affected.”<sup>107</sup>

A tendency to conceive of the notice-and-comment process as a sort of referendum can be seen among lay participants and observers. For example, when the Department of the Interior proposed restricting snowmobile access to Yellowstone National Park, it received 360,000 comments, eighty percent of which supported a ban on snowmobiles.<sup>108</sup> The final rule *expanded* snowmobile access.<sup>109</sup> In an article entitled “Flooded

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<sup>102</sup> KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 66–67 (1969) (discussing the superiority of rulemaking procedure over adjudicative procedure for making law or policy affecting a large scope of people).

<sup>103</sup> ATTORNEY GENERAL’S FINAL REPORT, *supra* note 44, at 101–02.

<sup>104</sup> *Id.* at 101.

<sup>105</sup> *Id.* at 101–02.

<sup>106</sup> *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also* *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969) (identifying the primary purpose of § 553 as being “to give the public an opportunity to participate in the rule-making process” and mentioning that “[i]t also enables the agency promulgating the rule to educate itself”).

<sup>107</sup> *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1061 (D.C. Cir. 1987) (alterations in original) (emphasis added) (quoting *Guardian Fed. Sav. & Loan v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978)).

<sup>108</sup> Katharine Q. Seelye, *Flooded with Comments, Officials Plug Their Ears*, N.Y. TIMES, Nov. 17, 2002, at C4.

<sup>109</sup> *Id.*

with Comments, Officials Plug Their Ears,” *The New York Times* reported that “officials say the sheer volume of public comment is not a determining factor. ‘It is not a vote,’” said one park official.<sup>110</sup> This prompted a letter to the editor calling it “reprehensible” that “park administrators chose to ignore the overwhelming support in favor” of a ban.<sup>111</sup> “Whether the support comes in the form of personal letters or e-mail is irrelevant—the sentiment is what matters.”<sup>112</sup>

Researchers at the Cornell e-Rulemaking Initiative (CeRI) have observed what they label “the voting instinct” among public commenters. In cooperation with the Department of Transportation, CeRI has created a rulemaking participation platform aimed at generating effective, informed, and useful lay comments in actual rulemakings.<sup>113</sup> The project team seeks to increase the level of public participation, and to produce comments that are either more useful to the agency or more satisfying to the commenter, or both. This requires getting the word out, educating participants about the nature of the process, and facilitating comprehension of the proposal. Trained discussion leaders break the preamble into discrete, manageable portions, explain specific issues and components, and moderate discussions.<sup>114</sup> The goal is to overcome the ignorance, unawareness, and information overload that stands in the way of effective public participation.<sup>115</sup>

In what they consider perhaps “the most valuable insight to come from Regulation Room,” Professor Farina and her colleagues have found that “Web 2.0 technologies and methods offer extraordinary opportunities for lowering the barriers to public engagement in rulemaking, but Web culture and expectations often fundamentally conflict with getting ‘more better’ participation.”<sup>116</sup> They give several examples of this dynamic, but the most interesting and important is “the voting instinct.”<sup>117</sup>

Rulemaking 2.0 takes place at the intersection of two powerful cultural patterns. The first is the popular equation in the United States of democratic voice with casting a vote, or, it’s [sic] privatized equivalent, responding to a poll. Because voting is how “public participation” is culturally constructed, site visitors already “know”

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<sup>110</sup> *Id.*

<sup>111</sup> Leo G. Weiss, Letter to the Editor, *Snowmobile Opposition*, N.Y. TIMES, Nov. 24, 2002, at D12.

<sup>112</sup> *Id.* Similarly, a recent *Washington Post* article mocking Department of Agriculture regulations noted: “The government asked for public comments in 2008. It got 997. Just 50 commenters were in favor of the rule as written. But that, apparently, was enough. After a years-long process, the rule took effect . . .” David A. Fahrenthold, *Watch Him Pull a USDA-Mandated Rabbit Disaster Plan out of His Hat*, WASH. POST, July 17, 2013, at A1.

<sup>113</sup> The project, which can be found at <http://www.regulationroom.org>, is described in Farina et al., *supra* note 79.

<sup>114</sup> Farina et al., *supra* note 79, at 413–14.

<sup>115</sup> *Id.* at 417–19.

<sup>116</sup> *Id.* at 419.

<sup>117</sup> *Id.* at 429–32.

how the public provides input in government decisionmaking. Everyone “understands” that the side with the most votes wins. The second pattern is from online culture: Voting is how the Web works. Ranking or rating—by assigning stars, sliding a bar, or simply clicking “Like” or “Recommend”—is a staple of Web 2.0 interactivity. Like the gladiators of ancient Rome, web content lives or dies by whether the crowd gives thumbs up, or down. The confluence of these two patterns may create such a powerful “voting instinct” that the presence of even fairly modest preference-aggregation devices causes users to ignore other signals that they really ought to learn more about how rulemaking works.<sup>118</sup>

On this account, “voting impulse” might be a better term than “voting instinct,” since the attitude is mainly a learned one. In any event, the Regulation Room researchers have seen it repeatedly expressed in specific comments (e.g., the e-mail that complains “I can’t figure out how to vote”) and overall behavior (e.g., an unwillingness to take the time to seriously engage with the materials).<sup>119</sup>

On the other hand, this conception of notice-and-comment rulemaking as a plebiscite has not made much progress with insiders. Among academics, agency officials, and the judiciary, there remains universal agreement that rulemaking is not about preference aggregation. Regulations.gov is explicit that “the comment process is not a vote.”<sup>120</sup> Professor Farina and her colleagues describe “better” public participation as being that which, among other things, “comport[s] with the nature of rulemaking as a technocratically rational (as opposed to preference aggregation) process.”<sup>121</sup> In a recent article on the legal aspects of e-rulemaking, Bridget Dooling writes that to acknowledge the value of lay participation in rulemaking “does not imply that rulemaking is a plebiscite. That point is settled.”<sup>122</sup> Nina Mendelson has come closest to contesting this view. She argues agencies should give weight to non-technical public comments that express

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<sup>118</sup> *Id.* at 431–32 (citations omitted).

<sup>119</sup> *Id.* at 427.

<sup>120</sup> REGULATIONS.GOV, TIPS FOR SUBMITTING EFFECTIVE COMMENTS 2, [http://www.regulations.gov/docs/Tips\\_For\\_Submitting\\_Effective\\_Comments.pdf](http://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf) (last visited Dec. 12, 2013); *see also id.* at 3 (“Many in the public mistakenly believe that their submitted form letter constitutes a ‘vote’ regarding the issues concerning them. Although public support or opposition may help guide important public policies, agencies make determinations for a proposed action based on sound reasoning and scientific evidence, not a majority of votes. A single, well-supported comment may carry more weight than a thousand form letters.”).

<sup>121</sup> Farina et al., *supra* note 79, at 410.

<sup>122</sup> Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 901 n.31 (2011); *see also* Benjamin, *supra* note 70, at 905–07; Bill Funk, *The Public Needs a Voice in Policy. But Is Involving the Public in Rulemaking a Workable Idea?*, CPRBLOG, CTR. FOR PROGRESSIVE REFORM (Apr. 13, 2010), <http://progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E>.

or reflect *values* that are relevant to the agency's decision<sup>123</sup> (I will return to this below). But even she is quite clear that notice-and-comment should not be a referendum.<sup>124</sup> And notwithstanding their openness to the idea that participation in rulemaking is a response to the nonrepresentative nature of agencies,<sup>125</sup> courts have explicitly rejected the popularity contest model.<sup>126</sup>

Agency officials are only human: When their conclusion has strong support in the comments they tend to note that fact,<sup>127</sup> and when it does not they tend to glide over it.<sup>128</sup> And the fact that non-governmental organizations continue to urge their members to submit multiple duplicative comments indicates that they think sheer numbers may indeed move the agency.<sup>129</sup> But I am not aware of any agency actually endorsing the

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<sup>123</sup> See generally Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

<sup>124</sup> *Id.* at 1374 (denying “that an agency should tally up the total number of comments for or against a particular issue and have that serve as a referendum or a dispositive vote of some sort on the policy issue at hand. The judicial opinions saying agencies need not do this are clearly correct”).

<sup>125</sup> See *supra* notes 106–07 and accompanying text.

<sup>126</sup> See, e.g., *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003) (Posner, J.) (“The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.”); *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 87 (D.C. Cir. 2001) (noting that the agency “has no obligation to take the approach advocated by the largest number of commenters; indeed, the Commission may adopt a course endorsed by no commenter” (citations omitted)); *NRDC v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) (“The substantial-evidence standard has never been taken to mean that an agency rulemaking is a democratic process by which the majority of commenters prevail by sheer weight of numbers. Regardless of majority sentiment within the community of commenters, the issue is whether the rules are supported by substantial evidence in the record. The number and length of comments, without more, is not germane to a court’s substantial-evidence inquiry.” (citations omitted)). A whiff of disregard for the voting model can be sensed in Judge Randolph’s opinion in the greenhouse gasses case. There he writes that “[i]n response to EPA’s request for public comments . . . the agency received nearly 50,000 submissions. Most were short expressions of support for the petition; many were nearly identical.” *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005) (citations omitted), *rev’d on other grounds*, 549 U.S. 497 (2007).

<sup>127</sup> See, e.g., 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, EPA & DOT, 77 Fed. Reg. 62,624, 62,636 (Oct. 15, 2012) (noting that an “overwhelming majority of commenters supports the proposed” rule).

<sup>128</sup> See *supra* notes 108–10 and accompanying text.

<sup>129</sup> According to political scientist Stuart Shulman:

While these campaigns are presumed to be largely ineffective because they generate little new information, in some instances (e.g., the EPA’s Advanced Notice of Proposed Rulemaking on the Definition of U.S. Waters, or the USDA’s organic rulemaking, where about 100,000 unique comments carried weight with officials and influenced the final rule), it does at least appear to contribute to an outcome favorable to the mass mailers.

plebiscite model. Consider one of the more striking instances in which the weight of numerous comments was ignored: the FCC’s 2003 media ownership rules.<sup>130</sup> That proposal drew something like two million comments,<sup>131</sup> 99.9% of which opposed what the Commission (which divided three to two) did.<sup>132</sup> The order for the Commission majority essentially ignored the fact that public sentiment was so one-sided. Not surprisingly, the two dissenters did not.<sup>133</sup> But they both rejected the referendum model.<sup>134</sup> Moreover, political scientist Stuart Shulman has concluded that “astroturf” campaigns by public interest groups who get thousands of members to send identical messages can actually *undercut* the commenters’ substantive position.<sup>135</sup> Agency staffers are overwhelmed and annoyed. If he is correct, then the agency is quite emphatically *not* treating the process as a referendum.

Many anticipated that the move to electronic rulemaking would prompt a shift in participants’ understanding of the basic nature of the process toward the referendum model.<sup>136</sup> It is striking how resistant everyone has been to such a shift, and overall few

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Stuart Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV’T. 41, 46 (2006).

<sup>130</sup> See Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules, 18 FCC Rcd. 13,620 (2003). The rulemaking is described, and the Commission’s rejection of overwhelmingly negative public comment criticized, in Mary M. Underwood, Comment, *On Media Consolidation, the Public Interest, and Notice and Agency Consideration of Comments*, 60 ADMIN. L. REV. 185 (2008).

<sup>131</sup> The FCC’s decision does not make clear exactly how many comments were in fact received. Compare 18 FCC Rcd. 13,620, 13,624 (“We received more than 500,000 brief comments and form letters . . .”), with *id.* at 13,977 (Adelstein, Comm’r, dissenting) (“We have heard from nearly two million people in opposition to relaxing our ownership rules . . .”).

<sup>132</sup> *Id.* at 13,978 (Adelstein, Comm’r, dissenting).

<sup>133</sup> See, e.g., *id.* at 13,977 (Adelstein, Comm’r, dissenting) (“Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals, and virtually everyone in between. We have heard from nearly two million people in opposition to relaxing our ownership rules, and only a handful in support.”).

<sup>134</sup> See *id.* at 13,958 (Copps, Comm’r, dissenting) (“The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails ‘for’ and the letters, cards and e-mails ‘against’ and awarding the victory to the side that tips the scale.”); *id.* at 13,978 (Adelstein, Comm’r, dissenting) (“I have heard it said we cannot make this decision by polls or by weighing postcards. That is fair enough.”).

<sup>135</sup> Shulman, *supra* note 128, at 58.

<sup>136</sup> See, e.g., Michael Herz, *Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2002–2003, at 129, 149 (Jeffrey Lubbers ed., 2004) (predicting that an agency confronted with millions of comments will “[u]navoidably . . . start to do what, for example, members of Congress do: avoid the subtleties and keep a running tally with the grossest sort of division—basically ‘for’ or ‘against’”); Peter Strauss, Professor, Columbia Law Sch., Remarks at the E-Rulemaking Conference, American University Center for Rulemaking 28 (Jan. 8, 2004), available at <http://web.archive.org/web/20060920113741/www.american.edu/academic.depts/provost/rulemaking/transcripts.pdf> (noting that the impulse to treat mass comments as votes will be “quite strong”).



inroads on the traditional, it's-not-a-vote model have been made. The agency is constrained by law and by fact, expected to apply its expertise, part of a presidential administration, and to some extent exercising independent judgment.<sup>137</sup>

Despite all this, there has long been an undercurrent in administrative law pushing toward a more frank endorsement (or at least acknowledgement) of the role of politics in rulemaking. Three decades ago, then-Professor Antonin Scalia wrote that agencies “may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to want.”<sup>138</sup> (To stick with our current vocabulary, one might rewrite this statement to say that agencies may make some decisions in rulemaking not because they are supported by *data* or supported by *argument*, but because they reflect the public's *views*.) Scalia's point was not that *all* rulemaking is or should be political; often an agency has a technocratic task to which political considerations are irrelevant. But actions taken under broad delegations—for example, to manage the airwaves “in the public interest, convenience and necessity”<sup>139</sup>—were properly informed by political judgments. The challenge, he acknowledged, was distinguishing the two settings.

### 3. Views and Values

Agency decisions often turn in part on values. If values count, then aren't straightforward statements of “views” relevant to the decision? In a word, “views” are “data.” Nina Mendelson argues that when agencies are resolving policy issues that turn on questions of value, “value-laden comments, including comments from laypersons that arrive in large volumes,” merit “systematic consideration.”<sup>140</sup>

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<sup>137</sup> See, e.g., *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003) (Posner, J.) (“The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.”); Funk, *supra* note 122 (arguing that notice-and-comment rulemaking is not a political exercise and expressing concern that encouraging broad participation by the general public will misleadingly induce commenters to see the process as a referendum).

<sup>138</sup> Antonin Scalia, Chairman's Message, *Rulemaking as Politics*, 34 ADMIN. L. REV., at v (1982). For a discussion, see Michael Herz, Chair's Message, “*Rulemaking as Politics*,” *Thirty Years On*, 37 ADMIN. & REG. L. NEWS 1 (2012).

<sup>139</sup> See Communications Act of 1934, 47 U.S.C. § 151 (2006) (containing numerous references to “the public interest, convenience and necessity”).

<sup>140</sup> Mendelson, *supra* note 123, at 1371–72, 1380. Though decidedly more skeptical, Cynthia Farina also has some sympathy for this position. Cynthia Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 142 (2012).

Note that while a “value-laden comment” might be a simple expression of a bottom line—a vote—it is not necessarily so limited. Consider a few examples of comments that strongly communicate certain values with only modest or no information or argument:

I oppose the shoot-on-site policy of the Wyoming Government.  
People must get-over their “Red Riding Hood” “Three Little Pigs”

mentality. Wolves are needed for the Ecosystem. HUNTERS, TROPHY HUNTERS, gun and rifle association members, wolf haters are NOT needed in Wyoming to murder/slaughter these magnificent animals. My husband and self visit Wyoming ONLY to hear and see the wolves, their free-spirit of a DYING WEST because of MAN. STOP THIS HATRED OF THIS BEAUTIFUL ANIMAL AND LEARN THROUGH EDUCATION TO EXIST W>THEM. GOD bless the wolves—stay safe and away from the crazies!!

Place the grey wolves back on the Endangered Species List. STOP allowing the politicians of your state and the Federal Government to be in the back pockets of the lobbyists for hunting. STOP THE KILLINGS! I try to teach my children and grandchildren what you are doing in Wyoming, Idaho and Montana is wrong. IT IS MURDER, it is NOT HUNTING. The hunters do NOT carry home the wolves to eat, they enjoy the THRILL OF THE KILL AND THE HATRED THAT GOES WITH IT. ENOUGH is ENOUGH! Leave the wilderness and the animals alone. God did NOT give man the right to kill his creations, when they are not benefiting man's survival for food. IT IS MURDER and the BLOOD is on each of your hands as each wolf is slaughtered. God bless the wolves!! May they have the strength to run from the murderers.

Comment from Barbara Laxson, FWS-R6-ES-2011-0039-2465 (Jan. 11, 2012), <http://www.regulations.gov/#!documentDetail;D=FWS-R6-ES-2011-0039-2465>.

I urge the EPA to limit industrial carbon pollution from new and existing power plants. I support the EPA's proposal to limit industrial carbon pollution from power plants. Clean air is better for everyone, especially the polar bears and climate change. Innovate new clean energy technologies for now and the future. Stop being so greedy and not caring for this world.

Comment from Donna McWhirter, EPA-HQ-OAR-2011-0660-6909 (May 25, 2012), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-6909> (regarding EPA proposed rule to limit GHGs from power plants).

This is nothing but a sociopathic, manipulative, typical corporate scam . . . . . when will they get a conscience???

Comment from Wayne Dimock, FDA-2010-P-0491-0706 (Dec. 27, 2011), <http://www.regulations.gov/#!documentDetail;D=FDA-2010-P-0491-0706> (regarding whether to allow use of the term “corn sugar” rather than “corn syrup” on food labels).

This is simply idiotic. E-cigarettes are the same as traditional cigarettes in name only; they contain none of the harmful secondhand side-effects. Anyone even halfway educated about them would know this. But this measure is not meant towards them; it is meant to appease the ignorant masses that store their brain in their ass. Quit trying to regulate peoples' lives and quit trying to pass laws to appease ignorant morons.

Comment from Anonymous, DOT-OST-2011-0044-0027 (Sept. 15, 2011), <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0044-0027>.

The Volcker Rule is critical to preventing banks from unscrupulous banking activities. At the expense of American citizens, their dependants, and their posterity banks have made trillions of dollars for their CEO's and shareholders. It is time to stop their inner-circle deals and demand justice

Doing this requires pulling off two tricks. The first is figuring out which comments reflect “values” to which government officials should attend. This touches on a fundamental debate concerning the divergence between expert and lay judgments, which has been a particular focus in the area of risk regulation. It is well known that the public is very concerned about certain risks that experts dismiss as trivial, and unconcerned about some risks experts know to be significant. This divergence has two sources. First, we laypersons misestimate the magnitude of many risks. Second, we care about certain qualitative aspects of risk—most familiarly, whether risks are voluntary—that experts often ignore. If public comments about potential regulation of a risk diverge, in either direction, from expert judgment, should the agency care? It could defer to them, or it could try to determine whether the divergence rests on a value choice or on ignorance and technical error.<sup>141</sup> This is a fundamental question of democratic theory and risk regulation that I am not going to try to answer,<sup>142</sup> but it requires answering to know which comments should get “systematic consideration.”

The second trick is figuring out what this consideration consists of. Mendelson wants agencies to do something other than just ignore mass comments.<sup>143</sup> But it is a

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for every American. I will not allow some bank to rob me and my family  
of everything that we work for with our blood, sweat, and tears.

Comment from Amy Margolis, FSOC-2010-0002-0523 (Nov. 4, 2010), <http://www.regulations.gov/#!documentDetail;D=FSOC-2010-0002-0523>.

<sup>141</sup> See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1078 (2000) (“[G]overnment’s task is to distinguish between lay judgments that are products of factual mistakes (produced, for example, by the availability heuristic) and lay judgments that are products of judgments of value (as in the view that voluntarily incurred risks deserve less attention than involuntarily incurred ones).”). Sunstein strongly opposes simply deferring to uninformed lay concerns about risk. In his view doing so

rests on a controversial and even unacceptable conception of democracy, one that sees responsiveness to citizens’ demands, whatever their factual basis, as the foundation of political legitimacy. If those demands are uninformed, it is perfectly appropriate for government to resist them. Indeed, it is far from clear that reasonable citizens want, or would want, their government to respond to their uninformed demands.

*Id.* at 1074. Nina Mendelson points to an interesting example of an agency doing as Sunstein recommends, while also seeking to educate the public. The National Highway Traffic Safety Administration conducted a rulemaking regarding whether to allow automobile dealers to retrofit cars with on-off switches for airbags. See Mendelson, *supra* note 123, at 1366 (discussing Air Bag On-Off Switches, DOT & NHTSA, 62 Fed. Reg. 62,406 (Nov. 21, 1997)). Almost all the 600 comments from members of the public supported airbag deactivation. See *id.* The agency concluded, however, that these strong views reflected a misunderstanding of the actual risks and benefits of airbags. After convening focus groups that suggested that public education would reduce public misconceptions, the agency issued a rule that prohibited on-off switches except in limited circumstances and also required any car owner seeking deactivation to read an information brochure. See *id.*

<sup>142</sup> A brief, helpful introduction to the debate can be found in DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 140–45 (2011).

<sup>143</sup> Mendelson, *supra* note 123, at 1371–72.

little harder to affirmatively state what agency officials should do. It does not mean keeping a tally; Mendelson joins the it’s-not-a-vote chorus.<sup>144</sup> Officials must “attend to” and “respond” to such comments, not “bury” them.<sup>145</sup> Such comments “deserve especial attention” if they are numerous, one-sided, raise an issue that is relevant under the statute, are coherent and persuasive, and point in a different direction than that considered by the agency.<sup>146</sup> The agency must “pay attention” to such comments.<sup>147</sup> “They should prompt agency officials at least to think twice—and perhaps to consider and investigate public views more systematically.”<sup>148</sup> What all of this suggests is that such comments are never in themselves a reason to do something. Rather, the comments are a *prompt*; they flag an issue that the agency should focus on, but the agency should then determine whether the more accepted bases of agency decisionmaking justify a particular outcome.

In three ways, Mendelson implicitly acknowledges the difficulty of pinning down what it would mean for the agency to do what she is suggesting. First, she states that this requirement could not be judicially enforceable; it is just not possible for a court to determine that the agency gave adequate weight to value-laden comments.<sup>149</sup> That suggests that she herself cannot quite articulate what the agency is supposed to do. Second, she suggests that a strong set of value-laden comments might trigger not a substantive consideration but additional *procedures*: targeted opinion polling, focus groups, civil juries, and/or referral to the White House.<sup>150</sup> (She is not clear on whether these are in

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<sup>144</sup> *Id.* at 1370, 1374.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1375.

<sup>147</sup> *Id.* at 1378.

<sup>148</sup> Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 177 (2012).

<sup>149</sup> Mendelson, *supra* note 123, at 1378–79. Accordingly, she writes, “judicial review under the APA on these matters ought to be limited to requiring agencies to give *some* acknowledgment of significant views expressed through lay comments, and courts then should defer to the content of any subsequent response from the agency.” *Id.* at 1379.

<sup>150</sup> To her list might be added one other standard lawyer’s move: shifting the burden of persuasion. Consider again the public comments in the FCC’s media ownership rulemaking. *See supra* notes 130–34 and accompanying text. These met all the criteria Mendelson identifies for meriting “especial attention”: a huge number of comments, essentially unanimous, urging the FCC to stand by its existing and clearly valid approach, contrary to the Commission’s desire to change course. One of the dissenting Commissioners argued that while this outpouring did not bind the Commission, it did shift the burden of proof:

[T]he public apparently has no interest in further media consolidation. Is the majority that confident that it is serving the interests of the nearly two million citizens who are motivated enough to contact the Commission or attend field hearings to oppose further concentration? I would not assume that those people who took time to alert us to their concerns, more than 99.9 percent in opposition, are wrong unless overwhelming evidence and reasoned analysis proves it.

addition to or instead of direct agency consideration.) Third, she suggests that agencies themselves should establish written standards under which they “commit to weigh lay-person comments in a particular way,”<sup>151</sup> but she does not suggest what way or ways would be appropriate.

All of which leaves me sharing Mendelson’s instincts but unsure as to what actually to do about it. If all that comments communicate is a point of view, a bottom line—I am for; I am against—then how can an agency pay attention to them other than by treating the process as a kind of vote? The process itself implicitly instructs the agency to do what Mendelson says to do, somehow to take the comments into account. But if the only way not to ignore them—the only thing that can be done with them—is to tally them, then that is what will happen.

Finally, there is reason to be concerned about the incentives and potential for manipulation that agencies’ approach to expressions of “views” creates. If agencies give weight to value-based comments, more of them will arrive. It is likely that forces on both sides of an issue will mobilize, leading to a stalemate. When comments on a technical question (Is benzene a carcinogen?<sup>152</sup> What is the global warming potential of methane?<sup>153</sup>) are divided, the agency can make a reasoned determination between the positions: it can do the best it can to determine which is right. But when comments on a question of values are divided, there is no principled basis on which the agency can choose between them. It could, of course, opt for the views most aligned with those of the president. But if that is all it is doing, then the public comments have essentially been denied any weight at all. Furthermore, such a standoff might occur even if overall popular sentiment is quite unevenly divided; those for whom an issue is most salient will produce comments far in excess of their proportion in the population.<sup>154</sup>

#### *D. Review and Legitimation*

Having disaggregated the § 553(c) trio, I would like to conclude by considering the package as a whole. Why these, and only these?

Administrative law has always required a theory to explain how and why unelected bureaucrats can exercise discretion. That is why the nondelegation doctrine never goes

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Report and Order and Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules, 18 FCC Rcd. 13,620, 13,978 (2003) (Adelstein, Comm’r, dissenting).

<sup>151</sup> Mendelson, *supra* note 123, at 1379.

<sup>152</sup> *See Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

<sup>153</sup> *See ENVIRONMENTAL PROTECTION AGENCY, OVERVIEW OF GREENHOUSE GASES: METHANE EMISSIONS* (2013).

<sup>154</sup> These features are characteristic of the legislative process, and one might therefore assume they are appropriate for the agency counterpart to congressional action. That argument is beyond the scope of this Article, but I would at least say that (a) the traditional understanding is that agencies are doing something different than legislatures and (b) in the legislative setting too they may be bugs rather than features.

away as a theoretical matter, even though in practice it has been pretty much the judicial equivalent of the Loch Ness Monster or the Yeti—the subject of endless attention but never actually sighted.<sup>155</sup> Almost all models of the administrative state take into account—indeed, are developed in response to—the democratic concerns of unelected officials wielding discretionary authority.

Richard Stewart’s 1975 article, *The Reformation of American Administrative Law*, offered the definitive account of shifting models of legitimacy until that time, tracing the decline of the “transmission belt” theory, according to which agencies are mechanical implementers of legislative decisions, the move to a focus on technocratic expertise, and the subsequent rise of an interest representation model.<sup>156</sup> These remain, in essence, the three basic theories.<sup>157</sup> The first reflects rule-of-law aspirations and assumes that agencies are meaningfully bound by and simply implementing decisions made by elected, and thus more legitimate, actors.<sup>158</sup> The second reflects technocratic aspirations and assumes that there are right answers to policy questions and that agencies know what they are doing.<sup>159</sup> The third reflects democratic aspirations and assumes that the administrative process can replicate or even improve on the larger electoral and political process, with direct or indirect participation by affected interests in some sort of either Madisonian republican or preference aggregating process.<sup>160</sup>

I have focused on another cluster of three, so the reader can guess what is coming next. The three models correspond (though concededly loosely) to the three types of notice-and-comment submissions. In reverse order, the democratic model involves consideration of public views; the technocratic model involves consideration of data; the formal model requires submissions of (legal) arguments. The third of these is the poorest fit, because “arguments” might include other than legal arguments and because factual information is equally important under that model. Still, there is some correspondence. The point is not that one or the other is therefore correct. Rather, the point is that we look in particular places to justify agency action, and we end up looking in the same places whether we are concocting grand theory or whether we are determining what particular inputs would be useful to agencies. All three types of input are relevant. And any of the three theories would suffice (though only if, or to the extent that, they have a basis in fact).

A similar overlap exists with the § 553(c) trio and principles of judicial review. To oversimplify: Courts can set aside agency action because it is unsupported by the facts,

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<sup>155</sup> See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722–23 (2002).

<sup>156</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

<sup>157</sup> A useful overview is David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611 (2012).

<sup>158</sup> See *id.* at 613–14.

<sup>159</sup> See *id.* at 616–17.

<sup>160</sup> See *id.* at 620–21.

because it is counter to law, and because it is poorly reasoned and just does not make sense.<sup>161</sup> Here again there is a loose but real correspondence to § 553(c). Data submitted through public comment may show that the agency's decision has or lacks a basis in fact; argument may show that it satisfies or violates legal constraints; views may indicate that it is not arbitrary and capricious.

#### CONCLUSION

In titling this Article “a rumination,” I sought to excuse myself from the need to conclude with a firm normative takeaway. Instead, I will return one last time to the honeybees. Life as a honeybee has its drawbacks. Bees are, of course, very, very busy. During the summer, they pretty much work themselves to death, expiring in a matter of weeks. But though their life is short, it is neither nasty nor brutish. To the contrary, it has its moments of transcendence, as when the swarm reaches its unanimous, and almost invariably correct, decision about where to build a new hive. Here the bees manage to solve collective action problems that bedevil human beings in many settings, including notice-and-comment rulemaking. If humans, like bees, had congruent interests and shared preferences, so the only challenge was gathering information, the rulemaking process would be a good deal more straightforward. But we do not, and the APA's drafters knew it, requiring agencies to permit persons to participate through submission not only of data, but also of arguments and views.

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<sup>161</sup> 5 U.S.C. § 706 (2006). I set to one side the question of procedural errors. *Id.* § 706(2)(D).