Reg Neg Redux: The Career of a Procedural Reform

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This Article traces the trajectory of negotiated rulemaking within American administrative law. The popularity of negotiated rulemaking — among scholars, politicians, and regulators — has waxed and waned since its start in the 1980s. This Article describes and assesses these shifts, charting the birth of negotiated rulemaking, its incorporation into the APA, and its infrequent use in recent years. In mapping the rise and fall of negotiated rulemaking, we focus on two particular critiques — that it violates normative commitments to expertise and rationality in bureaucratic decision making, and that it fails to deliver on its promises of faster rulemaking and less litigation. This Article contends that the first critique is overblown and that the second is true in some instances but not in others. We argue that negotiated rulemaking is most valuable when the appropriate negotiating parties can be easily identified, when they are likely to make concessions and build rapport with each other, and when traditional methods of rulemaking have become ossified.

Introduction

An adversarial approach to rulemaking is endemic to the American regulatory state. This is unsurprising, given the prominent role of trial-type procedures and judicial review in our administrative law. Over the years, however, reformers have proposed various measures to counteract or soften these adversarial norms, and some have been adopted. One of the most significant is *regulatory negotiation* or *negotiated rulemaking* ("reg neg" for short), which relies on front-end negotiation between interested parties to reach some agreement that the agency may use in making its decisions about the relevant rule. Reg neg seeks to reduce the tendency of parties in adversarial proceedings to emphasize procedural and tactical maneuvering and litigation

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at the expense of productive, face-to-face communication. By encouraging such communication by the interested parties outside of the formal, highly structured, legalistic process of rulemaking, reg neg encourages them to develop consensus through a negotiating process that facilitates trust, understanding of competing interests and positions, compromises, and thus more creative, swifter solutions to regulatory problems.

This, at least, was the theory that animated reg neg when one of us first proposed it thirty-five years ago.[1] Our Article assesses how well reg neg has fulfilled this promise. Part I begins with reg neg's humble origins and the efforts of a regulatory reform entrepreneur and later academic, Philip J. Harter, to turn a promising idea into a viable, institutionalized administrative procedure. It next considers how the federal government embraced reg neg by incorporating it into the Administrative Procedure Act (APA) and encouraging agencies to use it, and it concludes by reviewing how the statute regulates reg neg.

Part II considers two principal critiques of reg neg: (1) the notion that agencies that use it abdicate their authority to regulate in the public interest and give unfair access and influence to special interests; and (2) the claim that, in practice, it reduces neither the costs of the regulatory process at the agency level nor subsequent court litigation. We offer some responses to these critiques, namely that, in certain cases, increased satisfaction and better information from regulated parties may be worth the costs of reg neg.

Finally, Part III examines reg neg's more recent history and considers why agencies only rarely engage in it. By way of illustration, it presents two actual examples of reg neg in action — one successful, the other not. We conclude that reg neg, for all its limitations, remains a viable complement to conventional notice-and-comment rulemaking.

I. The Origins of Reg Neg

A. Reformers Launch Reg Neg

While different agencies have experimented with consensual regulatory approaches at least since the 1940s,[2] reg neg began to take shape as a distinct

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1 Peter H. Schuck, *Litgation, Bargaining, and Regulation*, 3 Reg. 26 (1979).

2 *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255, 1261-62 (1997) ("The idea of involving affected parties in executive branch policymaking dates back at least to the New Deal . . . ."); Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 Duke L.J. 1389, 1389 (1997) (describing informal conferences discussed in a 1947 Attorney General's manual as "the predecessors of advisory

idea in an essay by Peter Schuck, *Litigation, Bargaining, and Regulation*.[3] This essay took stock of the shortcomings of the overly adversarial posture of rulemakings in the 1970s[4] and proposed a new direction. In particular, the piece considered the virtues of face-to-face bargaining as a way to retain most of the benefits of adversarial proceedings without the costs and constraints of litigation. It claimed that

> there may well be an appropriate (if modest) place for bargaining in standard-setting, though it will require that the regulatory agency itself play a new and delicate role in the process. The agency would have to preside over what might be called "structured bargaining," in which it would prescribe certain policy parameters within which the bargaining would be conducted and attempt to ensure that all legitimate interests had an opportunity to participate.[5]

The essay expanded on this idea by comparing it to the "offeror" proceedings then used by the Consumer Product Safety Commission (CPSC), arguing that "such a regulatory procedure, at least in theory, encourages informal, face-to-face, problem-solving negotiation between the affected interests, under the auspices of a public body that retains final decision-making authority."[6] The

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committees"). John T. Dunlop, Secretary of Labor from 1974 to 1975 and a distinguished scholar, encouraged consideration of alternatives in rulemaking in the mid-1970s. *See* John T. Dunlop, *The Limits of Legal Compulsion*, 27 Lab. L.J. 67 (1976); *see also* Coglianese, *supra*, at 1261-62 (explaining that in the late 1970s, Dunlop

> chaired the opening meeting of the National Coal Policy Project . . . , one of the most prominent early experiments with negotiation over regulatory policy. The National Coal Policy Project sought the consensus of environmental groups and industry on policies related to increased coal production, and achieved agreement on several hundred proposals. Although most of these proposals were never ultimately enacted, the Project did serve as a model for reg neg by demonstrating that consensus could be built across conflicting groups of interests.).

3 Schuck, *supra* note 1.

4 *Id.* at 28-29 (discussing the shortcomings of the "litigation model"). For more background on the adversarial posture of rulemaking and rulemaking ossification, see Thomas McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 Duke L.J. 1385 (1992).

5 Schuck, *supra* note 1, at 32.

6 *Id.* at 33. "Offeror" proceedings involved the CPSC "contract[ing] with an outside organization (the 'offeror') to develop a product safety standard that the CPSC [might have wished] to adopt as a mandatory standard." *Id.* For more

piece suggested that these procedures might be given greater consideration going forward.[7]

In 1982, Philip J. Harter transformed this argument into a viable alternative approach to rulemaking, later dubbed "reg neg."[8] Harter cited serious concerns about the legitimacy of administrative decisions taken under the APA and the time and expense associated with them. In response, Harter proposed

> that a form of negotiation among representatives of the interested parties, including administrative agencies, would be an effective alternative procedure to the current rulemaking process. Although virtually every rulemaking includes some negotiation, it is almost never the group consensus envisioned here. Negotiations among directly affected groups conducted within both the existing policies of the statute authorizing the regulation and the existing policies of the agency, would enable the parties to participate directly in the establishment of the rule. The significant concerns of each could be considered frontally. . . . A regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack.[9]

Harter then examined specific aspects of reg neg, considering the drawbacks and benefits of a negotiated approach. In particular, he emphasized the importance and power of choosing the members of a rulemaking committee (and the difficulties associated with convincing different stakeholders to take part).[10]

Harter's article was based on a report prepared in 1982 for the Administrative Conference of the United States (ACUS),[11] and, also in 1982, much of this new scheme was incorporated into a formal proposal by the ACUS.[12] The ACUS recommendation solidified the more theoretical discussions of reg neg into detailed rules regarding how agencies could practically implement the new

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background on offeror proceedings, see *id.* and the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089 (2012).

7 Schuck, *supra* note 1.

8 Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1, 34 (1982).

9 *Id.* at 7.

10 *Id.* at 52-82.

11 *Id.* at 1.

12 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4), 47 Fed. Reg. 30708 (proposed July 15, 1982) (codified at 1 C.F.R. § 305.82-4 (1987)).

approach.[13] However, the ACUS hedged its bets in this first recommendation, stating that "this procedure should be viewed as experimental, and should be reviewed after it has been used a reasonable number of times."[14]

The ACUS did not have to wait long to observe reg neg in practice. By 1985, the ACUS reported that the "procedures [of Recommendation 82-4] have been followed four times by federal agencies [including the Federal Aviation Administration, the Environmental Protection Agency, and the Occupational Safety and Health Administration]."[15] Strikingly, given that reg neg mainly existed in the minds of commentators before the mid-1980s, agencies seized on the innovation with relative alacrity. Moreover, the Federal Aviation Administration (FAA), Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA) are agencies with very different substantive missions. The willingness to adopt negotiated rulemaking across different areas of policymaking suggests that it addressed a structural, transubstantive need within the regulatory system. Building on this momentum, the ACUS's 1985 Recommendation expanded on its initial proposals, adding various new rules, including that "[a]n agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations" and that "[t]he agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement."[16]

B. Congress and the Executive Branch Act to Approve Reg Neg

While scholars and the ACUS had effectively launched reg neg by the late 1980s, it still faced a major headwind: reg neg's legal status was uncertain in the absence of explicit congressional approval. Coglianese explains that

> although . . . early attempts at negotiation were generally considered valuable experiences, by 1990 only five federal agencies had promulgated

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13 *Id.* at 30709 ("The purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules.").

14 *Id.*

15 Procedures for Negotiating Proposed Regulations (Recommendation 85-5), 50 Fed. Reg. 52895 (Dec. 27, 1985) (codified at 1 C.F.R. § 305.82-4 (1987)). As the Recommendation suggests, the FAA appears to have been the very first agency to use a formal reg neg. *See* Flight Time, Duty Time, & Rest Requirements for Flight Crewmembers, 48 Fed. Reg. 21339 (May 12, 1983). The EPA was the second agency to complete successful reg negs.

16 50 Fed. Reg. 52895.

> rules using negotiated rulemaking. Even though the Federal Advisory Committee Act (FACA) effectively authorized agencies to establish committees to negotiate rules, agencies were thought reluctant to proceed in the absence of clear congressional guidance specifically approving negotiated rulemaking committees.[17]

Congress considered legislation contemplating some form of reg neg throughout the 1980s. In 1980, a bill regarding Regulatory Negotiation would have established "a pilot program to encourage the voluntary formation of regulatory negotiation commissions as an alternative to the adversarial process of establishing regulatory policy."[18] In the late 1980s, hearings were held in the 100th and 101st Congresses on two reg neg bills.[19] It was not until 1990, however, that Congress laid to rest any doubts about reg neg's legality with the passage of the Negotiated Rulemaking Act (NRA).[20] Coglianese argues that Congress passed the Act — at least partly — because of claims that reg neg would produce rules more quickly and result in less litigation.[21] Congressmen relied upon the successes of the earliest reg negs from the 1980s to support these claims.[22]

After Congress approved of reg neg, the executive branch followed suit. As part of the National Performance Review, an initiative designed to improve government performance early in the Clinton administration, Vice President Gore, who oversaw this Review, called for "agencies to use negotiations to develop regulations — i.e., the reg neg approach." He further argued that "[t]his process allows representatives of an agency to work with affected interests in a cooperative effort to develop regulations."[23] President Clinton then issued

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17 Coglianese, *supra* note 2, at 1263-64. Coglianese counts these five agencies as the Department of Education, Department of Labor, Department of Transportation, Environmental Protection Agency, and Nuclear Regulatory Commission. Three other agencies — the Department of Agriculture, Department of Interior, and the Federal Trade Commission — had initiated negotiated rulemaking proceedings but had yet to issue final rules following these negotiations.

18 Regulatory Negotiation Act of 1980, S. 3126, 96th Cong. (1980).

19 H.R. 3052, 100th Cong. (1987); H.R. 743, 101st Cong. (1989).

20 *See* Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969, *amended by* 5 U.S.C. §§ 561-570 (1994).

21 *See* Coglianese, *supra* note 2, at 1264-66 (offering quotes from congressional debates focusing on speed and reduced litigation).

22 *Id.* at 1258 (quoting *Negotiated Rulemaking Act of 1987: Hearing on H.R. 3052 Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 100th Cong. 31 (1988) (statement of Sen. Carl Levin)).

23 Nat'l Performance Review, *Executive Summary*, *in* Improving Regulatory Systems: Accompanying Report of the National Performance Review (1993),

an executive order directing agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[24] By 1996, the federal government appeared to fully support reg neg, and Congress permanently reauthorized the Negotiated Rulemaking Act (NRA).[25] The Act has been codified within the Administrative Procedure Act (APA),[26] firmly ensconcing reg neg in the super-statute at the heart of American administrative law.

C. How Reg Neg Works

The core sections of the NRA, now sections 563-566 of the APA, control when and how reg negs occur.[27] First, under section 563, to launch a reg neg, an agency head must make a determination that "the use of the negotiated rulemaking procedure is in the public interest."[28] Section 563 provides criteria that an agency head must take into account, including whether

> (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
> (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (A) can adequately represent the interests of those [that will be significantly affected by the rule]; and (B) are willing to negotiate in good faith to reach a consensus on the proposed rule;
> (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
> (5) the reg neg procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

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available at http://govinfo.library.unt.edu/npr/library/reports/reg.html.

24 Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993).

25 Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 3873. Coglianese notes that the arguments made during the Act's initial passage were repeated upon its reauthorization. Coglianese, *supra* note 2, at 1270-71.

26 5 U.S.C. §§ 561-570 (2012).

27 We omit detailed considerations of the remaining sections of the Act (except for § 570, pertaining to judicial review) because they discuss more minor issues like the purposes of the Act (§ 561), definitions of terms in the Act (§ 562), the termination of a reg neg committee upon promulgation of a final rule (§ 567), the use of agency services and facilities (§ 568), the expenses of reg neg committee members (§ 568), and executive branch encouragement of reg neg (§ 569).

28 5 U.S.C. § 563.

> (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee . . . .[29]

Most importantly, one of the criteria that must be taken into account under section 563 is whether "the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment."[30] This criterion makes clear that agencies are not bound by the deliberations of a reg neg committee. A committee's output does not override an agency's legal obligations, and whether the agency uses the consensus of the committee as the basis for a rule is simply one factor among many to consider in determining whether to initiate a reg neg. While agencies facilitate a reg neg committee's negotiations, they remain in charge of formulating the final rule and shepherding it through the notice-and-comment process.[31]

While section 563 provides agencies with tools to determine whether or not reg neg is appropriate, Congress makes this determination itself in some specific cases by requiring agencies to use reg neg. For instance, the No Child Left Behind Act requires that the Department of Education use reg neg before promulgating certain regulations under the Act.[32] Essentially, section 563 allows any agency to opt in to reg neg, but Congress may preclude agency determinations on the issue by mandating that they follow a negotiated approach.

After an agency determines that it will conduct a reg neg, section 564 of the APA provides for publication of notice of negotiated proceedings and for applications for membership on the reg neg committee. Under section 564(a), agencies must publish various details of the reg neg in the Federal Register, including:

> (1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;
> (2) a description of the subject and scope of the rule to be developed, and the issues to be considered;
> (3) a list of the interests which are likely to be significantly affected by the rule;
> (4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

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29 *Id.*

30 *Id.*

31 Section 563 also provides for the use of a convener to assist the agency in determining whether negotiated rulemaking is appropriate and in identifying parties who will be significantly affected by a proposed rule. *Id.*

32 *See* 20 U.S.C. § 6571(b) (2012); 25 U.S.C. § 2018 (2012).

> (5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;
> (6) a description of administrative support for the committee to be provided by the agency, including technical assistance;
> (7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and
> (8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).[33]

Section 564(b) details how "[p]ersons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented . . . may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule."[34] The application process created by section 564(b) constitutes an important safeguard within reg negs. Under section 564(a), the agency proposes persons to represent affected interests on the committee, but, if the agency makes a mistake and overlooks an affected party (or unfairly excludes one), under section 564(b), they may apply to join the committee and contribute to the negotiations.

Sections 565 and 566 concern the establishment and conduct of reg neg committees. After an agency has complied with section 564 by publishing notice of the reg neg and receiving comments and applications, it may formally establish a reg neg committee.[35] It may also decide not to establish a committee; if it does so, it must publish its decision and its reasoning in the Federal Register.[36] Section 565 suggests that committees be limited to twenty-five members, but allows an "agency head [to] determine[] that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership."[37] Moreover, the section requires that "[e]ach committee shall include at least one person representing the agency."[38] Section 566 governs

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33 5 U.S.C. § 564.
34 *Id.*
35 *Id.* § 565.
36 *Id.*
37 *Id.*
38 *Id.* § 566:

> The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

the conduct of established reg neg committees. Most importantly, it states the duties of reg neg committees: "[e]ach negotiated rulemaking committee . . . shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule."[39] It also provides for presentation of the results of the committee's negotiations in a report:

> If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.[40]

Although it does provide a detailed structure for reg neg efforts, the NRA gives no authoritative weight to any negotiated outcome. A reg neg committee may report a proposed rule back to an agency if one is agreed upon, but if so, the NRA does not require the agency to adopt it as a final rule.[41] This is a key aspect of reg neg and one that often complicates attempts to consider it alongside, or in opposition to, notice-and-comment rulemaking: it is not quite right to call reg neg an alternative or a competitor to notice and comment. Instead, it should be seen as an add-on to notice and comment, an enhancement that seeks to reduce or soften the adversarial tendencies of the traditional APA approach while fully observing the APA's principles and requirements. Moreover, section 570 of the APA ensures that negotiated rules will receive no greater judicial deference than rules promulgated under standard notice-and-comment proceedings:

> Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be

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39 *Id.*

40 *Id.*

41 *See* Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 194-95 (D.C. Cir. 1988) (per curiam).

> accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.[42]

Finally, the NRA repeatedly recognizes the costs of reg neg. It explicitly identifies the availability of "adequate resources" and the "willing[ness] [of the agency] to commit" them to the reg neg project as factors in determining whether reg neg is appropriate.[43] Descriptions of "support for the committee to be provided by the agency, including technical assistance," must appear in the agency's publication of notice of a reg neg.[44] In addition, section 568 authorizes the use of agency services and facilities by reg neg committees. At least one empirical study has confirmed that reg neg can be costly: "[n]egotiated rulemaking participants . . . spend nearly twice as much as conventional participants do in terms of overall (monetary and nonmonetary) resources relative to those available."[45] While the NRA provides a framework for interested parties to thoroughly air their concerns and develop a regulatory consensus, these procedures do not come for free.

II. The Reaction Against Reg Neg

As suggested by its primarily nongovernmental origins, academic commentators were initially strongly in favor of reg neg. Roughly until the permanent reauthorization of the NRA in 1996, scholarly consensus supported the wider adoption of reg neg as a regulatory option. By the mid-1990s, however, "cracks in that support seem to have developed."[46] Over time, these cracks have deepened into two main critiques of reg neg, one theoretical and one practical.[47] The more normative, theoretical critique objects to the prominence and influence awarded to regulated parties in reg neg proceedings. Essentially, this critique argues that adversarial rulemaking processes are adversarial for a reason: because they are the best way to adequately protect the public interest.

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42 5 U.S.C. § 570. Although note that this section does block judicial review of "agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee." *Id.*

43 *Id.* § 563.

44 *Id.* § 564.

45 Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. Pub. Admin. Res. & Theory 599, 619-20 (2000).

46 William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 Duke L.J. 1351, 1355 (1997).

47 *See* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. Tex. L. Rev. 987, 1003 (2008).

Softening or weakening adversarial processes might lead to regulatory capture or undermine the legitimacy of regulatory outcomes. The more descriptive, practical critique questions the validity of negotiating rulemaking's claims to speeding the rulemaking process and easing the burdens of litigation. In particular, this critique contends that, as an empirical matter, reg neg has not delivered significant benefits. The following Sections consider these critiques in turn.

A. Abdication of Agency Authority

In an influential opinion in 1996, Judge Richard Posner appeared to take issue with the "whole notion of negotiated rulemaking."[48] In criticizing the promise of a Department of Education (DOE) official to a regulated party that the Department would abide by a negotiated consensus absent compelling reasons to depart from it, Judge Posner succinctly articulated the main theoretical objection to reg neg: "[the promise to the regulated party] sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the 'capture' theory of administrative regulation."[49] By allowing regulated parties to help write the rules of the game, Posner suggested, reg neg had compromised the public interest.

William Funk expanded this idea into a full-blown critique of reg neg in his article, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*.[50] Although Funk conceded that reg neg fit within the letter of administrative law, he argued that it violated its spirit:

> [T]he law is now merely a limitation on the range of bargaining. The parties to the negotiation are not serving the law, and the outcome of the negotiation is not legitimized by its service to the law. The regulation that emerges from negotiated rulemaking is, as Harter said, legitimized by the agreement of the parties. In short, law becomes nothing more than the expression of private interests mediated through some

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48 Funk, *supra* note 46, at 1355. *See* USA Grp. Loan Serv., Inc. v. Riley, 82 F.3d 708 (1996).

49 *USA Group Loan Services*, 82 F.3d at 714. For a recent discussion of capture theory, see Mariano-Florentino Cuéllar, *Modeling Partial Agency Autonomy in Public Health Policymaking*, 15 Theoretical Inquiries L. 471 (2014).

50 Funk, *supra* note 46. Funk put forward much of the substance of his critique in an earlier article, William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiations and the Public Interest — EPA's Woodstove Standards*, 18 Envtl. L. 55 (1987).

> governmental body. Public choice theory changes from a descriptive to a normative theory.[51]

Funk elaborated on this charge by claiming that "negotiated rulemaking reduces the agency to the level of a mere participant in the formulation of the rule and essentially denies the agency any responsibility beyond effectuating the consensus achieved by the group."[52] Moreover, he claimed that reg neg inappropriately privileged consensus over rationality in formulating regulations. In Funk's account, the APA and the rest of American administrative law "confirm and elaborate on the fundamental concept that rulemaking is to be an exercise in reasoned decisionmaking."[53] In the context of reg neg, by contrast, "the facts don't matter as long as everyone is happy."[54] More troublingly, agencies may present reasons justifying a rule to the public when they did not actually rely on such reasons when negotiating the rule. Funk had begun to develop this criticism in an earlier piece on woodstove standards promulgated by the EPA in the 1980s.[55] In that context, Funk

> described how decisions that in fact were bargained for in the negotiation process were reflected in the preamble as the product of the agency's reasoned decisionmaking. Data and scientific analysis were provided by the agency, as well as some of the other participants, but rather than being used in a reasoned decisionmaking process, the data and analysis were merely chips to be used in the bargaining process, giving advantage here in one case and there in another. The preamble, purporting to explain the basis for various provisions, was a fictional narrative.[56]

While Funk has done perhaps the most thorough and eloquent work in expounding these objections to reg neg, he is not alone in this line of criticism.[57]

We think that such objections are wide of the mark. Because all negotiated rules must still proceed through notice and comment and must be subject to the normal judicial review, they are likely to strengthen both the rulemaking process and the substantive rules that result from this process. If we trust

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51 Funk, *supra* note 46, at 1375.

52 *Id.* at 1376.

53 *Id.* at 1380.

54 *Id.* at 1381.

55 *See* Funk, *supra* note 50.

56 Funk, *supra* note 46, at 1382.

57 *See, e.g.*, Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 Rutgers L. Rev. 1069 (2000); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 Duke L.J. 1206, 1211-12, 1216-17 (1994).

the standard procedures of notice-and-comment rulemaking and review by courts to meaningfully police the quality and legitimacy of regulations (i.e., if we trust that administrative law can work), then a negotiated rule cannot be any worse, and is likely to be better, than those that emerge from the more conventional procedures. If a negotiated rule really did flout the public interest or meaningfully depart from norms of reasoned decision-making, we should expect notice and comment procedures and judicial review to detect and reject it.

Judge Posner's opinion in *USA Group Loan Services, Inc. v. Riley* illustrates this point well.[58] Because Judge Posner was engaged in judicially reviewing a negotiated rule, his concern about "the final confirmation of the 'capture' theory of administrative regulation"[59] was beside the point and merely hypothetical in that he might object to the DOE agreement *if the agreement were enforceable*. In a conventional exercise of judicial review, however, he rightly concluded that it was not enforceable:

> We have doubts about the propriety of the official's promise to abide by a consensus of the regulated industry, but we have no doubt that the Negotiated Rulemaking Act did not make the promise enforceable. *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 194 (D.C. Cir.1988) (per curiam). The practical effect of enforcing it would be to make the Act extinguish notice and comment rulemaking in all cases in which it was preceded by negotiated rulemaking; the comments would be irrelevant if the agency were already bound by promises that it had made to the industry. There is no textual or other clue that the Act meant to do this. Unlike collective bargaining negotiations, to which the servicers compare negotiated rulemaking, the Act does not envisage that the negotiations will end in a binding contract. The Act simply creates a consultative process in advance of the more formal arms' length procedure of notice and comment rulemaking. See 5 U.S.C. § 566(f).[60]

Judge Posner's opinion echoed the D.C. Circuit's ruling in *Natural Resources Defense Council v. EPA* confirming that, for purposes of judicial review and APA applicability, negotiated rules are no different than any other regulations.[61]

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58 USA Grp. Loan Serv., Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996).

59 *Id.* at 714.

60 *Id.* at 714-15.

61 Natural Res. Def. Council, Inc. v. EPA 859 F.2d 156, 194 (D.C. Cir. 1988) (per curiam). Note that some commentators have gone further than simply acknowledging that reg neg rules are subject to judicial review and have argued

But what really appears to trouble Funk is something else: the "cynicism of public choice theory" and the "insidious" way in which an agency may present the outcomes of reg neg as reasoned choices when they actually are the fruits of bargaining among some of the affected parties. This concern, however, rests on a dubious, perhaps outdated conception of the administrative state which relies on the "expertise theory" of delegated powers to agencies, a conception made explicit in Funk's 1987 article on an EPA rulemaking:

> James Landis provided the best contemporary justification and explanation for the administrative state . . . . [A]ccording to his analysis, Congress creates administrative agencies because modern society requires government regulation to a degree simply beyond the resources and expertise of Congress. These agencies are empowered to make law because they are or will become expert in their fields. Not articulated, but implicit in his analysis, was a belief that these agencies faced problems capable of objective solution, that politically neutral administrators could determine finite and correct answers to the problems of modern industrial society.[62]

In many cases, there is much to be said for Funk's preference for rulemaking dictated by technical expertise rather than by the sausage-making process described by public choice theorists.[63] But this preference begs many difficult questions about what we mean by technical expertise (two related but distinct concepts), what its sources are, who is best qualified to deploy it, whether it resides wholly in the agency, and how accurate or complete this technocratic account is in the real world of everyday agency rulemaking. To some extent — which surely varies according to the nature of the agency and of the rule under consideration — Funk's technocratic account is wishful thinking: claims of rational justifications for rules are often smokescreens for interest group horse-trading, with the agency playing mediator, orchestrator, or auctioneer. Indeed, reg neg has the advantage of realism and transparency, revealing the

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that courts should not give negotiated rules deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See* Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 Rutgers L. Rev. 1069 (2000).

62 Funk, *supra* note 50, at 89-90.

63 The old chestnut that "laws are like sausages; it's better not to see them being made" has been attributed to Otto von Bismark but has not been accurately traced. *See* Oxford Dictionary of Quotations 548 (Elizabeth Knowles ed., 7th ed. 2009). Regardless of the quote's origins, we accept its insight. For more on public choice theory, see Peter H. Schuck, Why Government Fails So Often, and How It Can Do Better ch. 5 (2014).

most influential non-agency parties in the rulemaking process to each other and to the public, rather than allowing their influence to operate obscurely and informally.[64] There is simply no reason to expect that reg neg will give greater power over the outcomes of rulemakings to affected interests than they already possess. And in the end, it is the agency that must balance these interests, take any other interests into account, and formulate the final rule.

In this sense, reg neg resembles more corporatist approaches to rulemaking, where sustained engagement among different stakeholders shapes policy outcomes.[65] Corporatism thus offers another model to compare with reg neg. Further, corporatism may hold lessons for reg neg. Corporatist negotiations often continue across multiple rounds of policymaking — peak associations may be involved in many rounds of labor negotiations, for instance.[66] Reg neg, which usually focuses on a single rule or set of rules, might benefit from bringing participants into multiple rounds of negotiation.[67] However, the comparison between corporatism and reg neg should recognize a core difference: reg neg ultimately feeds into a notice and comment rulemaking process; it enriches the standard notice-and-comment approach by exploiting the advantages of face-to-face bargaining.

Fully engaging with the complex debate over the consequences and legitimacy of public choice theory (and the virtues and deficiencies of more corporatist models) is beyond the scope of this Article. It suffices to say that technical expertise remains a contested descriptive account and normative justification for administrative law and the administrative state. We accept Funk's point that reg neg is not isomorphic with his theory of agency decision-

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64 We note a further objection here, made by Talia Fisher, that reg neg particularly privileges those organized interest groups which are better able to participate in negotiations. We agree that reg neg does favor interest groups over individuals in this respect. Nevertheless, we regard interest groups as legitimate participants in policymaking processes which play valuable roles in a pluralist democracy. *See generally* Schuck, *supra* note 63, at 105-10; Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 Yale L. & Pol'y Rev. 553 (1997).

65 This comparison is not original. Susan Rose-Ackerman and others have previously noted the corporatist dimensions of reg neg. *See* Rose-Ackerman, *supra* note 57, at 1217.

66 *See generally* Michael Wallerstein, Miriam Golden & Peter Lange, *Unions, Employers' Associations, and Wage-Setting Institutions in Northern and Central Europe, 1950-1992*, 50 Indus. & Lab. Rel. Rev. 379 (1997) (describing the involvement of labor unions and employer associations in labor negotiations in eight European countries across the latter half of the twentieth century).

67 We thank Talia Fisher for this insight.

making, but we emphasize that, as with any model of administrative law, reg neg strikes a distinctive and contestable balance between technocratic, participatory, and other administrative state values.[68]

B. Claims of Ineffectiveness

A second, related critique of reg neg is more functional; it contends that reg neg does not work very well. In particular, the claimed practical benefits of reg neg — less time and resources spent on rulemaking and fewer lawsuits post-promulgation — have not materialized.[69] The flavor of this debate is much more empirical than the theoretical disagreement considered in Section II.A. Since agencies adopted reg neg in earnest, scholars have attempted to observe and document its practical effects.

Cary Coglianese has performed the most comprehensive work in this respect.[70] A 1997 article by Coglianese analyzes all reg negs that resulted in the promulgation of a rule between 1983 and 1996.[71] His conclusions are troubling for supporters of reg neg. First, he finds that only thirty-five federal reg negs were completed between 1983 and 1996, an extremely small number given the total volume of federal regulations promulgated during that period.[72] Second, Coglianese argues that use of reg neg did not meaningfully shorten the length of time between an agency's publication of its intent to promulgate a rule and a final promulgation.[73] Coglianese's methods are more questionable for this claim because he relies solely on a sample of EPA rulemakings to support it. He compares the length of fifteen EPA reg negs

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68 *See generally* Jerry L. Mashaw, Due Process in the Administrative State (1985).

69 Less time and fewer resources spent on rulemaking and avoidance of litigation were among the main benefits of reg neg claimed by supporters. *See, e.g.*, Nat'l Performance Review, *Reg03: Encourage Consensus-Based Rulemaking*, *in* Improving Regulatory Systems: Accompanying Report of the National Performance Review (1993), *available at* http://govinfo.library.unt.edu/npr/library/reports/reg.html.

70 Coglianese, *supra* note 2; *see also* Rose-Ackerman, *supra* note 57, at 1211-12.

71 Coglianese, *supra* note 2, at 1279, 1281 (including a table of all thirty-five reg negs completed before 1997).

72 *Id.* at 1276 ("[T]he overall proportion of agency regulations adopted using negotiated rulemaking remains consistently small — less than one-tenth of one percent . . . . In comparison with overall regulatory activity, then, the rate of negotiated rulemakings has been minuscule.").

73 *Id.* at 1286 ("[I]t is impossible to conclude that negotiated rulemaking has successfully increased the speed of the regulatory process.").

(three of which were still in progress in 1997) with an average length of time to promulgation for EPA rules reported by Cornelius M. Kerwin and Scott R. Furlong.[74] Third, Coglianese claims that reg neg did not lead to a lower rate of litigation compared to standard notice and comment rulemaking.[75] Again, Coglianese's methods for this claim are open to question. He tallied how many EPA rules promulgated under two key statutes from 1980-1991 were the subject of petitions for review filed in the D.C. Circuit and how many of the EPA's negotiated rules were the subject of petitions for review before the same court.[76] Affected parties petitioned for review of roughly half of the reg negs, whereas petitioners filed against only thirty-five percent of the EPA's other rules.[77] Coglianese sums up the combined results of his study as follows:

> If negotiated rulemaking were living up to the theoretical advantages others have attributed to it — that is, if it really saved agencies substantial time and avoided litigation — overworked agency officials might well be expected to use it extensively. Yet even though the number of negotiated rulemakings has increased somewhat in the past few years, the practice remains confined to the tiniest fraction of all federal regulations. In light of the outcomes negotiated rulemaking has achieved in terms of its two main goals, such infrequent reliance on negotiated rulemaking would seem to make sense. Negotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation.[78]

As Coglianese himself acknowledges, his approach to drawing empirical conclusions concerning reg neg is contestable.[79] In particular, reg negs may suffer from a selection bias: if, because of the content or impact of the rules selected for negotiation, they would have taken longer to be promulgated than average or been more likely than average to be challenged, regulatory negotiations may still have provided benefits.[80] Coglianese admits as much

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74 *Id.* at 1280-86; *see* Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. Pub. Admin. Res. & Theory 113 (1992).

75 Coglianese, *supra* note 2, at 1309.

76 *Id.* at 1300-01.

77 *Id.* at 1301. We note that Coglianese's reliance on D.C. Circuit court records may overlook challenges with other procedural postures.

78 *Id.* at 1309.

79 *Id.* at 1311.

80 Indeed, commentators have claimed that some of the negotiated rulemakings in Coglianese's EPA sample were more likely to have long promulgation periods or to be challenged, in part because the notice of proposed rulemaking was the key agency step in certain cases, mobilizing industry players to an upcoming

but also attempts to respond to this concern.[81] Based on his analysis of EPA rulemaking, he argues that "it appears that agencies have chosen those rules [for negotiated rulemaking] that would have less of a tendency for time delays or litigation."[82] He specifically examines the EPA's selection criteria for reg negs, as well as the proportion of negotiated rules that qualify as "major rules," and concludes that

> the proportion of EPA negotiated rulemakings considered major (33%) is only modestly higher than the proportion considered major among the significant rules analyzed by Kerwin and Furlong in their study of EPA rulemaking (29%).
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> . . .
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> EPA's negotiated rules have stood at least a notch below the agency's large programmatic rules in terms of their scope and importance. Each of the negotiated rules has affected only a limited number of parties, at times just a single industry, precisely as the agency's own guidelines suggest. Instead of selecting the most challenging rules, the agency has used negotiated rulemaking for what an earlier EPA report called "'second-tier' rules," or those rules "affecting program implementation — rather than rules establishing program structure."[83]

Coglianese also relies on the criteria given in section 563 of the APA to argue that the EPA's negotiated rules are actually less likely to be delayed or result in litigation.[84] For instance, section 563(a)(5) requires an agency head to take into account whether "the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule."[85] Essentially, Coglianese contends that any selection bias cuts in favor of his wider claims. Beyond this objection, Coglianese's account may also be open to the charge that he focuses too narrowly on the EPA and that his sample sizes are simply too small to support meaningful conclusions.

Since Coglianese threw down his gauntlet in 1997, the core components of this practical critique of reg neg have not been thoroughly refuted. Harter has attempted to do so on a few occasions, but many of his methodological

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regulatory shift. *See* E-mail from Philip J. Harter to Peter H. Schuck (Oct. 10, 2013, 11:01 AM) (on file with authors).

81 Coglianese, *supra* note 2, at 1312.

82 *Id.* at 1316.

83 *Id.* at 1315, 1318-19.

84 *Id.* at 1319-20; *see* 5 U.S.C. § 563 (2012); *supra* Section I.C.

85 5 U.S.C. § 563(a)(5).

objections to Coglianese focus on specific cases and are not comprehensive.[86] Moreover, it appears that Coglianese's observations concerning the frequency of reg negs remain valid, and use of reg neg has further declined over time.[87]

Some commentators have come up with a better response than simply denying the accuracy of Coglianese's claims. Harter and others have pointed out that accelerated rulemaking and reduced litigation were not reg neg's only goals and that Coglianese's focus on these two metrics misses the point.[88] Harter has argued that reg neg leads to

> rules that are substantively "better" and more widely accepted. Those benefits were seen as flowing from the participation of those affected, who bring with them a practical insight and expertise that can result in rules that are better informed, more tailored to achieving the actual regulatory goal, and hence, more effective and more enforceable.
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> . . .
>
> [T]he rules that emerge from negotiated rulemaking tend to be both more stringent and yet more cost-effective to implement.[89]

Harter does not make clear exactly what "better" rules entail and relies on a study by Laura Langbein and Neil Kerwin to support his claims. Kerwin and Langbein phrase the benefits of reg neg as "greater satisfaction."[90] They evaluate satisfaction with a rule based on a combination of qualitative metrics, including "economic efficiency" and "cost effectiveness" as perceived by participants in reg negs.[91] In interviews with participants in EPA reg negs and traditional rulemakings, Langbein and Kerwin found that participants in

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86 *See* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. Envtl. L.J. 32 (2000); Harter, *supra* note 2; *see also* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. Envtl. L.J. 386 (2001).

87 *See* Lubbers, *supra* note 47, at 996; *infra* Section III.A. (updating Lubbers's results).

88 *See* Harter, *supra* note 86, at 52-56; Langbein & Kerwin, *supra* note 45.

89 Harter, *supra* note 86, at 54-55.

90 Langbein & Kerwin, *supra* note 45, at 599. Mark Lubell reported similar findings based on a survey of participants in the EPA's collaborative National Estuary program. *See* Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking*, *in* The Promise and Performance of Environmental Conflict Resolution 69, 72 (Rosemary O'Leary & Lisa B. Bingham eds., 2003) (citing Mark Lubell, Attitudinal Support for Environmental Governance: Do Institutions Matter?, Paper Presented at the Annual Meeting of the American Political Science Association, Wash., D.C. (Aug. 31, 2000)).

91 Langbein & Kerwin, *supra* note 45 at 604.

reg negs reported, on average, significantly greater satisfaction and higher quality scientific analysis than participants in traditional rulemakings.[92] In particular, they report that "participants learn more in negotiated processes and that negotiated processes are more horizontal in their sources of information (i.e., negotiated rule participants were more likely than conventional rule participants to see other participants as a source of information)."[93]

Coglianese has responded to these arguments by criticizing the use of "satisfaction" as an appropriate metric of success for reg negs.[94] In particular, Coglianese argues that "participant satisfaction does not necessarily mean that a policy is better."[95] Interestingly, Coglianese begins to sound like Funk as he invokes the concept of the public interest to demonstrate that participant satisfaction may not be the best measure of a rulemaking's success:

> In the end, even if everyone "at the table" could be made better off by certain forms of public participation, this does not mean that society overall would be better off. Moreover, if the intensity of a participatory process means that participants are not representative of the public at large, then collaborative processes aimed at satisfying participants could actually serve the broader public rather poorly, even if they succeed in satisfying participants greatly.
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> . . .
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> The evaluation community needs to ask not whether participants are satisfied, but whether the public's collective interests would likely be more satisfied with the results of a given procedure than the results that would have emerged from alternative procedures.[96]

Like Funk, Coglianese may be assuming too quickly here that the public interest can be coherently defined in an objective manner — and to such a level of precision that the outcomes of traditional rulemakings may be judged better or worse along this metric than the results of reg negs. But while Coglianese does raise some methodological objections to the studies of participant satisfaction, he generally concedes that participant satisfaction can be measured in some form and that reg neg appears to score well.[97] Moreover,

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92 *Id.* at 604, 625-26.

93 *Id.* at 607; *see also* Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENVTL. L. 45 (2005) ("[N]egotiation can produce a heightened level of information exchange.").

94 *See* Coglianese, *supra* note 90.

95 *Id.* at 74.

96 *Id.* at 77.

97 *See id.*

the claim that participants in reg negs learn more and more from other parties remains largely unrefuted.[98]

In sum, then, both the normative and functional critiques, as well as the responses to them, converge on a common view of reg neg. Reg neg is not a "cure" for the pathologies of administrative decision making in the sense that it accomplishes the same goals of standard rulemaking procedures at less cost, in a shorter period of time, or with fewer disputes. Instead, reg neg offers a different tradeoff than the pure notice-and-comment approach: for a given rulemaking, regulators may purchase, at some cost in terms of time and resources, somewhat richer information, greater satisfaction, and increased trust among a specific group of participants and parties. Whether the reg neg option is normatively preferable is open to debate, but it does provide an alternative mode of decision making within an administrative system.[99] Regardless of how reg neg affects any particular case, then, it should be seen as contributing diversity and flexibility to an increasingly ossified regulatory state.

III. The Future of Reg Neg

This final Part examines the more recent history of reg neg and considers specific rulemakings in light of the perspectives presented in Part II. First, it is clear that, despite its now decades-long presence on the regulatory scene, reg neg remains as Judge Posner described it in 1996 — a "novelty in the administrative process."[100] Use of reg neg committees, especially of reg neg committees not required by statute, has declined. In 2008, Jeffrey S. Lubbers reported that

> from the beginning of 1991 (the year after the NRA was enacted) through the end of 1999, sixty-three separate [reg neg] committees were created, while from 2000 to the end of 2007, there were only twenty-two. Thus, the number went from about seven per year to about three per year. More tellingly, the number of statutorily mandated committees was

98 *But see* Rose-Ackerman, *supra* note 57, at 1211 ("[R]egulatory negotiation does not help parties acquire technical or scientific information."). Rose-Ackerman does not cite empirical evidence for this claim, which seems to conflict with Langbein and Kerwin's later findings that reg negs garner higher scores on "quality of scientific analysis" and "incorporation of appropriate technology" metrics. *See* Langbein & Kerwin, *supra* note 45, at 604.

99 Reg neg is only one among diverse policymaking process options in the American administrative state. *See* Schuck, *supra* note 63, ch. 3.

100 USA Grp. Loan Serv., Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996).

> only twenty-three of sixty-three (36.5%) in the first period but fifteen of twenty-two (68%) in the most recent period.[101]

Using Lubbers' methodology, we attempted to determine if the trends he observed continued in the 2007 to 2013 period. Based on searches for "negotiated rulemaking committee" or "negotiated rulemaking advisory committee" in Westlaw's Federal Register database, we found thirteen unique announcements of intent to create reg neg committees between December 1, 2007 and April 28, 2013.[102] Thus, the number of reg negs per year has declined gently since 2007: Lubbers found about three per year (3.1) between 2000 and 2007; we found about two and a half (2.4) per year from 2007 to 2013. Eleven of the thirteen instances (eighty-five percent) were required by statute, a marked increase from the sixty-eight percent found by Lubbbers between 2000 and 2007.[103]

Lubbers proposes several reasons for the decline he observed. First, the disbanding of the ACUS in 1995 may have harmed reg neg. The ACUS produced the recommendations that led to agency experimentation with reg neg and the eventual enactment of the NRA. Congress also gave the ACUS a series of official responsibilities pertaining to the technique: to compile data, serve as a clearinghouse of information, report to Congress, provide training, and even pay the expenses of agencies in conducting a reg neg (including paying the expenses of the convenors, facilitators, and committee members).[104] The loss of the ACUS (restored in 2010) may have made it logistically more difficult to conduct reg neg and deprived reg neg of a source of political support, or at least a site where political support could have been rallied.

Second, Lubbers cites the upfront costs of reg neg as contributing to its decline: "[t]here is no question that convening and conducting a reg-neg involves a greater cost than organizing a notice-and-comment process. A 1995 report of EPA's costs for conducting reg-negs . . . included costs for convening, facilitation, analysis, travel and per diem, and consultants."[105]

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101 Lubbers, *supra* note 47, at 996.

102 The thirteen announcements, with citations to the Federal Register, are given in the Appendix. We note that two of these announcements led to the formation of multiple reg neg committees: one led to five committees being established, the other led to two. *See* Notice Of Establishment Of Negotiated Rulemaking Committees, 73 Fed. Reg. 80,314 (Dec. 31, 2008) (initiating five committees); Notice of Establishment of Negotiated Rulemaking Committees, 74 Fed. Reg. 46,399 (Sept. 9, 2009) (initiating two committees).

103 *See infra* Appendix.

104 Lubbers, *supra* note 47, at 996.

105 *Id.* at 997.

Third, Lubbers points to a lack of support from commentators and the Office of Information and Regulatory Affairs (OIRA).[106] As we discussed above, the academic consensus that launched reg neg dissolved during the 1990s. Finally, Lubbers also suggests that agencies may simply be able to gather sufficient information from affected parties through common, informal means. For example, he quotes a statement by "one of the EPA's leading officers [in the reg neg area] . . . in 2001 that the agency's emphasis had shifted toward 'facilitation of public meetings and workshops.'"[107] Lubbers is critical of this business-as-usual approach: "such meetings may certainly be useful, but they are less likely to produce consensus-based rule texts."[108]

All of this is not to say that reg neg has become extinct. As noted above, several new reg negs occur each year, and some are currently in progress[109] or have been recently completed.[110] Moreover, the convening statements associated with recent reg negs indicate that agencies recognize the particular benefits that reg negs can provide, such as the acquisition of sophisticated information in complex rulemakings and better relationships among regulated parties and regulators.[111] To more fully explore these benefits, as well as the pitfalls of reg neg, the following Subparts consider examples of negotiated rulemaking in greater detail.

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106 *Id.* at 999-1001, 1003-05.

107 *Id.* at 1001-02.

108 *Id.* at 1002.

109 Osage Negotiated Rulemaking Committee, 78 Fed. Reg. 16629 (Mar. 18, 2013) (to be codified at 25 C.F.R. pt. 226).

110 Native American Housing Assistance and Self-Determination Reauthorization Act of 2008: Amendments to Program Regulations, 77 Fed. Reg. 71513 (Dec. 3, 2012).

111 In a recent convening report, for example, the Department of Energy stated that "[r]eg neg is the preferred process for the undertaking compared to an ordinary rulemaking process since it is a more effective means of addressing the complex technical issues involved. Moreover, the process can help repair what many see as a strained relationship between the industry and the Agency." U.S. Dep't of Energy, Convening Report on the Feasibility of a Negotiated Rulemaking to Revise the Certification Program for Commercial Heating, Ventilating Air Conditioning and Commercial Refrigeration Equipment (2012), *available at* http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/convening_report_hvac_cre.pdf.

A. An Unsuccessful Example

Many recent reg negs have been required by the No Child Left Behind Act (NCLB).[112] The NCLB reg negs offer an interesting case study in some of the downsides of the negotiated approach. First, Congress raised the upfront costs of rulemaking under the Act by requiring the Department of Education to organize and finance formal negotiations.[113] Second, under NCLB, Congress mandated reg neg on regulations that would have a nationwide impact on the education of American children, a broad topic that implicates many stakeholders. According to the legislative history of NCLB, Congress intended that "representatives of migrant children, homeless children, and limited English proficient children . . . and that civil rights groups, test publishers, participating private schools, and faith-based organizations with educational expertise" be included in the rulemaking processes under the Act.[114] These congressional preferences are reflected in the appointed negotiators for an early rulemaking under the Act: individual negotiators, including some parents, are listed as "Representing Business Interests" and "Representing Students (Including At-risk Students, Migrant Students, Limited-English-Proficient Students, Students With Disabilities, and Private School Students)."[115]

The stated purpose for these particular negotiations was to implement portions of the Act "designed to help disadvantaged children meet high academic standards" and "pertaining to standards and assessments."[116] It is possible that the vagueness of the language in the Federal Register is misleading here. However, the combination of this vague language and the diverse roster

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112 *See, e.g.*, Notice of Intent to Establish an Adequate Yearly Progress Negotiated Rulemaking Committee, 78 Fed. Reg. 6770 (Jan. 31, 2013) (to be codified at 25 C.F.R pt. 30); Heating, Cooling, and Lighting Standards for Bureau-Funded Dormitory Facilities, 77 Fed. Reg. 60041 (Oct. 2, 2012) (codified at 25 C.F.R. pt. 36). The No Child Left Behind Act was President George W. Bush's signature education policy initiative. Among other reforms, it promoted the use of standardized testing to monitor teacher performance and allocate funds. For more background, see *No Child Left Behind*, U.S. Dep't of Educ., http://www2.ed.gov/nclb/landing.jhtml (last visited Jan. 26, 2014).

113 *See* Langbein & Kerwin, *supra* note 45, at 619-20; Lubbers, *supra* note 47, at 997.

114 *See* Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 Neb. L. Rev. 1015, 1044-45 (2007) (citing H.R. Rep. No. 107-334, at 809 (2001)).

115 Notice of Meetings to Conduct a Negotiated Rulemaking Process, 67 Fed. Reg. 9223 (Feb. 28, 2002).

116 *Id.*

of formal negotiators suggests that Congress employed reg neg to conduct a wide-ranging and essentially political conversation. Reg neg may not be the best approach for such conversations, particularly when they concern fraught issues like education standards that touch upon deeply held ideological and personal commitments.

Certainly, consensus may be reached on such matters through face-to-face negotiations, but other procedures may be able to give the many stakeholders a fair opportunity to contribute without the additional costs associated with selecting, convening, and running reg neg committees. Notice and comment rulemaking, for instance, seems better designed for resolving such broad disputes. Moreover, from its earliest incarnations, one of the most important components of reg neg has been bargaining.[117] It is not clear that, for broad regulations like those mandated under NCLB, the parties are able to make good use of this component of reg neg. The interests of parents and "business interests" may not exactly align, but they are likely not exactly orthogonal to each other either. If one of the main advantages of reg neg is tempering potentially sharply adversarial proceedings by allowing parties to strike deals, it is not clear that using reg neg as a miniature political convention is the best approach.

Some of these issues came to a head early on in rulemakings under NCLB. In 2002, a group of four non-profit agencies and a parent of a public school child sued the DOE to invalidate the composition of one of its first NCLB reg neg committees.[118] The plaintiffs argued that NCLB "required . . . the participation of non-governmental organizations with relevant expertise."[119] The case was dismissed,[120] refiled several years later,[121] and ultimately resolved by the D.C. Circuit on the question of standing.[122] This litigation was anomalous because courts generally do not have jurisdiction to review agency decisions pertaining to reg neg.[123] Because it resolved the case on a standing issue, the D.C. Circuit did not reach the question of whether the NCLB requirements allowed judicial review of the DOE's reg neg decisions.

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117 *See* Schuck, *supra* note 1.

118 Ctr. for Law & Educ. v. U.S. Dep't of Educ., 209 F. Supp. 2d 102, 103-04 (2002).

119 *Id.* at 105.

120 *Id.* at 119.

121 Ctr. for Law & Educ. v. U.S. Dep't of Educ., 315 F. Supp. 2d 15 (2004).

122 Ctr. for Law & Educ. v. U.S. Dep't of Educ., 396 F.3d 1152 (2005).

123 *Id.* at 1154 ("The NRA bars judicial review of '[a]ny agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter,' unless such review is otherwise provided by statute.") (citing 5 U.S.C. § 570 (2012)).

Even so, litigation over the content of a reg neg committee constitutes a practical instance of a well-known weakness in the negotiated approach: when determining who sits at the negotiating table, agencies may exclude interested parties. At the same time, as agencies include more parties in the proceedings, the negotiations become more costly and less likely to produce beneficial bargains (because interests are more diffuse and less conflicting). Accordingly, one lesson from the NCLB experience is that reg neg works best when a regulation implicates an easily identified and moderately-sized group of parties possessing well-defined and conflicting interests.[124] Other things being equal, the costs of reg neg will be lower and the likelihood of useful bargaining higher in such circumstances.

B. A Successful Example

The promise of reg neg can be glimpsed in the Federal Energy Regulatory Commission's (FERC's) use of negotiated proceedings in hydropower dam relicensings.[125] Prior to the adoption of a negotiated approach, FERC dam relicensing proceedings were expensive, adversarial affairs that sometimes failed, resulting in the closing and dismantling of dams.[126] The FERC first attempted a negotiation-oriented model in 1994 with the relicensing of four dams owned by International Paper (IP), located along the Androscoggin River in Maine.[127] While not strictly a rulemaking, the relicensing proceedings produced a detailed agreement that performed an essentially regulatory function, determining the conditions of continued use of IP's dams.

In addition, the relicensing process closely tracked reg neg procedures. From 1994 to 1997, "a collaborative team with local and national environmental NGOs, representatives of IP, the state of Maine and national regulatory authorities (EPA and FERC)" met repeatedly, compiled data, and negotiated the terms of the dam relicensing.[128] Ragnar Löfstedt argues that along the metrics of cost-effectiveness, time efficiency, and building trust, the negotiated

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124 The NRA incorporates this observation in various provisions, including section 563(a)(2), which requires that agency heads consider whether "there are a limited number of identifiable interests that will be significantly affected by the rule," and section 565(b), which suggests that committees be limited to twenty-five members. 5 U.S.C. §§ 563, 565.

125 *See* Ragnar E. Löfstedt, *Regulatory Negotiation: The Case of International Paper's Hydrodam Re-Licensing Procedure*, 5 Risk Mgmt. 37 (2003).

126 *Id.* at 42.

127 *Id.* at 44.

128 *Id.*; *see* Hydroelectric Applications, Notice of Applications, 62 Fed. Reg. 20171 (Apr. 25, 1997) (publishing the formal relicensing applications of IP).

dam relicensings were a success.[129] In particular, the relicensing of the IP dams seems to have occurred in record time and arguably cost less than the traditional adversarial approach.[130] Moreover, "the negotiated rule-making process appears to have contributed to rebuilding public trust in IP."[131]

What accounts for the success of the proceedings in the relicensing case? First, the FERC appears to have done a good job of gathering all parties interested in the proceedings. It no doubt benefited from having dealt with dam licensings (including the licensings of the dams at issue) and relicensings before. This highlights a particularly beneficial use of reg negs: when similar regulations have been put in place before, reg negs can rejuvenate ossified regulatory dynamics with limited extra work or uncertainty because the agency knows from past experience who will be affected and who might object.[132] Second, the FERC appears to have remained committed to the reg neg process, despite the outlay of time and resources it required. At one point, the negotiating committee met weekly to work on the agreement.[133] Finally, the relicensing process appears to have been one where specific bargaining efforts yielded concrete results. The final agreement includes detailed concessions from IP regarding environmental stewardship of the area around the dams and in other parts of Maine.[134] Specific concessions not only facilitate consensus but also mean that each party can point to positive results once the negotiation is completed. In terms of building rapport and trust between interested parties, the usefulness of bargaining should not be overlooked. Even if parties have objections to the substance of negotiated outcomes, bargaining with other interested groups can create respect and understanding on both sides.

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129 Löfstedt, *supra* note 125, at 46.

130 *Id.* at 45-46.

131 *Id.* at 47.

132 A good current example of such benefits may be the Department of Energy's upcoming reg neg on commercial certification requirements for commercial HVAC, WH, and refrigeration equipment. *See* Notice of Intent to Form the Commercial HVAC, WH, and Refrigeration Certification Working Group and Solicit Nominations to Negotiate Commercial Certification Requirements for Commercial HVAC, WH, and Refrigeration Equipment, 78 Fed. Reg. 15653 (Mar. 12, 2013) (describing how industry groups failed to meet earlier regulatory requirements before DOE turned to reg neg).

133 Löfstedt, *supra* note 125, at 44.

134 *Id.* at 45.

Conclusion

Reg neg began as a simple idea — that bargaining and consensus could be valuable alternatives to the adversarial flavor of many rulemakings. It matured in the academy and came of age when Congress endorsed it. Once institutionalized, commentators began to object to it as normatively unattractive and functionally ineffective. Meanwhile, its defenders maintain that, on balance, reg neg produces *better* regulations and increases trust among the interested parties.

Recent experience suggests that the critics and the advocates are both correct: reg neg, while infrequently used, sometimes enables the government to facilitate agreements that produce good regulatory outcomes, particularly when the rulemaking implicates a well-defined set of parties and issues. Even so, its usefulness is limited when the interested parties are too numerous for effective negotiation. Given the notorious problems of traditional adversarial notice-and-comment rulemaking, regulators should consider the strengths of reg neg. But they should also consider the factors that most conduce to reg neg's effectiveness: when an agency has the resources to fully commit to a negotiated rulemaking, when it is easy to identify the most affected interests, when both sides are likely to yield important concessions, and when more traditional rulemaking methods have reached a point of diminishing returns. Reg neg remains a viable alternative process in these circumstances and one that can contribute to the flexibility and resilience of administrative systems, which need all the help they can get.

APPENDIX

This Appendix contains the thirteen unique announcements of intent to initiate reg negs published in the Federal Register since December 1, 2007. The "additional announcements" column shows later publications in the Federal Register that were not counted as distinct items because the earlier citations had already discussed the agency's intent to initiate a reg neg.

Federal Register Citation	Date	Agency	Required by Statute?	Additional announcements?
72 Fed Reg.71231	Dec. 17, 2007	Department of the Interior	No	73 Fed Reg.22970, 76 Fed Reg. 5317
73 Fed Reg.51990	Sept.. 8, 2008	Department of Education	Yes	73 Fed Reg. 80314 (initiating five reg neg committees)
73 Fed Reg.63008	Oct. 22, 2008	Department of the Interior	Yes	
74 Fed Reg.1227	Jan. 12, 2009	Department of Housing and Urban Development	Yes	
74 Fed Reg.24728	May 26, 2009	Department of Education	Yes	74 Fed Reg. 46399 (initiating two reg neg committees)
75 Fed Reg.26167	May 11, 2010	Department of Health and Human Services	Yes	75 Fed Reg. 42755
75 Fed Reg.71568	Nov. 24, 2010	Department of Agriculture	Yes	
76 Fed Reg.25650	May 5, 2011	Department of Education	Yes	76 Fed Reg. 66248
76 Fed Reg.45471	July 29, 2011	Department of Energy	No	76 Fed Reg. 50148
77 Fed Reg.25658	May 1, 2012	Department of Education	Yes	
77 Fed Reg.36226	June 18, 2012	Department of the Interior	Yes (required by agreement between the United States and the Osage Nation)	
77 Fed Reg.39452	July 3, 2012	Department of Housing and Urban Development	Yes	
78 Fed Reg.6770	Jan. 31, 2013	Department of the Interior	Yes	