

BARGAINING TOWARD THE NEW MILLENNIUM: REGULATORY NEGOTIATION AND THE SUBVERSION OF THE PUBLIC INTEREST

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INTRODUCTION

In 1982 Philip Harter provided the first real description of negotiated rulemaking.¹ The time was ripe; regulatory reform was in the air. Rather than conducting arm's length, adversarial undertakings loaded down with procedural requirements to protect everyone's interests, affected persons and the agency would sit together and cooperatively seek agreement.² This approach to

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1. See generally Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 42-112 (1982) (proposing a detailed regulatory negotiation process). Actually, Harter's work was widely available as a draft report for the Administrative Conference of the United States (ACUS) prior to its publication in the Georgetown Law Journal. For a history of the development of regulatory negotiation pre-Harter, see Henry H. Perritt, Jr., *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 PEPP. L. REV. 863, 869-74 (1987).

2. This Article assumes that the reader is familiar with the procedures of negotiated rulemaking. The basic procedures are outlined in Recommendation No. 82-4 of the ACUS. See Administrative Conference of the U.S., *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.82-4 (1993) [hereinafter ACUS Recommendation No. 82-4]. In a nutshell, when an agency considers adopting a regulation, it will assess whether the matter is appropriate for negotiation. ACUS recommended that agencies use a "convenor" to assist in this assessment. There are a number of criteria that influence the success of a negotiated rulemaking process. See *id.* ¶ 4. If the convenor determines that negotiation is appropriate and the agency agrees, the convenor should be given the tasks of identifying the affected interests and inviting them to participate in a negotiated rulemaking. See *id.* ¶ 5. To assure that all affected interests are notified, the agency should publish notice of the creation of a negotiated rulemaking committee and a list of the invited participants in the Federal Register. See *id.* ¶ 7. Persons who believe they are not adequately represented by the selected members may apply for membership, and the convenor, in consultation with the agency, may include additional members. See *id.* The negotiating groups are generally considered federal advisory committees under the Federal Advisory Committee Act. See ADMINISTRATIVE CONFERENCE OF THE U.S., *NEGOTIATED RULEMAKING SOURCEBOOK 70-71* (David M. Pritzker & Deborah S. Dalton eds., 1995) [hereinafter 1995 SOURCEBOOK].

rulemaking seemed consistent with the new move in both courts and agencies to use Alternative Dispute Resolution (ADR) instead of traditional litigation and adjudication.³ The Administrative Conference of the United States (ACUS)⁴ explored both negotiat-

Thereafter negotiations are held. ACUS recommended that the agency and convenor consider selecting a neutral mediator to facilitate the negotiations. See ACUS Recommendation No. 82-4 ¶ 10. This has become standard practice. See, e.g., Procedures Governing Establishment and Operation of Fishery Negotiation Panels, 62 Fed. Reg. 23,667, 23,668-70 (1997) (to be codified at 50 C.F.R. pt. 600) (requiring use of an impartial facilitator when negotiated rulemaking procedures are used to develop fishery conservation and management measures). In the negotiations, the agency is represented by a senior official as one of the participants. See *id.* ¶ 8. The goal of the negotiating group is to achieve agreement by consensus on a proposed rule, which the agency agrees beforehand to publish as the agency's proposed rule. See *id.* ¶¶ 11, 13. Consensus is generally defined as unanimity. See *id.* ¶ 11. If a consensus rule is achieved, the group reports the rule and its supporting facts to the agency. The agency then publishes the proposed rule for notice and comment. See *id.* ¶¶ 11, 13. ACUS recommended that the negotiating group be given an opportunity to review the comments received to determine whether to recommend changes to the consensus rule, see *id.* ¶ 14, but not all agencies follow this practice. See E-mail from Philip J. Harter to William Funk (Sept. 15, 1997) (on file with the *Duke Law Journal*).

This process is, of course, different from conventional rulemaking, whether it occurs under the auspices of § 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), or under any of the various "hybrid" rulemaking statutes. In conventional rulemaking, the agency develops a proposed rule internally (sometimes after it publishes an advance notice of proposed rulemaking to obtain some public input prior to drafting actual regulatory language) and then publishes the rule in the Federal Register as a notice of proposed rulemaking. As an accompaniment to the proposed rule language, the agency includes a preamble which explains the purpose and effect of the proposed rule and any factual basis upon which it relies. After considering the comments received in response to the proposed rule, the agency adopts a final rule; the preamble of the final rule responds to the public comments and explains the rationale underlying the agency's final rule. See ADMINISTRATIVE CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 47 (2d ed. 1991). "Hybrid" rulemaking statutes are those which supplement or modify the normal rulemaking procedures for particular regulatory programs or agencies. See, e.g., 42 U.S.C. § 7607(d) (1994) (listing the rulemaking requirements of the Clean Air Act).

3. See, e.g., National Inst. for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 1-3 (1983), reprinted in ACUS SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 5, 9-11 (1987) (discussing expressions of enthusiasm for ADR from parties including Chief Justice Burger, two U.S. Attorneys General, ACUS, various legislatures, and the private sector); Philip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1393-95 (1983-84) (relating the purpose and goals of alternative dispute resolution to those of administrative programs and procedures).

4. ACUS was a unique federal agency that existed from 1968 to 1995. It was composed of between 75 and 101 individuals drawn from agencies, academia, and the private sector who were expert in administrative law and who volunteered their time. The primary function of the Conference was to study administrative processes with an eye towards

ed rulemaking and ADR and adopted several recommendations relating to each subject.⁵ ACUS followed through on its recommendations and became a strong supporter of both ADR and negotiated rulemaking.⁶

The academic literature on the subject of negotiated rulemaking blossomed.⁷ Virtually all of it was supportive. In 1990, when ACUS published its first Negotiated Rulemaking Sourcebook,⁸ the bibliography included only two articles with a negative slant on negotiated rulemaking.⁹ The articles in the 1995 Sourcebook demonstrated the same general support and lack of

recommending improvements to Congress and the agencies. Many, if not most, of its recommendations became the basis for much of what is standard administrative law today. See ADMINISTRATIVE CONFERENCE OF THE U.S., 1994-1995 ANNUAL REPORT 1, 55-56, 119, 126 (1995).

5. See Administrative Conference of the U.S., Recommendation No. 82-2, Resolving Disputes Under Federal Grant Programs, 1 C.F.R. § 305.82-2 (1993); ACUS Recommendation No. 82-4, *supra* note 2; Administrative Conference of the U.S., Recommendation No. 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (1993) [hereinafter ACUS Recommendation No. 85-5]; Administrative Conference of the U.S., Recommendation No. 86-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-3 (1993); Administrative Conference of the U.S., Recommendation No. 86-7, Case Management as a Tool for Improving Agency Adjudication, 1 C.F.R. § 305.86-7 (1993); Administrative Conference of the U.S., Recommendation No. 86-8, Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 C.F.R. § 305-86.8 (1993).

6. ACUS was a strong proponent of the Negotiated Rulemaking Act of 1990 and was given a number of responsibilities under the Act. See 5 U.S.C. § 569 (1994).

7. See, e.g., ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK 913-23 (David M. Pritzker & Deborah S. Dalton eds., 1990) (bibliography).

8. See *id.*

9. See William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 57 (1987) (suggesting that whatever the practical benefits of regulatory negotiation, it substituted bargained-for private interests in place of a search for the public interest); Rena Steinzor & Scott Strauss, *Building a Consensus: Agencies Stressing 'Reg Neg' Approach*, LEGAL TIMES, Aug. 3, 1987, at 16 (noting that agencies can cajole warring parties to reach agreements inconsistent with statutory mandates); see also Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 17-33 (1985) (criticizing some commentators' suggestions for less strict judicial review of negotiated rulemakings).

significant criticism.¹⁰ The literature extolled the virtues of negotiated rulemaking both in theory¹¹ and in practice.¹²

Some agencies seemed to be quite enamored with negotiated rulemaking. The Environmental Protection Agency (EPA) created a special office to spearhead the agency's efforts to increase the use of regulatory negotiation as a tool in the rulemaking process.¹³ The Department of Transportation (DOT) was an early and faithful advocate for the use of regulatory negotiation.¹⁴

Reflecting the current wisdom, Congress passed the Negotiated Rulemaking Act in 1990.¹⁵ In its study to improve government regulation, Vice President Gore's highly publicized National Performance Review touted negotiated rulemaking as a significant reform that agencies should adopt.¹⁶ President Clinton followed up with an executive order and memorandum to agencies calling on them to use regulatory negotiation.¹⁷ The Negotiated

10. See generally 1995 SOURCEBOOK, *supra* note 2. The 1995 SOURCEBOOK was written as a guide and reference manual for federal agencies and other parties interested in undertaking negotiated rulemaking, and claimed to be "based on the best available research and the collected experience of the government agencies and other parties that were willing to try this innovative technique." *Id.* at xv.

11. See, e.g., Perritt, *supra* note 1, at 867-75 (discussing the history of and theory behind negotiated rulemaking); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 159-64 (1985) (discussing EPA's approach to negotiated rulemaking and concluding that within the negotiations, interested parties felt well-represented, they believed the outcome was legitimate, and they felt that the agency had upheld its statutory mandate).

12. See, e.g., Daniel J. Fiorino & Chris Kirtz, *Breaking Down Walls: Negotiated Rulemaking at EPA*, 4 TEMP. ENVTL. L. & TECH. J. 29, 40 (1985) (finding, based on EPA's experience, that reg neg is a useful complement to standard notice-and-comment rulemaking, with benefits of consensus-based regulations extending beyond the rulemaking process to implementation of the rule); Stephen B. Goldberg, *Reflections on Negotiated Rulemaking: From Conflict to Consensus*, WASH. LAW., Sept.-Oct. 1994, at 42 (commenting on an FCC negotiated rulemaking, noting that the procedure was successful in that information was exchanged and consensus reached on many issues).

13. See Regulatory Negotiation Project, 48 Fed. Reg. 7494 (1983).

14. See, e.g., Neal Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FED. B. NEWS & J. 371, 372 (1984) (explaining DOT's decision to try reg neg based on benefits including a less adversarial and more creative process, representation of all interests, clear definition of issues, and reduced likelihood of post-process attacks on the rule).

15. See Pub. L. No. 101-648, 104 Stat. 4970 (1990) (codified as amended at 5 U.S.C. §§ 561-570 (1994)) (authorizing and establishing a framework for negotiated rulemaking).

16. See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 3 (1993).

17. See Exec. Order No. 12,866, 3 C.F.R. 638, 644-45 (1994), *reprinted in* 5 U.S.C. § 601 (1994) (directing each federal agency to consider the use of negotiated rulemaking); Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52,391, 52,391 (1993)

Rulemaking Act, which was originally supposed to sunset in 1996, was made permanent by a Congressional amendment that same year.¹⁸ In short, government was four-square behind negotiated rulemaking.

If negotiated rulemaking had enjoyed near unanimous support during its initial decade, however, cracks in that support seem to have developed in the past few years. Most notably, Judge Posner, whose views often are bellwethers for new directions in legal thinking, recently wrote an opinion for the Seventh Circuit in which he strongly criticized the whole notion of negotiated rulemaking.¹⁹ Less notably for sure, during the Administrative Law Section's presentation at the Association of American Law Schools in January 1997, the issue of negotiated rulemaking arose in a panel discussion of non-legislative rules as one possible response to the ossification of rulemaking; the panel, which represented a range of interests, took the opportunity to castigate regulatory negotiation. In addition, there appears to be a growing amount of academic literature questioning both the theory and alleged practical benefits of regulatory negotiation.²⁰ Now, Duke Law School has organized a symposium on negotiated rulemaking, and the panel appears weighted toward the critics and skeptics, not the supporters of negotiated rulemaking—is this conscious design or a subtle reflection of a changing climate?²¹

(calling on federal agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking").

18. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

19. See *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714-15 (7th Cir. 1996) (questioning the propriety of an agency official's alleged promise to negotiated rulemaking participants that the Department of Education would abide by the consensus agreement "unless there were compelling reasons to depart" from it, and describing the agreement as an "abdication of regulatory authority to the regulated").

20. See, e.g., Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994) (arguing that regulatory negotiation has been over-emphasized as a reform measure and that incentive-based systems, which remove the need for certain types of rulemaking, deserve more emphasis); Steinzor & Strauss, *supra* note 9, at 16 (arguing that regulatory negotiation can allow administrative agencies to ignore their statutory mandates and encourage interest groups to make legally inappropriate compromises, avoid deciding non-compromisable issues, and shift the burden for research and development of regulatory alternatives to private participants).

21. The April 1997 issue of the *Duke Law Journal* collects Articles written on regulatory negotiation by the panel members. See Symposium, *Twenty-Eighth Annual Administrative Law Issue*, 46 DUKE L.J. 1255 (1997).

This Article will survey the judicial reaction to negotiated rulemaking, with particular emphasis on the decision in *USA Group Loan Services, Inc. v. Riley*,²² and will summarize the empirical work to date. It will then address some of the issues that have been raised with respect to the legality of the negotiated rulemaking process, but it will conclude that negotiated rulemaking has been structured to comply with all formal legal requirements. The Article will then address what this author has long maintained is the fundamental tension between negotiated rulemaking and traditional administrative law processes. It concludes that while negotiated rulemaking may formally satisfy current legal requirements, the principles, theory, and practice of negotiated rulemaking subtly subvert the basic, underlying concepts of American administrative law—an agency's pursuit of the public interest through law and reasoned decisionmaking. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law.

I. JUDICIAL REACTION TO NEGOTIATED RULEMAKING

In Philip Harter's original article on regulatory negotiation he expressed concern with regard to judicial review of negotiated rulemakings.²³ If potential negotiators could lay back and later obtain strict judicial review of the rulemaking after it had been negotiated, it would create a disincentive for others to engage in the process.²⁴ Harter did not suggest an abandonment of judicial review of negotiated rules, but he did advocate a special form of judicial review tailored to the peculiarities of these rules.²⁵ This suggestion drew a negative response from Judge Patricia Wald.²⁶

22. 82 F.3d 708 (7th Cir. 1996).

23. See Harter, *supra* note 1, at 102; see also Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 485-89 (1983) (discussing potential problems with the application of existing standards of review to negotiated regulations and proposing a new method for judicial review of such rules).

24. See Harter, *supra* note 1, at 102.

25. See *id.* at 102-07 (suggesting that courts would review for conformity with the law but would defer to the committee's interpretation of the law. For other challenges on the merits the challengers would have to establish that their interests had not been adequately represented in the negotiations, or else their review would be precluded. Beyond this, courts would not use the "searching and careful" review standard enunciated in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but would only assess whether the committee's action was grossly irrational).

26. See Wald, *supra* note 9, at 18-25.

Her analysis indicated that many of the traditional issues involved in judicial review of agency rulemaking would, and should, remain in any judicial review of a negotiated rule.²⁷ Moreover, it was entirely possible that a rule which had been negotiated would raise other, equally thorny questions specific to the fairness of the negotiation.²⁸ Judge Wald's article, in turn, occasioned a response from Harter, in which he retreated from one of his original ideas, that a person challenging a negotiated rule would have to show that his interest was not adequately represented on the committee negotiating the rule.²⁹ Nevertheless, he continued to maintain that courts should be especially reluctant to overturn a negotiated rule on the grounds that it exceeded the agency's statutory authority or that it was arbitrary and capricious.³⁰

Whatever the merits of this interesting debate, it was cut short in 1990 by the terms of the Negotiated Rulemaking Act³¹ itself. Section 570 of the Act specifically addressed judicial review and clearly settled two issues.³² First, it made clear that there should be no judicial review of an agency's establishment of, assistance to, or termination of a negotiated rulemaking committee.³³ Thus, if an agency failed to ensure that the committee represented all the interested factions, provided unfair assistance to one or more members of the committee, or terminated the committee to prevent the development of a consensus, it would not be subject to judicial review. Second, the provision explicitly precluded a court from "accord[ing] any greater deference" to a negotiated rule than to an ordinary rule.³⁴ This effectively eliminated Harter's suggestion from any consideration by the courts.

Even before the Negotiated Rulemaking Act became effective, however, courts had acted without regard to the fact that a rule had been developed through negotiation. Indeed, it was not until

27. *See id.* at 23.

28. *See id.* at 24-25 (describing some of the potential judicial challenges specific to the fairness of the negotiation; for example, it might become necessary to assess the extent of interest group participation in the proceeding).

29. *See* Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 66-67 (1986).

30. *See id.* at 61-65.

31. *See* 5 U.S.C. §§ 561-570 (1994).

32. *See* 5 U.S.C. § 570 (1994).

33. *See id.*

34. *Id.* The provenance of the provision is unknown, but it seems clearly to have been occasioned as a negative response to Harter's proposal.

1988 that the first negotiated rule was challenged in court; in the course of the court's review upholding the rule, the court never acknowledged that the rule had been adopted through negotiation.³⁵

In the same year, another EPA rule, which had been developed through a process similar to regulatory negotiation, was challenged in *Natural Resources Defense Council, Inc. v. EPA (NRDC I)*.³⁶ That rule was adopted as part of a settlement agreement pursuant to which the EPA would propose whatever regulation was agreed upon by the parties to a certain litigation.³⁷ Consensus was achieved, and the EPA published the rule for comment.³⁸ Although no negative comments on the proposed rule were received, the EPA nevertheless made a change to the final rule. This change was challenged as a violation of the settlement agreement.³⁹ The court of appeals denied the challenge, observing that the EPA had only agreed to propose the consensus rule, not to adopt it.⁴⁰ In passing, the court noted Harter's admonition to agencies in regulatory negotiation to abide by consensus determinations or to risk the consequence that parties will be reluctant to negotiate rules with agencies.⁴¹ Nevertheless, the court indicated that "the soundness of that advice to the agency, however great, cannot impair its legal right to make such changes."⁴²

Following the passage of the Negotiated Rulemaking Act, there have been more judicial challenges to rules that involved some degree of regulatory negotiation, but the few decisions that mention the process do so only in passing⁴³—at least until *USA*

35. See *Safe Bldgs. Alliance v. EPA*, 846 F.2d 797 (D.C. Cir. 1988). Also, in *Natural Resources Defense Council, Inc. v. EPA*, the court upheld most aspects of a rule challenged by both industry and environmentalists, making no mention of the rule's origin in a negotiated rulemaking committee that failed to reach consensus. See 907 F.2d 1146 (D.C. Cir. 1990) [hereinafter *NRDC II*]; see also 1995 SOURCEBOOK, *supra* note 2, at 389 (noting that the promulgated rule was substantially similar to the last draft discussed in the committee).

36. See *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156 (D.C. Cir. 1988) [hereinafter *NRDC I*].

37. See *id.* at 194.

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.* at 194-95.

42. *Id.* at 195.

43. See, e.g., *Career College Ass'n v. Riley*, 74 F.3d 1265, 1267 (D.C. Cir. 1996) (upholding a negotiated rule of the Department of Education; mentioning the negotiated

Group Loan Services, Inc. v. Riley.⁴⁴ *USA Group* concerned the Higher Education Amendments of 1992,⁴⁵ which authorized the Department of Education to adopt certain regulations to improve the financial soundness of the student loan guaranty program. These amendments required any such regulations to be adopted through the process of negotiated rulemaking in accordance with the recommendations of ACUS or any "successor . . . law."⁴⁶ The Negotiated Rulemaking Act was a "successor law" to the ACUS recommendations and therefore applied to the rulemaking.⁴⁷ The Department of Education first held a series of public meetings and then created a number of regulatory negotiation committees to negotiate the rules.⁴⁸ One of these rules involved the liability that a "servicer" (an entity that furnishes administrative services to banks, educational institutions, and guarantors) of government-guaranteed student loans would have to the government in the event the servicer made some error that caused the government to lose money.⁴⁹ The committee negotiating this rule apparently reflected the full range of interests involved in the issue.⁵⁰

rulemaking process only in passing), *reh'g denied*, 82 F.3d 476 (D.C. Cir. 1996); *Career College Ass'n v. Riley*, No. 94-5213, 1995 WL 650151, at *1 (D.C. Cir. Sept. 29, 1995) (upholding a negotiated rule of the Department of Education without discussion of the regulatory negotiation process); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1121 (D.C. Cir. 1995) (overturning a rule adopted by EPA as beyond agency authority without mentioning negotiated rulemaking); *Alabama Power Co. v. EPA*, 40 F.3d 450, 453, 456 (D.C. Cir. 1994) (vacating a rule adopted after a failed regulatory negotiation; commenting only briefly on the attempted rulemaking); *Central Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1545 (9th Cir. 1993) (upholding a negotiated rule against challenge and remarking on the "virtually unprecedented cooperation between the governmental agency and the directly affected parties").

44. 82 F.3d 708 (7th Cir. 1996).

45. Pub. L. No. 102-325, 106 Stat. 448 (1992) (codified as amended in scattered sections of 20 U.S.C.).

46. 20 U.S.C. § 1098a(b) (1994).

47. See *USA Group*, 82 F.3d at 714.

48. See Notice of Proposed Rulemaking, 59 Fed. Reg. 8044, 8044-45 (1994) (describing the process the Department of Education undertook in inviting representatives of groups involved in student financial assistance programs to participate in a preliminary meeting at the Department of Education and in four regional meetings. Participants in the regional meetings nominated individuals to participate in the negotiated rulemaking sessions, which were held in the Washington, D.C. area.).

49. See *USA Group*, 82 F.3d at 711 (explaining the loan servicers' challenge to a rule that would have made them jointly and severally liable for even "inadvertent" violations of statutes, regulations or contracts pertaining to student loans).

50. Judge Posner's opinion continually refers to the committee as if it was made up

Consistent with ACUS's recommendations, the agency promised to publish any consensus regulation as the agency's proposed rule unless there were compelling reasons to depart from the consensus.⁵¹ At some point in the negotiations, the agency provided a draft to the committee proposing that servicers would be strictly liable for their errors, but only to the extent of the fees they received from customers.⁵² The court's opinion indicates, however, that the committee reached a consensus different from the Department of Education's initial draft, deciding that servicers should not be held liable under any circumstances.⁵³ The Department of Education did not propose this consensus determination as a proposed rule, despite its promise to do so, nor did it propose its draft concept. Rather, it proposed to make servicers strictly liable with no cap on their liability.⁵⁴ After the Department of Education adopted its proposed rule as the final rule, a servicer organization sued, alleging *inter alia* that the rule was invalid because the agency had breached its promise to propose the consensus rule and had bargained in bad faith.⁵⁵

only of the servicers—"the servicers reached a firm consensus," *id.* at 714, "a consensus of the regulated industry," *id.*, "promises that [the agency] had made to the industry," *id.* at 714-15, "the industry . . . rejected the proposal," *id.* at 715—but any negotiated rulemaking pursuant to either the recommendations of ACUS or the Negotiated Rulemaking Act would have a balanced membership of the interests involved, and Harter states that this was true here. *See* Philip J. Harter, *First Judicial Review of Reg Neg a Disappointment*, ADMIN. & REG. L. NEWS, Fall 1996, at 1, 1, 12; *see also* Notice of Proposed Rulemaking, 59 Fed. Reg. at 8044 (indicating that the Department of Education appointed rulemaking committees that reflected the variety of interests involved).

51. *See USA Group*, 82 F.3d at 714. ACUS Recommendation No. 82-4 states that "[t]he agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking." ACUS Recommendation 82-4 ¶ 13.

52. *See USA Group*, 82 F.3d at 714.

53. *See id.* The actual language of the opinion states that the "servicers reached a firm consensus." *Id.* The agency's preamble to its proposed rule, however, denies that any consensus was reached. *See* Notice of Proposed Rulemaking, 59 Fed. Reg. at 8048-50. It is possible that the court meant only that the servicers on the committee reached this consensus, but in context that does not seem likely, because, as noted above, *see supra* note 50, the court continually referred to the committee as if it were comprised of only the servicers.

54. *See USA Group*, 82 F.3d at 714. The court referred to this proposal as an "unexplained withdrawal" of the agency's previous draft proposal, *id.*, but the preamble to the proposed rule does explain the reasoning behind the agency's published proposal and why the agency was not convinced that a "cap" was appropriate, although it specifically asked for comments on the subject. *See* Notice of Proposed Rulemaking, 59 Fed. Reg. at 8049-50.

55. *See USA Group*, 82 F.3d at 714. The servicer also challenged the rule on the substantive grounds that it was beyond the agency's statutory authority or, in the alterna-

The court expressed doubts that either the Negotiated Rulemaking Act or the Higher Education Act created any "remedy" if the department violated their requirements regarding regulatory negotiation.⁵⁶ Even if they did, however, the court found that the servicers' allegations regarding the actions of the Department of Education did not qualify as sufficiently egregious even to justify further discovery of the agency's decisionmaking process, much less to invalidate the rule.⁵⁷

First, with respect to the agency's alleged breach of the promise to propose the consensus rule, the court stated that "[w]e 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."⁵⁸ The court cited *NRDC I* in support of this conclusion.⁵⁹

Second, with respect to the withdrawal of the draft proposal "without explanation," the court found that the plaintiffs simply "misconceive[d] the nature of negotiation."⁶⁰ It is not "bad faith" negotiation to withdraw an offer made in hopes of reaching agreement, when the offer does not in fact produce agreement. That the Department of Education ultimately adopted a position less favorable to servicers, after the servicers (and presumably other committee members) rejected the Department of Education's position, is neither surprising nor inappropriate.

The court's conclusion on the second point seems undoubtedly correct, but its analysis of the first point is more questionable. As an initial matter, because *NRDC I* predated the Negotiated Rulemaking Act, it is difficult to see how it is the proper authority for the court's conclusion that the Act does not make the promise enforceable. Nonetheless, the court is certainly correct in concluding that the Negotiated Rulemaking Act does not provide any judicially reviewable right to have an agency propose a con-

tive, that it was arbitrary and capricious. *See id.* at 711-14.

56. *See id.* at 714-15.

57. *See id.* at 715.

58. *Id.* at 714.

59. *See id.* (citing *NRDC I*, 859 F.2d 156 (D.C. Cir. 1988)). In *NRDC I*, the court had observed that a settlement agreement obligating an agency to propose a consensus rule for comment did not, and could not, impair the agency's right to make changes in the final rule after notice and comment. *See* 859 F.2d at 194-95.

60. *USA Group*, 82 F.3d at 715.

sensus rule. Nothing in the Act specifies any obligation by the agency to publish a consensus rule; it does not even contain a parallel statement to the ACUS recommendation that the agency "should publish" the negotiated text.⁶¹ Moreover, the judicial review provision of the Act clearly reflects a decision to preclude review of such a question.⁶² Although its language only explicitly refers to precluding review of agency decisions to create, assist, or terminate a committee,⁶³ the termination of a committee to avoid consensus would certainly seem to be at the same level of bad faith as the refusal to propose a consensus that was achieved.

Even if the Negotiated Rulemaking Act does not provide any right or remedy for failure to negotiate in good faith, what about the Administrative Procedure Act (APA)⁶⁴ itself? That is, if the Higher Education Act required the Department of Education to use a negotiated rulemaking process, and if the agency simply refused to do so and just published a proposed rule for notice and comment without any attempt to negotiate a rule, would this not constitute a violation of the procedure that is required by law? If so, one would think that a person could sue under the APA to set aside the adopted rule.⁶⁵ This logic would also suggest that at some level "bad faith" negotiating would likewise violate a requirement to negotiate a rule. This right would not arise under the Negotiated Rulemaking Act, but under another law, such as the Higher Education Act, which actually imposes a legal requirement to negotiate a rule. Judicial review, therefore, would occur not under the Negotiated Rulemaking Act, but under the APA, and traditional standards of review would be applied to analyze alleged violations of procedural requirements. However, only a few laws, including the Higher Education Act, require negotiated

61. Compare ACUS Recommendation No. 82-4 ¶ 13 ("The agency *should publish* the negotiated text of the proposed rule in its notice of proposed rulemaking," (emphasis added)); with 5 U.S.C. § 563(a)(7) (1994) ("In making . . . a determination [whether to establish a rulemaking committee], the head of the agency *shall consider* 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." (emphasis added)).

62. See 5 U.S.C. § 570 (1994).

63. See *id.*

64. 5 U.S.C. §§ 551-559, 701-706 (1994).

65. See 5 U.S.C. § 706(2)(D) (1994) (mandating that a reviewing court "hold unlawful and set aside agency action . . . found to be without observance of procedure required by law").

rulemaking.⁶⁶ Even supporters of regulatory negotiation advise against laws mandating its use.⁶⁷

The court in *USA Group* went beyond the legal issues in its discussion of regulatory negotiation, indicating a less than enthusiastic view of the idea. At the same time, the court's apparent misunderstanding of the process impeaches its negative impression. The court began by calling negotiated rulemaking "a novelty in the administrative process."⁶⁸ The relative infrequency of negotiated rulemaking compared to normal rulemaking⁶⁹ might justify such a description, but the reference seems to suggest more newness than rarity. Inasmuch as regulatory negotiation has existed and has been exhaustively written about for over 15 years, to refer to it as a novelty suggests that the court does not take it very seriously. More fundamentally, the court mischaracterizes the regulatory negotiation process. For example, the court states that, prior to notice and comment, the agency "submit[s] draft regulations to the industry or other groups that are likely to be significantly affected by the regulations."⁷⁰ Under the Negotiated Rulemaking Act and ACUS recommendations, however, agencies do not normally submit draft regulations, and the negotiating committees are not composed simply of "the industry or other groups"⁷¹ likely to be affected. The committees are to be fairly balanced, and should reflect all the interests that are likely to be affected.⁷² The court

66. See, e.g., Higher Education Amendments of 1992, 20 U.S.C. § 1098a (1994) (requiring negotiated rulemaking for certain education financial assistance regulations); Indian Self-Determination Contract Reform Act of 1994, 25 U.S.C. § 450k(d) (1994) (requiring negotiated rulemaking for Indian self-determination contract regulations); Housing and Community Development Act of 1992, 42 U.S.C. § 1437g(a)(3)(A) (1994) (requiring negotiated rulemaking for regulations related to the vacant public housing unit performance funding system); Price-Anderson Amendments Act of 1988, Pub. L. No. 100-148, § 19(b), 102 Stat. 1066, 1083-84 (1988) (requiring negotiated rulemaking, "to the extent consistent with" other provisions of the Act, for determining whether to enter into certain indemnity agreements under the Atomic Energy Act of 1954, 42 U.S.C. § 2210 (1994)).

67. See, e.g., ADMINISTRATIVE CONFERENCE OF THE U.S., BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT 29 (1995) ("On balance, the disadvantages of statutory mandates requiring the use of negotiated rulemaking for particular rules and programs seem clear, and any advantages less so.")

68. *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

69. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1276 (1997) (suggesting negotiated rules constitute less than 1/10th of 1% of all rules adopted in a year).

70. *USA Group*, 82 F.3d at 714.

71. *Id.* (emphasis added).

72. See 5 U.S.C. § 565 (a)(1), (b) (1994); see also ACUS Recommendation No. 82-4

then goes on to refer to the agency negotiating with the industry as if it were a bipolar negotiation—the agency against the industry.⁷³ In reality, most regulatory negotiations involve multiple interests; the agency itself represents just one interest.⁷⁴ As the Negotiated Rulemaking Act states, “[t]he 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.”⁷⁵

The court expressed surprise, and disapproval, about the agency’s promise to abide by any consensus reached by the group absent compelling reasons to the contrary.⁷⁶ Apparently, the court was unaware that this is standard practice, endorsed, if not required, by both the Negotiated Rulemaking Act and ACUS’s recommendation.⁷⁷ Here, too, however, the court apparently misunderstood the process, because the court did not realize that the promise only applies to what the agency will propose for comment, not to what it will eventually adopt.⁷⁸

Finally, the court expressed the view that “[n]egotiated rulemaking does not usually produce a comprehensive administrative record, such as notice and comment rulemaking, . . . any more than a settlement conference will usually produce a full record.”⁷⁹ This observation is consistent with the original concept of regulatory negotiation described by Harter,⁸⁰ but it is not consistent with actual practice. From the beginning, agencies have not

¶ 5 (“Reasonable efforts should be made to secure a balanced group in which no interest has more than a third of the members”); Federal Advisory Committee Act, 5 U.S.C. app. § 5(b)(2) (1994) (requiring advisory committees to be fairly balanced).

73. See *USA Group*, 82 F.3d at 714–15.

74. See Harter, *supra* note 50, at 12 (criticizing Judge Posner’s characterization of negotiated rulemaking committees as “the industry,” and noting that “the much broader practice, and the one that in fact was followed in this case, . . . is . . . to put together a committee reflecting the breadth [of interests affected by the rule]”).

75. 5 U.S.C. § 566(b) (1994).

76. See *USA Group*, 82 F.3d at 714.

77. See *supra* note 61 and accompanying text.

78. See *USA Group*, 82 F.3d at 714–15 (“The practical effect of enforcing [the promise] 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.”). The court then correctly observed that the Act only creates a process “in advance of the more formal arms’ length procedure of notice-and-comment rulemaking.” *Id.* at 715.

79. *Id.* at 715.

80. See Harter, *supra* note 1, at 99.

skipped on the administrative record to support regulations adopted after a negotiating process.⁸¹ Moreover, inasmuch as judicial review is to proceed seemingly without regard for the negotiation process,⁸² this agency practice seems well founded. Even if the court were referring to the negotiation process itself, rather than the full rulemaking, it was not correct, because the Federal Advisory Committee Act (FACA), which is applicable to regulatory negotiation,⁸³ mandates that there be “[d]etailed minutes” of all committee meetings.⁸⁴ In addition, the Negotiated Rulemaking Act requires a committee that reaches consensus to make a report to the agency,⁸⁵ which the ACUS recommendation suggests should contain the same information that an agency’s preamble would normally contain—“a concise general statement of [the rule’s] basis and purpose”⁸⁶ and a description of “the factual material on which the group relied in preparing its proposed regulation.”⁸⁷ Finally, all the committee’s records are sent to the agency at the conclusion of the committee’s work and presumably would become part of the rulemaking’s record.⁸⁸

In light of these rather significant misunderstandings of the way negotiated rulemaking is *supposed* to take place, it is doubtful whether *USA Group* should rightfully stand for much in terms of judicial review of the process. It is but one case, undoubtedly right in outcome, but an example perhaps of the old adage that “easy cases make bad law.”

II. EMPIRICAL ASSESSMENTS

There are innumerable articles, long and short, by participants in or observers of particular regulatory negotiations.⁸⁹ Most give

81. See, e.g., Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1671 (1986) (discussing a Federal Aviation Administration regulation that was issued with 350 column inches of preamble).

82. See 5 U.S.C. § 570 (1994) (requiring the same level of judicial review for negotiated rules as for other rules).

83. See 5 U.S.C. § 565(a)(1) (1994).

84. See Federal Advisory Committee Act, 5 U.S.C. app. § 10(c) (1994).

85. See 5 U.S.C. § 566(f) (1994).

86. ACUS Recommendation No. 82-4 ¶ 11.

87. *Id.*

88. See 5 U.S.C. § 566(g) (1994).

89. See, e.g., 1995 SOURCEBOOK, *supra* note 2, at 411-26 (providing a bibliography of articles, reports and related materials on negotiated rulemaking).

high praise to the process;⁹⁰ others make recommendations for improvements to the process, but retain an underlying faith in the worthiness of the undertaking,⁹¹ while a few criticize the idea.⁹² None of these articles, however, would qualify as a serious assessment of the costs and benefits of using regulatory negotiation in the place of ordinary rulemaking. There are, of course, serious difficulties in attempting such an assessment. As ACUS conceded in its final report in 1995:

There has been little formal evaluation of the use of negotiated rulemaking, perhaps because such evaluation presents formidable challenges. "Success" in a negotiated rulemaking cannot be precisely defined; even when a negotiating committee fails to reach consensus on a proposed rule, its efforts sometimes succeed in narrowing issues or providing agency regulators with important information they can use to craft their own proposals. While some of the costs of the process can easily be identified, moreover, the possible benefits—a higher quality rule based on better information, improved compliance, and reduced litigation—may be difficult to quantify.⁹³

As a result, most attempts at empirical evaluation end up as a series of testimonials⁹⁴ or speculations.⁹⁵

The EPA did attempt an assessment of its pilot project in 1987. While the agency provided credible support for some of its findings of benefits from regulatory negotiation, the sample of rules considered was very small and somewhat idiosyncratic.⁹⁶ At

90. See, e.g., *Regulatory Negotiation: Four Perspectives*, DR FORUM (National Inst. Disp. Resol.), Jan. 1986, at 8, reprinted in 1995 SOURCEBOOK, *supra* note 2, at 858 (interviewing four participants in negotiated rulemaking, reflecting generally positive opinions of the process).

91. See, e.g., Perritt, *supra* note 81, at 1627-30 (characterizing negotiated rulemaking as a "realistic alternative" and assessing four negotiated rulemaking efforts).

92. See, e.g., Funk, *supra* note 9, at 84-89 (cataloguing ways in which negotiated rulemaking reflected bargaining among private interests without regard to the law or the public interest).

93. See ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 67, at 28.

94. See, e.g., *id.* & nn. 31-32 & 34-35 (discussing comments by four different agency officials as to the benefits they perceived from their agency's negotiated rules).

95. See, e.g., HENRY H. PERRITT, JR., USE OF NEGOTIATED RULEMAKING TO DEVELOP A PROPOSED OSHA HEALTH STANDARD FOR MDA, REPORT TO THE DEPUTY ASSISTANT SECRETARY OF LABOR 30-31 (1988), reprinted in 1995 SOURCEBOOK, *supra* note 2, at 661, 693-94 (noting the difficulty in evaluating the success of a negotiated rulemaking used by the Occupational Safety and Health Administration).

96. See PROGRAM EVALUATION DIV., U.S. ENVTL. PROTECTION AGENCY, AN AS-

the same time, the assessment also identified some costs of the process.⁹⁷ In particular, the EPA found regulatory negotiation to be particularly labor-intensive and burdensome for both the agency and the non-agency participants, and it did not enable the agency to avoid pre-proposal data-collection and analysis. Further, it raised expectations which, if not met, could lead to disappointment among the participants.⁹⁸ In the end, however, we should not be surprised that the studies of negotiated rulemaking by the very persons who had theorized its value would confirm its value.⁹⁹

Most recently there have been more systematic attempts at empirical research.¹⁰⁰ All are focused on the EPA, for the obvious reason that it has engaged in more regulatory negotiation than any other agency and it has supported studies of its process. With the exception of Professor Coglianese's article in this symposium, however, the other studies are strictly limited to the EPA; two are heavily based on interviews with persons involved in the process.¹⁰¹ Moreover, again with the exception of Professor Coglianese, the conclusions of the other studies are so tentative and limited that they suggest little more than the need for further research.

ASSESSMENT OF EPA'S NEGOTIATED RULEMAKING ACTIVITIES 4-9 (1987), *reprinted in* 1995 SOURCEBOOK, *supra* note 2, at 23, 26-31 (providing the EPA's assessment of the benefits of seven rulemaking efforts, which included findings that: the proposed rules were more pragmatic and could produce better environmental results in some instances than would have normally been developed; the process facilitated communication between the EPA and the other participants and among the different participants; the final rulemaking was made easier and cheaper; and working relationships developed in the rulemaking have carried over to other undertakings).

97. *See id.* at 30-31.

98. *See id.*

99. *See, e.g.,* Susskind & McMahon, *supra* note 11, at 150-51, 159-64 (leading theoreticians of the benefits of regulatory negotiation concluded that the EPA rules they studied provided the expected benefits).

100. *See* Cary Coglianese, *supra* note 69, at 1271-1309; CORNELIUS KERWIN & LAURA LANGBEIN, AN EVALUATION OF NEGOTIATED RULEMAKING AT THE ENVIRONMENTAL PROTECTION AGENCY: PHASE I 5-6 (1995) (report prepared for ACUS); Brian Polkinghorn, The Influence of Regulatory Negotiations on the U.S. Environmental Protection Agency as an Institution 20-31 (1995) (unpublished paper presented at the 1995 American Political Science Association Meeting, on file with the *Duke Law Journal*); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 120-21 (1992).

101. *See* Polkinghorn, *supra* note 100, at 3; KERWIN & LANGBEIN, *supra* note 99, at 5-7.

Professor Coghianese has grappled with two of the benefits claimed to arise from regulatory negotiation: that overall it takes less time than normal rulemaking and that it reduces litigation.¹⁰² While these are not the only claimed benefits of regulatory negotiation,¹⁰³ they are probably the ones most highly valued. Professor Coghianese's study suggests that both of these claimed benefits are illusory. The length of time to conduct the rulemaking from beginning to end is not decreased;¹⁰⁴ there is merely a shift from the period between the proposed and final rule to the period before the proposed rule. In addition, the rate of litigation of negotiated rules is not in fact lower than that of conventional notice-and-comment rules.¹⁰⁵

The first of these conclusions is not startling. All observers of the process have noted the extensive investment of time and resources involved prior to and during the actual negotiation process.¹⁰⁶ Some have had the impression, though, that the savings in time after the proposed rule made up for the extended pre-proposal period.¹⁰⁷ One might include the time involved in litigation in the calculation of total time and assume that, while a large percentage of rules adopted by normal notice-and-comment rulemaking result in judicial challenge, few if any negotiated rules end up in court. Thus, overall, negotiated rules would take less time than normal rules. This argument, of course, depends on the assumption that negotiated rules are less likely to be challenged in litigation, which raises Professor Coghianese's second conclusion,

102. See Coghianese, *supra* note 69, at 1271-1309.

103. See, e.g., Lee M. Thomas, *The Successful Use of Regulatory Negotiation by EPA*, ADMIN. L. NEWS, Fall 1987, at 3-4 (identifying additional benefits of regulatory negotiation including: promoting "ownership" in the regulations on the part of affected groups; better regulations in terms of the technical information; and increased communications among affected parties after the regulatory negotiation is concluded); Eisner, *supra* note 14, at 372-73 (identifying additional benefits of negotiated regulations including: greater likelihood of creative solutions; more easily enforceable rules due to greater acceptance of the rules; and rules that reflect both a clearer focus on the issues and the use of better data).

104. See Coghianese, *supra* note 69, at 1278-86.

105. See *id.* at 1295-1309 (finding that between 25-35% of the EPA's rules are challenged in court, while 50% of the EPA's rules adopted after a negotiated rulemaking process were challenged in court).

106. See Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,647, 10,651-52 (Oct. 1992).

107. See Thomas, *supra* note 103, at 3.

that in fact there is no reduction in litigation as a result of regulatory negotiation.¹⁰⁸

This conclusion is counterintuitive. If parties negotiate a consensus rule, and indeed agree ahead of time to support a consensus rule, how can it be that such rules end up in litigation as frequently as normal, notice-and-comment rulemaking? There are a number of different reasons. First, although the agency may have initiated a negotiated rulemaking process, the members may not in fact have reached consensus.¹⁰⁹ Second, even if the participants in the negotiation reached consensus, the agency may have breached its promise to propose the consensus rule.¹¹⁰ Third, although the agency may have proposed the consensus rule, it may have adopted a different final rule.¹¹¹ Fourth, an affected person may have been excluded from the negotiating group and his interest may not have been adequately represented.¹¹² Fifth, a mem-

108. See *supra* note 105 and accompanying text.

109. An example of this is the Asbestos-Containing Materials in Schools rule, 52 Fed. Reg. 41,826 (1987) (codified at 40 C.F.R. § 763.80-99 (1996)). See 1995 SOURCEBOOK, *supra* note 2, at 390 (noting that twenty of the twenty-four represented interests agreed to portions of proposed regulatory language). This rule was challenged in *Safe Buildings Alliance v. EPA*, 846 F.2d 79, 81 & n.1 (D.C. Cir. 1988).

110. An example of this is the rule proposed by the Department of Education, 59 Fed. Reg. 8044 (1994), challenged in *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708 (7th Cir. 1996). See *supra* notes 45-60 and accompanying text.

111. This occurred during the rulemaking process leading up to the Renewable Oxygenate Requirement for Reformulated Gasoline rule, 59 Fed. Reg. 39,258 (1994), challenged in *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1115-16 (D.C. Cir. 1995). The EPA initially proposed standards for reformulated gasolines based on the consensus reached by a negotiated rulemaking committee. See 59 Fed. Reg. at 39,259. In response to public comments, however, the EPA subsequently proposed a different rule, to promote the use of ethanol and other renewable oxygenates in reformulated gasoline. See *id.* at 39,259-60. A final rule was issued that apparently returned to the consensus rule, but the EPA then proposed another rule promoting the use of renewable oxygenates in reformulated gasoline. See 58 Fed. Reg. 68,343, 68,344 (1993). When the second rule was finalized, the preamble noted that the rule was meant to "supplement and not negate" the negotiated rule. See 59 Fed. Reg. 39,258, 39,260. This "supplemental" rule was ultimately rejected by the court as beyond the scope of the authorizing statute. See *American Petroleum Inst.*, 52 F.3d at 1119-21.

112. Although not strictly a negotiated rulemaking, the Grand Canyon Visibility rulemaking, see 56 Fed. Reg. 50,172 (1991) (codified at 40 C.F.R. § 52 (1996)), was widely considered to be an example of a regulatory negotiation. See D. Michael Rappoport & John F. Cooney, *Visibility at the Grand Canyon: Regulatory Negotiations under the Clean Air Act*, 24 ARIZ. ST. L.J. 627, 632-35 (1992). That rule was challenged in *Central Arizona Water Conservation District v. EPA*, 990 F.2d 1531, 1533 (9th Cir. 1993), by affected interests which had not been included in the negotiating group. See Coglianese, *supra* note 69, at 1289.

ber of the consensus group may renege on its promise to support the consensus rule in light of a perceived advantage to be had through litigation.¹¹³

The first four of these explanations could be described as unsuccessful regulatory negotiation processes. Had the process worked correctly, no affected person's interests would have been inadequately represented. Had it proceeded according to plan, a consensus rule would have ensued and been proposed by the agency. And had the system been working correctly there would have been no reason for the agency to adopt a different final rule. Perhaps this is why Harter could still say in 1996 that "there has never been a judicial challenge to a negotiated rule that was issued by the agency intact."¹¹⁴ However, because a high percentage of regulatory negotiations do *not* result in a negotiated rule being issued "intact," it is not surprising that a significant number of the rules that finally result from a process that started with regulatory negotiation end up in litigation.

Nevertheless, whatever the results found by studies of regulatory negotiation, there is no question that the agencies that began as believers in negotiated rulemaking remain convinced that its benefits exceed its costs. There is no suggestion that the commitment to regulatory negotiation of the EPA and the DOT, the two leading agencies using negotiated rulemaking, has waned. Moreover, the enthusiastic support which first came from ACUS and later from the Vice President's NPR is now reflected in Presidential directives exhorting agencies to use negotiated rulemaking.¹¹⁵ Finally, Congress too has signed on the bandwagon with its permanent reauthorization of the Negotiated Rulemaking Act.¹¹⁶ As a consequence, regulatory negotiation remains a theoretically preferred tool in the administrative armory, even if Judge Posner thinks it a novelty.¹¹⁷

113. It is not clear that this has ever happened, but Harter seemed to recognize the possibility, noting that represented parties "should" support a consensus rule. See Harter, *supra* note 1, at 102.

114. *Reauthorization of the Negotiated Rulemaking Act: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 69 (1996) (statement of Philip Harter on behalf of the American Bar Association).

115. See *supra* note 17 and accompanying text.

116. See *supra* note 18 and accompanying text.

117. See *supra* note 68 and accompanying text.

III. ADMINISTRATIVE LAW AND NEGOTIATED RULEMAKING

In the early days of negotiated rulemaking considerable attention was given to assure that the process could be carried out without violating any laws.¹¹⁸ The principal laws considered were the APA¹¹⁹ and FACA.¹²⁰ Both practice and theory converged on the solution that regulatory negotiation would precede any notice of proposed rulemaking; thereafter the rulemaking would proceed in accordance with all APA requirements.¹²¹ Not only would this assure formal compliance with any statutory rulemaking requirements, it would obviate any claim that regulatory negotiation was inconsistent with the D.C. Circuit's prohibition of *ex parte* communications in rulemaking articulated in *Home Box Office v. FCC*.¹²² That decision, controversial at the time and oft distinguished in later cases, essentially banned *ex parte* communications in rulemaking *after* the publication of the notice of proposed rulemaking.¹²³ Prior to the public notice, however, the court seemed to approve of informal give-and-take between industry and agencies.¹²⁴

Under the APA as construed by the courts, when someone challenges an agency rule as arbitrary and capricious,¹²⁵ courts are to engage in a "searching and careful" inquiry to assure that the agency considered "the relevant factors" and did not make "a clear error of judgment."¹²⁶ In order that courts may make these determinations, the agency has the "responsibility . . . to explain

118. See, e.g., Perritt, *supra* note 1, at 898-915 (discussing the potential conflicts between negotiated rulemaking and various administrative law doctrines and standards).

119. 5 U.S.C. §§ 551-559, 701-706 (1994).

120. 5 U.S.C. app. §§ 1-15 (1994).

121. See, e.g., Susskind & McMahon, *supra* note 11, at 150-51 (describing a three-step process for conducting regulatory negotiation).

122. 567 F.2d 9 (D.C. Cir. 1977).

123. See *id.* at 57.

124. See *id.* ACUS Recommendation No. 82-4 suggested that agencies provide the negotiating members with an opportunity to review the comments on the proposed rulemaking and to recommend changes to the negotiated rule. See ACUS Recommendation 82-4 ¶ 14. While this occurs on occasion, see, e.g., Perritt, *supra* note 81, at 1671 (noting the Federal Aviation Administration's revisions to a proposed rule based on input received upon presenting comments to the negotiated rulemaking committee), those familiar with the process say that the practice depends upon the agency involved. See E-mail from Philip J. Harter to William Funk (Sept. 15, 1997) (on file with the *Duke Law Journal*).

125. See 5 U.S.C. § 706(2)(a) (1994).

126. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

the rationale and factual basis for its decision."¹²⁷ Agencies have attempted to meet these requirements in practice by providing exhaustive records and elaborate preambles to their rules.¹²⁸ Under Harter's original concept, part of the time savings involved in negotiated rulemakings would have been achieved because agencies would not have to provide such exhaustive records and preambles accompanying rules.¹²⁹ This, however, did not become the practice. Perhaps fearing judicial review, agencies have tended to create rulemaking records and preambles that are all but indistinguishable from those accompanying conventional, notice-and-comment rulemakings.¹³⁰

The Federal Advisory Committee Act has also been cited frequently as a law that stands in the way of greater use of negotiated rulemaking.¹³¹ FACA establishes rules governing the creation and operation of "advisory committees" established by an agency to provide advice to the agency. Two aspects of FACA impede regulatory negotiation. First, FACA generally requires all advisory committee meetings to be open to the public,¹³² but there are many circumstances in which negotiating committees would like to close their sessions to prying eyes.¹³³ Second,

127. *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986); *see also* *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (acknowledging "a general 'procedural' requirement of sorts . . . mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision").

128. *See* ADMINISTRATIVE CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 270-72 (2d ed. 1991).

129. *See* Harter, *supra* note 1, at 99.

130. *See, e.g.*, Roadway Worker Protection Rule, 61 Fed. Reg. 65,959, 65,959-75 (1996) (to be codified at 49 C.F.R. pt. 214) (seventeen page preamble to Federal Railroad Administration regulations adopted through negotiated rulemaking).

131. *See, e.g.*, ACUS Recommendation No. 82-4 ("The Federal Advisory Committee Act (FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations.").

132. *See* 5 U.S.C. app. § 10(a) (1994).

133. *See, e.g.*, Harter, *supra* note 1, at 84 (describing the benefits of closed meetings: 1) they make it easier for negotiators to explain concessions to their constituents, thereby promoting concessions as a means to maximize their own goals; 2) parties are able to discuss confidential data that would be useful in the negotiations without fear of the information becoming public; 3) closed meetings promote a give-and-take atmosphere because the parties do not have to fear that a tentative position raised during the negotiations will be used against them in later, different negotiations; and 4) a public forum may cause some parties to maintain a hard, unyielding position); Perritt, *supra* note 81, at 1664-65 ("Open meetings would hamper good faith negotiations . . . because risks to individual participants of making concessions would be increased.").

FACA generally requires the approval of the General Services Administration (GSA) for the creation of any new advisory committee,¹³⁴ and this approval process is both burdensome and subject to the Clinton administration's efforts to reduce the number of advisory committees.¹³⁵ As a result, ACUS and others have in the past suggested that negotiated rulemaking committees receive some sort of exception from FACA requirements.¹³⁶ While later assessments have determined that regulatory negotiations can take place without serious disruption from FACA and its requirements,¹³⁷ Congress has established a few exceptions from FACA to facilitate regulatory negotiation.¹³⁸

In addition to the APA and FACA, there was an early concern that negotiated rulemaking could run afoul of the non-delegation doctrine—not the unconstitutional delegation of legislative authority to an agency, but the potentially unlawful or unconstitutional delegation of legislative authority to private entities.¹³⁹ It is sometimes forgotten that the National Industrial Recovery Act was declared unconstitutional not just on the grounds of excessive delegation of legislative authority but also because of its delegation of legislative authority to private entities.¹⁴⁰ Whatever the consti-

134. See 5 U.S.C. app. § 9 (1994); see also 5 U.S.C. app. § 7 (1994) (providing for GSA oversight of existing advisory committees).

135. See Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 494-95 (1997).

136. See, e.g., ACUS Recommendation No. 82-4 ¶ 2 (recommending enactment of legislation to "provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings . . . free of the restrictions of [FACA]").

137. See, e.g., ACUS Recommendation No. 85-5 (noting that FACA had not impeded effective negotiations, and that under judicial and agency interpretations of the Act, meetings could be held in private where "necessary to promote an effective exchange of views"); Fiorino & Kirtz, *supra* note 12, at 30-31 (noting that "FACA was less of a constraint than it had first seemed" and that in many ways FACA's procedural requirements "may even have enhanced the legitimacy of the negotiations").

138. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11(e), 110 Stat. 3870, 3874 (1996) (requiring the Director of the Office of Management and Budget to take action to eliminate redundant administrative requirements for chartering committees); 5 U.S.C. § 566(c) (1994) (stating that the facilitator need not be a federal employee); 5 U.S.C. § 566(d)(3) (1994) (stating that the personal notes of the facilitator and members of the committee are not subject to the Freedom of Information Act).

139. See Perritt, *supra* note 1, at 900-02; see also Harter, *supra* note 1, at 107-09 (stating that a regulatory negotiation scheme that grants final authority to the agency does not violate the non-delegation doctrine: "[b]ecause the government agency conducts the final review and makes the decision, the authority is not delegated to . . . private group[s]").

140. See *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); see

tutional vitality of those doctrines, however, it seems that limiting regulatory negotiation to the formulation of the proposed rule, combined with the agency's formal reservation of authority to adopt the regulation solves the constitutional problems posed by the non-delegation doctrine.¹⁴¹ In sum, blessed by Congress and structured to conform to the requirements of the Constitution, the APA, and FACA, negotiated rulemaking does not raise serious legal questions.

IV. NEGOTIATED RULEMAKING AND THE PERVERSION OF THE ADMINISTRATIVE PROCESS

The above discussion concludes that negotiated rulemaking can be employed consistently with all formal legal requirements and restrictions applicable to agency rulemaking. To say this, however, is not to say that negotiated rulemaking is consistent with the norms of the administrative process. To the contrary, the theory and principles of regulatory negotiation are inconsistent with the theory and principles of the APA.

A. *The Rule of Law*

First, consider the theory and principles of the APA. Implicit in the APA is the notion of the rule of law. Agencies exist to carry out the law. Their statutory directions may be specific or general, but the agencies' actions are justified and legitimized by their service to those directions. Even under the doctrine announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁴² requiring judicial deference to an agency's reasonable interpretations of ambiguous statutes,¹⁴³ the agency's actions proceed from an implicit delegation from Congress to make law, consistent with the agency's authorizing statute. The statute is not just a brake or anchor on agency autonomy; it is the source and reason for the agency's actions.

Now consider regulatory negotiation. The law still exists, but the law is now merely a limitation on the range of bargaining. The

also *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936) (holding the wage and hour limitations adopted by councils of producers and unions pursuant to the Bituminous Coal Conservation Act to be unconstitutional delegations of legislative authority).

141. See Perritt, *supra* note 1, at 901-02.

142. 467 U.S. 837 (1984).

143. See *id.* at 865-66.

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.¹⁴⁴ Accordingly, Harter argued, if the parties agree that a rule should contain a particular provision, the legality of that provision should not be determined by traditional methods.¹⁴⁵ Instead, the courts should defer to an agreement of the parties that is not manifestly inconsistent with the purpose of the authorizing statute.¹⁴⁶ Harter explains why:

The parties are typically better able [than courts] to determine "what works" within the theory of the statute and hence what is the best way of achieving its overall goal. Or, a provision may be included in a statute to benefit a particular interest. If that interest does not insist on its full exercise as part of the agreement, . . . [the fact] [t]hat they agreed indicates the interest achieved the protection sought in the statute¹⁴⁷

In short, law becomes nothing more than the expression of private interests mediated through some governmental body. Public choice theory¹⁴⁸ changes from a descriptive to a normative theory.

Of course, supporters of negotiated rulemaking do not encourage or even sanction negotiations that bargain for outcomes beyond statutory authority.¹⁴⁹ Nevertheless, as the above language suggests, and the actual practice confirms, there is a subtle (and sometimes not so subtle) dynamic in the negotiation process that diminishes the sanctity of the law as both the source of agency authority and its limit.

In an article I wrote in 1987, I described how in one negotiated rulemaking the dynamics of the negotiating process resulted in substantial deviations from the law.¹⁵⁰ Not only did the agency

144. See Harter, *supra* note 1, at 99.

145. See *id.* at 102-03.

146. See *id.* at 104.

147. Harter, *supra* note 29, at 63.

148. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 1 (1991) (defining public choice theory as the view that legislation may serve private rather than public interests, because private special interest groups are better organized than large but fragmented public groups).

149. See Harter, *supra* note 29, at 61.

150. See generally Funk, *supra* note 9, at 57 (discussing how EPA's regulatory negotiation for residential woodstove heaters produced a rule that was not authorized by the

fail to police the negotiations in this regard, it was an active participant in the violation of the law.¹⁵¹ This occurred because it was in the agency's interest to achieve consensus. The agency's desire and need for consensus to achieve a rule that would not be contested made it willing to bargain for unauthorized provisions, so long as it furthered the goal of consensus. Prior to the regulatory negotiation, the agency had exercised its independent judgement as to certain legal requirements and had withstood contrary pleas by interested groups.¹⁵² In the context of the negotiations, however, the role of the agency had changed. In the new context, the agency's goal was to achieve consensus.

B. *The Agency as Responsible Actor*

A second principle central to the APA is the role of the agency as the responsible actor.¹⁵³ The agency is not a broker or mediation service. In the famous words of a classic administrative law case, the agency's "role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection."¹⁵⁴ Nor is the agency merely an enforcer of private agreements. Rather the agency is the authority responsible for and empowered to achieve the statutory design.

This is not, however, the role of the agency in regulatory negotiation. To the contrary, 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. This is reflected in ACUS's recommendation, based upon Harter's study, that the agency representative should participate in the negotiation.¹⁵⁵ This is not because the agency is responsible for the rulemaking, but because "[t]he agency is indisputably a party in interest

Clean Air Act).

151. *See id.* at 78-89.

152. *See id.* at 59-60, 79-80.

153. The definition of agency in the APA is "each authority of the Government of the United States" except the Congress, the courts, the governments of the territories or possessions of the United States and the government of the District of Columbia. *See* 5 U.S.C. § 551(1)(A)-(D) (1994).

154. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965).

155. *See* ACUS Recommendation No. 82-4 ¶ 8.

and . . . would be eligible for participation in negotiations."¹⁵⁶ Harter conceded that "[a]gency participation can be viewed as inconsistent with the agency's role as the sovereign decisionmaker because participation may cloud its ability to determine independently what is the best regulation."¹⁵⁷

The agency, however, should not let this inconsistency persuade it to act in negotiations in a manner that reflects its sovereign decisionmaking capacity. ACUS cautioned that an agency should not be able to dominate the negotiations by virtue of its power to promulgate the final rule.¹⁵⁸ As Harter explains, if the agency is able to issue edicts or specify acceptable outcomes, its role "is inconsistent with the concept of negotiations, in which the parties together define issues and agree on acceptable [solutions]."¹⁵⁹ Accordingly, the agency's participation should not differ in kind from that of the other parties in interest.¹⁶⁰ In other words, it should bargain and trade its "interests" (the public interest) in the same way the other participants may trade their interests. It is likely that Judge Posner shared this perception of the process in *USA Group Loan Services v. Riley*, when he indicated that he doubted the propriety of the agency's agreement to abide by the consensus.¹⁶¹

Harter recognizes the possible objection to this role as inconsistent with the concept of the agency as sovereign decisionmaker.¹⁶² "Under a view of the agency as the decisionmaker, as in the New Deal vision of the agency, it would be illegitimate for the agency to negotiate with the parties in interest."¹⁶³ His answer to this is two-fold. First, the agency's representative, Harter says (and ACUS recommends), should not be allowed to bind the

156. Harter, *supra* note 1, at 57.

157. *Id.* at 58.

158. See ACUS Recommendation No. 82-4 ¶ 4(e).

159. Harter, *supra* note 1, at 60.

160. Other aspects of the ACUS recommendations further reflect the fact that the agency should play no special role in the negotiations. See ACUS Recommendation No. 82-4 ¶ 4 (noting that neutral parties should be sought as "convenors"); ACUS Recommendation No. 85-5 ¶ 8 (noting that "a neutral outside individual" should be appointed, where appropriate, to receive and evaluate confidential data and to report back to the negotiating group).

161. See 82 F.3d 708, 714 (7th Cir. 1996).

162. See Harter, *supra* note 1, at 64.

163. *Id.*

agency.¹⁶⁴ Second, the agency would retain the authority to assess whether the consensus rule reflected the agency's policies sufficiently to merit publication.¹⁶⁵ These answers, however, are disingenuous at best. As to the first response, the fact that the agency's representative cannot bind the agency does not distinguish the agency's representative from any other participant in the regulatory negotiation. Harter himself recognizes that no "single constituency would be bound irrevocably by the position taken by its representative."¹⁶⁶ Instead, each participant must constantly keep his principals informed as to the direction he and the group are taking.¹⁶⁷ Thus, the agency participant is no different from the non-agency participants.

As to Harter's second response, the agency's formal power not to propose the consensus rule does not change the fact that the agency *agrees* to publish the consensus rule before the negotiations begin.¹⁶⁸ Certainly the agency has the power to reject a consensus rule which it agreed beforehand to publish, which it participated in developing, and to which its representative agreed to—a representative who is supposed to be a "senior official" of the agency¹⁶⁹ who was keeping his principals abreast of the group's actions. However, unless an agency acts in bad faith and violates a written undertaking made at the beginning of the negotiation, it is bound to publish the consensus rule as its proposed rule, a rule adopted by a group in which the agency was a mere participant—bargaining, negotiating, and compromising just like all the other participants to achieve a rule agreed to by all.

Again, the formalities remain in place; the agency is titularly acting in a sovereign capacity. But the dynamics of the process all run in the opposite direction. The incentives that suggest regulatory negotiation in the first instance undermine any serious attempt by the agency to retain the role of agency-as-responsible-actor. If

164. *See id.*; ACUS Recommendation No. 82-4 ¶ 4(g).

165. *See* Harter, *supra* note 1, at 64.

166. *Id.*

167. *See id.* at 92, 100; *see also* Siegler, *supra* note 106, at 10,649 (describing the responsibility of many participants to confer with their constituents before, after, and during breaks in the formal negotiations, and the time and effort some participants, such as trade associations, spend in obtaining the necessary approval of their constituents).

168. *See* ACUS Recommendation No. 82-4 ¶¶ 11, 13.

169. *See id.* ¶ 8; *see also* 5 U.S.C. § 566(b) (1994) (stating that the agency representative "shall be authorized to fully represent the agency in the discussions and negotiations of the committee").

it rejects or blocks consensus by invoking its "authority," it engenders bad will among those it has induced to come to the table; it largely negates any benefit of the negotiation and may have wasted valuable time and resources on a futile endeavor; and it is back to "square one" with its rulemaking. In short, the dynamics of "getting to yes"¹⁷⁰ pervert the role of the agency as sovereign.

C. *Rulemaking as an Undertaking of Instrumental Rationality*

The APA as drafted, but even more as construed by the courts over its half century of experience, requires agencies to engage in a process designed to elicit solutions to problems. Originally, there was a perhaps naive view that expert, non-political agencies¹⁷¹ could find finite solutions to real world problems.¹⁷² Indeed, lack of confidence in this vision formed the basis for the passage of the APA itself, a compromise piece of legislation designed to constrain the discretion of agencies through procedural regularity and judicial oversight.¹⁷³ The formal rulemaking procedures rather clearly embody a structure for the rational determination of facts and their application to legal requirements in a reasoned manner: the use of instrumental rationality.¹⁷⁴

Informal rulemaking in its original iteration was less rigid, but the requirements to allow interested persons to submit data, views, and arguments and for the agency to consider the relevant material and make a statement of basis and purpose¹⁷⁵ distinguish rulemaking from legislation, even if the outcome of rulemaking

170. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* xii (1981) (outlining "principled negotiation" as a strategy to decide issues on their merits instead of using a "haggling process" where issues are decided by a "contest of wills").

171. The early regulatory agencies established during the Progressive and New Deal eras were mainly independent regulatory agencies with relative independence from the more politically connected power centers. See, e.g., SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW AND POLICY* 30-31 (1993) (noting the theory of turning to expertise as a restraint on politics).

172. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1-16, 23-24, 45-46 (1938).

173. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1678-81 (1996) (discussing the history and passage of the APA).

174. See, e.g., 5 U.S.C. §§ 556, 557 (1994) (requiring rules to be supported by reliable, probative, and substantial evidence and for there to be findings of fact, conclusions of law, and statements of reasons therefor).

175. See 5 U.S.C. § 553(c) (1994).

might be indistinguishable from statutes enacted by Congress. The procedural requirements of the APA even for informal rulemaking, therefore, reflect the notion of an agency acting consequentially, not politically, in an exercise of instrumental rationality. The years since the APA, in terms of the judicial gloss on its requirements,¹⁷⁶ the statutory accretions that have created "hybrid" rulemaking,¹⁷⁷ and even the most recent "regulatory reform" enactments,¹⁷⁸ only confirm and elaborate on the fundamental concept that rulemaking is to be an exercise in reasoned decision-making.

This is not the paradigm of regulatory negotiation. As Harter wrote,

Under the traditional hybrid process, the legitimacy of the rule rests on a resolution of complex factual materials and rational extrapolation from those facts, guided by the criteria of the statute. Under regulatory negotiation, however, the regulation's legitimacy would lie in the overall agreement of the parties.¹⁷⁹

The logical consequence of this is that "[i]t would be inappropriate to require the negotiating group and the agency to conduct research similar to that required in the hybrid process."¹⁸⁰ "The agency would not be required to prove either the existence of a problem or the feasibility of the proposed solution if those who

176. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-20 & n.30 (1971) (remanding for plenary review by district court where Secretary did not make formal findings in connection with decision to build a highway across a park, stating that district court may require agency officials to give testimony regarding their decisions or to prepare formal findings).

177. "Hybrid" rulemaking refers to substantive statutes that supplement or modify the normal APA rulemaking procedures for particular regulatory programs or agencies. See, e.g., 42 U.S.C. § 7607(d) (1994) (rulemaking requirements of the Clean Air Act).

178. See, e.g., 2 U.S.C. § 1532 (Supp. 1995) (requiring a "qualitative and quantitative assessment of the anticipated costs and benefits" of unfunded mandates on state and local governments and the private sector); 5 U.S.C. §§ 603, 604 (1994) (requiring initial and final regulatory flexibility analyses, including a description of the proposed rule's impact on small entities).

179. Harter, *supra* note 1, at 99; see also Daniel J. Fiorino, *Regulatory Negotiation as a Policy Process*, 48 PUB. ADMIN. REV. 764, 770 (1988) ("[Regulatory negotiation] subordinates the fact and value premises of decision to the instrumental needs of the parties as they seek consensus. . . . [N]egotiation stands in contrast with the net-benefit and other analytically-based policy models.").

180. Harter, *supra* note 1, at 106.

would be affected agree on both issues."¹⁸¹ In short, the facts don't matter as long as everyone is happy.

As Harter and other supporters of negotiated rulemaking argued,¹⁸² the nature of the legitimacy of the negotiated rule should alter the nature of judicial review under the "arbitrary and capricious" standard of the APA.¹⁸³ The focus should no longer be on the rationality of the rule as measured by the facts considered and the judgment exercised by the agency. Judicial review of the agency's performance in this regard, designed to provide incentives to the agency to do "the right thing," is no longer necessary, because the "directly affected parties are in a far better position than the agency or a reviewing court to determine what the 'relevant factors' are and the weight to be accorded each."¹⁸⁴ Rather judicial review should focus on whether the negotiating process ensured the directly affected interests a suitable opportunity to negotiate and on whether the rule adopted indeed reflects the consensus rule.¹⁸⁵ This new focus is justified because it centers on the underlying basis of the negotiated rule, not the facts or judgment, but the bargain.

Earlier, I indicated that despite the logical validity of this argument, agencies have not been willing to test courts' receptiveness to the notion of a new form of review for negotiated rules, especially in light of some judges' expressed reluctance to adopt such a new form of review.¹⁸⁶ Moreover, ACUS was not willing to have its recommendation rest on such an untested and novel approach.¹⁸⁷ As a result, the preambles to negotiated rules, contrary to Harter's wish, do not look greatly different from the preambles to conventional notice-and-comment rules. This might suggest that agencies are also engaged in the same data-gathering and research incident to the negotiated rulemaking as they would do in conventional notice-and-comment rulemaking. The literature on various negotiated rules generally supports that conclusion.¹⁸⁸

181. *Id.* at 99.

182. *See, e.g.,* Perritt, *supra* note 1, at 911-12.

183. *See* 5 U.S.C. § 706(2)(A) (1994).

184. Harter, *supra* note 29, at 65.

185. *See id.* at 65-68.

186. *See* Wald, *supra* note 9, at 19-23.

187. *See* ACUS Recommendation No. 82-4 ¶ 11 (suggesting that the negotiating group should "prepare a concise general statement of [the rule's] basis and purpose" as well as "describe the factual material on which the group relied").

188. *See, e.g.,* Perritt, *supra* note 81, at 1671 (discussing length and substance of pre-

What the literature does *not* support, however, is the conclusion that the rule proposed is the result of reasoned decisionmaking based upon the facts in the record. In my article on the EPA's woodstove regulation, for example, I 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.¹⁸⁹ 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.¹⁹⁰ The preamble, purporting to explain the basis for various provisions, was a fictional narrative.¹⁹¹

Here, the practice, if not the theory, of regulatory negotiation has managed to accommodate the requirements of the APA and judicial review for instrumental rationality, but it has done so in an insidious way, by having agency preamble writers make up rationalizations for decisions made on other grounds. The subversion of the principles of the APA is manifest when the outward and visible rationale masks the reality of bargained for exchanges.

D. *The Search for the Public Interest*

Underlying the APA and all other statutes directing or authorizing agencies to adopt regulations is the notion that the agency will be acting in the public interest. In some cases the public interest may be largely undefined, as in the charge to the Federal Trade Commission to protect against "[u]nfair methods of competition"¹⁹² or to the Federal Communications Commission to regulate the broadcast spectrum as required by the "public convenience, interest, or necessity."¹⁹³ In other cases it may be relatively better defined, as when a statute requires an agency to set an air emission standard as "the best system of emission reduction which (taking into account the cost of achieving such reduction

amble to FAA regulation after negotiated rulemaking).

189. See Funk, *supra* note 9, at 85-89 (giving examples of explanations in the preamble that were at odds with how the regulatory provisions had actually been derived).

190. See *id.*

191. See *id.*

192. 15 U.S.C. § 45(a)(1) (1994).

193. 47 U.S.C. § 303 (1994).

and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."¹⁹⁴ Nevertheless, in all cases much is left to the discretion and judgment of the agency to determine how to best achieve the statutory goals. Congress presumes that the exercise of that discretion and judgment will aim to further the public interest. Today we might interpret the oath required of all officers to support the Constitution¹⁹⁵ as nothing less than an oath to serve the public interest pursuant to the statutes and Constitution of the United States.

What is meant by the public interest is not always clear. I mean it to be the best interests of the nation, the people, the body politic. So expressed, it is clear that determining the public interest is not a task one achieves; it is a goal one strives for. It encompasses the ideal notions of a James Landis¹⁹⁶ as well as the more modern notions of civic republicans.¹⁹⁷ Whatever it is, it is to be distinguished from the public choice or interest representation models of the administrative state.¹⁹⁸

Public choice theory arose out of studies of legislative and administrative processes to explain why the outcomes of those processes did not seem to achieve the public interest, but rather to reflect the capture of government processes by special interests.¹⁹⁹ The answer was that legislators and bureaucrats would act in their own self-interest (to get reelected or to enhance their agency's power and responsibility) and therefore would ally themselves with whatever special interest would further that end.²⁰⁰ In this sense, public choice theory is a descriptive, not a normative

194. 42 U.S.C. § 7411(a)(1) (1994).

195. See U.S. CONST. art. VI, cl. 3.

196. See LANDIS, *supra* note 172, at 16 (noting that the creation of administrative power was in response to the "demand that government assume responsibility not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state").

197. See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992) (describing civic republicanism as the view that government decisions should be the "product of deliberation that respects and reflects the values of all members of society").

198. See generally, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1711-16 (1975) (evaluating the potential of increased public participation in agency decisionmaking as a solution to the problems of unguided or unduly influenced agency discretion).

199. See FARBER & FRICKEY, *supra* note 148, at 1.

200. See *id.* at 1-7.

theory, although it has been used to argue for deregulation on the grounds that the unregulated market will be more efficient than government regulation and at least as moral.²⁰¹ The conflict between public choice theory and a public interest concept of regulation is obvious.

Interest representation theory, on the other hand, is both descriptive and normative. It starts from the proposition that there is no "objective 'public interest,'" no "ascertainable 'national welfare' as a meaningful guide to administrative decision."²⁰² This assumption implies that agencies are adrift in their discretion, and the means traditionally employed to control their discretion are merely illusory. To supplant those traditional means of control, the interest representation model suggests that organized interests can themselves constrain agency discretion through expansive participation in agency processes.²⁰³ The courts play an important role in administrative decisionmaking by protecting all parties' rights to adequate participation and directing agencies to attend to the interests of those participating. Interest representation theory implies that the true metal of regulation will emerge out of the fire of clashing interests. The agency is merely the filter through which this process operates. The relationship between interest representation theory and the theory of negotiated rulemaking is obvious. How interest representation theory could lead to public choice theory also seems obvious: the clash of interests results in one interest capturing the regulatory process.

It is not the place of this Article to address the descriptive validity of either public choice or interest representation models of the administrative state. This Article does maintain, however, that modern regulatory systems and statutes do not reflect a conscious embrace of the cynicism of public choice theory or an endorsement of the normative values of interest representation theory. This conclusion with respect to public choice theory should be self evident. If public choice theory were both accepted and consciously acknowledged by lawmakers it would destroy any legitimacy

201. Cf. Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1666 (1993) (book review) (noting that public choice theory suggests that the "balance of opposing forces generated by self-interest" in an unregulated market will produce economic efficiency whereas government regulation cannot be relied on to do so).

202. Stewart, *supra* note 198, at 1682-83.

203. *See id.* at 1712.

their laws would otherwise have. This conclusion with respect to interest representation is less obvious.

Many laws besides the Negotiated Rulemaking Act encourage and support methods to provide a voice for affected interests in developing rules that affect them. The APA's notice-and-comment requirement is an obvious beginning; the National Environmental Policy Act's notice-and-comment procedure for environmental impact statements is another.²⁰⁴ The various substantive statutes including hybrid rulemaking provisions are other examples.²⁰⁵ Moreover, the generic requirements beyond the APA for rulemakings of various types, such as the Regulatory Flexibility Act,²⁰⁶ the Unfunded Mandates Reform Act,²⁰⁷ and the Paperwork Reduction Act²⁰⁸ are still other examples. Nevertheless, an inspection of all these laws rebuts any suggestion that these enhanced public participation requirements substitute for the agency's responsibility to engage in reasoned decisionmaking in search of the public interest. For example, environmental impact statement requirements are consistently described as intended to improve the *agency's* decisionmaking.²⁰⁹ The substantive statutes with hybrid procedures likewise are laden with requirements to assure the *agency* is making a rational decision, not just adding up the votes of the interested parties.²¹⁰ And the primary focus of generic rulemaking requirements beyond the APA is cost/benefit or risk assessment analysis to assure that the rules adopted are plainly

204. See 40 C.F.R. § 1503.1(a)(4) (1996).

205. See, e.g., 42 U.S.C. § 7607(d), (h) (1994) (elaborating on basic notice-and-comment procedures for rulemaking under the Clean Air Act, by requiring the EPA to create a docket for comments and an opportunity for oral comment, and requiring disclosure of the data and methodology used by the agency).

206. See 5 U.S.C. § 609 (1994) (creating specific procedures for obtaining comments from small entities).

207. See 2 U.S.C. §§ 1533, 1534 (Supp. 1995) (requiring special plans and processes for obtaining the input of state and local governments concerning regulations which impose mandates on them).

208. See 44 U.S.C. § 3506(c)(2) (Supp. 1995) (requiring special notice-and-comment procedures for agencies' collection of information requirements).

209. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (noting that National Environmental Policy Act requirements are intended "to insure a fully informed and well-considered decision" by the agency).

210. See, e.g., 42 U.S.C. § 7607(d) (1994) (referring to input from the Scientific Review Committee of the National Academy of Sciences and the need for responses by the agency to all criticisms and inclusion of all data in the record).

adapted to their purpose—the public interest.²¹¹ Thus, while modern rulemaking seeks full participation by interested persons, the agency still determines the public interest. Modern rulemaking has not substituted interest representation theory for traditional notions of administrative rulemaking.

The same could be said for negotiated rulemaking. After all, the process has been carefully crafted to fit within traditional rulemaking requirements. Here, again, however, no matter how faithful negotiated rulemaking may be to the formalities of traditional rulemaking, its effect is to subvert the principles of that rulemaking. This is reflected once again in Harter's revealing statement that the legitimacy of the regulation "would lie in the overall agreement of the parties."²¹² Note the use of the word "parties." The rulemaking has "parties" who make the agreement. They make the agreement among and for themselves. They bargain and deal to achieve their own interests. There is no mention of the "public." The wisdom and fairness of the rule is equated with the satisfaction of the parties.²¹³ Public law has been subtly transformed into private law relationships.

Moreover, negotiated rulemaking succeeds if the parties reach consensus. To the extent that agencies are taught that regulatory negotiation is a process to be used in the place of conventional notice-and-comment rulemaking, agencies learn that achieving consensus of the parties is the measure of success. The statistics in Professor Coglianese's article further confirm this lesson—if the consensus is not reached, or if the agency does not abide by the consensus, the likelihood of lawsuits increases, and the "benefits" of negotiated rulemaking evaporate.²¹⁴ Thus, agencies are influenced to see their role not as serving the public interest, but as generating a consensus among the parties to the negotiation. Public choice theory is not resisted; it is adopted with a vengeance.

The effect on the culture and identification of the agency may outlive the particular negotiation. That is, when the negotiation is

211. See, e.g., 2 U.S.C. § 1535 (Supp. 1995) (requiring identification of reasonable alternatives and the selection of the least costly alternative that achieves the objective of the rule); 5 U.S.C.A. § 604(a)(5) (West Supp. 1997) (requiring final regulatory flexibility analysis to describe "the factual, policy, and legal reasons for selecting the alternative adopted in the final rule").

212. Harter, *supra* note 1, at 99.

213. See Susskind & McMahon, *supra* note 11, at 164.

214. See Coglianese, *supra* note 69, at 1322–28.

over, the consensus is obtained, and the rule is promulgated, where is the agency's interest in assuring compliance with the rule, in assuring that the rule continues to serve its purposes? The agency does not have the same sense of responsibility for the rule, because it does not reflect the agency's considered determination as serving the public interest; instead, it reflects the bargain of the parties. It is the parties' rule, not the agency's.

CONCLUSION

There is no gainsaying that Congress and the Clinton administration seem enamored with negotiated rulemaking. It is not clear, however, that this infatuation recognizes that the theory and logic of regulatory negotiation is at war with the theory and logic of administrative law as it has been practiced for the past half century. To the contrary, there appears to be a belief that negotiated rulemaking is a pure good—a way to retain all the benefits of conventional rulemaking while capturing additional benefits of faster rulemaking, less litigation, and more widespread acceptance of regulations by the affected persons. Professor Coghianese's article questions the assumption that negotiated rulemaking indeed provides these additional benefits; this Article suggests that whatever benefits negotiated rulemaking may provide, it provides them at the cost of some of the most fundamental and valued principles of administrative law.

I have tried to demonstrate that while the practice of negotiated rulemaking may coexist with the formal requirements of conventional, notice-and-comment rulemaking, the theory of negotiated rulemaking is at war with the theory underlying conventional, notice-and-comment rulemaking. To the extent that negotiated rulemaking is the model for rulemaking, its theory and principles subvert the principles and theory of normal rulemaking. Moreover, the incentives to make negotiated rulemaking succeed themselves undermine and subvert the principles underlying traditional administrative law by elevating the importance of consensus among the parties above the law, the facts, or the public interest. I have also described how courts are unlikely safeguards against this subversion, because of their focus on the formalities of the process. The agencies can either accommodate this focus on formal procedure, or they can disguise any deviations from formal processes.

It seems unlikely that Congress and the administration, despite their unequivocal support of negotiated rulemaking, have considered the issues raised herein. Whether their support would survive a recognition of negotiated rulemaking's dark side is open to question; it is still possible that they would affirmatively choose an interest representation model over a public interest model. Until the political branches grapple with these issues, however, negotiated rulemaking remains a wolf in sheep's clothing, and we can only take comfort in Professor Coglianese's calculation that negotiated rulemakings currently constitute a mere 1/10 of one percent of all rulemakings.²¹⁵

215. See Coglianese, *supra* note 69, at 1276.