

# ADR AND THE COURTS: AN UPDATE

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## INTRODUCTION

For well over a decade now, Alternative Dispute Resolution (ADR) and all its variations<sup>1</sup> have been hailed in rhetoric and anecdote as the Prince Charming to a court system in distress.<sup>2</sup> Professor Cary Coglianese challenges that claim in the case of negotiated regulations, one form of ADR.<sup>3</sup> Aside from providing a brief commentary on his thesis, however, this Article will discuss ADR from a broader perspective, assessing its effect on the quantity and quality of the work of the courts—primarily the federal courts, where I work. I want to briefly examine three kinds of ADR programs: those that take place inside the court (which are sometimes called “court-annexed programs”), those that occur inside the administrative agency (or “agency-annexed programs,” only a small portion of whose product may come before the courts), and negotiated regulations, some of which (despite all good efforts) continue to be challenged on review—often in my own D.C. Circuit Court.<sup>4</sup>

## I. COURT-ANNEXED ADR

Most judges are happy when their cases settle either before trial or on appeal before argument. And indeed most civil cases filed in the federal district courts do settle or drop out before

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1. These processes include arbitration, mediation, settlement conferences, early neutral evaluation, mini-trials, and summary jury trials.

2. See, e.g., James F. Henry, *No Longer a Rarity, Judicial ADR is Preparing for Great Growth—But Much Care is Needed*, 9 ALTERNATIVES TO THE HIGH COST OF LITIGATION 95, 96 (1991) (discussing the increased use of ADR).

3. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

4. Of the 3295 administrative appeals in federal courts of appeals in 1995, 617 were filed in the D.C. Circuit; the Ninth Circuit, with 921 appeals filed, was the only Circuit to surpass us. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 20 tbl.2, 87–90 tbl.B-1 (1995) [hereinafter JUDICIAL BUSINESS].

trial; a good number fall out on appeal as well.<sup>5</sup> But in the last decade court administrators and long-range planners have aggressively sought to create even higher rates of settlement. For example, Federal Rule of Civil Procedure 16 provides for pretrial conferences in which the presiding judge will generally seek to move the parties toward settlement,<sup>6</sup> and Rule 68 penalizes the party who rejects a settlement offer and then obtains a final judgment no more favorable than the rejected offer.<sup>7</sup> The Civil Justice Reform Act (CJRA) of 1990<sup>8</sup> requires every federal district court to prepare a plan aimed at reducing delay and costs in civil litigation, and directs the courts to consider using a formal ADR program for pretrial referral of some types of cases.<sup>9</sup> In addition, ten pilot districts tested six specific case management techniques, including the referral of certain cases to ADR programs.<sup>10</sup>

Unsurprisingly, the CJRA greatly expanded the use of ADR in federal district courts.<sup>11</sup> All but thirteen of our ninety-four federal district courts presently authorize judges to use ADR on a case-by-case basis.<sup>12</sup> Two-thirds of the CJRA plans provide for settlement conferences, which are often run by magistrate judges.<sup>13</sup> One-third of the plans authorize the establishment of a court-annexed mediation program and one-third authorize arbitration un-

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5. During 1995, the number of trials completed by all federal district court judges decreased 5%, including a 7% drop in civil trials; in fact, only 17,816 civil and criminal trials were completed while 185,324 civil cases were terminated by judges before or during pretrial proceedings. See JUDICIAL BUSINESS, *supra* note 4, at 29. More than 50% of all appeals filed in the federal courts are disposed of by means other than a decision on the merits. See COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 68 n.26 (1995). That figure holds for administrative appeals as well. See JUDICIAL BUSINESS, *supra* note 4, at 114 tbl.B-5A (1406 out of the 3264 administrative appeals in 1995 were terminated on procedural grounds, including 352 of the D.C. Circuit's 661 administrative appeals). Only 25% of the D.C. Circuit's administrative appeals are terminated on the merits, compared to almost 49% for all federal courts of appeals. See *id.* at 110 tbl.B-5.

6. See FED. R. CIV. P. 16.

7. See FED. R. CIV. P. 68.

8. 28 U.S.C. §§ 471-482 (1994).

9. See *id.* § 473(b)(4).

10. See JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 4-5 (1996).

11. See The Civil Justice Reform Act of 1990 Final Report, at 35-36 (on file with author) [hereinafter CJRA Report].

12. See *id.*

13. See *id.*

der an existing statute,<sup>14</sup> although only ten districts are allowed to mandate arbitration.<sup>15</sup> Finally, fourteen districts authorize early neutral evaluation.<sup>16</sup>

The Rand Institute for Civil Justice evaluated the pilot districts over a four-year period in order to assess ADR's effectiveness at reducing cost and delay.<sup>17</sup> The results of its evaluation are decidedly mixed.<sup>18</sup> The Rand Report concluded that the value of ADR varied widely depending on the design and implementation of the local program.<sup>19</sup> Overall, however, its analysis of ten pilot and ten comparison districts showed that even mandatory arbitration did not significantly reduce cost or delay.<sup>20</sup> Its separate evaluation of mediation and early neutral evaluation in six districts found "no strong statistical evidence" that those programs cut down on delays or billable hours.<sup>21</sup> The Report did note, however, that most participants in ADR enjoyed the experience.<sup>22</sup> Unsurprisingly, it concluded that these types of ADR were "not a panacea for perceived problems of cost and delay."<sup>23</sup>

A separate study of three demonstration districts, conducted by the Federal Judicial Center (FJC), published somewhat more positive results.<sup>24</sup> Close to half of the attorneys interviewed in each district thought that ADR reduced costs. Further, approximately forty percent in each district thought that it saved time; although in reality, only one district's data indicated that time actually was saved.<sup>25</sup> The Rand and FJC analyses led to a recom-

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14. *See id.* at 31-32.

15. *See* 28 U.S.C. § 658 (1994).

16. *See* CJRA Report, *supra* note 11, at 36.

17. *See id.*

18. *See* JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 74-76 (1996).

19. *See id.* at 5.

20. *See id.* at xxviii.

21. JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT xxxiv (1996).

22. *See id.* at xxxiii-iv.

23. *Id.* at xxxiv.

24. *See* FEDERAL JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 8-10 (1997).

25. *See id.* at 7-9.

mendation by the Judicial Conference of the United States to Congress that continued use of and experimentation with ADR was justified in the federal courts.<sup>26</sup>

So basically we have learned that the participants approve of ADR, and that so far it has had some effect, but has not made a huge impact, on cost or delay in the federal trial courts.<sup>27</sup> Strangely enough, from a judge's point of view, that's good news on balance. Court-annexed ADR is a useful addition to our toolbox, even if it can't fix everything. In my circuit, some sixty to seventy cases a year are channelled into available mediation programs for at least one mandatory session. Our lawyer-mediators work for free, and the program causes a fair number of cases (almost a third), including a few big ones, to disappear from our appellate dockets each year.

These pre-pubescent developments in ADR may seem like ho-hum stuff, but many academics have long fretted over what they perceive to be the judiciary's overenthusiasm for settlements and ADR. Beginning with Owen Fiss's classic article "Against Settlement,"<sup>28</sup> academics have expressed concern that a judicial system overwhelmingly concerned with settling cases will: 1) degenerate into a two-tiered system in which the poor and disadvantaged receive quick and dirty solutions while full-scale trials are reserved for the rich and famous;<sup>29</sup> 2) cause poor and badly-lawyered clients to suffer disproportionately in nontrial fora for lack of the benevolent spirit of an Article III judge looking out for their rights;<sup>30</sup> 3) harm the judicial system by reducing the num-

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26. See CJRA Report, *supra* note 11, at 37-38. The Rand findings have been deemed by some as too premature to serve as the basis for any conclusions on whether further federal support should be provided for ADR. See Elizabeth Plapinger, *Rand Study of Civil Justice Reform Act Sparks Debate*, NAT'L L.J., Mar. 24, 1997, at B18, B18; see also Deborah Hensler, *Puzzling over ADR*, FACTS & TRENDS, April 1997, at 6 (suggesting that ADR has the greatest potential to be effective before a case is filed and that its benefits lie in creative solutions and party satisfaction rather than cost and delay reduction).

27. For a similar appraisal, see generally Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1619-22 (1995) (describing the uses and limitations of mediation and facilitated negotiation in mass personal injury cases and contending that while parties are well served by agreements reached through these means, actual participation of the parties is limited).

28. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

29. See *id.* at 1087-88.

30. See Geoffrey P. Miller, *Settlement or Litigation: A Critical Retrospective*, in RE-

ber of legal precedents and rationales available to sustain its jurisprudence;<sup>31</sup> 4) bury in sealed settlements the resolution of issues of truly public significance—most distressingly those implicating the visibility of public decisions and the accountability of public servants;<sup>32</sup> and 5) transform Article III judges from authoritative enunciators of societal values and constitutional norms into mere “managerial judges.”<sup>33</sup>

On the other side, some academics debunk the notions that there are likely to be too many settlements, that a solution worked out through a negotiated procedure will necessarily be of lower quality than one dispensed in our adversarial court system, and that negotiation disfavors the weak and poor any more than litigation disfavors them.<sup>34</sup> These ADR supporters also point out that we have no real evidence to support the contention that frequent settlement leads to under-enforcement or lack of vindication of the social goals incorporated in legislation, and that as long as ADR is freely chosen by the parties, the theorems of economics favor settlements.<sup>35</sup> The big question for this group is how to design ADR programs that will produce more and better settlements.<sup>36</sup>

Professor Judith Resnik offers an interesting perspective on what is actually happening in the competition between settlement and litigation in the real world of the judiciary (an oxymoron, perhaps).<sup>37</sup> After tracing the Supreme Court’s historic turnaround from skepticism bordering on disdain for settlement devices to all-embracing hospitality toward them (the Court hasn’t seen one it doesn’t like for some time now),<sup>38</sup> she postulates that the traditional concept of the courts as a forum primarily for adjudication, with settlement and ADR as mere secondary alternatives, is being changed such that settlement, not litigation, is now viewed as a

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FORMING THE CIVIL JUSTICE SYSTEM 13, 22 (Larry Kramer ed., 1996).

31. See Frank E. Sander et al., *Judicial (Mis)Use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 893 (1996).

32. See *id.* at 1085.

33. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 378 (1982).

34. See Miller, *supra* note 30, at 22–25.

35. See *id.* at 23–24.

36. See, e.g., *id.* at 25–30 (reviewing mechanisms that can be used to overcome settlement obstacles such as party optimism and agency costs).

37. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

38. See *id.* at 222–29.

primary activity and goal of the courts.<sup>39</sup> Courts have taken over ADR techniques and have made them their own; gone are the notions that the best judges monitor (and occasionally modulate) social policies, or announce important social values. Now the best judges are those who excel at facilitating private settlements. Adjudication is widely perceived both within the judiciary and outside the judiciary as too formalistic,<sup>40</sup> too expensive and time-consuming, often irrelevant to the merits of a controversy, and just plain "not worth it."<sup>41</sup> Even if a case does stay on the docket nowadays, the emphasis is on pretrial proceedings, motions to dismiss, and summary judgments,<sup>42</sup> while factfinding is increasingly delegated to non-Article III judges. "Let's make a deal" is the new courthouse motto. Resnik predicts that "we are approaching a time when many a civil trial will be characterized as a 'pathological event.'"<sup>43</sup>

Be that as it may, Resnik warns that the marriage of the courts and ADR, like most marriages, will transform both parties.<sup>44</sup> ADR, which its originators envisioned as constantly expanding in its forms and variations, will find itself uncomfortably constrained in its courtly new home where the premium will be on cheap, reliable methods of settlement, and mediation and settlement conferences will be preferred to arbitration.<sup>45</sup> In the end, Resnik fears, the claimant may face the worst of both worlds—a diminished opportunity to litigate *and* a punier selection of alternatives to litigation:

As this century draws to its end, we can observe the melding of ADR into adjudication, and then the narrowing of ADR and its refocusing as a tool to produce contractual agreements among disputants. The focus is shifting from adjudication to resolution. Frank Sander's lovely image of the accessible, multi-doored courthouse—with one door wide open for adjudication—has now

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39. *See id.* at 229–35.

40. *See id.* at 247.

41. *Id.* at 266.

42. For example, in the D.C. district court in calendar year 1996, 42% of civil case terminations were by dismissal, 19% by pretrial settlement, 3% by trial, 22% by summary judgment, 7% by transfer to other courts, and 7% by "other." *See* Statistics from the Office of the Clerk, United States District Court for the District of Columbia (on file with author).

43. Resnik, *supra* note 37, at 261 (footnote omitted).

44. *See id.* at 255.

45. Arbitration is costlier and takes more time.

been eclipsed. The door to the twentieth century's version of adjudication is closing.<sup>46</sup>

Professor Resnik's scenario may be unduly pessimistic, but from my vantage point her scenario is not at all implausible. The lines between ADR programs—even court-annexed ones—and traditional court procedures are growing ever more blurred, as the courts themselves incorporate ADR techniques into their operations in furtherance of what increasingly seems to be our preeminent goal: letting parties settle their disputes for themselves.

## II. AGENCY-ANNEXED ADR

ADR has also gained support as a substitute for agency adjudications. Some of its most aggressive proponents can be found in the Clinton Administration. For example, Peter Steenland, who holds the newly-created position of Senior Counsel for ADR at the Department of Justice recently co-authored an article that announced: "More and more, the government finds the tools of [ADR] a useful means of settling even more disputes than unassisted settlement discussions can yield."<sup>47</sup> The Administrative Dispute Resolution Act of 1990<sup>48</sup> (ADRA) validated the use of ADR at the agency level and established guidelines outlining eligible cases and procedures. Follow-up Executive Orders urged agencies to try agency-annexed ADR.<sup>49</sup> The Justice Department's Senior Counsel for ADR reports that within the Department individual sections have issued criteria, money has been earmarked to hire "facilitators," and the agency "culture" now rewards lawyers who settle as richly as it rewards attorneys who litigate.<sup>50</sup> Of course, there are limits on the use of agency-annexed ADR. Some

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46. *Id.* at 265.

47. Peter R. Steenland, Jr. & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 805 (1996). For earlier accounts of agency use of ADR, see Charles Pou, Jr., *Federal Agency Use of "ADR": The Experience to Date*, in ACUS SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 101, 101-02 (1987) [hereinafter ADR SOURCEBOOK] and Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process in ADR SOURCEBOOK*, *supra*, at 437, 438-43.

48. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified in scattered sections of U.S.C. tits. 5, 9, 28, 29, 31, 41).

49. See Executive Order No. 12,778, § 1(c)(2), 3 C.F.R. 359, 361 (1991), *reprinted in* 28 U.S.C. § 519 (1994).

50. See Steenland & Appel, *supra* note 47, at 817-18.

cases will be ill-suited to ADR, such as where the interpretation of a statute is critical, where the government has a jurisdictional defense, or where settlement might interfere with the valid exercise of agency discretion or require new appropriations.

Despite these limits, my eighteen years on the bench persuade me that a rich motherlode of cases that come before regulatory agencies may be settled, with no damage to precedent or to public values. The more of these cases that agency-annexed ADR concludes, the better.

The only context in which courts are likely to be involved in agency ADR programs is in their traditional role as settlement reviewers. Although at this juncture it seems doubtful that courts will have many occasions to review settlements resulting from agency ADR programs, largely because agencies are likely to exercise caution in picking out the cases that go into ADR, it may nonetheless be useful to explain briefly how courts conduct such reviews. Outside of those cases in which our approval of settlements or consent decrees is required by law, we will usually disapprove settlements only when third parties who did not participate in the settlement can demonstrate that their legal rights have been injured, or when a party to the settlement shows that the settlement violates statutory or constitutional norms, is totally unreasonable, was fraudulently induced, or is against public policy.<sup>51</sup> Occasionally, parties differ over the proper interpretation of the settlement and come to court for a binding construction of its terms. In general, reviewing courts defer to an agency's interpretation of a settlement that the agency has approved unless it strikes us as nonsensical or irrational; if it does, we will remand for a more adequate explanation from the agency.<sup>52</sup>

These normal principles of judicial review apply unless specific statutes provide otherwise. A number of statutes do precisely this.

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51. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 9.5.5 (1993) (citing *United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982)).

52. See, e.g., *Cajun Elec. Power Coop. v. Federal Energy Regulatory Comm'n*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (remanding case because agency interpretation of settlement between electric cooperatives was "rather strained"); *Associated Gas Distribs. v. Federal Energy Regulatory Comm'n*, 893 F.2d 349, 359 (D.C. Cir. 1989) (remanding case because agency did not give an adequate, reasoned basis for its interpretation of a settlement); *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 811 F.2d 1563, 1569 (D.C. Cir. 1987) (deferring to agency's interpretation of a settlement agreement).

The ADRA, for example, incorporates the Federal Arbitration Act (FAA) provision for review of arbitration<sup>53</sup> and states that there will be no review of an agency's *refusal* to use ADR.<sup>54</sup> Some agencies require, as part of their voluntary ADR procedures, that the parties waive judicial review of any arbitration agreement. The FAA itself makes the resulting award final except where it was procured by corruption or fraud, where an arbitrator's misconduct prejudiced a party's right, or where the arbitrator exceeded his delegated powers.<sup>55</sup> The Randolph-Sheppard Vending Stand Act<sup>56</sup> exemplifies a contrary approach. Under this Act, arbitration awards involving the licensing of blind vendors doing business on federal property must be reviewed under the Administrative Procedure Act's (APA) "arbitrary and capricious"<sup>57</sup> standard.<sup>58</sup> Given this combination of statutory mandates and normal judicial review principles, the legal landscape of judicial review of agency ADR is something of a patchwork quilt.

Still, even under the normal, narrow rules for reviewing settlements, courts are likely to examine a settlement more carefully if they think one party may occupy a disadvantaged bargaining position. Harry Edwards, Chief Judge of the D.C. Circuit, recently wrote an interesting opinion in a case challenging the validity of a clause in employees' contracts that required them to submit any employment grievances—including those based on statutory or constitutional violations—to arbitration.<sup>59</sup> The court upheld the arbitration requirement.<sup>60</sup> However, it interpreted the normally narrow exceptions for judicial review of arbitration awards fairly broadly, to assure that the award does not threaten any explicit

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53. See 9 U.S.C. § 10 (1994).

54. See 5 U.S.C. § 570 (1994).

55. See 9 U.S.C. § 10 (1994). These principles of review still allow for a healthy number of arbitration reviews in our courts each year. In all, 4182 arbitration cases were filed in district courts, representing 10% of all civil cases. See JUDICIAL BUSINESS, *supra* note 4, at 67 tbl.S-12. For a representative case involving the appeal of a private arbitration, see *Al-Harbi v. Citibank*, 85 F.3d 680, 683-84 (D.C. Cir. 1996) (declining to vacate arbitration award, finding no "evident partiality" on the part of the arbitrator, nor any showing of he demonstrated "manifest disregard" of applicable law), *cert. denied* 117 S. Ct. 432 (1996).

56. 20 U.S.C. § 107 (1994).

57. See 5 U.S.C. § 706(2)(A) (1994).

58. See 20 U.S.C. § 107d-2(a) (1994).

59. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467 (D.C. Cir. 1997).

60. See *id.* at 1489.

public policy, laws, or legal precedent, particularly any that might implicate employees' substantive rights.<sup>61</sup>

I would not be surprised if courts reviewed some types of agency ADR agreements under a similarly not-so-deferential standard, to insure that agencies are not being blatantly unfair or coercive, or flouting their statutory obligations. In the absence of any special statutory directive, I would expect ADR agreements ordinarily to be reviewed under the deferential standard applicable to settlements generally. But the courts may be a bit tougher on review of agency-annexed ADR settlements than on settlements agreed to between parties under private ADR auspices or without any intermediaries at all. This potential disparity might be based on a perception that the agency has to turn a squarer corner when dealing with members of the public than parties do with each other. Additionally, it may well be that if agency ADR catches on, Congress will want to lay down a uniform review standard to clear up the inevitable confusion and disparity that now exist between review of different kinds of ADR. On the other hand, the number of appeals from agency ADR agreements may turn out to be so few that no special legislative action is required.

While the courts have become increasingly hospitable to ADR, they can be expected to evidence discomfort in cases where they think the agency has exploited private parties by using ADR. Virtually all agency ADR is, of course, still voluntary; were mandatory ADR to be more widely authorized, I suspect that the scope of judicial review would become broader.<sup>62</sup>

Thus far, courts have been most active in overturning settlements in high visibility cases involving agency enforcement of regulatory laws, where the interests of third parties or the public in general are indisputably implicated.<sup>63</sup> Bringing these types of

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61. See *id.* at 1486-87. See, e.g., Darryl Van Duch, Assault on Mandatory Arbitration, NAT'L L.J., Aug. 25, 1997, at B1 (Equal Employment Opportunities Commission and National Association of Securities Dealers oppose mandatory arbitration in employee disputes involving statutory rights). See also *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761 (9th Cir. 1997) (skeptically scrutinizing arbitration agreements entered into by employees as a condition of employment).

62. See, e.g., Miller, *supra* note 30, at 23-25 (arguing that the economic justification for encouraging settlements is more controversial where negotiations are compelled over one party's objection).

63. See, e.g., *Environmental Tech. Council v. Browner*, Civ. A. Nos. 94-2119, 94-2346, 1995 WL 238328, at \*7 (D.D.C. Mar. 8, 1995) (refusing to approve a proposed consent decree because it lacked an impartial determination as to the reasonableness of

settlements, which most commonly involve antitrust, securities, or oil and gas regulation, into agency ADR programs is problematic, to say the least. It is not, however, impossible. My own court's ADR program has settled some big money, civil rights, class action-type disputes.<sup>64</sup> Just to be on the safe side, then, it is important to discuss the manner in which courts have been treating big-case consent order settlement reviews. My court's 1995 decision in *United States v. Microsoft Corp.*,<sup>65</sup> which overturned the district court's refusal to approve a settlement between the Department of Justice and Microsoft under the Tunney Act,<sup>66</sup> is perhaps the flagship decision in this area.<sup>67</sup> It lays down standards that have since been applied widely, both in Tunney Act and in non-Tunney Act settlements:

When the government and a putative defendant present a proposed consent decree to a district court for review under the Tunney Act, the court can and should inquire . . . into the purpose, meaning, and efficacy of the decree. If the decree is ambiguous, or the district judge can foresee difficulties in implementation, we would expect the court to insist that these matters be attended to. And, certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate. But, when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role. A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot

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time extensions for determining a new rule relating to hazardous waste, thereby leaving the "public interest . . . unprotected").

64. Examples of successfully mediated cases include class actions alleging racial discrimination against a federal law enforcement agency; fair housing claims against private developers for using "white-only" models in advertising; suits against federal agencies for locating major facilities in residential neighborhoods; wrongful death actions resulting from helicopter crashes; and a trademark infringement case by one fitness company against another. Interview with Nancy Stanley, Director, Alternative Dispute Resolution Programs for the District of Columbia Circuit, September 19, 1997 (on file with author).

65. 56 F.3d 1448 (D.C. Cir. 1995).

66. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1994).

67. *See id.* at 1459.

be interpreted as an authorization for a district judge to assume the role of Attorney General.<sup>68</sup>

In the past, my own Court of Appeals and district courts have refused to affirm or enforce, or have temporarily restrained, settlements where the interests of third parties were implicated,<sup>69</sup> where none of the remaining plaintiffs had standing,<sup>70</sup> and where, despite the parties' voluntary acceptance of binding arbitration, the agency thought it necessary to rule on a disputed issue as part of its enforcement obligations.<sup>71</sup> One important issue that we split on nearly fifteen years ago, and that remains controversial, is an agency's ability to avoid a consent decree on the ground that it impermissibly restricts the administrator's discretion to make certain policy decisions entrusted to him by statute.<sup>72</sup>

To summarize, agreements reached through agency ADR, especially under the existing guidelines, will not normally be appealed. When these agreements are appealed, however, we can expect that even under the narrow standard of review applicable to settlements, courts will take a more careful look at the surrounding circumstances.<sup>73</sup> Judicial review of settlements is a safety valve, and is thus meant to be used only rarely, but agency-annexed ADR settlements should expect to run the same gauntlet as the rest of their settlement peers, and sometimes to be subjected to an even closer scrutiny.

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68. *Id.* at 1462.

69. *See, e.g.,* *Native Village of Chenega Bay v. Lujan*, Civ. A. Nos. 91-483, 91-484, 1991 U.S. Dist. LEXIS 2986, at \*12 (D.D.C. Mar. 12, 1991) (discussing Alaskan citizens' successful request for a temporary order restraining settlement between United States government, State of Alaska and members of the oil industry).

70. *See, e.g.,* *Women's Equity Action League v. Bell*, 743 F.2d 42, 44 (D.C. Cir. 1984) (remanding to district court for a ruling on whether standing was satisfied).

71. *See, e.g.,* *Duke Power Co. v. Federal Energy Regulatory Comm'n*, 864 F.2d 823, 829-31 (D.C. Cir. 1989) (stating that Federal Energy Regulation Commission has continuing regulatory jurisdiction over rates and thus has an independent duty to remedy a utility's violation of its filed rate schedule).

72. *Compare* *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1130 (D.C. Cir. 1983) (holding that consent decree did not "impermissibly infringe on the EPA Administrator's discretion under the Clean Water Act") *with* *Gorsuch*, 718 F.2d at 1134 (Wilkey, J., dissenting) ("[A] decree of this type binds not only those present Administrators who may welcome it, but also their successors who may vehemently oppose it").

73. For example, we can expect courts to inquire into the circumstances of the private parties included or any third parties affected by the settlement. Courts will also examine what has been given up and what received (especially when the quid pro quo implicates statutory or constitutional rights), and what statutory norms have been departed from or dispensed with.

## III. NEGOTIATED REGULATIONS

Finally, I turn to negotiated regulations or "reg neg" (all adolescents have nicknames that they hate). In my view, reg neg is by far the most innovative and revolutionary aspect of ADR. Court-annexed and agency-annexed ADR are basically facilitated settlements; thus far, they have made few dramatic inroads into public law disputes, which have always been amenable to ordinary settlement procedures and consent decrees. On the other hand, reg neg, in my opinion, is meant to be a partial substitute for formal APA procedures governing the issuance of agency regulations pursuant to statutory authority. Under the formal procedures, the APA requires agencies to publish notice of a proposed rule, give interested persons an opportunity to make comments on the proposed rule, and to accompany the final published rule with a statement of the rule's basis and purpose.<sup>74</sup> As construed by the courts, the agency statement must contain a sufficiently detailed rationale, answers to all significant comments made during the rulemaking process, and, where appropriate, citation of underlying data.<sup>75</sup>

Under the negotiated rulemaking process set out in the recently amended 1990 Negotiated Rulemaking Act (NRA),<sup>76</sup> the rulemaking process undergoes an extra "first step." An agency publishes notice that it will conduct negotiations regarding a possible rule, names representatives of the "interests" implicated by the rule, and appoints a facilitator to run the negotiations.<sup>77</sup> If "consensus" is reached through the negotiation, the parties send the signed agreement, accompanied by a report and any pertinent documents, to the agency.<sup>78</sup> The agency then considers proposing the rule and opening it up for notice-and-comment under regular APA procedures.<sup>79</sup> While reg neg does not replace notice-and-

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74. See 5 U.S.C. § 553 (1994).

75. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (requiring that agency respond to all significant comments and criticizing the promulgation of rules based on data known only to the agency); *Kenecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (remanding for Administrator to supply an implementing statement to "enlighten" the court as to how he reached air quality standards from criteria in the Clean Air Act).

76. 5 U.S.C. §§ 561-70 (1994).

77. See *id.* at §§ 564(a), 566(c)-(d).

78. See 5 U.S.C. § 566 (1994).

79. See ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK 230 (David M. Pritzker & Deborah S. Dalton eds., 1995).

comment rulemaking entirely, it precedes it and, if successful, seems destined to convert the formal proceedings, totally or at least partially, into a mere formality. Reg neg rules should not, in theory, require as much record justification as other proposed rules do, and there should be fewer hostile commenters; therefore challenges in the courts should—theoretically—be rare.

In reality, however, there is many a gap betwixt the two parts of the process. Unhappy participants in the negotiation process may refuse to sign the agreement, and non-participants may feel that they are not bound by it in any way. Additionally, the agency may change its mind either before or after the formal notice-and-comment period, and may propose or issue a rule that is different from the rule agreed upon in the negotiations. As I understand it, different agencies play by different rules, and sometimes the agency's representative will not have the authority to commit the agency to proposing a rule, or even to state the agency's inclinations or negotiating limits.

Despite all these snags, the process has been used for some time now, and it works in many cases.<sup>80</sup> And although its proponents may sometimes, as Professor Coglianese suggests, overstate its successes,<sup>81</sup> the Clinton Administration continues to push for its increased use.<sup>82</sup> Reg neg has been invoked by 17 agencies in the formulation of 35 rules in 13 years, with the Environmental Protection Agency (EPA) taking the lead. The National Performance Review claims that negotiated rulemaking has reduced EPA's rate of rule litigation from 80% to 20%.<sup>83</sup> Professor Coglianese disputes those figures. He posits that even those reg negs that result in the issuance of rules do not save much time over regular rulemaking procedures, and that the percentage of judicial appeals following those few success stories is about the same as the percentage of appeals of regular rules (from 1987-1991, 6 of the 12 EPA reg neg rules have been appealed).<sup>84</sup> He concludes that "[i]n the aggregate, negotiated rulemaking has not generated any substantial difference in the way that legal challenges get resolved."<sup>85</sup>

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80. See Philip J. Harter, *The Adolescence of Administrative ADR*, ADMIN. & REG. L. NEWS, Spring 1996, at 2.

81. See Coglianese, *supra* note 3, at 1257-59.

82. See Steenland & Appel, *supra* note 47, at 817.

83. See Coglianese, *supra* note 3, at 1287.

84. See *id.* at 1301.

85. *Id.* at 1308. Coglianese also states that nearly half of all the appeals of EPA

I, however, reject the premise that the game is not worth playing if it doesn't produce dramatic improvements fast. As any parent knows, we must not be too impatient with the rate of an adolescent's progress, so long as he *is* progressing. If reg neg can, without adding substantial time or cost, contribute to a better rulemaking process by increasing satisfaction among the participants and bringing about a fuller exchange of information at the negotiation stage, why should we care if it doesn't rise above the rulemaking norm in terms of time required and number of judicial challenges brought? In any case, our experience with reg neg, as with other kinds of ADR, is still too incomplete to support any broad conclusions regarding its long-term promise.

### A. *Scope of Review*

Many questions about how a court reviews a reg neg rule remain unanswered.<sup>86</sup> Unlike the majority of court-annexed or agency-annexed ADR settlements, reg neg rules usually involve some aspect of public policy. Given this, I would not have expected courts to give them any less searching a review than they would apply to rules consummated entirely through regular procedures. Interestingly enough, however, there was a lively debate about the appropriate standard of review for reg neg rules in the 1980s, before section 570 of the NRA settled it:

Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section

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rules challenged in the D.C. Circuit between 1979 and 1990 were voluntarily dismissed before argument. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735, 756 (1996). Once a challenge is lodged, he points out, the parties can return to settlement talks, with fewer participants than in reg neg and usually with an "added degree of secrecy." See *id.* at 757. Moreover, he argues that formal challenges of EPA rules do not disturb ongoing relationships between EPA and nongovernmental or industry groups that are in continual contact with EPA. Typically such challenges are considered "business as usual." See *id.* at 736-37.

86. For further discussion of these issues, see Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 60-69 (1986) (suggesting that courts give agencies greater leeway in determining whether a result falls within the zone of reasonableness where a broad enough range of interests are represented during the rulemaking process); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 17-25 (1985) (analyzing and criticizing a proposal for limiting judicial review of negotiated regulations).

shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.<sup>87</sup>

Section 570 seems to indicate that a negotiated rule cannot be challenged on the ground that the negotiated rulemaking process itself was deficient, at least until the final rule is promulgated. It does not, however, answer the question whether the preliminary negotiating process can be attacked when the final rule is appealed—and if so, on what grounds. Chief Judge Posner of the Seventh Circuit, the first appellate judge to discuss reg neg in an opinion, raises this question in *USA Group Loan Services, Inc. v. Riley*,<sup>88</sup> but basically leaves it unanswered. The rule under attack in *USA Group Loan Services* involved the regulation of private intermediary guarantors of government-backed student loans.<sup>89</sup> The industry argued that the 1990 “negotiated rulemaking” directives had been violated, and that the Department of Education had carried on negotiations in “bad faith.” This bad faith was evidenced by the fact that after the negotiation was completed the Department issued a proposed rule markedly different from the one that had been agreed to in the negotiations—the one which the Department agent had assured the negotiating parties would be formally proposed barring “compelling reasons to depart.”<sup>90</sup> Among other things, the challengers complained that the Secretary had initially offered to put a cap on the industry’s liability; when the industry balked at subjecting themselves to *any* liability, the

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87. 5 U.S.C. § 570 (1994). During the NRA floor debate, Senator Sander Levin, the bill’s sponsor, stated that:

The purpose of this provision is to allow agencies to use negotiated rulemaking without the delays and procedural problems that might arise if judicial review of intermediate agency actions were available, while also continuing the tradition in Federal administrative law of permitting judicial review of agency rules at the time those rules are promulgated.

135 CONG. REC. S10,064 (daily ed. Aug. 3, 1989). Congressman Barney Frank, who chaired the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, which processed the bill, agreed: “[t]he intention here was not to confer any rights or additional rights; it was to codify a process . . . nor do I think there is any language which confers new rights of judicial review which did not previously exist.” 136 CONG. REC. H1855 (daily ed. May 1, 1990).

88. 82 F.3d 708 (7th Cir. 1996).

89. *Id.* at 711.

90. *Id.* at 714.

Secretary withdrew his proposal and ultimately issued a rule with no liability cap.<sup>91</sup>

Judge Posner's opinion displays a fair amount of skepticism about the whole negotiated rulemaking procedure, which he describes as "a novelty in the administrative process."<sup>92</sup> He comments that the NRA strongly implied that there could be no "bad faith" challenges in court to such negotiations. Further, even if such challenges were available, the *USA Group Loan Services* petitioners could not carry the day:

The propriety of such a promise [by the agency representative that the agency would go forward with the agreement barring compelling reasons] may be questioned. It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the "capture" theory of administrative regulation.<sup>93</sup>

In any case, he asserts, no such promise would be enforceable:

The practical effect of enforcing it would be to make the Act extinguish notice and comment rulemaking in all cases in which it was preceded by negotiated rulemaking; the comments would be irrelevant if the agency were already bound by promises that it had made to the industry. There is no textual or other clue that the Act meant to do this. Unlike collective bargaining negotiations, to which the servicers compare negotiated rulemaking, the Act does not envisage that the negotiations will end in a binding contract. The Act simply creates a consultative process in advance of the more formal arms' length procedure of notice and comment rulemaking.<sup>94</sup>

Furthermore, Judge Posner firmly denies the industry's pleas for more discovery into circumstances surrounding the negotiations (apparently the district court had allowed some), but adds provocatively that "[i]f as we doubt the Negotiated Rulemaking Act creates a remedy [for deficient negotiation] as well as a right, we suppose that a refusal to negotiate that *really* was in bad faith, because the agency was determined to stonewall, might invalidate

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91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.* at 714-15 (citing 5 U.S.C. § 566(f) (1994)).

the rule.”<sup>95</sup> No prima facie evidence of bad faith appeared here, however, and “[t]he Act’s purpose—to reduce judicial challenges to regulations by encouraging the parties to narrow their differences in advance of the formal rulemaking proceeding—would be poorly served if the negotiations became a source and focus of litigation.”<sup>96</sup>

What should we deduce from *USA Group Loan Services* regarding the possibility of challenging a reg neg rule on the ground that the negotiations were a sham? Judge Posner thinks it unlikely that the NRA was intended to permit such challenges, but he does not shut the door altogether on genuine “bad faith” claims. Why not? It could certainly be argued that if a negotiated rule subsequently went through the APA notice-and-comment process, and is not vulnerable to judicial challenge on any APA ground, any defects in the parties’ preliminary promenade should be irrelevant. Obviously the APA itself provides no basis for invalidating such a rule, and the plain language of section 570 of the NRA can hardly be read to do so either. Participants in a “bad faith” negotiation who find that they have been seduced and abandoned might be sadder and wiser, but why should the ultimate rule be invalidated unless the agency has somehow tricked or misled interested persons into not commenting on or participating in the formal rulemaking process? A party might allege, for example, that the agency stated in the public notice that the proposed rule incorporated the consensus of a genuine negotiated process when it had not. In such cases, though, the agency misconduct would consist of the issuance of the misleading APA notice itself, although demonstrating its falsity might lead to an examination of the underlying negotiation process. Short of that situation, however, it is still not clear why even Judge Posner’s hypothetical sham negotiation would invalidate a final rule that passed APA muster.

On the other hand, it could be argued that when Congress mandates a negotiation, the agency is not free to waste everyone’s time by flouting its instructions. In the extreme, could the agency ignore the mandate altogether and go straight to formal rulemaking? Probably not, or at least a good case could be made out to require the agency to perform the nondiscretionary duty of conducting the negotiation. The likelihood, however, that courts

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95. *Id.* at 715.

96. *Id.*

will go much beyond assuring that a required negotiation takes place and decide whether the agency was playing a bona fide role throughout, seems to me slim. Short of smoking gun evidence that the agency never had any intention of engaging in real negotiations, we can expect courts to shy away from examining the dynamics of the negotiations—even after the rulemaking is over. But, again I must caution, the circumstances under, and the degree to which courts will enter that arena remain uncharted territory.

#### B. *Who Can Challenge a Reg Neg Rule?*

Another interesting and unanswered question is whether a disgruntled party to the negotiation can submit, in the formal comment period and as part of the administrative record of the finally issued rule, a description of allegedly unfair aspects of the preceding negotiations, where the proposed rule purports to be and is in fact based on a “consensus” of other parties to the negotiations. By such a submission, a nonconsenting party could seek to discredit the other parties’ claim of consensus and perhaps even justify the commenter’s own repudiation of any earlier agreement not to challenge the rule. I see no grounds under the APA on which the malcontent could be barred from submitting such a comment. The weight a reviewing court would accord to it is a different matter. An equally nettlesome question is whether a rule that was based on an agreement reached by a reg neg process could be challenged by a nonparticipant in the negotiation who claimed that not all of the necessary “interests” were at the bargaining table,<sup>97</sup> or that the representatives present were “bought off” or for other reasons failed to represent their constituencies adequately.

These hypotheticals illustrate the broader question of who should be able to challenge a final rule based on a consensus arrived at through negotiation. Obviously, the normal rules of standing permit only those who participated in the formal agency notice-and-comment rulemaking proceeding, and who can satisfy the Article III justiciability requirements of injury, causation, and redressability, to challenge a final rule.<sup>98</sup> A nonparticipant in the

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97. See *id.* at 715; see also, e.g., *National Anti-Hunger Coalition v. Executive Comm.*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983) (stating that an advisory committee convened under the Federal Advisory Committee Act may be challenged if it is not “fairly balanced”).

98. See *Water Transp. Ass’n v. Interstate Commerce Comm’n*, 819 F.2d 1189, 1194

reg neg who meets normal standing requirements certainly seems eligible to do so;<sup>99</sup> seemingly a disgruntled reg neg participant who satisfies normal standing requirements and did not sign the consensus statement would also be eligible to challenge the rule. But would the courts reject a consensus-signer who simply changed her mind later? What if a consensus signer were persuaded in a different direction by comments made during the formal rulemaking, as agencies themselves sometimes are, and decided to challenge the rule on appeal? What about an organization that originally signed the consensus but has undergone a change in leadership in the interim, and now opposes the consensus agreement? Are all members of a trade association which signed the agreement bound as individual entities, even when their individual interests differ from the organization's?

The answers to these questions have important implications for the attractiveness of the reg neg process to agencies and potential challengers of a rule. If courts take a restrictive attitude toward challenges to final rules which incorporate previously negotiated consensus principles, the agency may feel comfortable in foregoing the kind or at least the amount of independent research and verification it would otherwise feel compelled to undertake in order to support the rule. If, on the other hand, seemingly satisfied participants in the negotiation can too easily challenge the underlying process on appeal later on, the agency may feel compelled to keep its guard up, and to produce the usual ponderous record for the formal rulemaking, rendering the entire negotiation process decidedly less attractive. Indeed, in *USA Group Loan Services*, the industry complained that there was "scanty articulation by the Secretary of the grounds for the challenged parts of the regulation."<sup>100</sup> Judge Posner quickly diverted that attack by pointing out that under Seventh Circuit precedent, the complainants were obliged to conduct their own studies, and to put their

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(D.C. Cir. 1987).

99. This tentative conclusion, however, is subject to a further caveat: could someone with notice of an agency's intention to conduct a reg neg and of the list of the representatives who would participate, who did not herself apply to participate as a representative in the negotiations, later be held not to have exhausted her administrative remedies insofar as her ability to challenge the conduct of the negotiation was concerned? See 5 U.S.C. § 564(b) (1994) (allowing persons who believe their interests will not be adequately represented to apply for membership on negotiating committee).

100. *USA Group Loan Servs.*, 82 F.3d at 713.

data before the Secretary if they thought his studies and data were inadequate.<sup>101</sup> The next time around, however, a truncated administrative record induced by the reg neg consensus might not so easily pass APA muster because it does not contain the "substantial evidence"<sup>102</sup> necessary to justify the rule. The greater the risk of a future challenge, the greater the burden on the agency to compile a record sufficient to meet ordinary APA review standards, at the expense of forfeiting any cost and resource gains that are supposed to come from hammering out a consensus regulation.

If an agency sticks to its side of the bargain and submits a proposed rule embodying the reg neg consensus, it does not seem altogether implausible for a court to enforce the other signers' agreement not to challenge the rule, just as courts will enforce parties' agreements to waive their rights to go to court. But, on the other hand, what is sauce for the goose ought to be sauce for the gander, and if a consensus signer finds herself persuaded otherwise by comments made during the formal rulemaking, why should a court refuse to entertain her challenges on appeal so long as she meets the other Article III standing requirements? After all, under the prevailing rules of the reg neg process, the agency always retains the ultimate option of changing its mind about proposing the consensus both before and after the formal rulemaking process.<sup>103</sup> Since any private party will have to submit comments in the formal agency rulemaking in order to bring a later appeal, the agency will receive notice of her change of heart in time to bolster its record response before the final rule is issued. And because the "consensus" will often be comprised of only agreement on "broad principles," with the agency left to draft the details, we can expect some participants to claim that the proposed rule is not in accord with the "principles" to which they agreed. I would expect that courts will be most reluctant to wade into the thistle-strewn thicket of enforcing consensus agreements on either side.

Finally, there will be cases where the agency ultimately proposes a rule containing some, but not all, parts of the consensus, and a party to the original negotiation claims that her agreement to the package deal does not oblige her to support any and all

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101. *See id.* at 713-14.

102. 5 U.S.C. § 556(d)(4) (1994).

103. *See USA Group Loan Servs.*, 82 F.3d at 714-15.

concatenations of its elements. Can that party now challenge all the parts of the rule, including those to which she had previously agreed? Does the fact that a negotiation implies a holistic set of exchanges by all the parties mean that any deviation from the original agreement releases the parties from their promises regarding each component of the agreement?<sup>104</sup> None of these questions have yet been answered.

### C. *The Standard of Review*

A court could, of course, simply ignore everything that preceded the formal notice of rulemaking, assuming, like Judge Posner, that any preliminary negotiations were basically irrelevant to the court's appraisal of the final rule.<sup>105</sup> In at least two prior appeals of reg neg rules, the D.C. Circuit has affirmed the rules without any discussion or even reference to the underlying negotiations.<sup>106</sup> For some aspects of judicial review, that is clearly the right stance. It seems pretty clear, for instance, that a court would apply the test set forth in *Chevron U.S.A. Inc. v. National Resource Defense Council, Inc.*<sup>107</sup> Under the Chevron "Step I"<sup>108</sup> the court would analyze the reg neg rule's conformity with congressional intent in the same way it always does, since no negotiation consensus could affect the courts' obligation to enforce unambiguous congressional intent. In fact, one negotiated rule failed on

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104. See, e.g., *OXY USA, Inc. v. Federal Energy Regulatory Comm'n*, 64 F.3d 679, 701 (D.C. Cir. 1995) (holding that petitioners who supported a change in methodology that was embodied in a proposed settlement could challenge the final settlement on appeal because other parts of the proposed settlement had been changed). The *OXY USA* court reasoned that:

By advocating a specific settlement, petitioners did not forfeit their standing to object to elements of the settlement to which they had agreed if changes made in others by the Commission work to their overall disadvantage. This recognizes the reality that businessmen will yield on particular points if they are satisfied that the net results of an agreement will accrue to their benefit.

*Id.* at 689.

105. See *USA Group Loan Servs.*, 82 F.3d at 714.

106. In prior cases dealing with reg neg, our court has usually ignored the reg neg origin of the rules. See, e.g., *National Resource Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990) (holding that EPA regulations are a reasonable exercise of authority and discretion without mentioning the origin of the regulation); *Safe Bldgs. Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988) (holding that EPA regulations covering asbestos hazards were within the mandate of the Asbestos Emergency Response Act without discussing the reg neg origins).

107. 467 U.S. 837 (1984).

108. See *id.*

appeal because the court found that the agency had not accurately considered the legislative intent.<sup>109</sup> It is when the court moves on, and assesses a rule under the *Chevron* "Step II" reasonableness test,<sup>110</sup> or under the APA's arbitrary and capricious test,<sup>111</sup> that the question of whether the court is entitled to take the negotiated origin of the rule into account arises. If the court can consider the consensus as a factor in support of the rule's reasonableness, the issue of a challenger's eligibility to impugn the integrity of the negotiation that produced the consensus moves to center stage.

The NRA permits a rulemaking committee to include in its agency report any information that it deems appropriate;<sup>112</sup> the NRA also allows any committee member to include any information it wishes as an addendum to the report.<sup>113</sup> Why then is it not entirely reasonable for a court to consider, as persuasive evidence of the reasonableness of the rule, the fact that all or even most of the major interested parties in the negotiation have acceded to it? Indeed, in non-reg neg situations courts often do acknowledge the unanimous or majority endorsement of a rule by affected groups. Of course, consensus alone would not insulate a rule that was facially unreasonable, or that lacked substantial evidence to support a key factual predicate, but it might weigh in to counter an allegation of arbitrariness in a close case. Put another way, a court might tolerate something less than the "hard look" rationale it generally requires from an agency, on the ground that there must have been significant give and take in the negotiations, and that if the end product makes overall sense, the details of the "deal" need not resemble the brainchild of a committee of agency experts. Cannot the negotiation process itself attest to a court that reasonable alternatives have been seriously considered? After all, in authorizing the reg neg process, Congress must have realized that the pragmatism of negotiation would sometimes supplant the logic of pure intellect. But again, even if that posture prevails, the agency must take the bitter with the sweet. If a court is allowed to give credence to the preliminary process to support an agency's decision, it follows that interested parties must be able to chal-

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109. See *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

110. See *Chevron*, 467 U.S. at 843.

111. See 5 U.S.C. § 706(2)(A) (1994).

112. See 5 U.S.C. § 566(f) (1994).

113. See *id.*

lunge the validity of the process with information regarding its deficiencies. That may well be a reason why courts so far have downplayed the reg neg process in their opinions until it was directly challenged in the *USA Group Loan Services* case.

My own feeling is that the court should be able to take account of consensus as a factor suggesting the reasonableness of the rule. That in turn may justify a more modest amount of factual justification and explanation of rationale than is required in the usual statement of basis and purpose for a rule. When the agency follows that course, however, it always runs some risk that an outlier, or even one who has previously signed on, will later bring a challenge on the merits or even challenge the negotiation process during the comment period. And the reviewing court must still have an irreducible minimum of backup evidence; one can't expect courts to abdicate their responsibility of ensuring that the agency has given *some* plausible reasons for all aspects of the rule that affect the public interest. A reviewing court must be ever mindful of the bare possibility that the parties have conducted their horse-trading without regard for some public interest meant to be protected by the statute. Indeed, the best insurance against reg neg deteriorating into the interest-bargaining paradigm that Judge Posner feared lies in the requirement that judicial review accord with the APA's baseline standards of rationality.<sup>114</sup>

#### D. *The Agency's Obligation in a Reg Neg*

Although reg neg supporters would normally welcome the opportunity for as eminent a jurist as Judge Posner to formally integrate reg neg into administrative review, the father of reg neg has labeled the *USA Group Loan Services* case a "disappointment."<sup>115</sup> Philip Harter asserts that Judge Posner's dismissal of reg neg as a "novelty" and comparison of it to the "capture" of a regulatory agency by the industry illustrate a failure to understand the goals or dynamics of the reg neg process.<sup>116</sup> Harter claims,

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114. One could even argue that although section 570 of the APA says that no "greater deference" should be given to negotiated rules, *lesser* deference is in fact appropriate because the agency is not using its expertise, but rather is delegating it to private parties. See 5 U.S.C. § 570 (1994).

115. Letter from Clay Wheeler, Editor-in-Chief, *Duke Law Journal*, to author (Feb. 3, 1997) (on file with author).

116. See *id.* In fact, the 1992 Higher Education Act Amendments involved in *Group Loan Services* required discussions and negotiations not only with the regulated guaran-

"[t]he court's narrow, erroneous perspective . . . colored the rest of the analysis."<sup>117</sup>

Whether such a blanket put-down is merited, Judge Posner did highlight one still-sticky facet of reg neg when he criticized the industry for relying on an agency representative's promise to submit the agreed-upon draft as its proposed rule "in the absence of compelling reasons."<sup>118</sup> Judge Posner doubted that an agency representative should have any such authority to commit the agency.<sup>119</sup> Yet, the 1990 Act does instruct an agency head who is deciding whether to undertake a reg neg to consider whether the agency "to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus . . . with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment."<sup>120</sup>

While no one disputes the agency's right to change its mind about any part of the proposed rule as a result of the formal comment process, if the agency too cursorily declines to even propose the consensus rule, the viability of the whole negotiating process is seriously impugned, and participants will be chary of expending much effort on it. Thus, the critical question of whether an agency representative can properly bind the agency to do anything as a result of the negotiating process remains unanswered, and it is a fair criticism that Judge Posner passed it over too lightly. Experienced reg neg participants point out that the process is least pro-

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tors themselves, but also with other interested parties. See *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 712 (7th Cir. 1996).

117. Letter from Clay Wheeler to author, *supra* note 115.

118. *USA Group Loan Servs.*, 82 F.3d at 714.

119. See *id.* (citing *Natural Resources Defense Council, Inc., v. EPA*, 859 F.2d 156, 194 (D.C. Cir. 1988) (upholding the agency's unlimited right to renege on its promise to go forward with a negotiated solution)). In *Natural Resources Defense Council, Inc.*, decided before the Negotiated Rulemaking Act came into effect and dealing with EPA pollutant discharge permits, the D.C. Circuit noted that agency negotiations with interested parties had played a significant role in shaping the challenged rule, but nevertheless reviewed the rule under the same standards applicable to other rules. See 859 F.2d at 192-95. Referring to Mr. Harter's earlier writings, the court said:

A commentator on negotiated rulemaking urges agencies engaged in such a process not to make changes in the proposed rules except in response to a meritorious comment, arguing that a practice of making *sua sponte* changes may lead the negotiation process to unravel . . . . But the soundness of that advice to the agency, however great, cannot impair its legal right to make such changes.

*Id.* at 194-95 (citing Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 102 (1982)).

120. 5 U.S.C. § 563(a)(7) (1994).

ductive when the key agency representative either refuses to reveal the agency's positions or bottom lines during the negotiation process, or refuses to commit to advancing a consensus reached as the presumptive basis for a proposed rule.<sup>121</sup> If the agency, barring significant new developments, feels no commitment to go forward with a consensus in which its own representative participated, the negotiation becomes just another public hearing or discovery mechanism, and nonagency parties will have little incentive to sign away their rights to challenge a consensus rule in court when the agency refuses to make a parallel commitment to go forward with it, even to the formal proposal stage.

On the ultimate question of an agency's ability to legally bind itself in advance to proposing a consensus rule, Judge Posner may have exaggerated when he suggested that an agency representative might not be authorized to make even the equivocal commitment to propose the rule "in the absence of compelling reasons."<sup>122</sup> My take on the issue is that if the agency is willing, after consultation at its highest levels, to authorize its representative to make such a commitment at the end of negotiation, no law has been violated and indeed the thrust of the NRA has been furthered. Obviously the agency will usually give itself an emergency exit route, as it apparently did in *USA Group Loan Services*,<sup>123</sup> in case some unexpected factor surfaces after the negotiation. But even with such a hedge, the agency's commitment will demonstrate a seriousness, otherwise lacking, to the other participants; this maximizes the potential for honest bargaining toward a true consensus. There may be no way to compel an agency to make such a commitment, but it would be strange for a court to tell an agency that it can't delegate such authority to its negotiating representative.

Still, the sixty-four thousand dollar question remains: if the agency can and does make a commitment to propose a consensus rule, will the agency's promise be enforced by a court? Here, I would guess ultimately not.<sup>124</sup> I think there is still strong senti-

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121. See Stephen B. Goldberg, *Reflections on Negotiated Rulemaking: From Conflict to Consensus*, WASH. LAW., Sept.-Oct. 1994, at 42.

122. *USA Group Loan Servs.*, 82 F.3d at 714.

123. See *id.* at 713-15.

124. Cf. *Beverly Health & Rehabilitation Servs. v. Feinstein*, 103 F.3d 151, 152 (D.C. Cir. 1996) (holding that a district court has no jurisdiction to enjoin NLRB proceedings pursuant to an unfair labor practice charge initiated according to statutorily mandated procedures because of prior agreement between General Counsel and respondent as to

ment in the judiciary, for reasons akin to those spelled out in Professor Funk's essay in this symposium,<sup>125</sup> that at every step in the process, agency officials must and do act in the public interest and that they should not be weighted down by prior commitments to interested parties. Time and space do not permit any detailed discussion of my belief that this is not essentially how government policymaking works: in my experience, formal rulemaking as well as reg neg procedure involve a continuous round of balancing opposing interests all the way through the agency hierarchy, and from there to the White House. The reg neg process actually restricts in some measure, through its insistence on face-to-face negotiations, the intrusion of political and extrasubstantive considerations at all levels of rulemaking, agency and White House, and from all sources, identified and unidentified.

Yet the notion that an agency should bind itself to introduce a particular proposed rule through an agreement with other parties, thereby signing away its discretion to pursue what it may later for whatever reason come to believe is in the best interest of the general public, sounds anomalous and even sinister to most people—certainly it did to Judge Posner.<sup>126</sup> However, agencies do enter enforceable agreements with parties before them every day in the adjudicatory-enforcement sphere, including agreements not to prosecute or penalize a person or organization who behaves in a certain way; these agreements too may have wide-ranging effects on, and implications for, the public interest. Why should rulemaking be so different—especially when all interested parties get a crack at the proposed rule during the comment period, and no one challenges the right of the agency to change its mind at that stage if it is persuaded by any of those commenters? The difference, I think, lies in the peculiar role of reg neg as a prelude to, rather than a substitute for, the regular statutorily mandated APA rulemaking process whose independence, integrity and transparency judges feel they must keep intact.

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special procedures for handling multiple charges against health care chain).

125. See generally William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997) (arguing that the theory and practice of negotiated rulemaking subtly subvert the basic concept of administrative law, which should be "agenc[y] pursuit of the public interest through law and reasoned decisionmaking").

126. See *USA Group Loan Servs.*, 82 F.3d at 714.

The fit of reg neg into the formal rulemaking processes is an uneasy one. Although it precedes and does not replace the processes in form, it tries to do just that in reality. Over the decades the neat paradigm of formal rulemaking, notice of proposed rules, comment, and issuance of final rule has been overlaid by heavy lobbying on and off the record, midstream changes in rule proposals, revisions at the White House, Office of Management and Budget review, and even occasional congressional directives, so that the final process more nearly resembles a mini-legislative engagement than a model of executive decisionmaking in the public interest. Reg neg acts as a device to cabin in some of that interchange and at least informally commit the participants to a consensus decision reached in open negotiations. Nonetheless the introduction of this extra process into an unaltered APA rulemaking procedure, which seems to assume isolated, nonpolitical expert agency decisionmakers assiduously reviewing data and making judgments based on subject matter expertise only, does produce tension, and leaves judges disconcerted as to whether they should realistically recognize what has gone on before the final rulemaking, or push forward with the myth that the formal process is really the only part of the process that can be acknowledged. Judge Posner's foray into this uncharted territory in *USA Group Loan Services* seems to prefer the latter approach,<sup>127</sup> but if reg neg is to go much farther, its legitimacy as an intrinsic and congressionally mandated or authorized part of the rulemaking process must be formally recognized and dealt with by courts, even belatedly in its adolescence.

#### CONCLUSION

Court-annexed ADR is neither a panacea nor a failure. It has enjoyed some modest successes, participants seem to like it, and courts are increasingly focusing on settlements, even without assistance from formalized ADR programs. Agency-annexed ADR is also gaining some momentum, but courts are likely to see only a few cases resolved under this procedure, at least so long as the procedure is reserved for the one-on-one negotiations that do not generally implicate public policies. I think, however, that courts will review agency ADR cases with great care, to ensure that

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127. See *supra* notes 74-81 and accompanying text.

disadvantaged parties are not hoodwinked or intimidated by the agency into surrendering valuable statutory protections.

As for reg neg, its relatively low profile could change, and many intriguing questions about the scope of review that courts will apply to its product still remain. The variations I have dealt with in this piece are still mostly theoretical,<sup>128</sup> but even as hypotheticals they help us to see the need for parties involved with reg neg to insist that the agency spell out ahead of time what its stance will be with regard to implementing any consensus. The first case in which reg neg received any judicial attention may have too casually dismissed it as a novelty, or as something akin to a voluntary industry standard. But there will be opportunities for other courts to pick up the slack, and integrate reg neg into our administrative law. Although its use has been limited to date, this promising adolescent deserves a niche in administrative law that justifies further clarification of its relationship to formal rulemaking and judicial review.

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128. Many of these theoretical variations were also made by Professor Ronald Levin in 1991. See Ronald M. Levin, *Judicial Review of Negotiated Rules: The "Reg-Neg Renegade" and Other Problems*, Address Before the American Bar Association Conference on Alternative Dispute Resolution in Energy and Environmental Regulatory Proceedings (Nov. 15, 1991) (on file with author).

