KNIGHTS OF THE ROUND TABLE: PARTICIPANT SELECTION MECHANISM FOR COURT-RELATED DELIBERATIONS

KEREN AZULAY†

ABSTRACT

In 2003, the Deliberative Democracy Consortium convened thirty leading scholars and practitioners specializing in public deliberations. They were asked to define the top priorities for future research. The primary issue they agreed merited further research was the effect the design of a deliberative procedure has on its outcome. This Article tries to meet the challenge of researching this interaction.

The Article presents a novel procedure for selecting and convening relevant participants for deliberative initiatives. It is based on the conventional wisdom that participation by all relevant stakeholders is likely to contribute to both the success of the deliberation and the legitimacy of its outcome. The participant selection mechanism presented here involves two stages. In the first stage, a trained facilitator identifies the relevant stakeholders and convinces them to join the deliberations. In the second stage, a court reviews the list of participants, and interested parties can object to the list of participants or file motions for intervention.

This participant selection mechanism helps bridge the existing gap between the theory and practice in the field of public deliberation. In practice, the participant selection mechanism shows how courts and skilled facilitators can cooperate to enhance the legitimacy and effectiveness of deliberative procedures. In theory, by utilizing the authority of courts in the participant selection procedure, it calls for future exploration of the ways in which legal mechanisms can overcome some of the difficulties deliberative decisionmaking procedures face.

† Doctoral Candidate, Columbia Law School. LL.M, Columbia Law School, LL.B, B.A., Hebrew University. My deepest gratitude to Michael C. Dorf for his invaluable advice, guidance, and comments, and to Robert A. Ferguson for his comments on this and earlier versions, and his endless support and encouragement. I also wish to thank Carol Liebman, Susan Sturm, Yonatan Even, Ori Herstein, Ittai Bar-Siman-Tov, Shlomi Cohen, and the participants in the JSD colloquium at Columbia Law School for their generous and insightful comments. I would also like to thank the Fulbright Foreign Students Program and the ISEF Foundation for their assistance, which made this project possible.
INTRODUCTION

Millions of people around the world deliberate every day on issues ranging from growth and environmental regulation, to municipal budgeting, to neighborhood management. One in four Americans indicates that he or she has attended a formal or informal deliberation over a public issue in the last year, and seventy-four percent of Americans reported having engaged in at least one type of discursive act, such as face-to-face meetings, informal conversations, or internet de-
This illustrates a natural tendency to rely on deliberative institutions as the forums in which policies are shaped and conflicts can be resolved.

Because deliberations are gaining popularity as an efficient conflict resolution approach, scholars have increasingly directed their attention to the benefits and pitfalls of deliberations. This research has focused on such issues as the underlying philosophical, political, and pragmatic justifications for citizen participation, the advantages of deliberative methods in resolution of complex public problems, and the ability of deliberative schemes to restore democratic values.

But while the theoretical research on deliberation proliferates, the design of deliberative institutions following the theory lags behind. This is especially true with regard to mechanisms to select par-


9. In the closing article of a recent handbook on deliberative democracy, Peter Levine, Archon Fung & John Gastil attempt to explain the gap between the scholarship and practice in the field of deliberation. They argue that most academics focus only on deliberations that have clear influence on political outcomes, ignoring other, smaller scale deliberations that could serve as ideal opportunities to address the questions on researchers’ agendas. See Peter Levine, Archon Fung & John Gastil, Future Directions for Public Deliberation, in THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY 271, 280 (John Gastil & Peter Levine eds., 2005). See also Mark Button & David Michael Ryfe, What Can We Learn from the Practice of Deliberative Democracy?, in THE DELIBERATIVE DEMOCRACY HANDBOOK, supra, at 20.
ticipants in deliberative endeavors. Even though deliberation supporters commonly agree that the identity of the people around the table affects the success of deliberations tremendously, most deliberative models do little more than identify, in very general terms, the type of parties that should participate (i.e., politicians, experts, representatives of various ethnic groups, etc.). Very few provide structured procedures for selecting and convening these participants. In practice, most deliberations are simply composed of those who want to join; usually these are members of organized interest groups or members of certain elitist groups that are better educated, better positioned, and wealthier than the rest of the population. Not infrequently, these tendencies create a bias that undermines the representativeness and legitimacy of the deliberations and jeopardize the achievement of its goals.

This Article aims to fill the gap between the theory and practice by presenting a novel procedure for selecting and convening participants for deliberative initiatives. Through a two-step process of group formation, the model proposed here aims primarily to identify and convene all relevant stakeholders in the issue being deliberated. In the first stage, a neutral facilitator interviews potential participants in an effort to ascertain the relevant parties and to convince them to join the deliberation. In the second stage, the facilitator's recommended list of participants is reviewed by a court, and all interested parties have standing to object to the list of participants or to request to join the process as well. The court's analysis focuses primarily on assessing a party's interest in the deliberation and her ability to represent the interest adequately. Following this hearing and the court's approval of the list of participants, the deliberation begins.

The two-stage selection model presented here seeks to maximize the combined expertise of neutral facilitators and courts. Trained facilitators specialize in conducting conflict assessments and in tracking relevant participants. In the process proposed here, the interviews between the facilitators and potential parties are confidential. Confidentiality enables parties to express their positions freely and to establish good rapport with the facilitator, who will later facilitate the deliberations as well. Trained facilitators that operate in an informal

10. See, e.g., Button & Ryfe, supra note 9, at 22-23. See also Susan P. Sturm, The Promise of Participation, 78 IOWA L. REV. 981, 997 (1993); INNES ET AL., supra note 1, at 15 (attributing the success of some of the deliberations documented there to the inclusivity of the process).

setting are often capable of convincing initially reluctant parties to join in deliberations. This can guarantee participation by all relevant parties. Trained facilitators can also persuade parties to cooperate with other participants and can interpose between parties that refuse to cooperate with "the other side." Courts, in the second stage of the model, institutionalize the participant selection procedure. Courts specialize in determining both the scope of a controversy and the parties needed for its resolution. Using their inherent authority to decide motions concerning parties to a dispute, courts not only review the list of participants and ratify it; they also provide a formal venue for interested parties to object to the list of participants if they believe it is incomplete or unrepresentative and to file motions for intervention.

This selection model strives to overcome most of the problems associated with existing participant selections mechanisms, as described recently by Archon Fung. The first method, used in the vast majority of deliberations, involves a self-selected mechanism in which deliberations are simply open to all comers. The difficulty with such processes is that those who choose to attend are often unrepresentative of the larger public. A second mechanism often used attempts to overcome this problem by concentrating on selective recruitment of participants from underrepresented groups. While this method may increase participation of groups that are not likely to participate, it neither guarantees the participation of underrepresented groups nor prevents exploitation of the procedure by groups who will try to stack the meetings with a large number of likeminded participants. Alternatively, another standard mechanism seeks to circumvent the problem of under-representation by using a random selection of participants from among the general population. This method guarantees descriptive representativeness. Even so, it does not promise that the best representatives, or at the minimum, those who are most concerned, sit around the table. The final two mechanisms often employed are more exclusive in that they either promote participation by lay stakeholders who are unpaid citizens with interest in the issue on the table, or, as is common with governance processes, they con-

12. See Archon Fung, Varieties of Participation in Complex Governance, 66 PUB. ADMIN. REV. 66 (2006). Button and Ryfe generally refer to three types of participant selection schemes: self selection, random selection, and stakeholder selection (in which organizers issue a formal invitation to groups they believe would be affected by the deliberations). See Button & Ryfe, supra note 9, at 23.
14. Id.
15. There are various problems associated with random selection. One study found that randomly selected participants tend to lean toward the majority's viewpoint, and that dissenters give up their positions and move with the group. See Mendelberg, supra note 6, at 164.
vene professional stakeholders that are paid to represent organized interest groups and public offices. These last mechanisms are likely to ensure that interested participants (and arguably adequate representatives) sit around the table, but they do not necessarily form a representative group that addresses all relevant interests.

The participant selection model proposed here avoids the trade-offs the above mechanisms make between inclusiveness and adequate representation. In this respect, the proposed model is more restrictive than these mechanisms, as it requires that, first, all the interests affected by the deliberations be represented around the table, and that, second, potentially the best representatives would speak for these interests.\(^{16}\) This will be accomplished through the two-stage procedure of the model proposed here. The neutral facilitator can engage in selective recruitment of potential participants, while the court can ensure (if necessary, through judicial order) that all the relevant stakeholders sit around the table and are capable of adequately representing their constituent groups.

The participant selection procedure presented in this Article operates within an innovative decisionmaking model called Constructive Controversy Deliberations (CCD).\(^{17}\) CCD seeks to resolve difficult, value-laden social controversies through processes of stakeholder deliberation administered by trained facilitators and supervised by courts.

CCD includes three main stages. At the first stage, which is the focus of this Article, the participants in the deliberations are chosen. At the second stage, participants engage in constructive deliberations facilitated by a skilled facilitator. Participants are encouraged to use innovative forms of deliberation that enable them to overcome their differences and reach a consensual outcome. At the third stage, once the parties have formulated a solution, they bring their agreement for review by a court. The court ensures that the processes advanced deliberative goals and that the outcome the parties reached falls within a zone of reasonableness. Once these conditions are met, the outcome becomes part of judicial order.

CCD is premised on the assumption that a judicial resolution of particularly complex social controversies such as issues of religion and

---

\(^{16}\) Note, though, that the participant selection mechanism suggested here is not intended to bring to the table a representative group of the public at large; instead, it seeks to convene a representative group of all the interests affected by and related to the issue at stake.

\(^{17}\) The model of Constructive Controversy Deliberation is part of my work towards the JSD degree. This Article focuses on one feature of the model, namely, how to select participants in deliberations. For convenience, this Article shall refer to the participant selection procedure as CCD.
state, abortion, immigration and citizenship, or same-sex marriage can be problematic for a variety of reasons highlighted by critics. To roughly generalize, one form of criticism concerns issues of legitimacy, and its main claim is that legislators, as representatives of the will of the people, should decide issues on which there is moral disagreement. The second form of criticism concerns issues of ability; this criticism contends that courts are ill-equipped to deal with public law issues because such issues require forward-looking judgments and necessitate creative solutions and remedies.

CCD seeks to circumvent these criticisms by devising a decision-making procedure that challenges the traditional role of courts. Under CCD, courts, instead of ruling on issues where there is deep moral disagreement, instigate and supervise the formation of a deliberative procedure and review its outcome. In return, courts under CCD not only circumvent conventional criticisms, but they also enhance the effectiveness of the deliberative procedure. By utilizing courts' specialties and institutional advantages, CCD helps overcome some of the problems deliberative procedure faces, including, inter alia, convening relevant stakeholders, ensuring adequate representation, and enforcing the deliberation's outcome.

While the participant selection procedure presented in this Article operates within CCD's conflict resolution scheme, its special characteristics enable it to apply to a variety of deliberative designs. First, the participant selection procedure's goal of convening all relevant stakeholders makes it applicable to deliberations that wish to assemble all interested parties as well as to deliberations with less inclusive aspirations. The participant selection procedure also includes structural incentives to promote participation of relevant stakeholders. This may prove to be an advantage in cases in which relevant participants refuse to join the deliberations. Finally, this participant selection procedure applies best to deliberations that operate in the shadow of courts. These can include, among many others, deliberating committees under the Negotiated Rulemaking Act, deliberations in the

---


remedial stage in structural reform litigation, or deliberations that are part of any other large-scale litigation.

I. CHOOSING PARTICIPANTS

A. WHY DO WE NEED STRUCTURED MECHANISMS FOR SELECTING PARTICIPANTS?

Why, given the plethora of deliberations and the vast amount of academic interest in the subject, has so little attention been given to structuring procedures for selecting participants? The answer is rooted in context. Scholars and practitioners tend to view deliberations as a flexible procedure and thus correctly assume that the subject of the deliberation and its goals directly influence the list of desired participants. Thus, deliberations that aim to confer information about governmental policies or political candidates, for example, may only require the participation of whoever wishes to join the process. By contrast, deliberations that are aimed at developing regulation that will bind multiple groups of people call for participation of all those who would be bound (or representatives thereof), thus requiring a more subtle method for choosing participants. And while it is undoubtedly important to choose participants in light of the specific context of the deliberation, this does not lead to the conclusion that general procedures cannot be formed in the abstract. As the selection procedure presented in this Article will show, proper contextualization and general procedures can be combined. We can devise general structured procedures for selecting participants while leaving room for specific contextual considerations.

Structured procedures for selecting participants not only increase the likelihood of bringing to the deliberation table all the relevant stakeholders, but also promote four additional objectives. First, there is the important value of transparency. A procedure that is pre-determined, open, and amenable to public objection assures the advantages of public scrutiny; as Justice Brandeis has said, "sunlight is the best disinfectant." Second, transparency helps to limit unwarranted po-


22. A new proposal for a National Deliberation Day prior to the national elections calls for participation of all citizens with franchise. This solution avoids the problem of choosing specific participants and representatives, albeit by suggesting mass participation. See BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY (2004).

23. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1933).
political influences. Skeptics will argue that decisionmaking forums are inescapably subject to political pressures; once deliberations gain credibility and become influential decisionmaking mechanisms, political powers can win them over simply by securing the participation of their representatives. Nevertheless, by designing monitoring mechanisms in the selection procedures, and in the deliberations themselves, we can detect, control and restrain such influences.  

A third advantage of structured procedures that scrutinize the interests involved, the subject matter of specific deliberation, and its goals, is that they allow determination of who is a necessary party. We tend to think of participation from a positive perspective—we are interested in determining who should participate. We invest little thought, if any, in determining who should not participate, or whose participation is so necessary that without it the process would be rendered inefficient or illegitimate. As will be discussed below, a determination that a party is necessary may lead, in appropriate cases, to compulsory joinder of parties.

Finally, by structuring fair selection procedures we can promote the legitimacy of the outcome of the deliberation. This tenet follows from Thibaut and Walker's procedural justice finding that people's satisfaction with the outcome of dispute resolution processes is independently influenced by their judgments regarding the fairness of the procedure and not just by their level of agreement with the actual outcome of the process. Further research by Tom Tyler not only strengthens Thibaut and Walker's findings, but also proves that demographic characteristics such as race, gender, education, ethnicity, income, and ideology do not affect the weight people place on issues of procedural justice and have little influence on people's definitions of procedural justice. Furthermore, Tyler proves that in a given setting, different types of people will agree on a set of procedural fairness criteria. Although Tyler does not provide a set of universal components of fair procedures, he does show that there is a substantial

24. A transparent selection procedure is the most fundamental monitoring mechanism. Along with it are additional mechanisms CCD (Constructive Controversy Deliberations) includes, such as the initial assessment of participants by a neutral facilitator followed by review of the court invested with the authority to examine the list of participants and assess their adequacy in an open hearing.

25. The term “necessary” is used here in its “procedural” meaning. Under Rule 19 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 19, a “necessary” party is a party that is so closely related to the litigation that its joinder is needed for just adjudication.


agreement across groups on the weight given to neutrality, trustworthiness, and standing as factors contributing to fair decisionmaking.28

The following sections of Part II utilize Thibaut and Walker’s findings and Tyler’s findings in the design of CCD’s participant selection model. The first section, “Convening,” opens with a description of the convening stage held by the facilitator. This stage is based on a mechanism usually applied in consensus building, a problem-solving method in which groups develop solutions and make decisions using consensus-based approaches.29

The second section, “Review by the Court,” provides a detailed account of the court’s review. This Article places special emphasis on the ways in which courts can use existing procedural rules of litigation in assessing the interest a party has in the deliberations and in evaluating the participants’ ability to adequately represent their respective interests.

Finally, this Article will address one of the hardest problems deliberative procedures face, namely, securing participation of relevant parties. It will concentrate on ways to encourage participation through structural incentives that promote voluntary participation, and, in extreme cases, through compulsory joinder.

B. Convening

CCD’s procedure for choosing participants uses the selection process of consensus building models as a starting point,30 because in the types of controversies CCD addresses, as in consensus building processes, participation of all relevant stakeholders is required. These processes share the assumption that only full participation of all relevant stakeholders can ensure that any agreement reached is based on all the relevant data and is legitimate in the eyes of those it would affect.31

In consensus building efforts, an assessor, a person specializing in assessing the conflict, would conduct a conflict assessment through a series of interviews with potential stakeholders.32 Based on these in-

---

28. Tyler, 28 Law & Soc'y Rev. at 826. In a study of encounters of citizens with the police and legal authorities, Tyler found that people from a variety of backgrounds put an emphasis on the efforts of the authorities to be fair, their honesty, and whether they followed ethical standards. Tyler, 22 Law & Soc'y Rev. at 128.


31. See, e.g., Sturm, 78 Iowa L. Rev. at 996-97.

32. The term “stakeholder” has many definitions, most of which relate to an individual or organization that is affected by an issue or conflict, with the power to make
Interviews, the assessor forms a list of relevant participants and the issues that are expected to dominate deliberations.\textsuperscript{33}

A similar course of action is advised as the first stage in the selection process of CCD. Upon determination by the court that a controversy may be apt for CCD deliberation, a chosen facilitator\textsuperscript{34} begins with a series of interviews of "first-tier" stakeholders, e.g., parties that had taken a public position on the issue, and institutions and organizations that work in the field of controversy. Naturally, the first participants to be considered are the direct parties in litigation. In addition to direct parties, it is safe to assume that in a given conflict we would agree on several other parties holding different standpoints who relate to the issue at stake.\textsuperscript{35}

In interviews with the first-tier stakeholders, the facilitator will request recommendations for other participants deemed necessary by the first-tier stakeholders. Based on these recommendations, the facilitator will interview a second tier of stakeholders (and a third one, if necessary) and come up with a list of relevant participants. The facilitator will also articulate the issues to be discussed and make a recommendation on whether or not to use CCD to the court based on her impression of the issues' amenability to constructive deliberations and the possibility of agreeable outcomes.

A good example of such a convening procedure can be found in the San Francisco Estuary Project – a consensus building process de-


\textsuperscript{34} Existing literature uses various terms to refer to the role of the person leading the deliberation – moderator, assessor, facilitator, neutral and mediator, are the common ones. The term "facilitator" is used here to emphasize her role in facilitating between the parties involved. The facilitator must be trained in deliberative decisionmaking procedures and must be neutral in terms of her ability to affect the final outcome. Like mediators, the facilitator here has no influence whatsoever on the outcome, and her role is limited to facilitating between the parties and reporting back to the court. It is important to note, though, that while the facilitator is expected to be neutral with respect to the outcome, in some deliberations she can be identified with one of the parties or with a certain position. It is possible to assume that in some instances parties would agree to be facilitated by a trained facilitator they trust, even though she may belong, ideologically, for instance, to one of the groups or may work for a governmental agency that is affected by the deliberations.

\textsuperscript{35} In most public deliberations, the immediate stakeholders would usually be governmental agencies, public interest groups and NGOs.
signed to bring all the stakeholders in the estuarine system into a consensual agreement on the state of the estuary and on a comprehensive conservation and management plan for it.\textsuperscript{36} Passing through twelve counties and touching four major geographical areas on its way to the ocean, the San Francisco Estuary affects multiple groups of people. The interests involved included those of environmentalists wishing to preserve endangered species that rely on the estuary habitat, builders who wanted to build on its wetlands, cities and industries that were under pressure to reduce discharges, boaters and fishermen who use the estuary waters, farmers and developers that rely on water diverted from the estuary, and others.\textsuperscript{37}

"First-tier" stakeholders were easily recognizable, and they were the first invited to participate in the process by the U.S. Environmental Protection Agency (EPA), which officially housed the process. These stakeholders included state agencies such as the Department of Water Resources, the State Resources Control Board, and the Regional Water Quality Control Boards, as well as other federal agencies such as the U.S. Fish and Wildlife Service and the Bureau of Reclamation. The first participants consensually agreed to expand the list of participants. To choose the second-tier of stakeholders, a series of widely published public workshops were held. These workshops helped identify other relevant stakeholders who had not already taken an active role in debates.\textsuperscript{38} Overall, the deliberation brought together representatives of public agencies, interest groups, and citizens. Two years into the process, a third tier of stakeholders was deemed necessary, and the existing group invited them to participate.\textsuperscript{39}

C. REVIEW BY THE COURT

While most consensus building processes end the selection procedure with the assessor's recommendation, CCD proposes that the facilitator should then submit the list of participants for review by the relevant court. Parties who consider themselves improperly excluded or inadequately represented or parties objecting to the inclusion of other parties will be able to bring their grievances before the court in a

\textsuperscript{36} For a review and analysis of this consensus building process see Judith Innes, \textit{San Francisco Estuary Project, in Coordinating Growth and Environmental Management through Consensus Building: A Policy Research Program Report}, supra note 1, at 113-42.

\textsuperscript{37} Id. at 115.

\textsuperscript{38} Id. at 115, 116.

\textsuperscript{39} Later participants were representatives of the Delta Area and the city of Sacramento. Note, though, that while most participants agreed that participation was balanced in terms of the interests involved and that different perspectives were represented, there were still a few complaints that some interests were left out or that representation was not balanced. See id. at 116-17.
process similar to appealing the decision of an administrative agency. The review by the court is designed to evaluate the facilitator’s recommendation and to give interested parties standing to object to the list of participants. Review serves as a secondary safeguard, ensuring that relevant parties are not excluded from the process and that existing parties adequately represent their constituent groups.

I. Why Courts?

Even if one accepts the contention that a review of the facilitator’s recommendation is required, one could reasonably ask, Why courts? Surely we could invest reviewing authority in an expert body of neutral facilitators or with the administrative agency that is in charge of the subject matter of the deliberations. In fact, this was exactly what was done by the Negotiated Rulemaking Act, a procedure by which administrative agencies may conduct a process of deliberation as part of agency rulemaking. According to the Act, an agency may track the relevant participants by using the services of a convener. The convener identifies the parties that may be affected by a new rule, interviews them, and recommends a list of participants. If the agency decides to proceed with the negotiated rulemaking process, it publishes a notice in the Federal Register in which it announces its intent to start negotiations and solicits advice and comments on the issues to be negotiated and the list of participants. In addition, the notice gives individuals and groups who believe that their interests would not be adequately represented an opportunity to apply for membership in the negotiating rulemaking committee. After reviewing the applications, the agency determines whether to add new issues to the

42. 5 U.S.C. § 563(b). See also, PRITZKER & DALTON, supra note 41, at 100. The convener also recommends whether, in her opinion, the deliberations are likely to yield a consensual rule.
43. 5 U.S.C. § 564(a).
44. According to 5 U.S.C. § 564, the application shall include
(1) the name of the applicant or nominee and a description of the interests such person shall represent;
(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;
(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and
(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.
negotiation and whether to admit any additional parties.\textsuperscript{45} The agency's decisions regarding the list of participants, as well as its decisions relating to establishing, assisting, or terminating a negotiated rulemaking committee, are not subject to judicial review.\textsuperscript{46}

Research with regard to negotiated rulemaking committees has shown that although administrative agencies can review the list of participants recommended by the convener and although they can solicit participation of relevant parties, negotiated rulemaking committees do not represent all the interests relevant to a given regulation. Analyzing negotiated rulemaking committees, Jody Freeman concludes that in the process of selecting participants, agencies seem to rely on a party's ability to block the implementation of the rule as a key criterion for its participation, as opposed to the party's interest in the regulation. She states that

So far, however, only relatively established groups, such as large corporations, trade associations, and mainstream environmental groups, are invited to participate in most negotiated rulemaking committees. Members of negotiated rulemaking committees appear to be selected as much based on their historical ability to block a rule's implementation as on their ability to contribute meaningfully to it.\textsuperscript{47}

These findings are hardly surprising given the fact that an overseeing agency needs to cooperate with these parties in the implementation of the regulation, and in many cases, the parties and the agency have ongoing cooperative relationships. For example, the EPA, which is the agency that has turned to negotiated rulemaking most frequently, has to cooperate with "repeat players" (usually large corporations and environmental public interest groups), which have the capacity to block the implementation of the outcome of a rulemaking procedure and often have the further capacity to block future regulatory initiatives as well. This creates an incentive to include these groups in the deliberations, often at the expense of other relevant, but weaker, parties. The problem is that the decision to exclude relevant parties, or to dismiss objections to the representation of existing parties, is left to the sole discretion of the agency because the Negotiated

\textsuperscript{45} 5 U.S.C. § 565.

\textsuperscript{46} 5 U.S.C. § 570.

Rulemaking Act bans judicial review over the decision to establish a negotiated rulemaking committee.\textsuperscript{48}

CCD avoids this and other problems by investing the courts with the authority to review the list of participants. By doing so, CCD takes advantage of one of courts' fundamental capacities, namely, determining the relevant parties needed for resolution of a given issue. Courts routinely decide motions for party joinder and intervention. They are experts in evaluating whether prospective parties have questions of law or fact in common and in assessing the scope of a conflict. They specialize in identifying the interests a party has in a given case and whether their interest is sufficient to warrant intervention. Courts, in a number of legal constellations, most notably the class action, are responsible for ensuring that a named party is able to represent adequately absent interested parties. Finally, courts specialize in identifying not only parties with direct interest in a given case, but also parties with remote interests that could nonetheless affect and be affected by a case. When courts decide whether to allow a nonparty to file briefs as amicus curiae,\textsuperscript{49} for example, they recognize the contribution such a party can make, even if its interest is not as great as that of original parties. The ability of courts to identify parties with varying degrees of interests is especially important, given that we want to include in the deliberations all the relevant parties, even those that do not have a "strong" interest or suffer direct injury.\textsuperscript{50}

Courts have institutional advantages even more significant than these, making courts, ultimately, superior to any other governmental agency or expert body in determining relevant stakeholders. There are various ways for courts to sanction non-compliance, making it unlikely that decisions regarding the list of participants would be disregarded,\textsuperscript{51} and courts, unlike administrative agencies, are

\textsuperscript{48} See Center for Law and Education v. United States Department of Education, 209 F. Supp. 2d 102 (D.D.C. 2002), aff'd, 396 F.3d 1152 (D.C. Cir. 2005), in which the United States District Court for the District of Columbia denied a motion for a temporary restraining order seeking to prevent a meeting of a negotiated rulemaking committee established under the No Child Left Behind Act ("NCLBA"). The plaintiffs, four non-profit organizations and one individual, complained that the participants in the committee did not equitably balance between representatives of parents and students and representatives of educators and education officials, as required under Section 1901(b)(3)(B) of the NCLBA. The court denied the motion, holding, \textit{inter alia}, that Section 1901(b)(4) of the NCLBA, which provides the rulemaking process under the Act, follows the provisions of the Negotiated Rulemaking Act that banned judicial review over any agency action relating to establishing a negotiated rulemaking committee.

\textsuperscript{49} \textsuperscript{ FED. R. APP. P. 29.}

\textsuperscript{50} See further discussion \textit{infra} in Part II.

\textsuperscript{51} The ability of courts to monitor the enforcement of their decisions is not limited to the stage of choosing participants but is also used to guarantee enforcement of any outcome generated in deliberations. Courts are equipped to ensure that any decision
disinterested participants. Courts are isolated from the deliberating parties; they do not take part in the deliberations and they are not required to cooperate with the deliberating parties in the future. Their isolation promotes their neutrality and impartiality. And furthermore, use of the courtroom forum itself lends authority to the proceedings. The existence of an open hearing in which interested parties raise their concerns and the following judicial ratification of the list of participants add a sense of importance to the procedure as a whole.

In what follows, the foundations for the review of the court will be outlined. The focal points in the court's analysis are the assessments of parties' "closeness" to the deliberations by virtue of their interest in its subject-matter or its outcome and parties' ability to represent that interest adequately. These will be evaluated along with, inter alia, the goals of the deliberation, the disparity of the interests it affects and the number of potential participants.

In forming principles and guidelines to assess the interest a party has in the deliberation, CCD relies on existing procedural rules regarding parties to litigation. CCD presumes that instead of reinventing what seems to be a relatively well-functioning wheel, courts can draw upon the extensive body of civil procedure rules that address permissive intervention and compulsory joinder, briefs by amicus curiae, and, more generally, issues of interest and representation. The application of existing rules, with which courts are already familiar, typifies the way in which CCD utilizes courts' expertise. It is also important that the use of existing rules enables parties already included and those who seek inclusion to prepare and evaluate their arguments' strength.

A cautionary remark is in place here. Although both CCD and the Federal Rules of Civil Procedure address issues of participation, they form two distinct decisionmaking schemes with differing procedures and objectives. Hence, though CCD courts are instructed to draw analogies from existing rules, they should do so cautiously. This provision is especially relevant because the Federal Rules of Civil Procedure, for the most part, do not offer a clear formula to assess whether parties have an interest in a case or whether they are adequately representing it. The Rules, instead, speak in general terms, which courts apply on a case-by-case basis. One of the main explanatory sources courts look to when applying these rules is the underlying purposes of a specific rule as well as the purposes of the Federal Rules of Civil Procedure in general. CCD does not share all of these purposes. For example, courts may refuse to allow intervention in order to defer to

reached by the deliberating parties will be upheld. They are the only organ in government able to direct and order other branches to enforce these decisions.
the plaintiff's autonomy to structure litigation, or, conversely, they may allow it in order to reduce heavy caseloads. Neither of these considerations is relevant under CCD. Instead, decisions regarding the inclusion and exclusion of parties in CCD deliberations are guided by objectives such as promoting social discourse and enhancing the legitimacy of its outcome. As a result, certain deviations from court and procedural rules are required at times, to adjust them to CCD's goals and procedures. These adjustments, and others, are discussed below.

2. Interest and Relevancy

Consider the facts of the following case: White applicants who were denied admission to a university bring an action against the university, arguing that its race-conscious admissions policy violates the Equal Protection Clause. An interracial group of students and a few coalitions supporting affirmative action file motions for intervention in the lawsuit. They claim that they should be allowed to intervene due to their interest in educational opportunity, and because the resolution of the case affects their chances of being admitted to the university. They further claim that the university cannot adequately represent their interests.

Does their interest justify their intervention? Are they "relevant" parties?

The unsatisfying, yet inevitable, answer is, "It depends." Primarily, the answer depends on how "close" we want the parties to be in relation to the deliberation and its outcome. Do we want to include all "proper" parties, those with some factual or legal connection to the deliberation, or should deliberations be limited to "necessary" parties, who are so closely related to the deliberation that their joinder is needed to ensure a complete resolution of the controversy? While it is clear that the closer the party is to the controversy the more likely its presence in the deliberation is needful, other considerations apply as well. These include the goals of the deliberations, participatory aims, and the ability of existing or potential participants to represent similar interests. Thus in the example presented above, if the minor-

52. These are the facts of Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999). The United States Court of Appeals for the Sixth Circuit granted the parties' motion for intervention and reversed the decision of the district court. The court held that the Sixth Circuit applies a "rather expansive notion of the interest sufficient to invoke intervention" that does not require the applicant to demonstrate that she has a specific legal or equitable interest in the lawsuit. The court of appeals held that the applicants' interest in gaining admission to the university was direct and substantial enough to allow their intervention. Grutter, 188 F.3d at 398.

53. The concepts "proper" and "necessary" are based on the definitions of the Federal Rules of Civil Procedure. Although the Federal Rules of Civil Procedure do not use the terms "proper" and "necessary," they are part of the common jargon. Fed. R. Civ. P. 19 regulates the joinder of necessary parties.
ity students are found to be "close" in the sense that they would suffer direct injury or be directly influenced by the outcome, the court may decide that their interest suffices for intervention. If, conversely, the court finds their interest relatively remote and further estimates that other participants can adequately represent it, the court may refuse to allow intervention. 54

The court's first step is thus to determine the stake a party has in the deliberation or, in other words, its interest. 55 In assessing a party's interest, the most comprehensive analysis on which we can draw is found in the interpretation that courts have given to the interest requirement in Rule 24 of the Federal Rules of Civil Procedure. 56 Rule 24 recognizes two types of intervention: Intervention of Right and Permissive Intervention. For Intervention of Right, Rule 24(a)(1) first provides that an applicant shall be permitted to intervene in an action if "a statute of the United States confers an unconditional right to intervene." Various laws have granted an unconditional right to participate in litigation to persons that have a protectable interest related to the litigation. For example, the Federal Government has a general right to intervene in any case that questions the constitutionality of federal statutes 57 and, similarly, states have an unconditional right to intervene in cases that question the constitutionality of state statutes. The United States Attorney General has a right to intervene in any litigation alleging violation of equal protection, 58 and the Commissioner of Patents may intervene in appeals on decisions regarding registration of trademarks. 59 Some laws have granted a right to intervene to private people, yet again acknowledging their interest in the proceedings. A good example is found in the Administrative Procedure Act, 60 which entitles any interested person to participate in agency proceedings as long as she does not interfere with the conduct of public business. Other statutes, including the National Labor Relations Act, 61 the Civil Rights Act 62 and the Fair Housing Act, 63 have

54. These were the outcomes in Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999), and Hopwood v. Texas, 21 F.3d 603 (5th Cir. 1994), a case with similar facts, respectively.
55. Another form of interest in the deliberations can be described as power a certain player possesses. Examples of such powers include the power to block the implantation of the outcome, or the power to promote it, or the power to bear witness.
granted a right to intervene to any person (or to the Attorney General on behalf of that person) aggrieved by violation of these acts.

In the absence of statutory authority, an applicant will qualify for intervention of right if, upon timely application, the applicant shows that she has an interest in the subject matter of the litigation, that her ability to protect that interest would be impaired if she were not joined, and that her interest is not adequately represented by existing parties. Although the three conditions are cumulative, courts have placed considerable weight on the first, addressing the interest in the subject matter of the litigation.

Courts are split as to the type of interest an applicant must show to justify intervention in an existing action. While it is clear that an identifiable interest in property, funds, or land will grant the applicant a right to intervene, cases presenting more remote interests are more difficult to decide. Although the Supreme Court has addressed the issue several times, its interpretation has not been consistent and has resulted in federal circuit courts' production of a confused body of case law. Some circuits have chosen a narrow approach, allowing intervention only when the applicant demonstrates a direct, substantial, and legally protectable interest or when the interest claimed.

---

64. For the leading and inconsistent Supreme Court decisions see Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 US 129 (1967) (choosing an expansive definition of the interest required, the Court allowed intervention by the State of California, a large industrial user of natural gas, and a large industrial distributor of natural gas, in an antitrust action brought by the United States, holding that each of the intervenors had an interest in retaining competitive conditions in the California natural gas market, and that even though it was a non-legally protected interest, it qualified for intervention of right); Donaldson v. United States, 400 U.S. 517 (1971) (upholding a denial of a motion to intervene by a taxpayer who moved to intervene in an enforcement proceeding through which the Internal Revenue Service sought to obtain tax records relating to him from his former employer, holding that the intervenor's interest to prevent his employer from complying with the summons was not a significantly protectable interest); Trbovich v. United Mine Workers, 404 U.S. 528 (1972) (allowing intervention to a union member who filed a grievance to the Secretary of Labor, which led the Secretary to initiate an action under section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959. Under the Act, the union member had no right to initiate a suit; thus, he asked to intervene in the litigation initiated by the Secretary. The Court held that the union member's interest in a free and democratic election sufficed for intervention, and he did not need to demonstrate standing to sue); Diamond v. Charles, 476 U.S. 54 (1986) (granting a motion to intervene in an action challenging the constitutionality of an Illinois abortion law to Diamond on the basis of his status as a pediatrician and a father. The district court ordered a permanent injunction against enforcing the law, which only Diamond appealed. The Supreme Court held that Diamond's right to appeal absent the party on whose side he was permitted to intervene was contingent upon his fulfilling standing requirements); and Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (holding, reiterating Diamond, that standing to defend on appeal in the place of an original defendant requires that the litigant possess a direct stake in the outcome).

suffices for Article III standing. By contrast, other circuits, including the Sixth Circuit and the District of Columbia Circuit, use an “expansive notion” of the interest required, arguing that an applicant “need not claim specific legal or equitable interest” to intervene.

a. Lenient interpretation of interest in public law litigation and for public interest groups

More relevant to our discussion is the lenient interpretation of required interest in cases involving public law. Acknowledging the special characteristics of public law litigation and its implications to a multiplicity of parties, several courts have adopted a lax notion of the interest required for intervention, holding that a nonparty would satisfy intervention conditions if a claimed interest falls within the zone of interests protected or regulated by the contested statute or constitutional provision. Such an approach relaxes the requirements an applicant must meet; in most cases the zone of interests protected by a

117, 120 (5th Cir. 1991). See also, Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998) (allowing a narrow reading); Dilks v. Aloha Airlines, Inc., 642 F.2d 1155, 1157 (9th Cir. 1981) (same).

66. The Fifth Circuit, for instance, refused to allow the city of New Orleans to intervene in an action brought by the electric utility against a gas supplier, holding that “By requiring that the applicant's interest be not only 'direct' and 'substantial,' but also 'legally protectable,' it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant.” See New Orleans Pub. Serv., Inc., 732 F.2d at 464.

67. Choosing the expansive notion allowed the Sixth Circuit to permit intervention to student groups and minority students in the race-conscious admission policies presented earlier. As mentioned supra, in footnote 52, the Sixth Circuit in Grutter concluded that the interests of the minority students in gaining admission to the university were substantial enough to allow their intervention. Other circuits have not chosen the same approach and have declined motions to intervene in litigation challenging admission procedures. See, e.g., Hopwood; and supra note 54. See also, for the District of Columbia Circuit, Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967), arguing that “We think a more instructive approach is to let our construction be guided by the policies behind the ‘interest’ requirement . . . the ‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.”

68. For the sufficient interest an applicant must demonstrate when the litigation centers on public law issues, see New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463-65 (5th Cir. 1984) (citing Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970)). In Data Processing Service, the court refused to allow intervention under a narrow approach of the interest required, yet it stated that “[i]n public law cases where statutory or constitutional violations are asserted as a basis for recovery, it has been said that standing is present when the complainant suffers injury and ‘the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’ . . . In a sense, a party within the zone of interests protected by a statute may possess a type of substantive right not to have the statute violated.” New Orleans Pub. Serv., Inc., 732 F.2d at 464-65. The court held that the applicant’s interest involved a contract and not a public law issue.
constitutional provision or a general law is likely to be broader than the interests protected by laws with limited application or by contracts.  

Over the years, several such categories of interests were found sufficient for intervention in public law litigation. These include the interests of parents and teachers in school desegregation cases, the interests of those affected by regulation, and the interests of employees in cases affecting employment policies or in cases in which the court restructures the institution in which they work.

Furthermore, several courts, most notably the Ninth Circuit, use a different standard to determine the interest required when the applicant for intervention is a public interest group. In acknowledgment of the special characteristics of public interest groups, the Ninth Circuit examines the connection between the public interest group and the litigation instead of examining whether the group can demonstrate a litigable interest in the lawsuit (i.e., an interest sufficient to establish a separate claim). Appropriate connection is most frequently found when a public interest group seeks to intervene in a case challenging application of statutes or public policy for which it lobbied. The Ninth Circuit decision in Sagebrush Rebellion, Inc. v. Watt illustrates this standard. The Audubon Society, a non-profit organization that is devoted to the protection of birds, other animals, and their habitats, sought to intervene in an action by another public interest group challenging the legality of actions taken by the Interior

70. For a list of such categories, see Peter A. Appel, Intervention in Public Law Litigation: The Environmental Paradigm, 78 WASH. U. L.Q. 215, 267-68 (2000).
71. See Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987) (citing further cases).
72. See, e.g., Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837 (10th Cir. 1996).
73. See Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996) (en banc); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 738 F.2d 82 (8th Cir. 1984).
74. An opposite approach was taken by the Seventh Circuit, which argued that even public interest groups need to demonstrate an interest that is direct, substantial, or legally protected. See United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985), in which the Seventh Circuit refused to allow intervention by a public interest group in litigation brought by the United States to condemn private property for inclusion in the congressionally authorized Indiana Dunes National Lakeshore, although the public interest group lobbied for the legislation. See also Keith v. Daley, 764 F.2d 1265, 1268-69 (7th Cir. 1985) (holding that no special broad definition of interest applies with respect to public law issues).
75. 713 F.2d 525 (9th Cir. 1983).
76. The National Audubon Society filed the motion along with five local chapters of the National Audubon Society, five non-profit Idaho organizations with environmental, conservation, and wildlife interests, and four Idaho residents.
Secretary when he recommended the creation of a Snake River. The district court disallowed intervention because the Audubon Society did not have an interest in the land that was the subject of the lawsuit; the Ninth Circuit reversed, holding that the Audubon Society's interest resulted from its involvement in the administrative process surrounding the Secretary's actions to establish the Birds of Prey Conservation Area.\textsuperscript{77} The Sixth Circuit gave similar reasoning in \textit{Michigan State AFL-CIO v. Miller};\textsuperscript{78} the court allowed intervention by the Michigan Chamber of Commerce, a non-profit Michigan corporation representing a large number of Michigan corporations, in an action brought by four labor unions challenging the legality of amendments to Michigan's Campaign Finance Act. The court found the Chamber a relevant party to the litigation because of its political role - the Chamber had lobbied for the challenged amendments. The court further found the Chamber to be "a repeat player in Campaign Finance Act litigation . . . a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and . . . an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs."\textsuperscript{79}

The court of appeals analysis, generally adopting a lenient standard for the interest required in public law issues and examining the connection between the public interest group and the litigation, is the sort of interpretation a CCD court should apply. The nature of cases amenable to CCD almost inevitably entails that most of the participants in deliberation are not individuals but representative groups that are unlikely to have a direct injury that could serve as the basis for a separate claim.\textsuperscript{80} This results from two main characteristics of CCD. First, CCD addresses cases that affect multiple groups of people, groups including many more than the direct parties to the litigation. Not all of the people affected possess an identifiable legal right that would satisfy traditional standing requirements. However, in the context of CCD deliberations, their interest may suffice to justify their participation in the deliberations. Consequently, unless a lenient interpretation of the interest required for intervention is used, a large

\textsuperscript{77} Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983). \textit{See also} Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995).

\textsuperscript{78} 103 F.3d 1240 (6th Cir. 1997).

\textsuperscript{79} Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1246-47 (6th Cir. 1997). \textit{See also} Meek v. Metro. Dade County, 985 F.2d 1471 (11th Cir. 1993).

\textsuperscript{80} In other words, in some deliberations, the parties may be relevant, yet they may not satisfy the requirements of standing under Article III.
A good example for such remote yet relevant interests can be found in a famous Israeli Supreme Court case known by the name “Women of the Wall.” Women of the Wall was a group of feminist Jewish women who wished to pray at the Western Wall—Judaism’s holiest site—in a manner considered by ultra-Orthodox worshipers to be reserved for men. After a number of incidences in which their prayers were interrupted and they were severely attacked by ultra-Orthodox worshipers, Women of the Wall petitioned the Israeli Supreme Court, asking the court to order the State of Israel to make the arrangements to enable their prayer.

While the case was pending before the court and attempts to resolve the matter by a consensual agreement were taking place, several Reform and Conservative Jewish communities living outside of Israel filed a motion for intervention in the litigation. The Reform and Conservative representatives argued that they had an interest in the outcome of the controversy. Justice Cheshin, writing for the court, denied these groups’ motion, holding that existing parties would represent the arguments raised by these groups.

To understand why an opposite decision should be made under CCD, one has to consider the broader conflict that the litigation encompassed. Although the litigation centered formally on the issue of prayer at the Western Wall, the litigation in fact joined a long line of cases that raised controversies of religion and state. The most famous of these cases has been the controversy surrounding the refusal of the Orthodox establishment in Israel to acknowledge processes of conversion into Judaism performed by Reform and Conservative communities.

81. Another way to analyze the distinctive nature of CCD is by examining the rights and interests these cases invoke. In most of these cases there is a struggle between a legal right and a protectable interest that does not amount to a legal right. An example for that can be found in a leading Israeli Supreme Court decision regarding the legality of a decision by the Central Traffic Authority to close to traffic on Bar-Ilan street, a main traffic artery in Jerusalem, during certain hours in the Shabbat. Chief Justice Barak, writing for the court, analyzed the case as one presenting a clash between a right and an interest. He stated:

Which interests and values clash in the case at bar? On the one hand, we have society’s interest in preventing offense to the sensibilities of the local religious population. . . . To these residents, the desecration of the Sabbath on Bar-Ilan Street is offensive and infringes their observant lifestyle. Indeed, from their perspective, the offense is both bitter and severe. This is the interest in question on one side of the issue. . . . On the other hand, we have freedom of movement, to which each citizen is entitled. Freedom of movement is a basic right, guaranteed to each and every Israeli.


82. The women’s style of service included wearing prayer shawls and reading and singing aloud from the Bible.
ties. This issue, more famously known as “Who is a Jew?” divided Orthodox Jews in Israel and Reform and Conservative Jews outside Israel and significantly affected the relationship between Jews in Israel and Jews around the world. Over the years, the conflict extended beyond the conversion issue to general issues of religion and state in Israel, including, but not limited to, prayer arrangements at the Western Wall. Placed in this context, it becomes clear that any decision regarding prayer by women at the Western Wall will influence Conservative and Reform communities outside Israel not only because of their Jewishness but also by virtue of their role in the conflict surrounding the nature of Jewish life in Israel. This type of problem is exactly where the lenient interpretation of the interest requirement comes into play. This version of interest admits not only those parties with direct injury and strong interest, like Women of the Wall (and women at large), but also those with a remote interest that are, nevertheless, relevant because the procedure seeks to engage a broad array of participants affected by a controversy.

This leads to the second characteristic of CCD that supports a lenient interpretation of the interest required for intervention. Because CCD seeks to promote deliberations between all relevant stakeholders, it is inevitable that deliberations will be held between representatives of these stakeholders. Stakeholders will most likely be public interest groups, NGO’s and representative bodies, which usually will not have the same legal interests as those of traditional private litigants. The courts of appeals have acknowledged public interest groups’ special role and have thus created the unique standard of examination discussed above, which looks at the connection between the group and the litigation. Such analysis would facilitate the participation of public interest groups that have lobbied for legislation or policy as well as groups that represent their members’ claims in courts or before administrative bodies and, more generally, groups that work in the field of controversy.

b. Rules of amicus curiae as guidance to assess interest

For groups with interests that do not amount to a direct injury, it may be useful to look at the way in which courts have examined motions to file briefs as amicus curiae, an additional form of participation often used by public interest groups and other representative

83. It is important to note that parties usually prefer intervention in litigation under Rule 24 to filing briefs as amicus curiae, since as amicus, at least under American law, they are not considered to be parties to the litigation in terms of participation in oral arguments and filing motions (unless allowed for by the court). For our purposes, this distinction does not apply.
organizations. Traditionally, amicus briefs are filed in cases of general public interest to support one of the parties or to bring to the attention of the court matters that may otherwise be ignored.\textsuperscript{84} Appellate Procedure Rule 29 governs the filing of amicus curiae briefs. An individual or an organization desiring to file an amicus brief may do so by the consent of all parties involved or by leave of the court.\textsuperscript{85} Unless the parties' consent has been obtained, an applicant must state in the motion her interest in the case and the relevance to the disposition of the case of the matters addressed in the brief. She may also point to new information she can add beyond that presented by existing parties. The decision whether to permit a nonparty to submit a brief is entirely within the discretion of the court.\textsuperscript{86}

Rule 29 does not set out clear conditions under which courts should grant leave to file amicus briefs, and appellate courts, therefore, usually apply the Rule permissively,\textsuperscript{87} perhaps because the amici, under American law, do not have the status of a named party and are precluded from filing pleadings, initiating legal proceedings, or assuming adversarial roles.\textsuperscript{88} Lately though, Judge Richard Posner of the Seventh Circuit has called for restricting the use of amicus curiae briefs, mainly because of heavy caseloads and the rising costs of litigation.\textsuperscript{89} In \textit{National Organization for Women, Inc. v. Scheidler},\textsuperscript{90} Judge Posner set out the conditions in which the Seventh Circuit would grant permission to file an amicus curiae brief:

\begin{itemize}
\item \textsuperscript{84}See, e.g., Michael J. Harris, \textit{Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence}, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1, 4 (2000).
\item \textsuperscript{85}FED. R. APP. P. 29(a). However, the United States, its officers and agents, a State, a Territory, a Commonwealth, or the District of Columbia may file such a brief without obtaining consent or leave.
\item \textsuperscript{86}FED. R. APP. P. 29(a), as was rewritten in 1998, provides
\begin{center}
When permitted, the United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.
\end{center}
\item \textsuperscript{87}See \textit{MICHAEL E. TIGAR \& JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE} 181 (3d ed. 1999). A comprehensive discussion on the development of the amicus curiae in American law is beyond the scope of this Article. Shortly, though, it should be noted that while the 1950s and 1960s marked a growing willingness on behalf of courts to allow the filing of amicus curiae briefs, starting in the 1990s, a shift back to restrictive approaches has become evident. For a statistical review on the growth in amicus curiae filings see Joseph D. Kearney & Thomas W. Merrill, \textit{The Influence of Amicus Curiae Briefs on the Supreme Court}, 148 U. PA. L. REV. 743 (2000).
\item \textsuperscript{88}See, e.g., United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991).
\item \textsuperscript{89}Judge Posner's approach generated controversy and was not widely shared by other appellate courts. Additionally, Judge Posner's arguments for restricting the use of amicus curiae briefs were challenged by then-Judge Samuel Alito in \textit{Neonatology Associates, P.A. v. Commissioner}, 293 F.3d 128 (3d Cir. 2002).
\item \textsuperscript{90}223 F.3d 615, 617 (7th Cir. 2000). \textit{See also} Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542 (7th Cir. 2003).
\end{itemize}
(1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.

Judge Posner's conditions — focusing on interest, representation, and relevancy — echo the conditions for intervention under Rule 24. Despite their restrictive nature, these conditions are in essence what a court would look for when deciding whether a party should participate in CCD deliberations. Even so, these conditions should be applied permissively. The reason for the broad interpretation advised here, in addition to the reasons stated above, is that most of the concerns weighing against inclusion that Judge Posner outlined are not relevant to CCD as it does not share such purposes as reducing heavy caseloads or respecting plaintiffs' choice of parties.

The recommendation of using lenient interpretation to determine the interest a party has in the deliberations ipso facto denies a practice used by several U.S. courts, under which Rule 24 intervention is allowed only when the applicant for intervention can demonstrate standing to sue as a prerequisite or substitute for showing sufficient interest in existing litigation. This requirement provides these courts with a bright-line test to determine an interest, albeit at the price of restricting intervention from parties whose interest may not sustain a separate claim yet may be "strong" enough to justify their intervention.91 It is not surprising then, that this practice is the subject of ongoing debate in the courts and academia.92

The risk in this far-too-restrictive approach lies in what it can wrongly infer — that one who lacks standing to sue also lacks sufficient interest for intervention. In fact, CCD's selection procedure aims to prevent exactly that. It seeks, purposefully, to grant intervention to parties with varying degrees of interest — starting with those parties with direct injury, but extending to those with weaker interests who can nonetheless affect deliberations. As a result, courts would have to strike a balance between allowing participation by all the parties affected and advancing efficient deliberations between a limited number

91. Paradoxically, those parties are exactly the ones who would benefit the most from the ability to intervene, as, unlike parties who have standing, they cannot bring a separate claim due to lack of standing. In the language of Rule 24, their interest would be impaired.

of participants. There is no exact formula to perform this balance. Unlike other procedures, such as those pursuant to the Negotiated Rulemaking Act, which instructs that a negotiated rulemaking committee would be limited to no more than twenty-five participants, it is not recommended here to determine, a priori, a maximum or minimum number of participants. Instead, the balance should be achieved on an ad hoc basis, based on an inclusive list of considerations: the nature of the controversy; the number of issues it raises and the number of potential parties it affects; the ability of potential parties to contribute to the legal or factual basis of the deliberation or to block the implementation of its outcome; the effect the deliberations would have on the party (or its members, in the case of a representative group); and the statutes governing the dispute and whether they confer a right of participation.

II. ENSURING ADEQUATE REPRESENTATION

As CCD is primarily a method for deliberations between representatives, a finding that a party has an interest in the deliberation does not guarantee its participation. Instead, in what is the second prong in the court's examination, the court will assess whether the party is capable of representing the interest adequately and whether other parties can represent similar interests. In this aspect, CCD deviates from the analysis of adequate representation applied under Rule 24, which suggests that a presumption of adequate representation exists upon showing an identity of interests. Instead, CCD advises that the court follow the path of class action certification, focusing on examination of what have come to be known as the "typicality" and "adequacy" requirements.

Rule 23 of the Federal Rules of Civil Procedure addresses class actions, and provides, inter alia, the prerequisites for maintaining a

---

93. Courts and facilitators can be creative in determining the number of participants. For example, they can create "two tables" – an inner circle of the parties that are the closest to the deliberations (and which have the power to vote) and a second circle of those with some interest, but not as much as that of the inner circle. The second circle can participate in the deliberations and contribute to it, even if its members will not be able to vote on the final agreement.

94. 5 U.S.C. § 565(b) (2000) provides that membership on the committee will be limited "to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership." The Act further determines that each committee will include at least one representative of the agency initiating the process.

95. Assuming existing parties are found to adequately represent these interests.

class action.\textsuperscript{97} Two of these prerequisites demand that the named party, who acts as representative for the absent class members, prove that her claims or defenses are \textit{typical} of the claims or defenses of the class and that she will \textit{fairly and adequately} protect the interests of the class. Although these two conditions serve independent functions, courts have repeatedly stated that an overlap exists between all prerequisites, especially between the typicality and adequacy requirements.\textsuperscript{98}

The \textit{typicality} requirement focuses on whether the claims made by the representative are similar to the claims asserted by the class she represents.\textsuperscript{99} Essentially, the typicality requirement assures that there is no conflict of interest between the representative and the class and that her interests are aligned with the common questions affecting the class.\textsuperscript{100} The \textit{adequacy} requirement serves to assure that the representative does not possess interests that are antagonistic to those of the class and that her counsel is a qualified and experienced lawyer who is able to lead the litigation. Obviously, the latter condition does not apply to CCD, but it can shed light on the factors courts should focus on in composing the deliberation.

A. \textit{Typicality}

Under the first of these, the \textit{typicality} requirement, though it is clear that the courts should verify that the views of the representative are consonant with the views of the bulk of the group she represents, there remains the issue of whether courts should demand, as some U.S. courts have, \textit{identity of interests}.\textsuperscript{101}

The answer to that brings us back to the multifaceted issue of the desired number of participants in the deliberations and requires an unavoidable trade-off. On the one hand, we can opt for deliberations between a smaller number of participants, each representing a large

\textsuperscript{97} The prerequisites are enumerated in Rule 23 of the Federal Rules of Civil Procedure, which reads:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

\textsuperscript{98} See, e.g., Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982); Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985).

\textsuperscript{99} See \textit{Gen. Tel. Co. of Sw.}, 457 U.S. at 158.

\textsuperscript{100} See 1 \textsc{alba} Conte \& Herbert \textsc{Newberg}, \textsc{Newberg on Class Actions} § 3:13 (4th ed. 2002).

\textsuperscript{101} Identity of interests essentially means that the representative has to share exactly the same interests as those of the group she represents. Her interests cannot be slightly different, and she cannot have any interests additional to those of her group.
number of interests. This will probably promote efficient deliberations and may even make it easier for the parties to reach a consensus; however, there is potential that this will increase the likelihood of conflicts of interests. On the other hand, we may choose to include in the deliberations a large number of participants, each representing a limited set of interests. This may make it difficult to deliberate constructively, yet it is likely to reduce the risk of conflicts of interest – at least those conflicts that are the result of the representative having to represent a number of interests and groups.\textsuperscript{102} As was previously argued, there is no one correct way to make the trade-off, and determinations should be made on an \textit{ad hoc} basis, with courts considering the contextual factors in each controversy. Among these factors are the type of controversy and the number of interests it invokes, the practicality of combining few interests together, and the number of groups seeking to participate in the deliberations.

B. ADEQUACY OF REPRESENTATION

The second tier in the court’s examination, after the typicality requirement has been satisfied, involves an investigation into the adequacy of representation. When examining adequacy of representation, CCD courts are instructed to evaluate the expertise, experience, and abilities of the representatives, alongside examination of their connection with their constituent group. The investigation is rigorous and is meant to guarantee that the \textit{best} representatives for each group sit around the table.

This requirement should not go unnoticed. In fact, it is contrary to the requirements posed by courts under both Rule 24 and class actions. Rule 24, applied in personal, rather than representative suits, defers to the party who first initiated the lawsuit by holding that, \textit{inter alia}, identity of interests suffices to presume adequate representation. In class actions, courts have taken an even more forthright approach, stating explicitly that the representative need not be the best one but rather only an “adequate” one.\textsuperscript{103} Presumably, the reason for this qualification is that in class actions we assume that even if representation proves inadequate, the loss to the individual who did not consent to the representation is rather small.\textsuperscript{104} A similar presumption

\textsuperscript{102} The trade-off does not necessarily mean that one method is superior to the other. We can find in the literature examples of successful deliberations between a large and small number of participants. \textit{See, e.g.}, INNES ET AL., \textit{supra} note 1.


\textsuperscript{104} In fact, the class action itself assumes that the private individual will not likely pursue legal actions, since her private harm is too small and the cost of litigating the wrong would be higher than the loss she suffered. Note, though, that this assumption is
cannot be made with regard to CCD deliberations because at stake are volatile issues which necessitate that deliberations do not fail simply because the representatives were not the best in terms of their ability to deliberate constructively and to present effectively the arguments of their constituent groups.\textsuperscript{105}

To ensure that the best representatives sit around the table, the court's examination should be guided by factors that reflect on the representatives' deliberative abilities, their reputation and their position with relation to the organization or group they represent. For example, a public interest group that has a large number of registered members is likely to enjoy wide support and also presumably has efficient mechanisms to communicate with its members.\textsuperscript{106} This organizational power may be an advantage because during the deliberation the representative can communicate with her constituents to certify changes in her position resulting from the deliberation, thus retaining the confidence of her group. Lobbyists, for instance, are usually professional representatives who often have formal meetings with their clients to propose and get approval for propositions they make.\textsuperscript{107} Similarly, if the representative has special expertise or experience working in the field of controversy, it may serve as an indicator of familiarity with the subject matter of the deliberations and with the other players in the field.

Less determinative are factors relating to prior experience in deliberative decisionmaking procedures. Despite the fact that experience in alternative forms of decisionmaking is unquestionably an advantage, courts should be cautious not to hold lack of experience against a party who would otherwise be regarded an adequate representative. The reason for this caution is that under CCD, prior to actual deliberations, parties go through a training session, which teaches them about deliberative decisionmaking and is meant to put all participants on an equal footing. The training session is also designed to eliminate or, at the minimum, reduce power imbalances between the participants that could impede the success of the

\textsuperscript{105} Under CCD, failure to reach an agreement results in court resolution of the controversy. Note, though, that such a failure can have far-reaching effects. It can allude, for example, that the controversy cannot be resolved without the intervention of the court. It can also discourage stakeholders from engaging in deliberative initiatives in the future.

\textsuperscript{106} Of course, it may well be that some groups will prove the opposite, that they are too large and thus cannot communicate with their members efficiently.

\textsuperscript{107} See \textit{Innes et al.}, \textit{supra} note 1, at 17. Yet even lobbyists, as the report indicates, could often miscommunicate with their groups and act without sufficient agreement from their organizations.
deliberations. Such power imbalances can be the result of economic gaps, inequalities in knowledge, education or expertise, and dissimilar political power or networks of associations.\textsuperscript{108} While the court is obviously not expected to balance between the representatives, it should not be guided by such imbalances in its decision to allow or to deny participation.

C. REPRESENTATION OF STRONG AND ABSENT INTERESTS

Three additional issues relating to representation merit our attention. The first issue relates to the link between interest and representation. What impact, if any, should the "strength" of an interest have on its representation? Put another way, should the court allocate more participants to represent "strong" interests? The answer is both yes and no. No, because it is practically impossible to assess the strength of an interest, especially if we want to evaluate its strength relative to other interests.\textsuperscript{109} Such examination would require courts to engage in assessments that they are not equipped to perform. But the answer is also yes, indirectly however, because it is probably safe to assume that a natural division of participation based on the strength of an interest will occur anyway, eradicating the need for the court to create this division artificially. By this I mean to argue that it is likely that strong interests will disperse themselves over a number of different groups of people, leading to representation of various standpoints relating to the same interest.

An example will clarify the argument. A woman files a sex discrimination lawsuit, arguing that although she was elected to become a member of a religious council, the Minister of Religion refuses to certify her nomination because she is a woman.\textsuperscript{110} As she is the first

\textsuperscript{108} One of the most common critiques of deliberative processes is that these power imbalances prevent effective deliberations. Archon Fung analyzed several deliberative decisionmaking processes and largely disproved these concerns. Fung showed that despite lack of resources, expertise, social networks, or education, participants in various deliberative forms were able to generate efficient and fair outcomes. In some of the cases, the outcomes and the quality of participation even exceeded those generated by wealthier and better-educated participants. See Archon Fung, Empowered Participation: Reinventing Urban Democracy 118-20, 201, 206-07 (2004).

\textsuperscript{109} Without a simple indication of direct injury, it is almost impossible to assess the strength of an interest, and we could come up with endless variables to examine it, some of which would likely contradict each other. For instance, a harm may be significant, yet be shared by a small group of people. Is it stronger than a less significant harm that is shared by many people?

\textsuperscript{110} These facts resemble, though they do not duplicate, the facts of HCJ 153/87 Shakdiel v. Minister of Religion Affairs IsrSC 32(2) 221. In that case the petitioner, an elected member of a city council, was recommended, along with three other men, to serve on the religious council. The religious council did not elect her, and she petitioned the Israeli Supreme Court, arguing that her appointment was rejected due to sex discrimination. The Court ruled in her favor.
woman ever to participate in elections for membership in religious councils, and the first to be elected for one, a small group of women, if any, share her direct interest. Nonetheless, the interest she invokes is “strong” in the sense that the Minister of Religion’s decision prevents her participation altogether, ignores democratic elections, and infringes equality, a fundamental human right. As a strong interest, her interest affects other close interests. Such groups may be feminists – religious and secular – that seek to promote equality, human rights organizations that seek to prevent discrimination, or public interest groups that want to uphold a decision made in democratic elections. All these groups are potentially relevant participants in CCD deliberations, which will all represent similar interests, albeit from different perspectives.

Secondly, in examining issues of representation, CCD courts should pay attention not only to the parties that are actively engaged in the process, but also to those that are not part of it and examine the consequences of their absence. In particular, courts should be aware of parties that may have an interest in the deliberations but cannot form a representative group or are not even aware of their interest, and of parties that do not yet exist but may have a future interest. These interests, assuming they justify intervention, should be represented by existing parties that the court finds to be adequate.

Lastly, it should be noted that additional aspects of representation include the possibility of conflicts of interest arising throughout the deliberations. Such a conflict can actually be the result of constructive deliberations, which can lead to a conflict between the representative’s responsibility toward her constituent group and her responsibility to the deliberation process and the other deliberating parties.111 This important issue extends beyond the scope of this Article, but in brief it should be stated that CCD provides two safeguard mechanisms to address such conflicts. The first safeguard mechanism is simply requiring that the deliberations be facilitated by a skilled facilitator who is able to identify such conflicts, reflect on them, and assist the parties in settling their competing obligations. The second safeguard is the final review performed by the court, which examines the substance of the deliberation’s outcome as well the procedures leading to it. By doing so, the court can assess, inter alia, whether parties deviated from adequate participation. Note, though, that unlike the skilled facilitator who can detect conflicts of interest on the

111. See David Laws, Representation of Stakeholders Interests, in The Consensus Building Handbook, supra note 29, at 241, 244. Laws describes this as the contradiction between the imperatives of internal deliberations and the imperatives of external interactions of the constituent groups.
spot, the court's review provides only a post factum monitoring mechanism.

III. COMPULSORY JOINER

Suppose you want to initiate deliberations that would attempt to resolve a socially contested controversy. You identify the interests that may be affected by the deliberation and you start locating potential participants. You are able to convince most of the relevant parties to participate in the deliberation except for one group that refuses to join. This group represents an important interest that you believe must be included in the deliberations – otherwise the process will be illegitimate and incomplete. Does their refusal put an end to your efforts? Can you compel their participation?

This hypothesis is hardly an imaginary one. It represents, although from a different perspective, the problem at the heart of this Article: namely, how to secure participation of relevant parties in a way that ensures the representativeness and legitimacy of the deliberative procedure. While all deliberations are faced with this problem, albeit in varying degrees, a variety of ways have been proposed to solve it. Some deliberative initiatives avoid the problem altogether by opting for deliberations that are based on voluntary participation. Those processes place the burden on the parties' shoulders, penalizing their refusal to join the process in their inability to influence its outcome.112 Others, like deliberative polling efforts, circumvent the problem by choosing participants based on a statistically random selection.113 Even though this guarantees representation of all groups identified as relevant, such mechanisms do not necessarily promote deliberations between the best representatives.114 Still other methods choose to promote representation and participation through active recruitment and outreach. These processes represent an effort to publicize the deliberation and reach communities that are traditionally under-represented.115 The problem associated with this ap-

112. This is, obviously, true in any case. The problem with this approach is that it simply abandons any attempt to create a representative group, resulting in participation of those who are well off, often at the expense of those whom the outcome of the deliberation would influence.


114. Archon Fung differentiates between cold deliberations and hot deliberations, differentiated by whether people have a personal stake in the deliberations. He suggests, and I share his opinion, that while individuals with a low stake in the deliberations will tend to be open-minded and without fixed positions, the participation of individuals with a personal stake in the issue will lead to better deliberations, as they will be willing to invest time, energy, and resources into the process to make it more effective and creative. See Fung, 11 J. POL. PHIL. at 345.

115. Such as Citizen Summits described by Fung, id. at 355.
approach is that, although it represents a genuine effort to include under-represented parties, it does not oblige their participation. Thus, if outreach attempts fail, the deliberation will still take place even without some relevant parties.

CCD is bolder than all these approaches because it employs, when applicable, compulsory joinder of relevant parties. This approach results, in part, from the unique status of CCD as a deliberative initiative that seeks participation of particular identifiable parties, who are not only relevant participants, but also the best possible representatives. This feature is what differentiates CCD from other deliberations – primarily those that choose participants randomly. Although both methods value representative participation, under CCD representatives are not being chosen solely because they represent a certain population or interest, but rather because they possess other qualities that are pertinent to the procedure: their ability to deliberate constructively, the support of their constituent groups, or their expertise in the subject matter of the deliberation.

Clearly, such an approach is controversial. It gives relevant parties significant latitude to control the deliberation – or, more accurately – to prevent it. Relevant parties, knowing that their participation is essential, can refuse to join deliberation as a tactic for preventing it from taking place, holding the deliberation hostage to their demands. Such an action could likely thwart any attempt to establish deliberations under CCD.116 More importantly, it is easy to assume that for most supporters of deliberative decisionmaking procedures, the idea of compulsory participation sounds sacrilegious. Commentators argue that compulsory participation in mediation stands in opposition to the very basic notion of ADR (Alternative Dispute Resolution), namely, the voluntary commitments of the parties to deliberate and reach agreeable solutions.117 They also assert that the compulsory participation in the deliberation would result in compulsion in the deliberation itself and may lead to “bad-faith” participation.118

116. There are two ways to overcome this problem. The first is through various incentives within the structure of the model that are aimed at promoting participation. The second is, of course, by compulsory joinder. See infra notes 124-58 and accompanying text.


At first glance, these criticisms may be correct. Yet, as this Article will show, research on mandatory participation in mediation proves that, despite the obligatory nature of the mediation, it yields similar results to those generated in voluntary mediation, and it has the effect of convincing initially resistant parties that cooperation may be useful in resolution of their disputes. These studies suggest that compelling parties to participate will not necessarily have a negative impact on their participation or their feeling of control over the procedure and its outcome.

Why do parties refuse to join deliberative initiatives? There are a number of possible reasons. Primarily, in the deep-rooted controversies CCD is addressing, opposing parties may refuse to sit and deliberate with the other side. Necessary stakeholders may feel that other parties' positions stand in opposition to religious or moral rules to which they adhere, thus preventing any possible compromise. Alternatively, parties may refuse to deliberate, fearing that, as Oscar Wilde's Lord Gorine observed, if they listen, they may be unreasonably convinced. Then, too, parties may be unfamiliar with deliberative forms of decisionmaking and feel that they lack the skills needed for making an effective and convincing presentation of their point of view or for reaching reasonable outcomes. Third, some parties – especially those with significant representation in the Parliament or in the Government – might think that they can achieve better outcomes in other decisionmaking venues, most notably political ones. Fourth, some parties may find it hard to justify to their constituents their involvement in such a procedure. In these instances, they may find it easier to be "compelled" by the order of the court than to voluntarily choose to join in the deliberation.

What mechanisms can we devise to ensure participation by all relevant stakeholders? I suggest two. The first mechanism I suggest consists of various incentives for participation that are part of CCD's design. These incentives are aimed at convincing potential participants that the deliberations are likely to generate better outcomes than other decisionmaking forums and that a group's absence from the deliberation will impede their ability to affect its outcome. The second mechanism is reserved for extreme cases and it employs the authority of the court to compel participation of necessary parties. Under this mechanism parties may be compelled to participate in the deliberation in the same way parties can be compelled by courts to go

---


119. See infra notes 126-36 and accompanying text.

through mediation prior to litigating a case or in the same way that
parties can be compelled by courts to join litigation as plaintiffs or
involuntary defendants.

Most of the incentives for participation that are part of the design
of CCD have been presented earlier in this Article, albeit not specifi-
cally as such. The first of these involves the initial conflict assessment
that is conducted by a trained neutral facilitator. In the process of
conducting a conflict assessment, the facilitator holds informal private
interviews with potential parties. This enables the facilitator to speak
to reluctant parties and convince them – on and off the record – to
participate. The facilitator can point to the potential of reaching an
agreement in the deliberations and to the reluctant party's ability to
influence it in their favor. Conversely, the facilitator can direct the
party's attention to the possible consequences of her refusal, includ-
ing, for instance, that other parties may be appointed to represent her
interest and that failure to initiate deliberations or to reach an agree-
ment would result in a court resolution of the controversy.

A second structural incentive lies in the deliberative nature of the
process. The Constructive Controversy method that stands at the core
of CCD promotes a social discourse that encourages the inclusion of
various views and standpoints, as well as novel methods of argument
and discussion that are not limited to rational argumentation. Additionally, these deliberations give parties significant control over the
formation of the outcome. Not only can deliberations design outcomes
for the benefit of the parties involved, but, in some cases, parties may
veto suggestions to which they strongly object. Furthermore, CCD
deliberations are not performed merely to inform the court of possible
outcomes or to advise administrative agencies of desired policies. The
deliberations are the forum where the outcome is actually determined,
and, as long as it falls within a zone of reasonableness, the outcome
will be included in the court's order.

A third incentive relates to the default rule of CCD, under which
failure to launch the deliberation or to reach an agreement results in a
court resolution of the controversy. For some parties this may be a
strong incentive to participate, as they may believe a court resolution

121. These include, for instance, giving voice to underrepresented groups, personal
testimony and story-telling. See, e.g., Lynn M. Sanders, Against Deliberation, 25 Pol.
122. CCD follows Harter's suggestions for determining consensus in Negotiating
Rulemaking committees. See supra note 41; Harter, 71 Geo. L.J. at 96-97.
123. Indicating that the ability to affect the outcome was what encouraged them to
participate (and kept them at the table), participants in the San Francisco Estuary Pro-
ject mentioned earlier said, "If we do not participate, decisions might be made that go
against our mandates." See Innes, supra note 36, at 117.
is not likely to promote their interests, or at least not as significantly as they themselves would, had they participated in a deliberation.

The second more provocative and arguably controversial mechanism is the order of compulsory joinder by the court. CCD advises use of this mechanism only as a last resort, and only after the court concludes that no other representatives are capable of adequately representing the interest and that the absence of this party is likely to harm her interest or the interests of existing parties.124

The method is simple. The court orders the party to participate in the deliberation before litigation can take place. The assumption is that the compelled entry to the deliberation would not necessarily affect the willingness of that party to deliberate constructively. This assumption is based on research that analyzed the results of mandatory mediation following the adoption of state statutes that oblige parties to mediate prior to litigation.125

A study by Roselle L. Wissler comparing mandatory mediation to voluntary mediation in Small Claims Courts has shown that the settlement rate in mandated mediation was not substantially lower than the settlement rate in voluntary mediation, suggesting that successful settlements are not solely the result of a voluntary selection of pro-

124. It should be noted that Rule 19 of the Federal Rules of Civil Procedure, titled "Joinder of Persons Needed for Just Adjudication," grants courts a similar authority to order compulsory joinder of necessary parties. Rule 19 prescribes the steps a court should follow prior to its decision. The first step includes examining whether the absentee is a necessary party. A nonparty would be found to be necessary if (1) without joinder a complete relief cannot be accorded among existing parties, or (2) the nonparty claims an interest relating to the subject of the action and nonjoinder may (i) impair or impede the nonparty's ability to protect her interest, or (ii) leave any of the existing parties subject to substantial risk of multiple or inconsistent liabilities. If one of these conditions is met, the court will order joinder unless it is infeasible. Infeasibility is mainly a factor of subject-matter or personal jurisdiction. If joinder is infeasible, the court would assess whether litigation can proceed without the necessary party or it should be dismissed. See Fed. R. Civ. P. 19.

125. For a survey of some of the statutes ordering mandatory mediation see Holly A. Streeter-Schaefer, A Look at Court Mandated Civil Mediation, 49 Drake L. Rev. 367 (2001). Some states even require good-faith participation in the mediation. For a description of such laws, see John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69 (2002). These laws have generated critique arguing that courts should sanction only "objective" and determinable bad-faith conduct, such as failure to attend mediation sessions or failure to provide written memoranda prior to mediation. See ABA Section of Dispute Resolution, Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs (Aug. 7, 2004), http://abanet.org/dispute/draftres2.doc. See also Edward F. Sherman, Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?, 46 SMU L. Rev. 2079 (1993); Kimberlee K. Kovach, Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic, 38 S. Tex. L. Rev. 575 (1997) (focusing on the role of lawyers in mandated mediation).
In addition, the fact that the settlement rate is not higher in mandatory mediation indicates that parties do not necessarily feel coerced to reach an agreement — a critique that is often made against mandatory mediation.127 Additional factors analyzed in the study reinforce the conclusion that mandatory mediation yields similar results to those obtained through voluntary mediation. For example, the length of the session has been similar in both mediation types, suggesting that the parties do not find it harder, or at least more time-consuming, to reach an agreement;128 the parties in voluntary and mandatory mediations do not differ in their ratings regarding the importance of assorted reasons for attaining or not attaining an agreement;129 and those who were compelled to mediate do not describe the mediation process and their experience in it differently than have those who chose to mediate.130 Most notably, participants do not differ in their feelings of control over the process or over the agreement reached if the mediation ends with an agreement.

Wissler also reported similarities between mandatory and voluntary mediation with regard to the agreements reached and parties' compliance with it. Wissler's study found no differences in terms of parties' estimates of their compromises, their judgment of the fairness of the agreement, or their satisfaction with it.131 Moreover, the study found no difference in compliance rates or in the parties' feeling of obligation to adhere to the deliberation's outcomes.132

It should be noted, however, that compulsion to engage in mediation did have an effect on the way parties have assessed the mediation itself, and that the parties in mandatory mediation that ended with an agreement were less likely to view the mediation process as fair (in spite of the fact that mandatory mediation did not affect their assess-


127. However, note that in cases in which the parties did not reach an agreement, litigants in mandatory mediation were marginally more likely to feel that the mediator pressured them to settle. Id.

128. Id.

129. Id. at 582.

130. Id. at 583. Parties were asked to describe the mediation session with regard to the following descriptions: "thorough, unhurried, open, understandable, informal, private, more like a discussion than an argument, involving the discussion of issues other than the money owed, focusing more on ways to solve the problem than who was right or wrong, and discussing a number of ways to solve the problem." Id.

131. Parties that were compelled to mediate did not differ from those who chose mediation in the way they assessed the agreement in terms of reaching their goals relative to the other side or their feeling that the dispute was resolved. Id. at 584.

132. Id.
The study also found that the compulsory nature of the mediation did not affect parties' assessment of the other side's reasonableness or the other side's willingness to understand the parties' point of view.

Similar results were documented in 2001 in a report prepared by an evaluation committee to examine the mandatory mediation pilot project of Ottawa and Toronto. The committee concluded that the pilot project yielded positive results supporting the inclusion and expansion of mandatory mediation programs, and it recommended enacting Rule 24.1, establishing mandatory mediation, as a permanent part of the Federal Rules of Civil Procedure. The committee found that cases were disposed of sooner under Rule 24.1. Four out of ten cases resulted in a settlement after a session of mandatory mediation, and two out of ten resulted in partial settlements. Moreover, the committee found that the mediation expedited proceedings even in cases that eventually returned to litigation. Furthermore, the responses to mandatory mediation were generally positive. Again, despite the obligatory nature of the mediation, eighty percent of Ottawa lawyers and eighty-two percent of Ottawa litigants agreed with the statement "I was satisfied with the overall mandatory mediation experience." Sixty-one percent felt that "justice was served by this process," and an especially high rate – eighty-six percent of Ottawa lawyers and eighty-eight percent of the litigants – agreed that if they had the choice, under the same circumstances, they would use mandatory mediation again to resolve similar disputes. Lower satisfaction rates were indicated in Toronto, apparently, as the committee concluded, because mandatory mediation was an entirely new procedure there, while it had existed in Ottawa before the pilot project began.

These studies have a far-reaching effect on the design of CCD. They suggest that parties can, in some situations, be compelled to deliberate without a negative effect on their participation, their willing-

---

133. Id. at 585. The study does not indicate how this relates to other conclusions, such as the feeling of control over the process or the satisfaction with the outcome.


135. Id. at 5.

136. Fifty-nine percent of Toronto lawyers and sixty-five percent of Toronto litigants agreed with the statement "I was satisfied with the overall mandatory mediation experience," forty-three percent and thirty-nine percent respectively agreed that "justice was served by the process," and sixty-six percent of Toronto lawyers and seventy-three percent of Toronto litigants agreed that if they had the choice, under the same circumstances, they would use mandatory mediation again to resolve similar disputes. See id. at 5-6.
ness to reach agreements, or their feeling of control over the process. Further contributing to this conclusion are various factors in the design of CCD that assist in overcoming potential obstacles that may result from compelling parties to participate. For example, prior to actual deliberations, parties go through a short instructional session in which they learn basic skills of constructive deliberation. This is likely to help those parties that initially refuse to participate due to limited experience with deliberative forms of decisionmaking. Another safeguard lies in the prerogative of the deliberating parties to determine the ground rules for the deliberations. As mentioned at the beginning, assuming that parties who participated in the formation of the deliberation procedures would consequently find them fair, it is highly plausible that they would consider the process and its outcome to be legitimate even though they initially refused to participate.\footnote{137}{See supra notes 26-28 and accompanying text.}

Despite these various mechanisms, however, it is still possible that reluctant parties will refuse to participate in the deliberation. In those instances, if there are no other representatives that can adequately represent that interest and there is a great likelihood that the group's interests will be impaired and the outcome would not be legitimate, there is no choice but to declare that CCD is not applicable – at least at this stage – for the resolution of that controversy.\footnote{138}{It is interesting to note that in the analysis of Rule 19, several courts have considered the refusal of a necessary party to join the litigation as an indication that the absentee does not believe her interests are threatened by the litigation, and thus, may justify a decision to proceed with litigation despite the absence of a necessary party. \textit{See} Burger King Corp. v. Am. Nat'l Bank & Trust Co., 119 F.R.D. 672, 678 (N.D. Ill. 1988) ("An absent person’s decision to forego intervention indicates that he does not deem his own interests substantially threatened by the litigation; and if he does not, the court should not, absent special circumstances, second-guess this decision."). This analysis does not necessarily apply in the context of CCD. As described above, parties may have various reasons not to join deliberations even if they believe their absence would impede their interests.}

**FINAL REMARKS ON APPLYING CCD'S PARTICIPANT SELECTION MECHANISM**

While the procedure for selecting participants presented here is intricate and systematized, the procedures to realize this mechanism should not be. Cumbersome procedures are hard to apply and can easily create a barrier between those who wish to raise their objections and the court. The facilitator, as well as the court, should be approachable. Objecting to the list of participants or asking to join the deliberation should not be a privilege limited to those who are well educated or those that can retain legal counsel.
That said, some basic procedures must be maintained in order to promote CCD's goals. The first procedural issue concerns the timing of objections and requests for intervention. Although some deliberative processes allow parties to join the deliberation at any time,\textsuperscript{139} it is suggested here that the request to join the deliberation or to object to the list of current participants must be made within a limited time.\textsuperscript{140} This limitation is required in order to form a constant group of deliberating parties. This group would go through a training period together, prior to the actual deliberation, and would determine the ground rules for the deliberation together.

A second procedural issue concerns the right to raise objections to the list of participants. This right should not be limited by a standing requirement. Instead, any party that wishes to object to the list of participants, or to intervene in the deliberation, has the right to file a motion with the court.\textsuperscript{141} Additionally, CCD provides that the court, and not only the parties, can raise concerns about the list of participants. Unlike traditional litigation, in which it is safe to assume that courts are not familiar with the circumstances surrounding the issue at stake and the relationship between the parties involved, under CCD, courts, especially after reviewing a facilitator's recommendation, can analyze the controversy and the parties needed for its resolution the same way other parties can.

CONCLUSION

Scholars often reflect on the tension between effective deliberation and inclusive participation.\textsuperscript{142} They suggest that one may come at the cost of the other. Expanding the scope of participants in the deliberation, they argue, will reduce its quality, and vice versa: improving the quality of the deliberation may result in limited participation.\textsuperscript{143}

This Article argues that the tension between inclusive participation and effective deliberation displays a lack of efficient mechanisms to track and convene relevant participants rather than an actual ana-

\textsuperscript{139} See, e.g., Sabel & Simon, 117 Harv. L. Rev. at 1019.
\textsuperscript{140} The limitation should be made by the court; it can be in the form of a right to raise objection within a number of days before or after oral argument.
\textsuperscript{141} Obviously, to be able to examine all motions, the court can join similar motions or decline without oral arguments those that are without merits.
\textsuperscript{142} See Ackerman & Fishkin, supra note 22, at 198. See also Joshua Cohen & Archon Fung, Radical Democracy, 10 Swiss J. Pol. Sci. 23 (2004).
\textsuperscript{143} Ackerman and Fishkin analyze this tension within a broader conflict between three central democratic values: deliberation, mass participation, and political equality. Ackerman and Fishkin suggest that their Deliberation Day proposal can resolve that tension by enhancing all three values. See, Ackerman & Fishkin, supra note 22, at 201-04.
lytical flaw. I suggest that better institutional settings can resolve or, at the minimum, make for a much better trade-off.

Several features in the design of “Constructive Controversy Deliberations” (CCD) further this goal. First, CCD provides a structured and detailed procedure to identify relevant parties. Such a procedure is an innovation itself. It assumes that the way to enhance participation while guaranteeing legitimate and efficient deliberations is not simply to open deliberations to all comers, but rather to identify those particular parties who are relevant to the deliberations by virtue of their interest in it. The assessment of the sufficient interest for participation is the essence of this procedure.

Second, CCD connects between the “who” and the “what” questions. The basic characteristic of CCD’s participants is that they are neither voluntarily self-selected nor a representative group of society. Instead, CCD requires that participants are selected by virtue of their relation to the issues at stake. In other words, the interest of potential parties in the deliberation needs to be greater than their abstract interest as, for instance, citizens of a state or residents of a city. To select these interested parties, CCD promotes active processes to locate participants, which include identification of potential parties by a skilled facilitator who contacts relevant parties, interviews them, and convinces them to join the process.

Third, to expand participation without reducing the quality of deliberations, CCD adds to the equation the concept of representation. Representative participation is what enables CCD to open the deliberations to all the relevant participants while keeping it at a relatively limited scope. To avoid the typical problems of representative participation, CCD promotes a rigorous evaluation of representatives’ ability to deliberate constructively and adequately represent its constituents. Assuring that the best representatives sit around the table promotes the quality of the deliberation and the outcome generated by it.

Fourth, CCD institutionalizes the participant selection mechanism by involving the court in the process of tracking participants, convening them and guaranteeing their ability to represent their constituent groups adequately. Existing mechanisms often fail to convene all relevant participants because they lack the supervision and enforcement courts can provide.

While CCD’s participant selection procedure promises to promote participation and high quality deliberations, it cannot be analyzed in a vacuum. High quality deliberations are not only a result of limited participation or of discussions between parties with a strong interest in the deliberations. They are also dependent on other considerations such as the forms of discussion in the group, the mandate given to the
deliberating parties, and the methods used to enforce the outcome generated in the deliberations. While these latter considerations have been explored at length in the research and practice of public deliberations, the design of mechanisms to select participants has long been overdue. The model for selecting participants presented here, if applied appropriately, will not only assist in identifying the relevant parties for deliberative initiatives, but will also advance the legitimacy, creativeness, and ultimately, the success of these deliberations.