ESSAY

THE ADMINISTRATIVE PROCESS FROM THE BOTTOM UP: REFLECTIONS ON THE ROLE, IF ANY, FOR JUDICIAL REVIEW

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ABSTRACT

This Essay offers a bottom-up analysis of judicial review in the administrative state that focuses on the dynamics of participation. A bottom-up perspective supplements the more conventional top-down analysis of agencies and the courts by drawing attention to the important role that different constellations of participants play in the functioning of the system. This pattern of participation helps determine the behavior of the political and administrative processes. It also helps determine the behavior of the adjudicative process and, therefore, of judicial review. As with the analysis of judicial review of the political process under the Constitution, participatory realities must be taken seriously in analyzing the judicial review of the administrative process. After drawing out the primary variables and forces that shape participation in agencies and courts, this Essay considers various reforms and adjustments that might improve bottom-up institutional functioning in the future.

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INTRODUCTION

Judicial review of administrative decisionmaking is an important subject. It is also a difficult one. There have always been concerns about biases in the administrative process exemplified in terms like captured agencies.[1] In such a setting, judicial review would appear to be a welcome source of correction. Yet in some quarters there is evidence that rather than alleviating biases in administrative decisionmaking, judicial review is aggravating them.[2] Agencies may give too much weight to the wishes of concentrated interests, but judges are seen as providing the same interests with an additional means of defeating needed regulation.[3] Moreover, because litigation can be used strategically to delay rules, judicial review sometimes provides a special, if unattractive, benefit available only to those concerned about too much rather than too little regulation.[4]

These problems in both the administrative and adjudicative processes can

1. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

2. *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–14 (1992) (detailing concerns that hard look review could effectively paralyze agency rulemakings).

3. *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1245–47 (1999); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 313 (1988).

4. *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 174 (1997) (noting that the timing of review and associated compliance costs affect a party's stake in challenging a rule).

be cast as problems linked to the ideology or motives of bureaucrats and judges. But there is evidence that bureaucrats are attempting to do the jobs set out for them and that judges are seeking to protect dispersed interests whether those judges are appointed by Democrats or Republicans.[5] Thus, there are perceptions of the perverse effect of judicial review of administrative decisionmaking accompanied by perceptions that judges seem concerned with bettering administrative decisionmaking.[6] Similarly, there are perceptions of serious malfunctions in administrative decisionmaking alongside the perception that bureaucrats seem concerned with making good administrative decisions.[7]

These paradoxes underscore the need for a more comprehensive understanding of the role and impact of judicial review. Professor Komesar has long argued that the analysis of law and public policy in general, and judicial review in particular, should focus on the allocation of decisionmaking—the question of who decides.[8] Because this choice of decisionmakers usually involves a choice between complex decisionmaking processes, the choice of who decides is really the choice of what decides. For this reason, we call the choice among complex decisionmaking processes "institutional choice." The analysis of institutional choice by its nature requires comparing the relative merits of these always imperfect alternative decisionmaking processes. We term this analytical approach "comparative institutional analysis."

Comparative institutional analysis was developed primarily in the context of constitutional and common law and used to critique prior analyses in these areas for the failure to consider institutional choice.[9] Fortunately, this has not been a problem in the administrative law literature where the choice between decisionmaking processes has long been an important mode of analysis.[10] To that end, scholars have dedicated considerable effort toward mapping institutional structures and identifying reformed approaches to judicial

5. *See generally* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717 (2012).

6. *See, e.g.*, Wagner, *supra* note 5, at 1786–89.

7. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140–41 (2014); Kevin M. Stack, The Paradox of Process in Administrative Rulemaking (2015) (unpublished manuscript) (on file with authors).

8. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

9. *Id.* at 4 (discussing institutional choice in the constitutional and economic approaches to law).

10. For examples of this substantial literature that deploys some form of comparative

review.[11] An intricate blueprint is slowly emerging from this collective work that charts how the courts interact and fare relative to other branches of government with respect to competency, representativeness, transparency, and resources in advancing both the accountability and legitimacy of the administrative state.

Although this literature does not adopt a single theory of institutional approach, the approach in this work is primarily top-down; the authors emphasize the actions and behavior of judges and agency officials in evaluating the merits of judicial review.[12] This Essay seeks to contribute to this important institutional design conversation by adopting a decidedly different vantage point. Rather than considering judicial review from the top-down, this Essay models the administrative process and judicial review from the bottom-up. Here, the central focus is the participation of those affected by agency decisions rather than the agencies or the judges that sit in judgment over agency actions. These institutionally established opportunities for participation determine the functioning (and malfunctioning) of the political and administrative processes. Judicial review makes sense as a reaction to this political and administrative malfunction. But participation in the form of litigation also determines the behavior of the adjudicative process and, therefore, of judicial review. As with the analysis of judicial review of the political process under the Constitution, the impact of participation on all the alternatives must be taken seriously in analyzing judicial review of the administrative process.

To this end, we envision the motives of government actors or judges as secondary; good results can come from bad motives and bad results can come

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institutional analysis in administrative law written over the last three decades, see Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016).

11. This work is vast. For some recent examples, see A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (Michael E. Herz et al. eds., 2d ed. 2015); William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411 (2013); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849 (2012).

12. *See, e.g.*, Jerry L. Mashaw, Recent Development, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007); *see also* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe & Kagan on the Administrative State*, HARV. L. REV. (forthcoming 2017) (summarizing the work of top thinkers like Louis Jaffe, James Landis, and Elena Kagan as stressing the need for a type of top-down independence of agencies).

from good ones. Here, the driving forces of decisionmaking are systemic variables like the dynamics of participation, the issue of who participates in the administrative process, and the adjudicative process. This conceptual mapping of the role of participants in existing processes helps explain why, even given the apparent commitment to rigorous and equal participation that undergirds the administrative process and the judicial review that oversees it, some sectors of agency decisionmaking are still dominated by industry and other concentrated interests, often to the detriment of the dispersed and dormant public.[13] This vantage point also allows us to sketch a more constructive role for the courts in the future. A reformed judicial review may return some lost accountability to administrative processes and carries the potential to be able to jumpstart healthier and more balanced political decisionmaking about social issues that are currently buried in incomprehensible agency rules and decisions.

Our project focuses on the primary variables and forces that shape participation in both the administrative state and judicial review. At key points, our approach links to empirical studies and cases, but our main project is to provide clarity by focusing on the key moving parts in the system. To further focus the analysis, we zero in on one important problem within the larger set of administrative concerns: the ability of concentrated interests to dominate agency outcomes at the expense of the larger public.[14] That the same problems can also occur in the judicial alternative makes this approach particularly important to the central issue of institutional issue choice. Other problems, such as the relative expertise between agencies and courts and the political accountability of various institutional actors, are de-emphasized to gain purchase on this particular longstanding challenge in the U.S. administrative process and its judicial review.

As we write this Essay, the administrative state is in turmoil; significant changes to the basic structure may occur over the next several years.[15] At

13. *See infra* note 21 and accompanying text.

14. While this problem overlaps with a basic concern about limited access to justice for the diffuse public, the problem we discuss here runs deeper in an institutional sense. We argue that, by design, participatory processes in administrative law are structured to provide means for the well-financed special interests to effectively close off thinly-financed groups and special interests by raising the costs needed to participate. Simple transfers of money to thinly-financed groups will not correct the problem because it is structural. The ability of high-stakes participants to continually ratchet up the costs of participation to others allows them to perpetually dominate the process. *See, e.g.*, *infra* notes 77–98 and accompanying text.

15. *See, e.g.*, Ed Yong, *How Trump Could Wage War on Scientific Expertise*, ATLANTIC (Dec. 2, 2016), https://www.theatlantic.com/science/archive/2016/12/how-trump-could-wage-a-

such a juncture, it is more important than ever to return to establish an analytical framework for understanding the current system. This allows us to not only gain a view of the status quo with all its problems, but to trace more clearly how various reforms and adjustments might fare.

Our bottom-up model of the administrative state and the role of judicial review unfolds in four parts. In Part I, we discuss the dynamics of participation and, in particular, the implication of both high information costs and the skewed distribution of stakes. We also examine the implication of a bottom-up versus top-down approach. In Part II, we show the implications of high information costs and the skewed distribution of stakes in the political process. In Part III, we do the same in the context of the administrative process. In Part IV, we carry the analysis to the adjudicative process and the workings of judicial review. Once one understands the workings of these three processes, it becomes clear that judicial review of the administrative process in its present form requires reform either by eliminating judicial review or by refocusing and reforming it.

I. AN OVERVIEW OF THE ANALYTICAL FRAMEWORK

Administrative law is, by definition, the body of laws that governs the activities of agencies.[16] Over the last half century, administrative law scholars have dedicated particular firepower to examining the role of judicial review within administrative law—how and by whom this process-focused set of laws should be interpreted and implemented. These scholars have emphasized the intricate parsing of a range of judicial deference tests applied to different administrative settings, the addition of procedural requirements that bind the agency and litigants in judicially enforceable ways, and the appropriate role of the Chief Executive in interpreting laws.[17] A form of insti-

war-on-scientific-expertise/509378/ (summarizing some of these developments, which include congressional vetoes of promulgated regulations, agency retractions of existing rules, draft legislation that would require particularly costly rules promulgated by agencies to be approved by both houses of Congress in a short time period before they take effect, and draft legislation that imposes new requirements on the ways that agencies use science for regulation); *infra* note 168 and accompanying text.

16. *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (laying out the dimensions of administrative law and practice).

17. For a summary of some of the top administrative law literature and the topics covered, see the scholarship awards given by the American Bar Association's (ABA's) Section of Administrative Law and Practice. *Award for Scholarship in Administrative Law*, AM. BAR ASS'N,

tutional choice and comparison has entered this picture. Top-down comparisons between different branches, particularly the judicial review of agency work, focus on issues of the comparative competence of bureaucrats and judges as well as the need for judges to check unsavory influence of agency decisions, such as capture and political corruption.[18]

The bottom-up approach used here asks many of the same questions these legal scholars are asking—the important choice of who (i.e., which institution) ultimately decides. But we approach that comparative institutional question from the bottom-up by looking at the participants that drive the system. More specifically, our bottom-up analysis begins by examining the mix of participants who engage in these institutions. Because agencies are political branches, much of their operations can be modeled using participation-based models that are familiar to the study of legislation and electoral processes. This bottom-up perspective necessarily prioritizes a different set of institutional features such as the costs of information and access to participants and the distribution of the benefits of participation.

A bottom-up perspective on administrative process is not new. Political scientists have stressed the vital role of participation in the administrative state in seminal works that date back to the 1980s. James Q. Wilson's highly regarded four-square quadrant that considers the costs and benefits of regulation and William Gormley's still widely-used and admired network theory laid the foundation for this perspective.[19] The bottom-up perspective also picks up dangling threads from *The Reformation of American Administrative Law*, Professor Richard Stewart's classic article that underscores the importance of participatory dynamics in shaping new judicial roles in administrative governance.[20] More recent work from political scientists such as Susan Yackee and legal scholars like Cynthia Farina further reinforces the importance of participation realities in understanding administrative practice.[21] Our Essay

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http://www.americanbar.org/groups/administrative_law/initiatives_awards/scholarshipawards.html (last visited Oct. 27, 2017).

18. *See supra* note 11 and accompanying text.

19. *See* James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 367 (James Q. Wilson ed., 1980) (providing four quadrants where interest group pressures vary substantially from one quadrant to another); *see also* William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595, 607 (1986).

20. *See generally* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (documenting and critiquing the liberalization of standing rules and the resulting greater judicial oversight of agency rulemakings through what he calls an "interest representation model").

21. *See, e.g.*, CYNTHIA R. FARINA & MARY J. NEWHART, RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION 12 (2013) (identifying "the

attempts to synthesize this important body of work and incorporate it into a fuller, more explicated model for a bottom-up participation-centered analysis.[22]

Greater attention to the participation-driven dynamics of administrative law is particularly important today given the dramatic changes that have occurred to the administrative state regarding participation since the Administrative Procedure Act (APA) was passed in 1946.[23] The rise of social regulation in the late 1960s, the advent of public interest groups in administrative processes (as opposed to just the regulated parties that were the focus of Congress in passing the 1946 statute), and the changing dynamics of the various interest group constellations in the last thirty years raise both theoretical and practical challenges to an administrative system of accountability that depends on this participation.[24] Indeed, just as it would be folly to study legislative process without considering the role of interest groups, campaign finance, and the skewed access to members of Congress, the same is true for administrative process.

To understand the behavior of the administrative state, we employ a participation-centered approach that emphasizes the participation of various bottom-up actors such as consumers, producers, voters, lobbyists, and litigants.[25] In the model, official actors in the political process and the adjudicative process such as executives, legislators, and judges play a secondary role dependent largely on the dynamics of participation. We assume for purposes here that the officials reflect and react to participants rather than react inde-

length and complexity of rulemaking materials" as a barrier to meaningful citizen participation in U.S. agency rulemakings); Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1362–63 (2015) (observing how "the current rulemaking process, despite its formal promises of transparency and broad participation rights, *routinely and systematically* disadvantages consumers, small business owners, local and tribal governmental entities, nongovernmental organizations, and similar kinds of stakeholders, as well as members of the general public"); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006) (identifying a "bias toward business").

22. We use the term "participation" broadly to encompass any form of meaningful engagement by affected persons with the agencies, although it tends to be measured only when it occurs formally—through submitting letters or reports, offering comments at hearings, and through notice-and-comment or filing motions for reconsideration or appeal.

23. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–09 (2012).

24. *See, e.g.*, Stewart, *supra* note 20; Yackee & Yackee, *supra* note 21.

25. *See* KOMESAR, *supra* note 8, at 8 (presenting this model for participation).

pendently of them. While this assumption is reductive, it allows us to highlight features of the administrative structure that otherwise might be obscured.

Examining the costs and benefits of participation captures the variation in, and the dynamics of, participation.[26] In particular, the cost of participation focuses on the costs of organization and, more importantly, the cost of information.[27] In turn, the benefits of participation focuses attention on the distribution of these benefits and more specifically on the degree to which there is a skewed distribution resulting in a smaller number of high-stakes interests on one side and a larger number of lower stakes interests on the other.[28] We refer to the former as concentrated interests and the latter as dispersed interests.

The dynamics of participation allow us to understand the behavior and imperfection of political and administrative decisionmaking.[29] And in turn the dynamics of participation help understand the behavior of the adjudicative process, which is tasked with reviewing administrative decisionmaking. These dynamics also help understand the behavior of and problems in the market that justify moving decisions to the administrative process.[30] But it is the behavior of the administrative and adjudicative processes that most concerns us here.

The other major structural element that helps define institutional behavior is the size or physical capacity of the decisionmaking process.[31] This factor recognizes that decisionmaking processes have a budget constraint in their capacity to engage participants. As we shall see, this budget constraint is particularly important in understanding the behavior of the adjudicative process that, by its nature, is much smaller than the various entities courts are tasked with reviewing. But the constraint is also important in understanding the behavior of agencies. Unlike our treatment of the dynamics of participation, the budgetary element is considered exogenous. That is, we are not spelling out in this Essay what factors determine physical capacity.

Before leaving the general discussion of the analytic framework, there are three important points that deserve special attention. The first concerns the

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26. *Id.*

27. *Id.*

28. *Id.* at 136–38.

29. *See generally id.* at ch. 3 (setting out the analysis of the political process).

30. *See generally id.* at ch. 4 (setting out the analysis of the market process). We discuss the role of the market as it relates to judicial review of the administrative and adjudicative processes at several points in this Essay. *See also id.* at 27–30, 32–33.

31. *See, e.g., id.* at 143–45 (describing this feature).

interaction between the dynamics of participation and institutional comparison. The same variables that cause variation in one institutional alternative are likely to cause variation in the others.[32] This means institutions often move together; the factors that cause problems for one institutional alternative tend to cause parallel problems for others. In turn, this means that single institutional analysis, which employs the imperfections in one institution as the sole justification to substitute another institution in its place, is useless. If institutions have parallel problems, cataloging the problems in only one institution is insufficient and should make us suspect that the alternative institution is suffering similar problems. Only when we chart these parallels can we compile the information relevant for realistic institutional choice.

The second insight derives from the first and concerns the interaction between top-down and bottom-up forces. Our bottom-up approach is not blind to the implications of variations in the structure of the political and administrative processes. The characteristics of the institutional structure determine and are determined by the dynamics of participation. For example, a public nonprofit group is likely to discover that challenging a rule in court tends to be more newsworthy than lodging detailed comments during the rulemaking process, and this fact may affect a group's participation in these two institutions. Institutional structures are also dynamic. Significant shifts in, or shocks to, the top-down aspects of the political process like the 2016 election or the expanding role of the unitary executive affect participants' ultimate cost-benefit assessment of participating in these institutions and, therefore, what we can expect from the bottom-up processes.[33]

The third point concerns *minoritarian bias*, by which we mean the one-sided participation of concentrated interests at the expense of the engagement by the public at large. In understanding the alternatives to and reforms of administrative decisionmaking, we must necessarily wrestle with the pervasive presence of minoritarian bias in all the alternatives. Phrases like "special interest legislation" and "captured agencies" reflect the overrepresentation of concentrated minorities to the detriment of majorities made dormant by the dynamics of participation.[34] But minoritarian bias also characterizes the

32. *See, e.g.*, *id.* at 160.

33. Many of these innovations and shifts are in fact endogenous to, and therefore, produced by, the bottom-up processes. Understanding the dynamics of participation helps to understand these innovations and shifts. Shifts in top-down forces impact the bottom-up dynamics of participation by changing the cost and benefits of participation in the various decisionmaking processes. Some interests will be more active because their costs are now lower or their benefits from participation are greater.

34. In this Essay, we make mention of the *dormancy* of dispersed majoritarian or larger

dynamics of litigation and therefore the behavior and potential bias within the adjudicative process.

The next three parts of this Essay set out various institutional alternatives in the parallel context of various forms and degrees of minoritarian bias. The basic point here is that the dynamics of participation are important everywhere and that they often produce a parallel form of institutional behavior in which a concentrated set of high-stakes parties dominate (i.e., minoritarian bias). But because the dynamics of participation are based on a small, well-defined set of variables, the analysis also allows us to see variation in the behavior of the alternatives and, therefore, to see moments for real reform as well as the problems that these reform attempts will confront.

II. THE DYNAMICS OF PARTICIPATION AND THE POLITICAL PROCESS

We begin with a discussion of the political process where the dynamics of participation and minoritarian bias are most easily defined and then spell out a fuller spectrum of political process outcomes using the two-force model of politics.[35] Much of what economists and political scientists have contributed to the analysis of politics is based on a simple but powerful bottom-up paradigm—the dominance of small, concentrated interest groups.[36] These

public interests. In fact, the dynamics of participation, which creates dormant dispersed majorities, also creates the possibility that these dispersed majorities will be misled or mistaken. That is, the cost of information relative to the per capita stakes of the members of this dispersed majority which creates minoritarian bias can create fertile ground for propaganda and false advertising. Thus, the members of the dispersed majority may act contrary to their true interests. For more extensive treatment of the subject, see KOMESAR, *supra* note 8, at 117–21. For the purposes of this Essay, we will focus primarily on the inactivity or dormancy of dispersed majorities when we speak about minoritarian bias.

35. Much of this analysis is drawn from Komesar's IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC Policy, *supra* note 8. *See id.* at chs. 3, 5.

36. Here, the prominent works in economics are George Stigler's analysis of economic regulation and the body of work which studies "rent-seeking." Stigler, *supra* note 1. The "rent-seeking" theory is captured well in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan, Robert D. Tollison & Gordon Tullock, eds., 1980). In political science, they include the works of James Q. Wilson, *supra* note 19, and William Gormley, *supra* note 19. But the same paradigm is reflected widely. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 175, 175 (Roger G. Noll ed., 1985); Theodore J. Lowi, *American Business, Political Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677 (1964); Paul H. Rubin, *On the Form of Special Interest Legislation*, PUB. CHOICE, Mar. 1975, at 79.

groups are small in number and concentrated in the sense that each member has a high stake in the political outcomes in question. In this scenario, the small, concentrated interest groups have substantially greater political influence than groups larger in number but with smaller per capita stakes, even though the total stakes for the larger group may significantly exceed that of the smaller group. The overrepresentation of concentrated interests that underlies a significant range of analyses of the political process in both economics and political science, has variously been called capture theory, special interest theory, or interest group theory.[37] All of these notions depend substantially on the concept of disproportionate influence of the concentrated few over the dispersed many.[38] For simplicity's sake, we lump this entire body of work into the interest group theory of politics and refer to the disproportionate influence of the concentrated few as minoritarian bias.[39]

Minoritarian bias and the interest group theory of politics focus on the distribution of the benefits of political action. Interest groups with small numbers but high per capita stakes have sizable advantages in political action over interest groups with larger numbers and smaller per capita stakes.[40] Higher per capita stakes make it more likely that the members of the interest group will know and understand the issues. In the extreme but not uncommon case, the members of the losing majority (often consumers or taxpayers) do not even have the incentive to recognize that they are being harmed. In some instances, they may even be convinced that they are being aided.[41] The majority is not stupid or innately passive. In most instances, the majority is us. The per capita impact on each member of the majority is just so low that it does not justify the expenditure of resources necessary to recognize the issue involved. Institutional disengagement in these settings is rational, and it is a familiar problem to public-benefitting regulatory programs like health

37. *See, e.g.*, Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006). *See generally* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2013).

38. *See, e.g.*, Gormley, *supra* note 19.

39. For a further exploration of the intellectual underpinnings of the interest group theory of politics, see KOMESAR, *supra* note 8, at 55–58. As an aside, whether the influence of either the few or the many is disproportionate depends on the social goal in question. For this theory, resource allocation efficiency (or something roughly like it) is the social goal.

40. *See id.* at 136–38 (elaborating on this point).

41. Legislation that effectively excludes competition and, therefore, harms consumers, is often cast in terms of consumer health and safety. A classic example is the legislation involved in the *Carolene Products* case, United States v. Carolene Products Co., 304 U.S. 144 (1938), whose famous footnote is an important moment in U.S. constitutional jurisprudence. For an exploration of both the footnote and the case, see KOMESAR, *supra* note 8, at ch. 7.

and environmental protection.[42]

When one considers this interaction between the costs and benefits of political participation, it is relatively easy to see why the dominant image of the political process and its biases is minoritarian. The concentrated few with their substantial per capita stakes have the incentive to understand their interests, organize for political activity, and determine the correct channels of influence in a complex political process. Their small numbers make organization and collective action easier. Once they have overcome threshold or start-up costs, subsequent activity becomes less expensive.

That so many theories of politics focus on minoritarian forces is, in a sense, remarkable. In the simple world of high school civics, democracy is dominated by majority rule. Numbers are central. The many dominate the few. Of course, modeling modern political behavior according to such simplistic majoritarian notions would be appallingly naive. Complex political structures and a massive heterogeneous population are only two among many factors that remove actual politics from the simple world of civics. In fact, it has become second nature to assume strength in concentration and weakness in numbers.

However, an awareness of the dynamics of participation should also lead us to recognize that variation in its factors can cause variation in the degree of dominance of concentration over numbers. There is significant variation in each of the factors we discussed; consequently, there are significant sources of variation in the dominance of the few and the dormancy of the many. These factors and, therefore, the degree of majority dormancy, vary across political issues and political jurisdictions.

On the benefit side, as the *absolute* per capita stakes for the majority increase (even holding constant the ratio between majoritarian and minoritarian per capita stakes), members of the majority will more likely spend the

42. Even if a member of an affected group recognizes the impact of the legislation and his or her per capita benefit exceeds the allocated share of costs of political participation (or even if the per capita benefit exceeds the *total* costs), we may still observe no willingness to contribute from this member and, more importantly, no collective action from this group. Whatever benefits an individual might gain by producing the collective action through his or her contribution, the net benefits to that individual would be even greater if he or she did not have to contribute. There is, therefore, an incentive to refuse to contribute and allow others to bear the costs of political participation; in other words, there is an incentive to free-ride. For elaboration, see KOMESAR, *supra* note 8, at 69–72 (discussing this problem in public law). The severity of the shortfall in the representation of a group depends on the degree or extent to which members of the group free-ride. At one extreme, if only a few free-ride and the efforts of others take up the slack, there is no underrepresentation. At the other extreme, if all free-ride, they will have no political representation and everyone in the group will lose.

resources and effort necessary to understand an issue and recognize their interests. In turn, variation within the distribution of the per capita benefits of political action—the degree of heterogeneity—affects the probability of collective action on behalf of the majority by subgroups of higher stakes individuals within it.[43] This collective action can take the form of informing and organizing lower per capita stakes members of the majority, thereby increasing the chance that an otherwise dormant majority will act. In these instances, those with higher stakes operate as a catalytic subgroup, activating the more dormant members. However, as discussed below, this arrangement raises significant challenges for ensuring both adequate information and representation of the diffuse publics.[44]

On the cost side, the probability of majoritarian response varies as the costs of political action vary. These costs depend in part on the rules and structural characteristics of the political process, such as size and population of the jurisdiction, size of the legislature (number of legislators), frequency of election, size and scope of the legislative agenda, and the rules of the legislature (and agencies). The probability of majoritarian activity increases when there are smaller numbers of voters, who are easier to organize and prevent from free-riding. Smaller legislatures with fewer legislators make it easier to understand the position of any legislator and, therefore, easier to discipline unwanted action at the ballot box.

Complexity and, therefore, the cost of information, also varies with the subject matter of the issue in question. The degree to which someone understands any issue also depends on that person's stock or endowment of general information as well as their cultural worldview.[45] This understanding can be influenced by a number of factors such as culture, formal education, and press and media coverage, which allow certain issues to be recognized more easily than others. Indeed, because the press and the media provide cheap and accessible information, press and media response is likely to be a central element in translating some complexity for diverse audiences. Hence the

43. *See id.* at 72 (elaborating the tradeoff between minoritarian and majoritarian influences).

44. Representation by these concentrated subgroups can suffer from all the ills of representation that plague class action representation in the adjudicative process. *See infra* note 147 and accompanying text. Because the dormant, dispersed group will not have the incentives (or even the knowledge) to monitor, the extent to which any subgroup will be a true representative will depend on just how closely the interests of the smaller and larger group converge.

45. For a sample of some of the work being done on this area of complex information and general public understanding, see, for example, Dan M. Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147 (2011).

media is an important factor in determining the degree of majoritarian influence.[46]

Thus, in this model, the political influence of concentrated minorities varies depending on the complexity of the issue involved, the absolute level of the average per capita stakes of the larger group, the unevenness of the distribution of the stakes in the larger group and the chance that this heterogeneity will produce catalytic subgroups, and the availability of free or low-cost information to the larger group. In other words, the prospect of the majority's ability to offset minoritarian influence are determined by variation in the same factors employed by the interest group theory of politics to generate its conclusion of minoritarian dominance.

Taken to its logical conclusion, this analysis suggests not just that the relative advantage of the concentrated group will vary, but that there may even be instances in which the larger group can dominate and even be overrepresented. This potential for domination stems from the simplest dimension of the difference between larger and smaller groups—the number of members in the two groups. This is the simple civics model with which we began. In the most straightforward sense, larger numbers of members translate to political power via voting.[47] Voting can provide large groups with a type of political power that, under the right circumstances, trumps the organizational advantages of special interest groups.[48] Catalytic subgroups within a majority who can threaten to turn out the vote hold a special bargaining chip unavailable to other concentrated interests in negotiating with political actors.

What we have here is a "two-force" model of politics that incorporates the dynamics of both majoritarian as well as minoritarian participation. This two-force model tends to lead to more stable outcomes because it involves more diverse perspectives that result from the clashing majoritarian and minoritarian views. Where the majority is dormant and the majoritarian influence is negligible, we get the results predicted by this interest group theory with its emphasis on minoritarian bias. But as the majoritarian influence grows, we can get a "countervailance"—a kind of dynamic equipoise—op-

46. *See id.* at 163 (discussing how the worldview of citizens systematizes opinions on regulatory and political issues).

47. Voting is not necessarily the only way in which numbers translate into political influence. Even in political systems without effective elections, large numbers may be important. Revolts, mobs, demonstrations, passive resistance, and sabotage allow political costs to be imposed by large numbers on a government otherwise ruled by the few.

48. *See, e.g.*, KOMESAR, *supra* note 8, at 74 (discussing in more detail the political power that voting offers large numbers).

erating between the minoritarian and majoritarian forces and, with it, political outcomes that are more "balanced" than predicted by a model that focused on only one force.

Given countervailance, broad-based legislation can occur even in the context of strong, narrow and selfish motivation on the part of either elected officials or interest groups. The two forces and their countervailance present the possibility of attractive outcomes dictated by the interaction of individuals and groups none of whom act from attractive motives. We will see this possibility in the administrative process in our subsequent discussion of virtual representation. In short, public virtue can result from private vice in the political process, as well as in the market process.

The interaction between the two forces, however, is not always salutary. Where minoritarian influence predominates, the model generates the unattractive results predicted by the interest group theory of politics. Even where countervailance is strong, the resulting broad-based legislation may be illusory. What majorities may win at one level of government may be undone by minorities at another level.[49] We will see this minoritarian undercurrent that chips away at the gains obtained through majoritarian action operating in the discussion of the administrative process and, in particular, the growth of the bureaucracy.

Most importantly, the two-force model recognizes a political evil beyond the purview of the one-force models; overwhelming majoritarian influence leads to majoritarian bias.[50] Some of the most dramatic evils done by government are represented here. Although these evils have often been observed, there has been little effort to understand them. When Alexis de Tocqueville used the phrase "tyranny of the majority" or James Madison spoke of the deleterious effects of majoritarian factions, they did not explain the characteristics of these evils.[51] The two-force model provides a way to understand when and why majoritarian bias (or minoritarian bias) is likely to occur.[52] When we turn to the administrative process, we will be dealing primarily with the evil of minoritarian bias. Even in the administrative process,

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49. *See infra* notes 101–15 and accompanying text (on the growth of bureaucracy).

50. *See* KOMESAR, *supra* note 8, at 79–81.

51. *See, e.g., id.* at 80.

52. There are quite dramatic examples of majoritarian bias in U.S. history including Jim Crow laws and the internment of Japanese-Americans in World War II. And there are echoes in the present treatment of Muslim-Americans. Internationally, it is dramatically reflected in the Holocaust and in various forms of ethnic cleansing. Majoritarian bias and its various manifestations in history and constitutional law are explored more extensively in KOMESAR, *supra* note 8, at chs. 3, 7.

however, we will see variation that represents some influences of majoritarian forces. And if we were analyzing the administrative process at the state and local level, especially in the zoning context,[53] we would see a significant chance of majoritarian bias.[54]

III. THE DYNAMICS OF PARTICIPATION AND THE ADMINISTRATIVE PROCESS

As long as the patterns of participation in administrative governance mirror the legislative process, we can expect similar pathologies of participation. Indeed, empirical studies of administrative processes note the dominance of industry in many sets of agency decisions, and the basic model of participatory processes, as we shall see, helps ground these observations.[55] In fact, our analysis shows why minoritarian bias is likely to be worse in the administrative process. These results reflect increasing costs of participation in the form of increasing costs of information about both policy and process. In this Part, we use this basic model to understand the administrative process and to establish those conditions where minoritarian bias dominates.[56]

The administrative state, known as the "Fourth Branch," is institutionally distinct from the political process, although considerable political pressure can be brought to bear on it.[57] No agency officials—even at the top levels—

53. For an explanation of the likelihood of majoritarian bias in local zoning, see NEIL KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS ch. 4 (2001).

54. For a fascinating examination of possible cycling between majoritarian and minoritarian bias in state level utility ratemaking, see Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031 (1989). A recent addition to the political science literature examines this fluctuation in terms similar to the two-force model. *See* James L. True, Bryan D. Jones & Frank R. Baumgartner, *Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking*, *in* THEORIES OF THE POLICY PROCESS 59 (Paul Sabatier & Christopher M Weible eds., 3d ed. 2014); *see also* KOMESAR, *supra* note 53, at ch. 4.

55. *See, e.g.*, Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013) (examining over 8,000 comments on the proposed Volker rule and raising questions about the quality of citizen participants as opposed to the engagement by the financial industry); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011); Yackee & Yackee, *supra* note 21.

56. The analysis in Part III is derived from the analysis of the political process found in KOMESAR, *supra* note 8, at ch. 3, as it applies to the administrative process.

57. *See, e.g.*, Strauss, *supra* note 16, at 578–79 (describing the various pressures, including political, that can be imposed on agencies by the three branches, yet noting agencies operate

are elected. Perhaps in reaction to this democratic deficit, Congress passed a procedural statute—the APA in 1946—to provide formal mechanisms for institutional accountability by allowing affected interests to influence and challenge agency action.[58] Specifically, the APA provides any interested party with a right to participate in agency rulemaking.[59] If the agency ignores a commenter who identifies flaws in the agency's interpretation of its statute, material errors in its fact finding, or logical inconsistencies in its reasoning, or if the agency violates procedural requirements, that commenter can challenge the agency's rule in court.[60]

The resulting reliance on interest groups to oversee the work of the agencies, or interest group pluralism, is a central design feature of the U.S. administrative process.[61] Indeed, the use of regulatory participants to ensure agency legitimacy has become so critical to the U.S. administrative process that Edward Rubin calls the APA a "one-trick pony" and argues that "All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties."[62]

In embellishing the procedures that should govern this all-important participatory oversight, congressional legislation focused on two types of rules that entail different processes. The first type of rule, formal adjudication, deals with the due process interests of individual participants, raised by issues such as the granting of licenses and permits.[63] Congress developed elaborate, trial-like processes to ensure that these affected parties are adequately represented in the agency's deliberations. These processes include the right to cross-examine and to present evidence, limits on ex parte contacts, and on-the-record hearings.[64]

Second, congressional legislation focused on the promulgation of rules

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as a distinct branch that cannot be neatly wrapped into the existing three branches).

58. *See, e.g.*, 5 U.S.C. §§ 553, 706 (2012).

59. 5 U.S.C. § 553(c).

60. 5 U.S.C. § 706(2)(a).

61. *See, e.g.*, Stewart, *supra* note 20, at 1683 ("Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy."); *see also* U.S. DEP'T OF JUSTICE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103 (1941) (observing that "Participation by [economic and community-based] groups in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.").

62. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003).

63. 5 U.S.C. § 554.

64. *Id.* §§ 556–57.

that have more general application.[65] This latter type of rule constitutes the lion's share of agency rulemaking activity and is the focus of this Essay. Specifically, and in order to ensure that all affected parties can participate in so-called "informal rules," Congress established a number of requirements. The most important requirements are: (1) the notice-and-comment process and (2) the agency's responsibility to consider all comments submitted by interested persons in finalizing its proposal.[66] As a result, and in contrast to Congress and the President, the agency is, in theory, expected to actively engage affected groups in vetting its proposals and is legally required to "consider" that input when promulgating rules.[67]

A. The Dominance of Concentrated Interests

Or so the standard story goes.

To understand what the administrative process actually does and what biases and malfunctions it has in practice, we need to ask some basic institutional questions. In particular, we need to ask what happens to the costs and benefits of participation. The very mention of pluralism supposes that participation is central and, in its ideal form, reflects the full range of interests.[68] The discrepancy between this assumption and reality forces us to examine the dynamics of participation carefully.

The perception associated with terms like captured agency is that the bias, if there is one, is minoritarian. From the perspective of the two-force model, it is relatively easy to understand and amplify this perception. Consistent with the predictions of both James Q. Wilson and William Gormley, public issues that must be resolved in ways that impose costs on concentrated, high-stakes players are likely to generate lopsided engagement from participants in administrative processes.[69] By contrast, the public often faces diffuse and much lower benefits to public-regarding policies like pollution control and drug safety and therefore must depend on nonprofits and other forms of indirect representation.[70]

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65. *See id.* § 553.

66. *Id.*

67. *Id.* § 553(c).

68. Pluralism is the notion that beneficial political process outcomes will occur when the interest of all groups is adequately represented. Adequate representation is a function of participation, and by understanding the dynamics of participation we can assess when and to what extent pluralism works rather than assuming that some formal offer of access will produce it. In other words, understanding real, as opposed to formal, pluralism requires understanding of the determinants of participation.

69. *See, e.g.*, *supra* note 19 and accompanying text.

70. *See id.*

The source of these observations lies in the dynamics of participation, and in particular, in the high costs of information and the low per capita stakes of dispersed interests. One can see this in the distinction between broad legislative mandates and their implementation at the administrative level. The broad-based legislative activities of Congress are more likely to receive attention from the press and from the general public than the more detailed implementations of that legislation at the administrative level.[71] In our terms, the cost of information is lower for legislative activities and the per capita stakes for the dispersed majority are higher. This hardly means that minoritarian bias is missing from the legislative process, but it does make it even more likely in the administrative process. Moreover, the complexity of the substantive issues associated with the implementation of legislation is often significant and again presents participants with a high cost of information.

In addition, it is hard for participants to decipher the workings of the administrative process. It often requires an ability to take part in complex hearings and negotiations or to have the ability to navigate the back halls of influence. Knowledge of the workings of administrative decisionmaking makes lobbyists as guides through the administrative labyrinth almost essential.

This makes direct majoritarian activity in the administrative process virtually impossible. It is extremely unlikely that any individual citizen would have the knowledge or sophistication necessary to appreciate the substantive issues and the avenues of influence presented by administrative decisionmaking.[72] An effective participant in agency decisions must provide relevant and material information or comments on one or more issues in the agency proposal. This effort requires research and expertise. Emotive comments or suggestions that fall outside the four corners of the proposal can be ignored by the agency without legal consequence.[73] It is only comments that are provided with specificity on terms of the proposal that must be "considered" by the agency, with the threat of judicial review looming if they are not adequately resolved and explained.[74]

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71. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1342–51 (2010) (providing an illustration of the salience problems that afflict regulatory issues).

72. *See generally id.*

73. *See, e.g.*, William F. Pedersen, Jr., *Formal Records and Information Rulemaking*, 85 YALE L.J. 38, 76 (1975) (observing that comments must raise objections with specificity in order to provide a platform for judicial review).

74. 5 U.S.C. § 553(c); *see, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (holding that a commenter cannot merely assert that a general mistake was made; he or she must provide specific evidence and argumentation as to the nature of that mistake and its implications).

Beyond the more expected costs associated with this type of technical participation are some less expected costs. Agency proposals are often not accessible and in some cases can be effectively incomprehensible.[75] Moreover, even if they are understandable, agency rules can be quite long, are often supported by voluminous records and background documents, and can involve technical issues that require economic or scientific expertise or both.[76] Further, the rules themselves are not written in ways that make them easy to comprehend. As Professors Cynthia Farina, Mary Newhart, and Cheryl Blake observe, from the perspective of affected citizens, the agency's rule and accompanying analysis "is about as accessible as if the documents were written in hieroglyphics."[77]

There have been no studies specifically measuring the inaccessibility of agency rules to important, yet thinly-financed stakeholders, but the information that is available suggests that the information processing costs pose a significant barrier to participation.[78] These barriers impede even the most well-versed expert from engaging because of the time required to make sense of the agency's often undigested analysis. The National Academies of Science Committee tasked to review the Environmental Protection Agency's (EPA's) regulatory assessment for formaldehyde took the EPA to task for incomprehensible decisions: "Problems with clarity and transparency of the [EPA's] methods appear to be a repeating theme over the years . . . . In the roughly 1,000-page draft reviewed by the present committee, little beyond a brief introductory chapter could be found on the methods for conducting the assessment."[79]

Descriptions of the regulatory processes, although anecdotal, provide reinforcement for the notion that the volume and density of the agencies' work is growing well beyond the capacity of even the insiders to keep up with the deluge of paper, issues, and details. Professor Kimberly Krawiec's study of the regulations implementing the Volker rule, a rule that regulates proprietary trading of financial institutions, gives a sense of the mammoth size of a single rule.[80] The proposed rule itself was over 125 pages and triggered more

75. *See, e.g.*, Farina, Newhart & Blake, *supra* note 21, at 1365.

76. *See, e.g.*, Wagner, *supra* note 71, at 1342–51 (offering a concrete example of the mammoth size and complexity of single rules drawn from environmental regulation; the remainder of the article then discusses the phenomenon more generally).

77. Farina, Newhart & Blake, *supra* note 21, at 1365.

78. *See, e.g.*, Wagner, *supra* note 71, at 1343–51 (2010) (citing to literature describing broader phenomena).

79. *See* NAT'L RESEARCH COUNCIL, REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE 4 (2011).

80. *See, e.g.*, Krawiec, *supra* note 55. The proposed rule is Prohibitions and Restrictions

than 8,000 comments.[81] While the vast majority was simply form letters, the remaining 150 or so comments were extremely lengthy and detailed, with an average word count ranging between 2,500 and 5,000 words and the longest comment reaching 19,500 words.[82] The agencies met with affected parties more than 400 times over a fourteen-month period.[83] In the environmental arena, Professor Coglianese describes similar rulemakings at the EPA; a single hazardous waste rule, for example, involved 481 commenters, required 800 hours from the EPA's contractor just to assemble and process the comments, and another 1,600 hours in EPA staff time to process the comments right before the final rule was promulgated.[84] Professor Wilson, in his classic book on bureaucracy, describes a huge record compiled for an Occupational Safety and Health Administration standard that took the agency four years to process and that included 105,000 pages of testimony "in addition to uncounted pages of documents."[85]

That the information processing costs constitute—in effect—a barrier to entry appears to be well-settled even within the Executive Branch. For example, over the last few decades, the President has directed agencies to use plain English and include executive summaries in their rules to make them more accessible to a broader range of stakeholders.[86] Yet, the resulting rulemakings, by and large, are slow to improve and some remain as complex as ever. A recent study found that the reading level required to understand executive summaries, written in response to a new presidential initiative for greater clarity, is "now being written at a grade level not even close to the suggested seventh to ninth grade level" and tends to be even more complicated than the text of the rule they are summarizing.[87]

Perhaps even more problematic is that once the information costs become

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on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pt. 255).

81. *See* Krawiec, *supra* note 55, at 71–72 (observing the number of total comments and analyzing them); *see also* 76 Fed. Reg., at 68,846 (exemplifying a proposed rule for public comment that spans over 125 pages of the Federal Register).

82. *See* Krawiec, *supra* note 55, at 86 tbl.2.

83. *Id.* at 98 tbl.8.

84. Cary Coglianese, Challenging the Rules: Litigation and Bargaining in the Administrative Process 51 (1994) (unpublished Ph.D. dissertation, University of Michigan) (on file with University of Michigan).

85. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 283 (1991).

86. Farina, Newhart & Blake, *supra* note 21, at 1367–79.

87. *Id.* at 1396.

high enough, they serve not only to obscure the agencies' choices but the ultimate consequences and the stakes at issue.[88] Thinly-financed groups and the diffuse public may not be able to appreciate how regulatory decisions affect them in the first place. Even more important, groups that seek to advance the interests of the diffuse public may have a difficult time gaining credit from these unengaged constituencies for crafting time-intensive, but largely obscure and non-salient comments. This will decrease their benefits to investing in commenting. Moreover, even when these groups do persevere and file comments, there can be significant slippage that occurs on multiple levels between the substantive comments filed by self-appointed representatives and the needs and concerns of the population they purport to represent.[89] The way that information processing costs can obscure the implications of a decision for affected persons makes the perniciousness of information costs a double-whammy; the costs not only raise the cost of participation but also lower the perceived benefits or, in some cases, likely obscure them completely.[90]

The possibility that increasingly complex decisions might impede vigorous participation by the very groups they are supposed to engage has not escaped notice in the social sciences. As already noted, more than four decades ago, prominent political scientists expressed concern about structuring institutional accountability processes in ways that depend on voluntary engagement by a diverse set of affected parties.[91] Professor Gormley's network theory, for example, is based on the problem of opacity and growing complexity for participants; he examines rules where the information is highly complex, concluding that those instances are particularly susceptible to interest group dominance (what he calls "board room politics").[92] In so doing, Gormley

88. *See, e.g.*, Wagner, *supra* note 71, at 1372–1403.

89. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1333–50 (2016).

90. One of the tasks of higher stakes interests within the otherwise dormant majority is providing information and, thereby, lowering the costs of participation and increasing the chance of majoritarian activity. But the idea that interest groups may work to educate and activate others does not mean that this always works or works to the same extent in all settings. In many instances, the dynamics of participation make the group dormant because per capita stakes are too low to encourage dormant members to even listen. This sort of dormancy is likely to be increased by activities of concentrated interests to mislead and confuse the low stakes majority. For a discussion of this sort of dynamic both in the market and the political process, see KOMESAR, *supra* note 8, at 115–21.

91. Although Richard Stewart's concerns were more far ranging, he raised this particular problem as well throughout his article. *See* Stewart, *supra* note 20.

92. *See* Gormley, *supra* note 19, at 606.

develops a foundation for understanding how the costs of processing information can serve as a barrier to participation, particularly for those groups who lack substantial resources or do not have high enough stakes.[93]

Even earlier, other academics documented various information problems that threatened to crash the participatory system and thwart its central purpose in ensuring agency accountability. They also foresaw the possibility of these information problems becoming a permanent fixture in regulatory processes, leaving in their wake dramatically imbalanced representation and oversight. James Landis, for example, observed in 1960 that regulated industry—in large part through the never-ending stream of information—has a "daily machine-gun-like impact" on the agency that leads to an industry bias.[94] And Professor Louis L. Jaffe suggested as early as 1954 that by virtue of their continuing presence, regulated parties "capture" agencies through the constant stream of information they provide.[95] Later, in 1978, Professors Bruce Owen and Ronald Braeutigam noticed how stakeholders could use information games—filing voluminous and technical comments for example—to gain control over the agency.[96]

Thus, the confluence of the skewed distribution and daunting information costs operating through the dynamics of participation creates the dominance of minoritarian bias in the administrative process, particularly in the heart of this process—engaging in draft rules. However, to say that minoritarian bias is the dominant force does not foreclose the possibility of balanced or reasonable regulation that reflects the positions of dispersed interests. The two-force model of politics showed the conditions under which dispersed interests would be represented and even overrepresented. Even dispersed interests with low per capita stakes may have high enough stakes to be active especially in those settings where information costs may be lowered by the attention of the press or some other source of low cost information. There may also be instances in which high per capita stakes pockets within the dispersed interests will activate or represent the rest. The existence of legislative mandates reflects these forces within the political process and they no doubt operate within the administrative process as well.[97] As we shall see, there are also

93. *See id.*

94. CHAIRMAN OF S. COMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 71 (Comm. Print 1960).

95. *See, e.g.*, Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1113–19 (1954); Louis L. Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. INDUS. & COM. L. REV. 565, 566 (1970).

96. BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 4–5 (1978).

97. Statutes passed on the heels of a crisis provide particularly good examples of this

instances in which concentrated interests will appear on both sides of an issue, thereby negating the presence of the skewed distribution.[98] But the fact remains that the costs of information about both policy and the decisionmaking process are especially high in the administrative process, and we can expect that where a serious bias exists, it will be minoritarian bias.

In subsequent sections, we will see how the problems with information are linked to the actions of the adjudicative process in judicial review and how the cost of information not only causes minoritarian bias but is, in turn, caused by minoritarian bias. But first, it is worth emphasizing that this picture of distortions and biases in the administrative process is bottom-up, not top-down. Minoritarian bias in administrative decisionmaking does not require evil or corrupt public officials. Serious distortions and biases can easily occur even if we assume that bureaucrats have public-interest motivations.

Again, the culprit is the cost of information. An omniscient public official motivated by the public interest can easily glean the relevant substantive information including the concerns and interests of the general public and, therefore, may be trusted to choose optimal and unbiased policies. But if we drop the assumption of perfect knowledge, the process and the dynamics of participation can change radically. The now partially ignorant, but still public-interested, official must depend on others to provide information on the impacts of the policies he or she is considering. Assuming the dynamics of participation are subject to minoritarian bias and, therefore, that concentrated groups have significant advantages in understanding and effectively representing their viewpoints, the public-interested official will garner a distorted picture of public policy implications. The interests of concentrated groups would be given too much weight in final results.

In addition to being able to present a distorted picture of the public interest to the public-interested but ignorant public official, overrepresented interest groups can alter outcomes through political pressure on the White House.[99] At least in settings where the appointment is not in the public spotlight, administrators with ideological or public interest perceptions consistent with those of the overrepresented constituent interests enjoy an advantage in

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majoritarian action, such as the passage of the Superfund legislation on the heels of Love Canal or the passage of the Oil Pollution Act following the Exxon-Valdez oil spill. *See, e.g.*, Roger A. Stetter, *Private Cost Recovery Actions under the Louisiana Superfund Law*, 39 LA. B.J. 358, 358, 361 n.31 (1992) (documenting these developments).

98. *See infra* note 123 and accompanying text.

99. *See, e.g.*, Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015) (empirically documenting how high stakes groups have succeeded in changing rules consistent with their interests by lobbying the White House command center, the Office of Information and Regulatory Affairs).

the appointment process over those whose interests are at odds with powerful minoritarian groups. So long as candidates exist who represent a range of views on the public interest, the same biased results can occur if public officials whose views of the public interest are inconsistent with the views of the overrepresented group are replaced with public officials who have consistent views.

In effect, an interest group can obtain a favorable result in three ways: propaganda (the provision of one-sided information), replacement, and inducement (bribes, contributions, and so forth). Only the last is eliminated by assuming that public officials are public-interested. Because both propaganda and replacement can carry the distortions in organization and representation that are the core of the minoritarian bias, evil or corrupt motivation is not a necessary condition for these distortions.[100]

B. Minoritarian Bias and the Rules of the Game

Unfortunately, there is no reason to see the forces of minoritarian bias and the resulting overrepresentation of concentrated interests as limited to operating within an externally prescribed administrative process. These forces can come into play in the very creation of that administrative process itself. They can manifest themselves in all the decisions that produce and define the administrative process, such as the choice of how much public decisionmaking to allocate to the administrative process as opposed to the political process and the degree of complexity of the administrative process and its rulemaking. Here we can see the workings of the two-force model and the interaction between the political and administrative processes on a broader level.

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100. Concerns about minoritarian bias also do not disappear if we assume that interest groups are also motivated by public interest or ideology rather than narrow self-interest. Contests between conflicting ideologies or perceptions of the public interest can involve strong pressure groups and cause substantial redistributions (albeit not necessarily pecuniary redistributions) by the operation of the same sorts of biases and distortions as those associated with more narrowly self-interested contests.

As a general matter, environmentalists, anti-Communists, welfare rights advocates, law and order proponents, and others who might be seen as public-interested or ideological are participants in the same political process as producers who seek tariffs or farmers who seek price supports. When one interest group or another is overrepresented because they are better organized, better informed, or otherwise more influential, we have reason to worry about serious political malfunction regardless of whether the overrepresented group has ideological or pecuniary interests.

We begin with an analysis of the growth of the bureaucracy and the delegation of a significant part of governmental decisionmaking to administrative agencies; these delegations create many of the problems the courts are expected to oversee and even fix. Although there are functional or public-interest explanations for this delegation, such as the need for greater technical expertise, these explanations are generally regarded as incomplete.[101] Economists and political scientists have long suggested various other theories to explain the growth of the bureaucracy to replace or at least augment these public-interest theories. Some theories trace the power in bureaucrats whose interests are tied to maximizing the size of their regulatory bailiwicks.[102] Other theories consider the power in Congress whose members benefit by producing complex regulatory schemes and offering guidance through the resulting maze to their constituents.[103] However, these theories are based largely on a top-down view and thus ignore the role of interest groups and constituencies.[104]

Morris Fiorina responded to this problem by presenting an alternative theory that reflects the interaction between Congress and constituents in explaining the delegation and the growth of bureaucracy.[105] Employing the usual minoritarian bias conception of the interest group theory of politics, he argues that Congress wishes to shift responsibility for issues that involve diffused benefits and concentrated costs because these are intrinsically politically costly to members of Congress.[106] In turn, Congress wishes to decide concentrated benefit/diffused cost issues.[107]

However, this theory fails to generate the results it supposes because it relies on a one-force rather than a two-force model of politics. If one assumes that only minoritarian influence is present, delegating issues with diffused benefits and concentrated costs to administrative agencies would not be the most profitable (or lowest cost) strategy for congressional representatives. It would be more beneficial to simply vote against the regulatory legislation in

101. For a comprehensive summary of the literature and the arguments, see Fiorina, *supra* note 36, at 184–87.

102. *See generally* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (theorizing that monopoly public bureaus will seek to enlarge their size and power in efficient ways and that competition is necessary to check these tendencies).

103. *See* Morris P. Fiorina & Roger G. Noll, *Voters, Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy*, 9 J. PUB. ECON. 239 (1978); Morris P. Fiorina & Roger G. Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 AM. ECON. REV. (PAPERS & PROC.) 256 (1978).

104. *See* KOMESAR, *supra* note 8, at 90–97.

105. Fiorina, *supra* note 36, at 175–97.

106. *Id.*

107. *Id.*

question—a concentrated benefit/diffused cost vote. Fiorina's analysis, based as it is on a traditional one-force interest group model, cannot explain delegation and increased bureaucracy; the two-force model can.

If one assumes that it is easier and cheaper for constituents to learn about congressional action than action by administrative agencies or bureaucracy, majoritarian influence is likely to be greater in the congressional setting than in the bureaucratic setting. In situations where this majoritarian influence is significant, Congress may pass legislation that presents the appearance of a majoritarian victory while at the same time allocating the details and implementation to the less observable and more complex administrative process. In the administrative setting, the advantages of concentrated interests are greater and hence the likelihood of minoritarian influence increases. Here, concentrated interests can frustrate the ostensible purposes of the legislation. In a sense, delegation provides a way for congressional representatives to serve both influences.

Issues of environmental regulation, which form many of the examples employed by Fiorina, fit this two-force perspective.[108] One can easily envision the injury from air and water pollution as one in which the victim is the general public, where everyone bears a low cost per each act of pollution, and the injurers are large-scale industrial polluters. But, over time and over many examples of pollution, the majority has grown cognizant of the evils of pollution. In turn, most people running for elective office claim devotion to protection of the environment.[109]

There is reason, however, to doubt that these public expressions of support necessarily translate into *effective* environmental regulation. What a politician would never do on the soap box, he or she can produce by allocating implementation to the more complex, more hidden world of the bureaucracy. A politician may declare an abiding concern for the environment and even support broad (albeit vague) legislation but then leave important issues for implementation by administrative agencies more likely to be influenced by concentrated interests.

The issue comes down to the extent to which Congress legislates with specificity rather than leaving the details to the administrative process. Where majoritarian influences produce a push for regulation, minoritarian forces can blunt the victory by pushing the details of implementation over to the administrative process. As such, passage of broad legislation with delegation of crucial details to administrative agencies provides an attractive political strategy and, therefore, a reason for delegation and bureaucratic growth.[110]

108. *See, e.g.*, KOMESAR, *supra* note 8, at 26–27.

109. *See, e.g., id.*

110. *See, e.g.*, McCubbins, Noll & Weingast, *supra* note 10, at 244.

The results follow from the existence of the two forces and the relative advantage belonging to a concentrated minority in more complex, less observed settings.

Minoritarian control over the sprawling bureaucracy is further enhanced by these groups' investments in influencing Congress' appropriation decisions. Agencies cannot execute the long list of tasks set out for them in majoritarian legislation without resources. Thus, beyond continuous, "machine-gun" like engagement in the details of the rules themselves, high-stakes, well-funded opponents of regulatory projects can exert dominance over agency output by lobbying for significant budget cuts in the agency's funding stream.[111] Evidence of this strategy and the resulting minoritarian bias in agency decisionmaking surfaces throughout environmental and natural resource regulation.[112]

The third example of minoritarian influence with respect to the rules of the game brings us to the thorny issue of the inflation of information costs in the administrative process, an inflation that exacerbates the minoritarian biases arising from bureaucratic growth by raising the cost of information. It is entirely possible that the sizable cost of information and sophistication facing dispersed interests and their representatives are themselves inflated by the activities of concentrated interests and their allies within the political and administrative processes. Administrative law is premised on accountability and agencies must ensure that they are effectively communicating their proposals and final rules in ways that make the deliberative process work.[113] It is not enough to have processes that allow stakeholders to participate; agencies need to ensure that these opportunities for engagement are meaningful. But this foundational element may be thwarted by incentives within the administrative process. Paradoxically, if predictably, agencies may have a perverse incentive to avoid being succinct, clear, or accessible in their proposals and explanations.[114]

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111. *See* CHAIRMAN OF S. COMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., *supra* note 94, at 71.

112. *See, e.g.*, RENA I. STEINZOR, MOTHER EARTH AND UNCLE SAM: HOW POLLUTION AND HOLLOW GOVERNMENT HURT OUR KIDS 50–53 (2008) (describing this problem at the Environmental Protection Agency (EPA)).

113. *See, e.g.*, Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005) (describing accountability as the "basic mechanism of administrative or bureaucratic government"); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 57–61 (2008) (explaining that the duty to provide reasoning arises from fundamental rule of law principles that expect the state to justify its actions).

114. *See, e.g.*, Wagner, *supra* note 71 (making this argument).

There are many factors that make obscurity attractive to agencies including, as we shall see, the actions of courts.[115] But a major question remains: why should concentrated interests allow the agencies to make agency actions more difficult to follow and understand and, thereby, raise the costs of participation to these concentrated interests?

The answer lies in the differential impact of increasing information costs on the activities of concentrated and dispersed interests. Increasing costs can operate in two distinct ways. On the one hand, the simplest application of economic theory suggests that an increase in the cost of political activity will decrease the political activity of any interest group, including special interests. This is the absolute or direct cost effect. On the other hand, an increase in costs that also impedes the opposition can actually favor special interest groups. Because the degree to which any expenditures on political action are efficacious depends in part on the extent of activity by the opposition, increased costs of political action that decrease the activity of opponents make activity by the original party more effective. This indirect or relative cost effect cuts in the opposite direction from the direct or absolute effect. Where one side can better deal with the increased costs of political participation from, for example, increased complexity, the increasing costs of participation may lead to increased rather than decreased activity by that side.[116]

There is good reason for concentrated interests to be particularly interested in raising costs for dispersed interests even if it raises costs for them. Minoritarian bias works because an active minority dominates a dormant majority. But as we saw in the discussion of the two-force model, an active majority operating with knowledge of its interest is a powerful political force. An active minority dominates a passive majority, but an active majority beats an active minority. Concentrated interests, therefore, have an incentive to obscure settings and, thereby, raise the costs of information and participation. The very essence of the interest group theory of politics is that higher costs of participation favor concentrated interests.[117]

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115. *See infra* Part V.

116. For a more extensive discussion of the interaction of relative and absolute costs, see KOMESAR, *supra* note 8, at 90–91.

117. Beyond advancing the interests of select high stakes interest groups, agencies may sometimes have the incentive to obscure underlying policy choices in massive rules in order to get a rule through the process. When there is heated conflict and vigorous advocacy from the full range of stakeholders and elected officials, an agency's ability to finalize a rule will be stalled and sometimes stopped dead in its tracks. By contrast, rules that are voluminous and incomprehensible are more likely to survive political and legal processes. *See, e.g.*, Wagner, *supra* note 71, at 1343–51. As a result, the fact that agencies are not required to make participation meaningful creates a loophole of sorts that allows them to limit or even escape publicity and political conflict.

C. Sources of Variation—Virtual Representation, Substitutes, and Complements

There are a lot of agencies and, therefore, the possibility of variation in the patterns of participation. In this section, we offer some examples of variations we think important in addressing the connection between the problems in the administrative process and the possibilities of judicial review. We begin with the issue of virtual representation (the possibility that the skewed distribution will be corrected by concentrated interests on both sides) and then move to the issue of substitutes and complements (the possibility that the tasks assigned to an agency will be handled effectively elsewhere in society and the possibility that these actions elsewhere will interact positively with the workings of the agency).

We can see the workings of virtual representation in issues of consumer protection. Consumers are among the most dispersed of interest groups. In the context of many products and services, the low per capita stakes of consumers combined with the high cost of information about complex products and pricing create problems for consumer choices in the market.[118] But, if consumers face difficult participation problems in the market context, they would seem to face even greater ones in the administrative process where their per capita stakes are even more attenuated, and the costs associated with the complexity of product implications can be aggravated by the costs associated with understanding the administrative decisionmaking process. Here, virtual representation by catalytic subgroups (e.g., nonprofits or other groups that operate as proxy representatives for a subset of the broader affected public) provides a mechanism to advance some of the interests of the diffuse public.[119]

Yet, virtual representation provides only a partial remedy to the chronic underrepresentation of the diffuse public in political processes; the collective action and resource limitations that hamper their political participation also impede the public's ability to monitor those subgroups who purport to advocate on their behalf.[120] Among the many sources of slippage between the diffuse public and their virtual representatives is the absence of mechanisms available to discipline aberrant advocates and the lack of two-way conversations between advocates and diffuse constituencies with respect to identifying priorities and positions. Foundations and other funding sources do provide

118. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (making this argument throughout the book).

119. *See, e.g.*, Seifter, *supra* note 89, at 1302–04 (noting the critical role that interest groups play as proxy representatives in administrative process).

120. *See generally id.* (identifying mistaken assumptions and limitations of the traditional deployment of interest groups to serve as proxy representatives for the broader public).

some accountability checks on these virtual representatives, but the foundations' own objectives can limit the scope of this oversight or even skew a nonprofit's priorities away from rigorous representation of the diffuse public.[121] Moreover, at least some of the diffuse constituencies in need of representation seem likely to fall outside of the foundations' radar; foundations rarely present or manage themselves as surrogates for all affected members of the public.[122] Given these impediments, the diffuse public's interests may in fact be poorly represented by the virtual representatives in some settings, even when these catalytic subgroups exist.

There is, however, the possibility of concentrated interests on both sides of a regulation issue producing sufficient representation for otherwise dormant dispersed interest groups. For example, in antitrust issues such as mergers, the interests of consumers are represented by concentrated interests arguing for and against the proposition that the merger is contrary to the welfare of consumers.[123] Both sides will argue that their position increases consumer welfare. Proponents of the merger will point to cost savings and superior product development. Opponents of the merger will emphasize the reduction in competition and, therefore, higher prices to consumers. To be clear, neither side is likely motivated by increasing consumer welfare; each is most concerned with maximizing its own profits. But it is effect, not motivation, which is important. In this setting, the bureaucrats in the agency will hear both sides and likely feel political pressure from both sides. It becomes less necessary to marshal corrective devices like administrative judicial review to check these agency determinations. The agencies, like all institutional alternatives, will make mistakes, but we have no reason to expect a strong bias

121. RONALD G. SHAIKO, VOICES AND ECHOES FOR THE ENVIRONMENT: PUBLIC INTEREST REPRESENTATION IN THE 1990S AND BEYOND 186–88 (1999) (discussing the "troubling" features of nonprofit organizations' increasing ties with philanthropists and corporate interests and citing an environmental reporter as stating that the "growing stream of "big money" support has buoyed the environmental movement even as grassroots contributions have faltered, but in the eyes of some it raises a troubling question: Are the funders now calling the shots?"); Robert Cameron Mitchell et al., *Twenty Years of Environmental Mobilization: Trends Among National Environmental Organizations*, *in* AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT, 1970–1990 11, 23–24 (Riley E. Dunlap & Angela G. Mertig eds., 1992) (discussing co-option and related tendency of "professionalized" national environmental nonprofits to become bureaucratic and unresponsive to members).

122. *See, e.g.*, WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 58 (9th ed. 2014) (arguing that environmental nonprofits are becoming Washington insiders that advance narrow self-interested goals rather than those of the general public).

123. For a more extended discussion of antitrust issues, see Neil Komesar, *Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts*, 41 LOY. U. CHI. L.J. 443 (2010).

or direction in these mistakes. Given the imperfections in judicial review, or for that matter any corrective institutional alternative, these agency determinations should not be a prime target for correction. We will return to this subject in the context of the examination of judicial review.

Not all determinations made in the antitrust context display this sort of even-handed virtual representation. One example is consumer price fixing, which may be characterized as a skewed distribution of stakes with low stakes per capita for consumers.[124] In these price fixing cases, many people have paid an overcharge because of the illegal conspiracy. Here, the interests of this dispersed and, therefore, likely politically dormant group will remain underrepresented in administrative agencies because there are no high-stakes players to provide this representation. The competitors of the price fixers have limited incentive to attack the price fixing in the administrative process because of the costs of participating in that forum. They would instead attack it in the market where supracompetitive prices attract their attention and competition. This is, of course, the classic market mechanism to end price fixing. This competitive activity may vary with the costs and stakes for entry. But the important point here is that, in the price fixing context, competitors participate, if at all, in the market, not in the administrative process.

Virtual representation by high stakes business interests is likely not limited to the antitrust setting.[125] We can see this sort of issue worked out in the world of rent-seeking and protectionism. Protectionism is an example of overregulation sponsored by the same sort of concentrated interests that in many contexts oppose regulation.[126] Protectionism by one state against the producers of other states is the evil which arguably was at least part of the motivation behind the establishment of the European Union (and for that matter the American Union). It constitutes the focus of at least some of the judicial review stemming from the European Court of Justice.[127] Its cost to

124. *Id.* at 452–53.

125. Consider here the role of the insurer, State Farm, in the infamous *State Farm* case. Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983). As an insurer, State Farm was concerned about the costs of harm to the public at large from National Highway Traffic Safety Administration's (NHTSA's) rescission of passive restraint requirements in passenger cars. Yet, they filed their appeal of NHTSA's rulemaking to advance their own narrow, economic self-interest.

126. *See, e.g.*, Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REG., May–June 1983, at 12, 12–16.

127. There are parallels in the context of the U.S. Constitution, its founding, and constitutional judicial review—particularly the Dormant Commerce Clause. For an excellent discussion of the anti-protectionist focus of the European Court of Justice and one that, incidentally, makes use of the comparative institutional perspective employed in this Essay, see generally MIGUEL POLARES MADURO, WE THE COURT (1998).

consumers is significant by suppressing access to better and cheaper goods and services.

When concerns about protectionism or rent-seeking are added to other consumer protection issues, the result seems to be a minoritarian bias nightmare. Consumers are now the targets for both too little and too much regulation all at the hands of overrepresented, concentrated interests. Imagine the difficulties for a corrective device like judicial review in sorting out the direction, let alone the severity, of minoritarian bias.

But the sort of virtual representation on both sides we saw in the antitrust setting reduces the challenges of dealing with overregulation via protectionism and rent-seeking. Attempts at consumer protection regulation that involve the suppression of competition will likely have concentrated business interests on both sides. Whether the representation of these competing concentrated interests is truly balanced is a trickier question than it was in the antitrust setting where the interest of competition was more explicit. But the presence of significant high-stakes interests on both sides of a regulation issue can reduce the need to have external review—especially review by courts subject, as we shall see, to their own limitations and biases.[128] We will return to this issue in our consideration of the role of judicial review in Part V.

We can turn now to the analogous issue of the role of substitutes and complements in determining the need for correction of biases in the administrative process. In our discussion of antitrust, we suggested that price fixing might be corrected by the action of concentrated interests operating not in the administrative process, but in the market. This example suggests that the problems created by the skewed distribution in the administrative process might be corrected in other decisionmaking contexts. We can think of one other important example—product liability in the torts system as a substitute for (and complement to) product safety regulation. Here, the substitute process is civil litigation and the sanction is tort damages.

Where the injuries of poorly made products are manifested in significant per capita losses *ex post* and the causal trail between defect and injury is rela-

128. Where we have the regulations of one jurisdiction operating to exclude competition from outside the jurisdiction, the balance of competing interests seems reliable. But the correction of these problems does not require the use of judicial review of the administrative process under the Administrative Procedure Act. Judicial review here takes a directly constitutional tinge in the form of the Dormant Commerce Clause in U.S. jurisprudence, the work of the European Court of Justice in the European context, and the work of the World Trade Organization in the broader international context.

tively straightforward, products liability can operate to regulate bad products.[129] In product liability actions, we have the same large-stakes manufacturer of products and services that dominated the administrative process regulatory decisions, but now there are high-stakes players on the other side in the form of seriously injured victims and their contingency fee lawyers. The skewed distribution of stakes *ex ante* (the setting where the administrative process regulation operates) shifts to a more uniform distribution of stakes *ex post* where products liability operates.

As with market competition in the price fixing setting, the substitute for the administrative process is an imperfect decisionmaker. Most importantly, determination of damages and some aspects of liability are left to lay juries who clearly have less expertise than the bureaucrats assigned to regulate products. But because the distribution has shifted to high per capita stakes on both sides, the product liability setting is subject to considerably less minoritarian bias.

Product liability litigation and product safety regulation can be complementary by providing valuable information useful to each other. Where product safety agencies compile literature searches and dossiers on the risks of products, this information can be used by plaintiffs in products liability actions. Here, even if the minoritarian bias negates serious regulations, agency studies can nevertheless strengthen products liability litigation. Similarly, investigations and discovery carried out by plaintiffs' lawyers in product liability cases can uncover serious product problems and provide inputs into the regulatory process. The publicity that these cases create can even stimulate majoritarian activity in the political and administrative processes.[130]

Substitutes for and complements to the administrative process can play an important role in correcting the workings of that process or in correcting its results elsewhere. Given the imperfections in the administrative process and, as we shall see, in the workings of judicial review, we need to remain cognizant of these potential, if seemingly tangential, decisionmaking processes.

IV. THE DYNAMICS OF PARTICIPATION AND JUDICIAL REVIEW

A participation-centered analysis of use of the courts and judicial review of agencies brings more bad news. First, judicial review is premised on the notion that any party adversely affected by an agency rule can seek review,

129. For a more extensive comparative institutional analysis of the role of the market, regulation and tort liability and product safety, see KOMESAR, *supra* note 8, at 153–95.

130. *See, e.g.*, Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693 (2007).

but to use this oversight process, the party needs to have been engaged in the notice-and-comment or a related participatory process.[131] As we have seen, concentrated interests are likely to dominate the agency comment processes and, therefore, enjoy a leg up in the courts as well. Second, and more importantly, the adjudicative process and the dynamics of litigation create distinct advantages for concentrated interests. These forces mean that rather than alleviating the minoritarian bias in the administrative process, judicial review can aggravate it. Here, judicial review provides the stronger, overrepresented interests with another bite at the apple. In so doing, judicial review can also result in delay and ossification of agency rules.[132] The problem is structural: as interpreted by the courts, judicial review under the APA interacts with the dynamics of litigation to increase minoritarian bias. This perversity does not require badly motivated judges or litigants. Judges may be interested in protecting dispersed interests. The APA does not produce interest group pluralism because the dynamics of litigation assure that much of the public—because it is dispersed—will not be represented or will be thinly represented compared to concentrated interests.

Faced with these problems, there are two plausible strategies: eliminate or reduce judicial review, or reform it. In the first two sections of this Part, we examine the adjudicative process and see the source of the problems in the judicial review of the administrative process. There is a strong case to simply eliminate this judicial review. But given the severe malfunctions in administrative decisionmaking and its central place in U.S. public policy, we are reluctant to jettison a potential source of correction of the administrative process. In the third and fourth sections of this Part, we explore and propose reforms to the judicial review of the administrative process.

A. The Adjudicative Process

From a comparative institutional perspective, judicial review is always a question of institutional choice in which one of the choices is the adjudicative process. So, we begin our consideration of judicial review of the administrative process by looking closely at the adjudicative process.[133]

Analyzing the adjudicative process raises three broad institutional considerations: the dynamics of litigation, the physical capacity of the adjudicative process, and the competence or substantive ability of adjudicative decisionmakers such as judges and juries. These three considerations interact

131. *See generally* McKart v. United States, 395 U.S. 185, 193–95 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court).

132. *See, e.g.*, McGarity, *supra* note 2, at 1410–20.

133. Much of this analysis is drawn from KOMESAR, *supra* note 8, at ch. 5.

with each other and with factors like numbers and complexity to determine the performance of the courts, including the judicial review of agency rulemakings.

These interactions are played out against the background of the structure of the adjudicative process. Compared to the administrative and political processes and the market, the judicial or adjudicative process exhibits three distinctive structural elements. First, the adjudicative process is more formally defined and has more formal requirements for participation than do the other institutions. Second, the adjudicative process is much smaller—its physical resources and personnel are far fewer—than the administrative, political, or market processes, and more importantly, it is far more difficult to increase in size.[134] Third, judges, the central officials of the judicial process, are more independent from the general population than either their market or political counterparts, and even the bureaucrats that staff the administrative process. These three basic characteristics—higher threshold access cost, limited scale, and judicial independence—are related.

The independence of judges stems primarily from their terms of employment. Federal judges serve for life and cannot be removed except by a cumbersome impeachment process.[135] Compensation is set for these judges as a class, and Congress cannot single out the compensation of individual judges.[136] Replacing judges is a longer-term strategy than replacing legislators or administrators. Financial inducement of judges is more difficult to arrange than with elected officials because elected officials have a more pressing need for campaign contributions and because contributions to elected officials carry fewer sanctions.

Independence, or at least insulation from unequal influence, is also increased by the manner in which information comes to judges. Information is largely funneled through the courtroom and the adversarial process. Obviously, judges are not immune from pretrial sources of information; they were not born on the day of trial. But informal, ex parte discussion is, at least formally, precluded and is, in reality, much more difficult to accomplish than in the less formal political and administrative processes let alone in the highly

134. In our analysis of the administrative process, we are also considering the effect of the constraints of agency budgets. But, the implications of size, scale, and budget are more profound for the adjudicative process because changes in size are far more difficult in that context. That is, agency budgets and size can be changed far more easily (although not necessarily by the agency itself) than can the scale of judicial activity.

135. U.S. CONST. art. II, § 4.

136. U.S. CONST. art. III, § 1.

informal market. The requirements of written complaints, service, and notice, along with pretrial discovery and the rules of evidence are designed to give all parties to a lawsuit equal access both to information and to official decisionmakers. As a result, relative to the other two institutions, there are natural limits to the influx of information and argumentation that arise from the scarce resources of the judiciary itself. In terms of information, then, courts tend to level the playing field between participants.[137]

From a social standpoint, the greater insulation of judges from the various pressures, produced in part by the presence of all the formalities, provides an important source of comparative advantage for the adjudicative process. This independence provides judges with the opportunity to shape social decisions without some of the systemic pressures that distort other institutions. The dynamics of participation via direct influence of judges is restrained when compared to such forces in the political and administrative processes.

These features of the adjudicative process lend support to the popular image that the judicial process is more evenhanded and its officials more independent than political officials. However, the same structural elements and safeguards that produce independence and evenhandedness raise the cost of participation—the cost of litigation. The resulting rise in the cost of participation limits the range of issues seen by the courts relative to other institutions. It also can cause significant differences between formal equality of participation and actual equality of participation as the increased cost of litigation precludes certain groups and issues. This is a central theme in considering judicial review of the administrative process.

The cost of participation in the adjudicative process, like the cost of participation in the market and the administrative and political processes, is dominated by the cost of information. In the adjudicative process, the formalities and complexities of the process itself require such a significant accumulation of knowledge and experience that the virtually universal manner of dealing with them is to hire an expert—the lawyer. Thus, although litigants can, in theory, represent themselves in court, few litigate their interests without the significant, indeed often dominating, presence of a hired lawyer with expertise in the particular area of law. Lawyers are hired as the least expensive (but certainly not inexpensive) way to deal with the daunting information costs of litigation.

The high threshold costs of litigation, interacting with the distribution of stakes, can keep the courts from a given social issue and even from large sets

137. *See, e.g.*, Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997) (discussing how court processes naturally create a stopping point on the amount of information and number of issues that can be considered).

of social issues as these costs of litigation keep low-stakes players and those with limited experience with adjudication from raising these issues.[138] The high threshold costs associated with the formal requirements of the adjudicative process will not preclude all issues, nor do they mean that the cost of participation in the adjudicative process will necessarily be higher than the cost of participation in other institutions. That depends on the setting. The point here is that the judicial independence that distinguishes the adjudicative process from other institutions comes at a significant cost that will affect the number and type of issue handled by the judiciary.

A second important systemic variable is the scale or size of the institution itself. In theory, the implications of increasing or decreasing the physical capacity (the scale) of any institution are significant in determining the ability of that institution. However, the constraints on the size of the adjudicative process and the implications of these constraints on judicial choices are more obvious and dramatic than any comparable constraints on the size of the market and political processes. In fact, it is the relative ease with which the market and political processes expand that creates the demands that strain the physical capacity of the adjudicative process. It is the output of these larger institutions that the courts are called upon to review.[139]

The most important constraint on the expansion of the adjudicative process stems from the central role of judges, particularly of appellate judges. The main bottleneck here is the appellate court structure. Each judicial system within the United States has, at its apex, a supreme court meant to articulate the rules under which adjudication takes place, to define the rights that trigger litigation, and to correct mistakes by and conflicts among the lower courts. These supreme courts are staffed by a small set of judges. The most obvious reform, increasing the number of judges on these high courts, does not easily or even necessarily increase the output of this court. Although an increase in judges would decrease the per judge load of opinion writing, it would likely increase the time and effort necessary to reach a collective decision by this body.

It is by no means impossible to expand the judiciary. The U.S. judiciary

138. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–87 (1991).

139. Judicial review of the market may seem a totally foreign concept to some. Judicial review is a concept commonly associated with public law such as constitutional and administrative law. But judicial review occurs throughout the law as courts determine their role in private law like contracts, commercial law, and corporate law. In each of these contexts, courts are deciding whether to substitute their determinations for market determinations. In this sense, judicial review, and more importantly, institutional choice, is everywhere in the law.

has grown significantly. But, as the U.S. experience indicates, this growth is far less rapid than the growth in the alternative institutions. It is difficult to imagine the judiciary growing at the same rate as these other institutions without eradicating most of the attributes we associate with the adjudicative process.

B. Existing Judicial Review and the Case for Its Elimination

The APA provides formal mechanisms for institutional accountability by allowing affected interests to influence and oversee agency action.[140] Specifically, the APA provides any interested party with a right to participate in an agency rulemaking.[141] If the agency ignores a commenter who has identified that the agency has acted in ways that are arbitrary, capricious, or fall outside of the statutory authority left to the agency by Congress, or if the agency violates procedural requirements, then that commenter can challenge the agency's rule in court.[142]

The courts have strengthened judicial review under the APA and expanded the range of interest groups that have a right to question agency results and seek judicial review.[143] In theory, then, all interest groups are invited to join the process. Interest group pluralism has seemingly been promoted.

And yet many administrative law scholars have criticized judicial review as having adverse and even perverse impacts on the administrative process. Scholars have long noted a possible causal connection between vigorous judicial oversight and resulting agency inaction.[144] Judicial review is linked to more, not less, overrepresentation of concentrated interests in administrative

140. 5 U.S.C. §§ 553(c), 706 (2012).

141. *Id.* § 553(c).

142. *Id.* § 706(2)(a).

143. *See generally* Stewart, *supra* note 20 (making this argument).

144. McGarity, *supra* note 2, at 1451; Pierce, Jr., *supra* note 3, at 300–02. While empirical research casts some doubt on whether this type of "ossification" or abandonment of the rulemaking process is systemic across all agencies and programs, *see, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012), there is strong evidence that it does exist in subareas of regulation where industry or other well-financed opponents to majoritarian regulation are positioned to oppose and challenge the agency at every turn. *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012).

decisionmaking. In turn, it is linked to a significant role of concentrated interests in negotiations before rules are set out.[145] And if a rule adverse to concentrated interests escapes these negotiations, concentrated interests bring the issue to the courts, thereby substantially delaying implementation.[146] In this scenario, the judicial review operates to handicap those agencies seeking to serve the public interest.

Perhaps the problem lies in the ideology of judges. Judges hostile to regulation should in theory favor the position of anti-regulation concentrated interests. Yet, as Komesar has previously observed, judicial decisions regularly protect dispersed interests.[147] These dispersed, interest-favorable decisions have even emanated from courts where Republican-appointed judges were in the majority.[148] This same study, however, also found that these judicial decisions and pronouncements were ignored by the relevant agency and that overrepresentation of concentrated interests in rulemaking continued.[149]

If we give credence to the picture painted by these examinations of judicial review, we see perverse effects that increase the role and influence of concentrated interests even in the context of well-intentioned judges who are seeking to overcome the effects of this influence. Is this possible? Even a quick examination of the workings of both the administrative and adjudicative processes shows that it is.

As we saw in the last section, minoritarian bias in the adjudicative process can occur even if judges are aware of this evil and seek in their decisions to overcome it. The source of minoritarian bias in the adjudicative process lies in the dynamics of litigation, a subset of the dynamics of participation where concentrated interests have the incentives to understand and use litigation and judicial review while dispersed interests may be dormant.[150]

In turn, this pattern of the use of judicial review creates an incentive for the agencies to give greater weight to the positions of concentrated interests.

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145. *See, e.g.*, Wagner, *supra* note 71, at 1372–403.

146. *See, e.g.*, OWEN & BRAEUTIGAM, *supra* note 96, at 4–5 (1978) ("The delay which can be purchased by litigation offers an opportunity to undertake other measures to reduce or eliminate the costs of an eventual adverse decision."); Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 737–38 (1991) (explaining that companies and trade associations are economically incentivized to appeal regulations through appellate litigation).

147. *See* Wagner, *supra* note 5, at 1740 (observing that the majority of successful litigation was brought by public interest groups).

148. *See, e.g.*, *id.* at 1744.

149. *Id.* at 1787–88.

150. *See, e.g.*, *id.* at 1747 (observing that public interest groups did not file any comments on roughly 50% of the hazardous air pollutant rules promulgated by the EPA).

Failure to do so threatens the agency and its budget with the prospect of continuing litigation. Even if this litigation by concentrated interests has little merit, it saps the resources of the agencies and delays rules. On the other hand, because dispersed interests tend to be dormant, agencies have less fear of litigation from that quarter even if previous litigation by dispersed interests has been successful.

Thus, even in a world in which judges recognize the potential for minoritarian bias in agency decisionmaking and seek in their decisions to protect dispersed interests, judicial review can favor concentrated interests. In turn, minoritarian bias in judicial review can produce or enhance minoritarian bias, even in agencies staffed by bureaucrats seeking to serve the public interest, because of the impacts on agency budgets and deadlines. We do not need judges and bureaucrats favorable to the positions of concentrated interests to see these positions overrepresented due to judicial review.

The skewed dynamics of litigation further increases the costs of information. The prospect of judicial review encourages agencies to ensure that their administrative record is complete and that they have adequately defended their rule against multiple challenges, carefully responding to each comment. The results are rules that can be quite convoluted and lengthy.[151] Agencies, unfortunately, face a much better chance of dodging both congressional and presidential oversight with long, complex rules because most of the audience will not know what to make of them.[152]

Case law emerging in the courts' review of agencies reinforces rather than counteracts the incentive for agencies to promulgate rules that can be effectively inscrutable. For their part, the courts require commenters to raise every concern "with specificity" during notice-and-comment if they wish to preserve their ability to challenge the issue in a subsequent appeal.[153] Long, detailed, and often multiple rounds of comments offer a time-tested way for commenters to protect their interests.[154] Again, the rule and its record grow

151. *See* Wagner, *supra* note 71, at 1331–32.

152. For discussions of the large role that both the President and Congress play in the substance of agency rulemakings in the United States, see Farber & O'Connell, *supra* note 7 (discussing the important role of the President in intervening in regulations); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) (describing the same for Congress).

153. *See generally* Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1 (1985).

154. Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, NAT. RESOURCES & ENV'T, Summer 1990, at 9, 9–10 (recounting the following advice from regulatory attorneys: "Make sure that you submit to the Agency *all* relevant information supporting your concerns in the rulemaking. This is the best way to convince the Agency to

longer and more convoluted, rather than the reverse, in response to these judicial incentives.

Other judicial doctrines further aggravate, however unwittingly, the inaccessibility of the agencies' reasoning to the full range of engaged stakeholders. For example, the courts established a "logical outgrowth test" that requires agencies to start the notice-and-comment process over if significant changes are made to a rule proposal and those changes were not originally subjected to comment.[155] This test thus creates legal incentives for agencies to develop rule proposals that are as complete as possible before they are published for notice-and-comment.[156] Unsurprisingly, to avoid the possibility of surprises from commenters, some agencies reach out to the most litigious groups before the proposed rule is published to ensure that all significant concerns have been considered and ideally resolved.[157] As one agency staff member remarked, "We help them; they help us."[158] However, these pre-proposal deliberations are not regulated by administrative process and the agency need not even log these communications. As a result, rulemaking participants who are not privy to these pre-proposal negotiations will not be alerted to the fact that these discussions occurred, much less what types of agreements might have been reached before the agency developed the proposal that it shared with the public.[159]

Perhaps the hope of the APA and the judicial interpretations that sought to expand judicial review was based at least in part on pluralism. But powerful systemic forces make the resulting process fall dramatically short of pluralism. Everyone may be invited to participate in the comment and judicial review processes, but only certain interests will accept the invitation. The dynamics of litigation mean that concentrated interest will dominate the comment and judicial review processes. Well-meaning judicial devices have only increased the costs of participation by increasing the costs of information. And these increased costs of participation have increased minoritarian bias in the administrative process.

This sad tale suggests that it may be in the public's interest for courts to

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respond favorably to your concerns.").

155. *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741, 757–63 (D.C. Cir. 1991) (holding that the agency failed to provide meaningful notice-and-comment opportunities on issues in the final rule; the issues were raised by commenters during the notice-and-comment process).

156. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992).

157. *See* William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 69–70 (2004).

158. *See* Coglianese, *supra* note 84, at 14.

159. *See* Wagner et al., *supra* note 55, at 102–03.

back away from serious judicial review of the administrative process altogether. This step would not be doctrinally difficult since the present level of judicial review was created by judicial interpretation of the APA in the first place. If the courts giveth, the courts can taketh away. Judges would need only send the signal that review of agency determinations would receive little or no serious scrutiny. This cessation of judicial review is a proposal that must be taken seriously. It is the fallback position for the reform proposals we are about to present.

C. Refocus and Reform

Like the sources of problems with the existing form of judicial review under the APA, the problems with simply dropping judicial review are fairly straightforward. The political and administrative malfunctions that characterize administrative decisionmaking in many areas may have been aggravated by the present system of judicial review. But they are at base a product of systemic problems unrelated to judicial review. These systemic problems are long-term, and if anything, seem to grow more severe over time. Reform through the political process is at best sporadic. For these reasons, we are reluctant to jettison judicial review without a consideration of how it might be reformed. The analytic framework we have been employing gives us directions for this reformation. But, as always, it also warns us that all alternatives will be imperfect and provides us with a checklist of potential problems.

1. Focusing on Minoritarian Bias

From a comparative institutional viewpoint, the judicial review of administrative decisionmaking should be focused on instances of severe administrative and political malfunction—almost exclusively on instances of severe minoritarian bias. The courts cannot continue to treat all parties and all issues with the same degree of judicial concern and scrutiny. To be clear, the issue here is not an association of correct policy results with the concerns of dispersed interests. Concentrated interests have important and valid positions. But those positions are well represented and quite likely to be realized in the political and administrative processes without any aid from judicial review. The results of the administrative process heavily reflect the positions of concentrated interests. Dispersed interests are systemically underrepresented. The task of judicial review must be defined in part as correcting or alleviating this underrepresentation.

There are two major reasons for this focus. First, the resources of the adjudicative process are severely limited, and a small subset or focus must be

found.[160] It only makes sense that this focus should be defined primarily in terms of the most severe need for correction. Second, focusing on the underrepresentation of dispersed interests minimizes the chance of the sort of perverse results of judicial review we just discussed.[161] Without a clear focus on the needs of the dispersed interest groups, any form of judicial review will be hijacked by concentrated interests who always understand the rules of the game and know how to exploit any opportunities. The courts must correct the tendency for judicial review to fall into the hands of concentrated interests. If this cannot be done, then *no judicial review* would be the superior solution.

There is a question of how explicit the court should be in casting administrative judicial review in terms of protecting the interests of dispersed interest groups. Courts would be understandably uncomfortable setting up a threshold that will itself generate litigation. The concept of an underrepresented dispersed interest is not self-defining. But if we are realistically considering a strategy for broad-based judicial review, the concern for underrepresented dispersed interests can no longer be implicit. Because concentrated interests have the incentive, experience, and resources to effectively game any system, there is too great a chance for too much and the wrong kind of judicial review unless courts are clear in their focus. The task of defining who is underrepresented or dispersed will just have to be handled by initially seeking out obvious examples and depending on the work of social scientists to define an effective measure of under representativeness.

An initial reaction will of course be that there cannot be two levels or two versions of judicial review of the administrative process—one for dispersed interest and another for concentrated interests. But it is hardly unusual to see judicial review based on a greater protection for groups ill-represented in the process under review. One only needs to consider the standard multiple level tests for judicial scrutiny found in equal protection law.[162] Put in equal protection terms, we are suggesting that claims made by concentrated interests would be subject to minimal (basically zero) scrutiny and claims made by dispersed interests would be subject to serious scrutiny.

What one sees throughout constitutional law is the heavy imprint of institutional choice—sometimes explicated, sometimes not. Not all political process actions can be subjected to serious constitutional judicial scrutiny,

160. *See, e.g.*, KOMESAR, *supra* note 8, at 142–49 (discussing limitations due to the small scale of the judiciary in more detail).

161. *See supra* notes 132–137 and accompanying text.

162. For a discussion of the threshold tests for judicial review under equal protection (and other constitutional provisions), see KOMESAR, *supra* note 8, at 250–54.

whether it is in terms of equality and the Equal Protection Clause or any other constitutional protection. In fact, only a fraction of government action could be subjected to serious constitutional judicial review because of the significant difference in the relative size of scale of the political and adjudicative processes discussed earlier.[163] What is true for constitutional judicial review is true for administrative judicial review. Courts will devise rules for review and oversight that are shaped in part by the judiciary's own limited resources. Working out the balance between the abilities and disabilities of the administrative process and the courts occupies the rest of this Essay. But it is important here to realize that judicial review is problematic without finding and focusing on a subset of administrative decisionmaking and that sensible judicial review means focusing on severe administrative and political malfunction.

It is not difficult to find the basis for this focused judicial review in the APA. The core image of the APA is based in part on interest group pluralism.[164] Given the overrepresentation of concentrated interest in the present administrative process, pluralism requires that the underrepresentation of dispersed interests be alleviated. At the very least, the court should play a role that decreases rather than aggravates this underrepresentation. The emphasis of the APA is on access and participation. The courts should pick up this thread and focus on the reality of access or participation, not its formality. All interests are not created equal. Having recognized the severe distortions in participation and access inherent in minoritarian bias, the courts should build the edifice for judicial review on the participation core of the APA.

However, the analytical framework we employ in this Essay and, in particular, our analysis of the adjudicative process immediately shows us potential problems with the broad-based plan for judicial review we are proposing. We are asking the courts to examine a potentially large range of public policy and, as such, we would seem to be confronting serious issues of scale. But these concerns seem to fade when we recognize that we are asking the courts to do less than the present system of judicial review under the APA. Under the plan we are proposing, a great part of what now is brought before courts will no longer be an issue. Claims by concentrated interests will receive minimal scrutiny, which in turn decreases strains on scale. The judicial review framework remains focused on administrative rulemaking and makes use of administrative expertise by presuming the validity of the rules, at least at the outset.

In fact, a great deal more can be pared away from the task of judicial

163. *See supra* Part IV.A.

164. *See supra* notes 56–57 and accompanying text.

review by asking whether particular areas of substance require review under our proposal. Our earlier discussion of virtual representation in the adjudicative process suggests that there are entire areas of administrative decisionmaking that can receive minimal scrutiny. As we saw in the discussion of the administrative process, dispersed interests may sometimes be represented by concentrated interests that have parallel, if not identical, concerns and concentrated interests on both sides of an issue may in balance produce sufficient representation of otherwise dormant dispersed interest groups.[165] When this virtual representation appears on both sides of an issue, the skewed distribution is ameliorated and courts can give these issues minimal scrutiny.

We saw this saga of virtual representation played out in the antitrust context and in instances in which consumers might be harmed by overregulation in the form of rent-seeking and protectionism.[166] Because of this form of virtual representation, these settings have a greater possibility of correction within the internal political and administrative processes. This is not a panacea, but the realities of the dynamics of participation in the administrative process and the adjudicative process suggest that the focus of the judicial review strategy should be elsewhere. Refocusing judicial review on minoritarian bias means leaving areas of inquiry where minoritarian bias is unlikely to the administrative process by giving these issues little or no serious judicial scrutiny.[167]

We could go further and suggest that claims of overregulation should in general receive minimal scrutiny. We do not claim or believe that these considerations are groundless. We do believe, however, that they are already well represented and that they have been ardently argued in the political and administrative processes by concentrated interests that oppose the regulation. Therefore, they should not be given additional examination in judicial review, especially because they provide concentrated interests a conduit to judicial review where the dynamics of litigation gives them the advantage.

In turn, this brings us to the case of the overzealous or unsophisticated bureaucrat and the issue of cost-benefit analysis in rationality review. In the abstract, we have no objections to cost-benefit analysis. Indeed, Komesar is

165. *See supra* note 123 and accompanying text.

166. *See supra* notes 124–127 and accompanying text.

167. There is an added twist here. Because of the presence of concentrated interests on both sides, the dynamics of litigation would predict calls for judicial review by the losing side more frequently than in instances in which the losing side is only a thinly-financed representative of a dispersed interest. Thus, we get a demand for judicial review that is greater in instances in which it is least needed. This analysis suggests yet another reason why courts should be careful about offering serious judicial review in these contexts.

an economist who has loaded his comparative institutional analysis with considerations of the costs and benefits of participation. The problem with cost-benefit analysis in rationality review lies in the power of minoritarian bias in the adjudicative process and in the dynamics of litigation.

As a general matter, it seems likely that some regulators will be controlled by the influence of concentrated interests in both the administrative and political processes. Articulated or not, the costs of regulation are already significantly represented by concentrated interests in the administrative process. More importantly, bringing cost-benefit analysis into judicial review of over-regulation provides a sizable backdoor to the sorts of misuse of judicial review by concentrated interests we discussed in the previous section. Anyone with a modicum of sophistication in economics and a bit of imagination can identify varieties of costs that agencies have neither articulated nor described well. We have already seen the ability of concentrated interests to find in judicial review a way to threaten those regulations that make it through the administrative process. Providing serious judicial scrutiny for claims of overregulation opens judicial review to the greater likelihood of aggravating rather than alleviating the existing minoritarian bias in the administrative process. It again allows concentrated interests to employ the judicial review process to get another bite at the apple and delay worthwhile regulation.

Before leaving the subject of judicial review of the administrative process, we should offer a few words on the power of the political process to completely remove judicial review from the picture. The political process controls the rules. It can alter the APA or eliminate regulatory mandates and, thereby, eliminate any aspect of administrative judicial review hostile to the positions of the controlling concentrated interests.[168] In other words, if minoritarian bias was serious enough in the political process, we might see new legislation or presidential directives negating or severely diluting the role of judicial review or more broadly the regulatory mandate itself. Therefore, when we speak of a strategy for administrative judicial review that deals with serious minoritarian bias, we mean minoritarian bias serious enough to need judicial review but not serious enough to have the political process eliminate administrative judicial review. If the political process explicitly ends administrative judicial review, the only judicial role would lie in constitutional judicial review.

Until the 2016 election, it seemed unlikely that legislation would completely sweep aside judicial review or that regulatory mandates would occur

168. For a current illustration, see, for example, *The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law, of the H. Comm. on the Judiciary*, 114th Cong. (2016).

because gridlock in the political process negated any such sweeping changes.[169] That is no longer so obvious, although it is still too early to tell. However, majoritarian pressures at the legislative level are likely to slow legislative action that openly eliminates regulatory mandates. From the earlier discussion of the two-force model, we saw reasons to believe that action by Congress or the President revoking certain forms of regulation might be met by majoritarian activity and that the fear of this majoritarian reaction might cause concentrated interests to want to operate in the more opaque world of the existing system of administrative decisionmaking rather than openly in political decisionmaking.[170] Here, they can operate more subtly, either through the appointment of administrative actors friendly to the reduction of regulation or by budget decisions starving an agency, rather than attempt to clear the table.

In this section, we primarily considered refocused judicial review in terms of the issue of scale. However, this is not the most important stumbling block in our proposal to reform judicial review. The major problems lie in the dynamics of participation and, in particular, the dynamics of litigation. Now we must turn to the challenges created in finding representation for dispersed interests within the refocused system of judicial review we propose.

2. The Challenges of Representation

If minoritarian bias is serious, it is unlikely that dispersed interests will represent themselves. Someone else must do it. We spoke of dispersed interests in terms of very low per capita stakes. But we also noted that there may be variation within the distribution of per capita stakes for the dispersed interest group. This heterogeneity affects the possibility of action on behalf of this dispersed interest group by subgroups of higher stakes individuals. This action can take the form of informing and organizing lower per capita stakes members of the majority or it can take the form of direct representation. In the first instance, those with higher stakes operating as a catalytic subgroup activate the more dormant members. But especially where activation is improbable, these catalytic subgroups can operate directly in the form of public interest litigants. In the environmental area, for example, there are groups like the Sierra Club, the Natural Resource Defense Council, Earth Justice, and so on. Judicial interpretation of the APA has extended standing to these

169. *See, e.g.*, E.W., *Unprecedentedly Dysfunctional*, ECONOMIST (Sept. 22, 2014), https://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock (observing in 2014 that "from the federal shutdown to gun control, stalemate is America's political norm. Congress is more interested in playing politics than solving problems.").

170. *See supra* Part III.A.

groups representing dispersed interests since the 1970s.[171]

We are asking the courts to expand the range and importance of groups claiming to represent the interests of dispersed majorities. Currently, public interest groups lack both the resources and the incentives to engage many important rules that affect the broader public. In a number of rulemaking programs, public interest groups are unable to submit comments on roughly half the public-benefitting rules.[172] Commenting is time-consuming and may yield limited benefit to donors and members because there is no clear "win" and the issues are tedious and detailed.[173] Even in the rules for which they do file comments, the vast majority of comments and hence the credible threats of litigation come from industry.[174] But, if the public interest groups do not file comments, any adverse features of the rule regarding the broader public interest are unlikely to be raised and, therefore, deemed waived for purposes of judicial review, even if the rule is patently illegal.[175]

We have two proposals we think may help. These proposals adjust the dynamics of litigation to change the incentives of the parties and, at the same time, help provide funding for dispersed interests. The first proposal provides subsidies for litigation by thinly-financed groups and simultaneously increases the chance that agencies will take the positions of dispersed interest more seriously. Even when judges rule in favor of dispersed interests, agencies in some cases ignore or delay repairing the rules.[176] Once again a significant culprit is the underrepresentation of dispersed interests in the dynamics of litigation. The favorable rulings mean that some public interest representative of the dispersed interest has successfully brought litigation. But the failure of the agency to respond to these results stems from the agency's realistic assessment of the prospect of continuing litigation by the dispersed interest side as well as political reinforcement for its position. Agencies wary of litigation have less to fear from dispersed interests than from concentrated interests, regardless of whether the litigation is the first attempt at judicial

171. *See, e.g.*, Stewart, *supra* note 20 (discussing this development).

172. *See, e.g.*, Wagner et al., *supra* note 55, at 108–09.

173. *See* Wagner, *supra* note 71, at 1384–88 (discussing the impediments that thinly financed groups face in filing comments on complicated rules).

174. *See, e.g.*, Wagner et al., *supra* note 55, 128–32.

175. *See supra* note 153 and accompanying text; *see also* Gabriel H. Markoff, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065, 1068–72 (2012) (discussing the exhaustion of remedies requirement in administration law and exploring its adverse implications for diverse engagement by all affected groups); Wagner, *supra* note 5, at 1783–84 (noting the prevalence of EPA's air toxic emission standard rules that did not trigger comments from public interest groups and the repercussions for judicial review).

176. *See, e.g.*, Wagner, *supra* note 5, at 1750–64.

review or a subsequent attempt to implement favorable rulings. This is true even if the chance of a favorable response from the courts is greater in dispersed interest litigation than in concentrated interest litigation. It is the chance of litigation, not the chance of winning, that is the problem.

Our suggestion here is relatively straightforward. Courts should shift the cost of dispersed interest litigation, which includes the costs of the investigative research needed to understand the rule, to the agency. We would apply this cost-shifting only to prevailing dispersed interest petitioners. Although this would leave dispersed interests with the task of funding prior to the outcome of the action, it would focus support on those cases that have the highest credibility. The legal rationale for such a shift can be found by implication from the comment provisions of the APA. These provisions attempt to increase public participation in administrative decisionmaking. This purpose makes the realities of participation fundamental.[177] Correction of underrepresentation in the judicial review process is an essential element in realizing goals of the comment provisions. Sanctioning agencies for failure to adequately consider the interests of dispersed interests is a sensible step.

Simultaneous with this subsidy, the courts should adjust the case law requiring the exhaustion of remedies before filing suit in cases, especially where parties can demonstrate that their financial support precluded early engagement in rulemaking. Several authors have criticized courts' creation of an exhaustion requirement for groups that operate on thin financing by proposing reforms.[178] Along with the shifting of litigation costs, these measures provide thinly-financed groups with more access to litigation and level some of the skew in the dynamics of litigation in administrative process discussed earlier.

Our second suggestion is the mirror image of the first and relates to the overrepresentation of concentrated interests in the litigation of judicial review. The suggestion would be to shift the litigation costs of the agency to any concentrated interest challenger who brings unsuccessful challenges to agency rules. Here the legal rationale can be found either in the same analysis of the notice-and-comment provisions or by taking more seriously those standard civil procedure provisions that allocate costs to any party that brings frivolous litigation.[179] There has been long-standing concern about the ability of concentrated interests to bring prolonged litigation with little or no

177. For a complementary proposal, see Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012).

178. *See* Markoff, *supra* note 175, at 1087–89 (proposing a reform that adopts a default presumption against an exhaustion defense).

179. *See, e.g.*, FED. R. CIV. P. 11.

merit to delay the implementation of regulations.[180] By making these concentrated interests pay for the cost they are imposing on the agency's budget, the shifting of costs may decrease such legal actions and increase the incentive for the agency to resist these low merit claims.

Before reaching the problems associated with the two proposals, we should summarize the behavioral changes we might expect from these provisions. The shift of costs from dispersed interest litigants to the agency should produce two largely salutary results. First, it increases the participation of public interest groups representing dispersed interests thereby correcting some of the underrepresentation of these interests. Second, it forces an agency concerned with its budget to now consider the positions of dispersed interests in a similar fashion to those of concentrated interests in the negotiations to form any rule. This should increase the chances that dispersed interests will be brought to the table in pre-rule negotiations. The shift of costs from concentrated interests to the agencies has parallel implications. It decreases the representation of concentrated interests in litigation, especially for weak claims whose effect and likely intent is delay and, because it decreases the threat of litigation from concentrated interests, it decreases their influence in the negotiation to form any rule.

Agency budget constraints mean that agencies will consider litigation costs in their rulemaking procedures, making litigation costs part of the agency's thinking on the existence and character of any rule. Under the present system, this means that agencies will tend to give in to the demands of concentrated interests who will litigate and discount dispersed interests who will not. Our proposals would expand dispersed interest litigation and contract concentrated interest litigation. Agencies would now have more incentives to accommodate dispersed interest positions in their initial thinking and negotiations, as well as less incentive to accommodate concentrated interest positions. Therefore, we would have better balanced participation in the administrative decisionmaking process and a new equilibrium for judicial review.

All of this sounds good but, as always, the devil is in the details. Many of the problems are definitional. Most importantly, these proposals depend on being able to identify which groups bringing litigation are concentrated interests and which are dispersed interests. This is easiest in the context of issues with simple indicators. For example, if we knew that dispersed interests were always pro-regulation and concentrated interest always anti-regulation we would have an easier time weeding out false claims. This is part of our motivation for presumptively giving anti-regulation claims minimal scrutiny even if there is a moderate chance of overregulation. It also makes the exclusion of judicial review from issues with strong virtual representation on

180. *See, e.g.*, MASHAW, *supra* note 4, at 174.

both sides more important.

But, even if courts can now ignore groups making explicitly anti-regulation arguments, special care must be taken because, as always, concentrated interests have the incentive to act or participate in any activity, including operating false flag groups claiming to be representing dispersed interests.[181] This is a version of the problems created when concentrated interests manipulate the constructs of class action litigation. In the class action setting, there can be serious issues in screening class representatives. In much of this civil litigation, the active client-lawyer team will be on the concentrated interest defendant side. Defendants can exploit the passivity on the plaintiff's side by offering settlements favorable to active plaintiffs but unfavorable to passive plaintiffs or favorable to plaintiffs' lawyers but unfavorable to plaintiffs. High per capita stakes defendants are even able to choose the plaintiffs' counsel most amenable to settlement on the defendants' terms.[182]

The problem in class actions and in our reforms of judicial review is that, as always, concentrated interests with high stakes are the ones who have the incentive to understand the process better and are, therefore, better prepared to game the system. In the context of class actions, this sometimes means constructing false claimants or exploiting gaps in dispersed interest representation. Similarly, in the context of judicial review of the administrative process, concentrated interests who oppose regulation can construct nonprofit groups that claim to represent a dispersed interest that is, in fact, fully represented by concentrated interests.

All of this warns us that concentrated interests will constantly search out the weak spots in any regime they face, including a refocused system of judicial review. The issue of defining and implementing definitions of concentrated and dispersed interests is not easily dealt with. There is little doubt that some of it will need to be handled on a we-know-it-when-we-see-it basis. But, it will remain a weak spot until judicial experience and academic investigation make the sifting process work better.

Our discussion of representation raises an amendment to our analysis. We suggested that judicial review should be greatest where dispersed interests are most underrepresented. But the potential for representation of dispersed interests by catalytic subgroups is likely to vary considerably. Thus, our reforms of the judicial review of the administrative process depend heavily on

181. *See, e.g.*, Ali Geering-Kline, *Greenwash of the Month: Chemical Industry Front-Groups You Should Know About*, CEH20 (Dec. 5, 2011), http://www.ceh.org/news-events/blog/greenwash-of-the-month-chemical-industry-front-groups-you-should-know-about/.

182. For a more complete discussion of class actions from this perspective, see KOMESAR, *supra* note 53, at 45–51.

having at least some of this virtual representation. That means that rather than have a linear relationship between judicial review and underrepresentation, we actually have a more parabolic relationship in which judicial review, at least as we have thus far discussed it, will continue to fall off as underrepresentation becomes severe. Our suggestion of a public advocate offered below may return us to a more linear relationship.

There is no magic in the reforms we thus far have suggested. We are confident that our refocused and enhanced judicial review would be superior to the system of judicial review we now have. Whether it is superior to no judicial review is a closer question, although given the importance of and problems in the administrative process, we think it worthwhile. But even if the refocused and enhanced judicial review we propose were adopted and survived attempts to remove it by legislation, problems in the dynamics of participation in the administrative process and the dynamics of litigation in the adjudicative process will continue. Minoritarian bias and, especially, the dormancy of dispersed interests are not easily solved.

However, we are not yet finished with our suggestions for reform.

3. A Public Advocate

As we have noted, public interest groups lack both the resources and the incentives to engage all the rules that affect the broader public, and their advocacy is further diminished by a series of nontrivial representational challenges.[183] The changes we suggest to reallocate the costs of litigation will help to partially close this gap, but they are unlikely to bring thinly-financed dispersed interest representation to a full and effective examination of rulemaking.

To address the shortfall, the establishment of a public advocate may offer a valuable, added corrective.[184] The public advocate would be an institutional addendum that tasks one or more independent advocates (or an office of advocates) with rigorously representing the diffuse public or, when needed, separate subgroups of the public. These advocates could not only provide sophisticated representation, where little is now present for dispersed interests, but they could also clarify the rules and the evidence to reduce the excessive obscurity and increased costs of information we described earlier.[185]

183. *See, e.g.*, Seifter, *supra* note 89.

184. For excellent overview of the topic, see Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, *in* PREVENTING REGULATORY CAPTURE 365, 368 (Daniel Carpenter & David A. Moss eds., 2014).

185. Guy L. F. Holburn & Pablo T. Spiller, *Interest Group Representation in Administrative Institutions: The Impact of Consumer Advocates and Elected Commissioners on Regulatory Policy in the United*

These advocates could be required to pore over all important public-affecting rules and provide "comments with specificity" that the nonprofits or others could use in litigation.[186] In turn, these advocates could make complex rules salient for others, including the general public. Finally, the advocate could be charged with engaging the affected communities he or she purports to represent.

A public advocate of this sort would reduce the need for courts to deal with the problems of virtual representation and the identification of dispersed interests not represented in the political and administrative processes that occupied us in the previous pages.[187] The presence of a dedicated public advocate would provide a natural approach for developing a heightened scrutiny approach by giving only those issues raised by the public advocate a harder look (more scrutiny). Additionally, providing attorney's fees for successful litigation advancing the public advocate concerns is a natural extension of our earlier proposal that provides further incentives for public interest representation, but that representation is now based on the issues and priorities identified by a seemingly more accountable representative—the proxy advocate.

All of this sounds very nice, but without more it only would fulfill the stereotypical "sweeping solution" that ends most articles. Anyone interested in comparative institutional analysis is precluded from such easy outs. If there are severe problems in alternative decisionmaking processes, then a reformer must be on guard for parallel problems in any reform proposal. In administrative agency decisionmaking, the most important difficulty is the skewed distribution of stakes combined with the high costs of participation. Because of the high costs—primarily high information and organization costs—high-stakes players will be active and low stakes players will be dormant. This distortion in participation is central and is likely to show up to some degree in all institutional decisionmaking processes, including a newly established public advocate office.

States 5 (Univ. of Calif. Energy Inst., Working Paper, 2002), http://escholarship.org/uc/item/5cg3d8q0#page-2 (discussing the important information-production role that consumer advocates play in the utilities setting).

186. The exhaustion requirement means only that the issue be raised—not that it be raised by the litigant that seeks judicial review—so nongovernmental organizations can and do use comments filed by states to litigate when they failed to file their own comments. *See, e.g.*, Sierra Club v. EPA, 353 F.3d 976, 982 (D.C. Cir. 2004) (successfully relying on several state comments for issues raised on appeal).

187. *See supra* notes 120–122 and accompanying text.

The office of public advocate will certainly not be immune from these distortions in the political process. To be effective, then, the public advocate position must be designed to be as immune as possible from concentrated interest pressures. To create a viable advocate in situations where the political support itself is weak, we suggest the following structural prerequisites.

First, the political process must commit to fund the public advocate in ways that are as immune as possible from politics.[188] For example, its budget could be prescribed by a formula for expansion based on inflation and other relevant factors, or its budget must be set by a blue-ribbon board of overseers. Along these same lines, a blue-ribbon board (perhaps made up of prominent academics) should be involved in appointing the public advocate and overseeing its activities.

Second, we must take steps to protect the public advocate from being captured by concentrated interests. One of the greatest dangers of establishing a public advocate's office is the possibility that it becomes a Trojan Horse that allows concentrated interests to increase their dominance of the administrative process or of judicial review. Unfortunately, this can be done simply, by loading the public advocate with the representation of dispersed interests that are already represented by concentrated interests and whose presence can obfuscate and delay the regulatory process.[189] We have already set out criteria for focusing judicial review, including a focus on pro-regulation positions, and these should be the criteria that define the activity of the public advocate. Proponents of a public advocate need to be able to spot and block attempts to open a backdoor to minoritarian bias. If they cannot block these attempts, they should be prepared to abandon the reform.

We have focused our attention on the public advocate as surrogate representative or enabler, not as a final reviewer. The public advocate as repre-

188. As Gormley notes in touting the attributes of a "surrogate representation model," "The central problem with proxy advocates is not that they don't participate . . . , but that they often don't exist. The decision to establish a proxy advocacy office requires a frank acknowledgement by public officials that other public officials have failed to protect the public interest." WILLIAM T. GORMLEY, JR., THE POLITICS OF PUBLIC UTILITY REGULATION 144 (1983).

189. In this context, it is disquieting that the primary existing example of the use of a public advocate at the federal level concerns the Small Business Administration and representation of small business concerns before the EPA and Occupational Safety and Health Administration. Perhaps all is well here, but there is a chance that this public advocate system could be both a conduit for considering positions already well represented by active concentrated interests and a source of delaying needed regulation in both the administrative process and the courts. *See, e.g.*, SIDNEY SHAPIRO & JAMES GOODWIN, DISTORTING THE INTERESTS OF SMALL BUSINESS (2013).

sentative or enabler retains the adjudicative process as the central mechanism in the review of administrative decisionmaking. The public advocate is a new cog in an established machine—judicial review of the administrative process—not a new machine. This makes the difficult task of designing the new structure easier because not as much is riding on that design. Making the public advocate part of the judicial review process also provides another layer of protection against concentrated interest subversion of the public advocate mechanism.

Both this public advocate and the public interest subsidy we proposed earlier should not be used in all administrative settings. They should be focused only on those areas of administrative decisionmaking where the underrepresentation of dispersed interest is most severe. Due to the need for some expertise and specialization requirements, it would also be preferable to establish a public advocate defined by a particular area of regulation such as environmental regulation. As with judicial review in general, failure to focus these activities has two general problems. First, judicial review in general, and public advocacy in particular, require a significant outlay of public funds and political capital, and it would be foolish to waste any of this. Second, and far more important, unfocused activities have the potential for creating distortions and delays that would have perverse effects on public-benefiting administrative decisions. The perverse delays can occur if the public advocate or public interest activity is focused on agencies where there is little underrepresentation of dispersed interests or on the representation of dispersed interests that are already well represented by concentrated interests.

We have supposed that the public advocate would be a publicly established office requiring legislation and public funding, but given the obvious political challenges, there is another route to establishing a public advocate. In theory, a public advocate, especially as a commenter in rulemaking, could be created outside of the political process by universities or coalitions of law and public policy schools. No change to the APA or the law is required. The concept requires assembling a dedicated team of analysts to pore over the rules emanating from targeted agencies in detail to make the issues that arise from a public interest perspective accessible, as well as to place the concerns in the record for future litigation. The task is somewhat limited by the focus of judicial review we propose, but it is an immense job. Resources and organization remain the issue. Operating to facilitate the representation of underrepresented interests in rulemaking and judicial review does not require the immense resources needed to change political process outcomes. Such an enterprise could provide a marvelous teaching tool for students of law and public policy.

V. SUMMARY AND CONFESSION

The central concern of this Essay is the overrepresentation of concentrated interests in the administrative process and the role of existing judicial review in aggravating rather than alleviating that overrepresentation. We could reduce the second problem by eliminating serious judicial review under the APA. This reform is in the control of the courts who largely created the present system in their interpretation of the APA. But eliminating judicial review leaves the administrative process subject to overwhelming minoritarian bias, and the administrative process is, for better or worse, the crucible of U.S. public policy. For this reason, we would prefer to reform the present system of judicial review to focus judicial review on minoritarian bias by providing serious judicial scrutiny only for those instances where there is serious underrepresentation of dispersed interests.

There are predictably difficult issues of definition. And there is the overriding issue of finding representation for dispersed interests in the adjudicative process because the dynamics of litigation underrepresent dispersed interests. We have offered an analytical framework to understand and trace the underrepresented dispersed interests and to consider alternative mechanisms for their representation in the adjudicative process. These included an appreciation of the role of virtual representation and the focus of judicial review on pro-regulation concerns.

The central question for us has never been which public policy considerations are worthy, but rather which worthy public policy considerations are underrepresented. We propose a system for reallocating the cost of litigation that should increase litigation of underrepresented concerns and decrease the litigation of those concerns already well represented in the administrative process. All these reforms can be made by the courts.

Whether courts would ever be bold enough to undertake this kind of dramatic rethinking of the APA's judicial review provisions without legislative authorization is a much harder question. The tiered scrutiny approach we propose may not contradict the APA any more than tiered scrutiny contradicts the Equal Protection or Due Process clauses, but it amounts to a significant change to the system of judicial review explicitly set out and to the system that has actually operated for the last seven-plus decades. If the courts will not be so bold, then the changes we propose must come from legislation.

We have also suggested a public advocate. This is a reform that will have to come from the political process and, at the same time, be protected from the political process. We have offered our ideas for design or, perhaps more exactly, our ideas for what issues need to be addressed in designing the public advocate.

We are comfortable with what we have proposed, but not very comfortable. We remain convinced that comparative institutional analysis and the participation-centered approach to institutional behavior provide a valuable analytic framework for law and public policy in general, and for the analysis of judicial review of the administrative process in particular. But comparative institutional analysis warns us that all decisionmaking alternatives will likely suffer from parallel problems and we have seen this in the power of minoritarian bias in both the administrative process and the adjudicative process. We have tried to remain true to the realization that these systemic defects are pervasive in proposing our reforms.

But there are two major questions that cast shadows over our proposals. The first question is what have we missed? We, like the institutions we study, are imperfect. In particular, we are ignorant of a vast array of administrative process settings and of the interests both concentrated and dispersed at play in these settings. We are, therefore, ignorant of variations of the themes we have sounded that might force our analysis in directions we have not foreseen. Only those with the knowledge we lack can take the analysis in these directions or force us to do so.

The second question is what the political process, the administrative process, and the adjudicative process will look like over time. We have yet to see what the 2016 election means for the character of these processes. How will the seemingly anti-regulatory unified political branches deal with the regulatory landscape? And what of the adjudicative process and the changes in its personnel, not just at the Supreme Court, but at the lower courts?

These shifts will impact the costs and benefits of participation, the dynamics of participation, and the functioning of these decisionmaking processes. Will the political process and administrative process become completely enthralled to concentrated interests making existing judicial review—even given the bias of the dynamics of litigation—better than no judicial review? Will judicial appointments make the adjudicative process biased beyond the dynamics of litigation and, therefore, make judicial review less attractive? It is the plague of institutional choice that institutions tend to move in the same direction. There is little doubt in our minds that the overrepresentation of concentrated interests that we see as biasing the results of the administrative process is likely to get worse before it can get better. Whether our solutions, or any solutions, can rectify this bias remains unclear.

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